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

Proceeding	92058839
Party	Plaintiff Le Reve Ventures, LLC
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Attachments	Petitioner's Reply in Support of Motion to Amend Petition for Cancellation.pdf(2784680 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

LE REVE VENTURES, LLC, a Texas limited liability company, Petitioner, v. WINE DIVE, LLC, an Florida limited liability company, Registrant.	Cancellation No.: 92058839 PETITIONER'S REPLY IN SUPPORT OF PETITIONER'S MOTION TO AMEND PETITION FOR CANELLATION

In its Opposition to Petitioner Le Reve Ventures, LLC's Motion to Amend its Petition for Cancellation, Registrant, Wine Dive, LLC claims that Petitioner's Motion is made in bad faith and would be futile. However, the Motion was not made in bad faith, and the objective of the Motion to Amend is not futile. The Motion should be granted so the matter of whether Wine Dive committed fraud on the Patent and Trademark Office ("PTO") can be determined after the introduction of evidence.

NO BAD FAITH

Petitioner's efforts to try to resolve an infringement claim amicably with a party that appears to have fraudulently secured a trademark registration, by forbearing from bringing a public accusation of fraud against the Registrant, is not bad faith. There was no bad faith and no effort to use the fraud claim to unduly coerce the Registrant. Further, as soon as it was clear from discussions among counsel that the infringement claim could not be settled amicably and no substantive effort was made by Registrant to dissuade the filing of the claim of fraud, without any delay, Petitioner filed the Motion to Amend the Cancellation to include the fraud claim so the entire case in controversy (likelihood of confusion and fraud) could be properly adjudicated.

Registrant portrays Petitioner's effort to avoid a public accusation of fraud as a deliberate effort to "threaten" the Registrant. Registrant goes on to develop an imagined "true motive" and tries to portray Petitioner as a trademark bully or over-aggressive ogre who feels it *"must"* own WINE DIVE at all costs in order to expand its own restaurants under pressure from "shareholders, potential franchises, investors or all three". However, the truth of the matter is that the Petitioner, hoping for a quick resolution of the infringement claim, chose to raise the issue of the suspect specimens with the Registration in a private forum. Petitioner did so with the expectation that an amicable settlement might be more likely if there was no public airing of the suspicious specimens because such a public attention to such unsavory behavior is likely to make anyone defensive. Because the Petition had been originally drafted with the claim of fraud including the images that provided the telling evidence (before Registrant decided it might be better not to file with the fraud claim), the Petitioner simply provided the original draft Petition to show Registrant the evidence of fraud that Petitioner had.

Accordingly, there has been no bad faith or undue delay and Petitioner respectfully request that the Board grant its Motion to Amend its Petition for Cancellation pursuant to FRCP 15(a).

THE ADDED BASIS FOR CANCELLATION IS NOT FUTILE

Substitute Specimens. Registrant objects to the addition of the fraud claim asserted by Petitioner as futile. Registrant states that even if the original specimens filed were not bona fide there were bona fide specimens in use at the time of the filing of the Statement of Use and that Registrant is entitled to file (and has now filed) substitute specimens of use. Without getting into the merits of whether or not Registrant may file substitute specimens 1 year and 8 months after it filed its original specimens in order to properly support its registration, the mere fact that Registrant has to make such a corrective filing, raises a question that may only be answered by the adjudication of the fraud claim. Petitioner does not suggest that the late filing of specimens *proves* fraud, but instead argues that under the circumstances there appears to be more to the

story and that the mere filing of the substitute specimens does not resolve the fraud issue, and does not render the assertion of fraud as futile.

Accordingly, the fraud claim is not futile and Petitioner respectfully requests that the Board grant its Motion to Amend pursuant to FRCP 15(a).

Sufficiency of the Pleadings. Registrant further supports its position that the added basis of fraud to the Cancellation action is futile by claiming that Petitioner's pleading is legally insufficient. Registrant goes to some effort to attack the "on information and belief" language used by Petitioner and quotes case law that states that pleadings that claim fraud "on information and belief" are not sufficient. However, the appearance of the words "on information and belief" in the pleading is not the end of the analysis. Petitioner's Amended Petition for Cancellation and exhibits should be reviewed in its entirety. The Amended Petition for Cancellation provides evidence that Registrant knowingly made false, material representations with the intent to deceive the PTO under *In re Bose Corp.*, 580 F.3d 1240, 1245 (Fed. Cir. 2009), by providing images collected from the Registrant's Facebook page and its website that show Registrant's actual signage as compared to what was submitted as specimens to support registration. The images show use of cropping and stickers to create the applied-for mark on signage that did not otherwise bear the applied-for (now registered) mark. This is evidence that the signage was modified or doctored in order to create specimens of use. And further, these images call into question the *bona fides* of the associated declarations about what the specimens represent. That being the case, the circumstances of the fraud at issue are pleaded with particularity, and Registrant's second rationale for its objection to the Motion to Amend the Petition for Cancellation should fail.

For the foregoing reasons, the Board should grant Le Reve Ventures' Motion to Amend Petition for Cancellation pursuant to FRCP 15(a).

Respectfully submitted this 30th day of July 2014.

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By_____

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that on this day I caused a copy of the foregoing to be served upon the following by email as agreed by the parties:

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DATE: July 30, 2014

Sheila Fox Morrison