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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92057344
Party	Plaintiff Cloudpath Networks, Inc.
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Submission	Motion to Amend Pleading/Amended Pleading
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Date	08/31/2015
Attachments	1317.2000_Motion to Amend_08312015.pdf(25015 bytes) 1317.2000_Amended Petition to Cancel_08312015.pdf(27165 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Cloudpath Networks, Inc.,

Petitioner,

- against -

Racemi, Inc.,

Registrant.

Cancellation No.: 92057344

August 31, 2015

PETITIONER'S MOTION TO AMEND

Craig A. Neugeboren

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Boulder, CO 80302

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MOTION TO AMEND

Petitioner hereby moves that it be permitted to amend its pleadings as listed in Petitioner's original *Petition to Cancel*, filed June 14, 2013. As grounds for moving to amend, Petitioner relies on Federal Rule of Civil Procedure 15(b), which states that "when an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue." Petitioner asserts that it tried the issue of whether Registrant's registration was void *ab initio* under section 1(a) of the Lanham Act by asking questions in discovery about the date of the first actual provision of services and submitting Registrant's responses as evidence during Petitioner's trial period. Petitioner further asserts that Registrant impliedly consented to the trial of the issue by answering the discovery questions and failing to object to them as not raised in the pleadings. Petitioner has set forth with particularity in its rebuttal trial brief filed on August 29, 2015 why it believes that an amendment to the pleadings is not necessary and why Racemi does not need, and should not be permitted, to present any new evidence in this proceeding. However, out of caution Petitioner is filing this motion.

Therefore, Petitioner requests that the Board grant its motion to amend the pleadings. An *Amended Petition to Cancel*, in which paragraphs 7-9 have been added to the original *Petition to Cancel*, is submitted herewith.

Respectfully Submitted,

/Craig A. Neugeboren/

Dated: August 31, 2015

Craig A. Neugeboren
Attorney for Petitioner
Neugeboren O'Dowd PC
1227 Spruce St., Suite 200
Boulder, CO 80302

Certificate of Service

I certify that on August 31, 2015, I had the foregoing documents served on Mr. Larry Jones, counsel for Racemi, Inc. via email, pursuant to an agreement between the parties to serve all such documents electronically.

/Craig A. Neugeboren/

Craig A. Neugeboren
Neugeboren O'Dowd PC
Attorney for Cloudpath Networks, Inc.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Registration No. 4,174,640

Cloudpath Networks, Inc. Petitioner, v. Racemi, Inc. Registrant	 Registration No. 4,174,640 Cancellation No. 92057344
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AMENDED PETITION TO CANCEL

Cloudpath Networks, Inc. ("Petitioner"), is a Colorado Corporation having a place of business at 1120 W. 122nd Ave, Suite 302, Westminster, CO 80234. Racemi, Inc. ("Registrant"), is a Delaware Corporation having a correspondence address at 360 Interstate North Parkway, #360, SE Atlanta, GE 30339. Petitioner believes that it is and/or will be damaged by continued registration of Registration No. 4,174,640 (the "registered mark"), and therefore requests cancellation of the registered mark in whole under 15 U.S.C. § 1064.

As grounds for the Petition to Cancel, Petitioner alleges that:

1. Registration No. 4,174,640 was filed on October 31, 2011 for the mark CLOUD PATH (the "Registrant's mark"), has a first use date of August 23, 2011, and was registered under the following services: Software as a service (SAAS) services featuring a hosted computer software application for migrating computer operating systems, applications, and data between customer data centers and public cloud providers, in international class 042.

2. Petitioner is in the business of providing access to online software for use in automated onboarding, provisioning, migration, and troubleshooting of computer software without information technology (IT) involvement and with access restricted to authorized users. Petitioner's goods and services are marketed and sold throughout many channels of trade.

3. Petitioner has offered products and services in support thereof under the mark and name CLOUDPATH continuously since at least as early as 2008.

4. Petitioner is the owner of all right, title and interest in U.S. Trademark Registration No. 4,045,900 filed with the USPTO on August 12, 2009 and registered with the USPTO on October 25, 2011, for CLOUDPATH (the "Petitioner's mark").

5. Since well prior to Registrant's first use of the challenged mark in connection with the goods and services listed in its registration, Petitioner has extensively and continuously used, advertised and promoted the CLOUDPATH mark for, *inter alia*, the design, selection, implementation and use of computer hardware, software, networking equipment and combinations thereof for itself and others, and related products and services.

6. Upon information and belief, Registrant made no valid use of the CLOUD PATH mark for the registered services prior to the registration or first use of Petitioner's CLOUDPATH mark.

7. Registrant filed its application for the CLOUD PATH mark under section 1(a), based on use in commerce.

8. Registrant did not actually provide any services under Registrant's CLOUD PATH mark until after its application filing date.

9. Registrant's CLOUD PATH registration is void *ab initio* under the Trademark Act,

§ 1(a), 15 U.S.C. 1051(a).

10. Registrant's CLOUD PATH mark so resembles Petitioner's previously registered CLOUDPATH mark, that it has caused actual confusion, under the Trademark Act § 2(d), 15 U.S.C. § 1052(d), when used in connection with Registrant's services.

11. Registrant's CLOUD PATH mark so resembles Petitioner's previously registered CLOUDPATH mark, as to be likely, when used in connection with the Registrant's services, to cause confusion, to cause mistake, to deceive, and/or to dilute the Petitioner's CLOUDPATH mark, under the Trademark Act § 2(d), 15 U.S.C. § 1052(d).

12. In the alternative, the continued registration of Registrant's CLOUD PATH mark on the Principal Register would be inconsistent with Petitioner's rights under its aforementioned registration and under the common law, and be damaging to Petitioner.

WHEREFORE, Petitioner requests that Registration No. 4,174,640 be cancelled in whole, that judgment in favor of Petitioner be entered, and that this Petition to Cancel be sustained in favor of Petitioner.

Respectfully submitted,

Dated: August 31, 2015

By: /Craig A. Neugeboren/
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Attorney for Petitioner

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I certify that on August 31, 2015, I had the foregoing documents served on Mr. Larry Jones, counsel for Racemi, Inc. via email, pursuant to an agreement between the parties to serve all such documents electronically.

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Attorney for Cloudpath Networks, Inc.