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

Proceeding	92058978
Party	Defendant Black Clouds
Correspondence Address	BLACK CLOUDS 3449 DARTMOOR LANE OLNEY, MD 20832 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Barbara L. (Pixie) Waite
Filer's e-mail	pixie@blwaitepc.com
Signature	/ B. L. Waite /
Date	05/16/2014
Attachments	Motion to dismiss.pdf(64189 bytes) brief.pdf(99345 bytes)

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

Daniel P. Matthews,

Petitioner,

v.

Cancellation No. 92058978
Registration No. 4,233,433

Black Clouds LLC,

Registrant.

Motion to Dismiss for Failure to State a Claim

Registrant, by counsel, hereby moves to dismiss the Petition to Cancel for failure to state a claim, pursuant to Fed. R. Civ. Pro. 12(b)(6). As more fully recited in the accompanying brief, Petitioner has no standing to petition to cancel the registered mark at issue. Furthermore, Petitioner has not asserted a likelihood of confusion between the registered mark and his mark nor has he asserted that his claimed prior use has not been abandoned.

Accordingly, Registrant moves the Board to dismiss the Petition to Cancel for failure to state a claim and lack of standing.

BLACK CLOUDS, LLC



By: Barbara L. (Pixie) Waite
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Telephone: (202) 587-5762
Email: pixie@blwaitepc.com

Dated: May 16, 2014

CERTIFICATE OF SERVICE

I, Barbara L. Waite, hereby certify that a true and accurate copy of the foregoing Motion to Dismiss for Failure to State a Claim was served by first-class U.S. Mail, postage prepaid, on the following on this the 16th day of May, 2014:

Christopher J. Marino
Giordano Halleran & Ciesla, PC
125 Half Mile Rd., Ste. 300
Red Bank, NJ 07701

Attorney for Petitioner



Handwritten signature of Barbara L. Waite in black ink.

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**Brief in Support of
Motion to Dismiss for Failure to State a Claim**

Registrant, by counsel, moves that the Petition to Cancel should be dismissed for the following reasons.

First, Petitioner has no standing to petition to cancel this registration. Although the burden to establish standing is low, TBMP § 303.03, Registrant submits that Petitioner has failed to meet that burden. Petitioner has not alleged that he has been damaged by the continued existence of the challenged registration. The only damage that Petitioner alleges is that “the registration *will likely block registration* of Petitioner’s mark THE BLACK CLOUDS *for which Petitioner intends to apply presently*” (emphasis added). Simply alleging the belief that a registered mark bars the pleader’s registration of its own mark is, of itself, insufficient. *International Tel. & Tel. Corp. v. International Mobile Machines Corp.*, 218 U.S.P.Q 1024, 1027 (TTAB 1983).

Furthermore, Section 2(d) of the Act provides that a mark shall not be registered if it “so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another *and not abandoned* as to be likely when used on or in connection with the goods of the applicant *to cause confusion, or to cause mistake, or to deceive*. [emphasis added]” 15 U.S.C. 1052(d). Petitioner has not alleged that its mark has not been abandoned. Petitioner has not alleged that there is a likelihood of confusion between his mark and registrant’s mark when used on or in connection with their respective goods. *Int’l Tel.*

& Tel. Corp., 218 U.S.P.Q. at 1026-27.

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’.” *John D. Ashcroft et al. v. Javaid Iqbal et al.*, 556 U.S. 662,, 678 (2009). Here, Petitioner has failed to allege both the necessary elements of his cause of action and of the facts necessary to support them.

Accordingly, Registrant respectfully submits that the Petition must be dismissed for failure to state a claim and lack of standing.

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Attorney for Petitioner



A handwritten signature in black ink, appearing to read "B. L. Waite", is written above a horizontal line.
