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

Proceeding	92059685
Party	Plaintiff SBG Revo Holdings, LLC
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**IN THE UNITED STATES PATENT TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL APPEAL BOARD**

_____)	
SBG REVO HOLDINGS, LLC)	
)	Cancellation No.: 92/059685
Petitioner,)	
)	Registration Nos. 3224978, 3476081 and
)	3476082
v.)	
)	Marks:
)	
)	revo REVO, and 
FTI CORPORATION LIMITED,)	
)	
Respondent.)	
_____)	

**PETITIONER’S REPLY BRIEF IN SUPPORT OF
REQUEST FOR RECONSIDERATION**

SBG Revo Holdings, LLC (“SBG” or “Petitioner”), hereby replies to Respondent’s (“FTI” or “Respondent”) Brief in opposition to Petitioner’s Request For Reconsideration of the Trademark Trial and Appeal Board’s (“Board”) December 30, 2015 order.

Respondent wrongly asserts that Petitioner’s Request for Reconsideration does not meet the standards required and that Petitioner raised new arguments. As explained further below, Petitioner’s Request for Reconsideration meets the required standards, and the previous arguments in opposition to Respondent’s Partial Motion to Dismiss under FRCP 12(b)(6) are not the same as Respondent’s arguments in support of the Request for Reconsideration of the

Interlocutory Attorney's December 30, 2015 Order ("Order"). Nor does the Request for Reconsideration raise new arguments or seek to introduce additional evidence.

Petitioner's Request for Reconsideration of the Order requests that Respondent's Partial Motion to Dismiss be decided in accordance with the Trademark Rules of Practice and under the proper standard for determining such a motion. Various errors were identified by Petitioner, including that the Order was improperly decided by an Interlocutory Attorney. The Motion was not decided by three Administrative Trademark Judges as required by the Trademark Rules of Practice. Petitioner is entitled receive a decision that is determined by judges in accordance with Trademark Rule 2.127(c) and Section 17(b) of the Trademark Act, 15 USC §1067(b).

The Request for Reconsideration identified additional errors including the failure of the Order to apply the proper standard for such a motion. In particular, the proper test is the legal sufficiency of the Petitioner's involved pleading, with Petitioner's allegations to be construed in favor of Petitioner. See: *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752 (Fed. Cir. 1998); *Caymus Vineyards v. Caymus Medical Inc.*, 107 USPQ2d 1519 (TTAB 2013); and TBMP §503.02 (June 2015).

Petitioner also provided numerous specific examples of the Interlocutory Attorney's determination of the *merits of numerous issues* including issues that underlie the main issues -- rather than deciding only the legal sufficiency of Petitioner's pleading. These determinations on the merits of the grounds and sub-issues are improper in the context of a Partial Motion to Dismiss under FRCP Rule 12(b)(6), and are prejudicial and unfair to Petitioner. The December 30, 2015 Interlocutory Attorney's order is in error and requires appropriate change.

On page 2 of FTI's Brief in opposition to SBG's Request for Reconsideration, FTI contends "SBG proffers new arguments that fail to identify any errors in the Board's analysis." To the contrary, Petitioner's Request for Reconsideration is based on the errors in the Interlocutory Attorney's order. Furthermore, these are "new" arguments only in the sense that they could not have been known to anyone until the Interlocutory Attorney issued the December 30, 2015 Order. In other words, these arguments relate specifically to the errors within the Order.

The non-precedential cases cited by Respondent for hornbook law quotations purportedly concerning the standard for a Request for Reconsideration are inapposite because the facts therein are so dissimilar from the facts in this cancellation proceeding.

-- *Smith v. Entrepreneur Media, Inc.*, Cancellation No. 92/053982 (TTAB February 23, 2012) (reconsideration of a Rule 12(b)(6) Motion to Dismiss concerning plaintiff's standing and the legal date a registration expires under Section 9 of the Trademark Act. -- Both the original decision and the reconsideration were decided by a panel of three Administrative Trademark Judges).

-- *AutoZone Parts, Inc. Dent Zone Companies, Inc.*, Cancellation Nos. 92/044502 and 92/050355 (TTAB April 14, 2009) (involving reconsideration of plaintiff's Motion to Dismiss the latter cancellation proceeding as it should have been a compulsory counterclaim and defendant's Motion to Amend its pleading to assert a counterclaim. -- Both the original decision and the reconsideration were decided by a panel of three Administrative Trademark Judges).

-- *Emerald Bioagriculture Corporation v. Biosafe Systems, LLC.*, Cancellation No. 92/042503 (TTAB June 28, 2006) (reconsideration of a decision on the merits after trial of a likelihood of

confusion claim, granting the Petition for Cancellation. The Board's three-page denial of defendant's Request for Reconsideration states on page 1: "The request for reconsideration on page 2, begins 'The Registrant's trial brief included the following.' Respondent then apparently quotes four pages from its brief... ." -- Both the original decision and the reconsideration were decided by a panel of three Administrative Trademark Judges).

-- *Jones v. Holtzschue*, Cancellation No. 92/040746 (TTAB September 23, 2003) (involved a decision on plaintiff's Motion for Summary Judgment, defendant's Motion for FRCP Rule 56 Discovery, and defendant's Motion to Extend Time to Respond to the Summary Judgment Motion. Within the decision the Board noted default judgment had been entered against defendant, but it was vacated in a March 24, 2003 order. The Board explained/stated on page 5: "To the extent that petitioner seeks reconsideration of the March 24, 2003 order,..."; that the March 24, 2003 order should have been issued by a panel of three judges; but that the USPTO Office of Initial Patent Examination had timely received the response to the notice of default; and therefore "the Board correctly vacated its entry of judgment herein." Because the relevant paper *was timely received by the USPTO* but was not timely associated with the Board file there was no error in vacating default judgment. -- This decision was decided by a panel of three Administrative Trademark Judges).

FTI asserts that none of Petitioner's arguments in its Request for Reconsideration have merit. (FTI's Brief, page 3). The facts show otherwise. Petitioner argued the decision was not properly decided by a panel of three judges as required by the Trademark Rules. Petitioner identified several issues regarding the Interlocutory Attorney's premature and erroneous decisions. For example, the Interlocutory Attorney's Order inappropriately limited Petitioner's common law rights; summarily dismissed the substantive issues regarding (i) the invalid (void)

assignment of one of Respondent's registrations without the goodwill; and (ii) the non-use of marks resulting in void *ab initio* use-based applications.

At this early stage, before discovery can be taken, the Order also improperly placed the burden on Petitioner to identify Respondent's use (or lack of use) for each specific product identified in each of Respondent's three involved registrations as such information relates to non-use, abandonment and fraud. See, for example, the December 30, 2015 Order, page 10, with regard to Petitioner's fraud claims that FTI's three involved registered marks were not in use on all of the identified goods when the applications were filed and when the Section 8 Declarations were filed with the USPTO. The Interlocutory Attorney states: "However, these fraud allegations [are] insufficient because Petitioner has failed to identify the specific goods that were not in use in commerce at the time of each filing at issue. (citation omitted- Court of Appeals for the Federal Circuit patent case concerning pleading of inequitable conduct)."¹

Based on reasonable inquiry prior to filing the Petition for Cancellation, Petitioner is aware that Respondent has not used its mark on all of the goods identified. For example, the mark does not appear to be used in commerce on or in connection with "canes, fur and leather for furniture" specified in Registration No. 3476082. However, Petitioner cannot be certain at this stage of the cancellation proceeding of each and every specific item on which Respondent's marks are not used. (See the discussion below of the *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036 (TTAB 2012) case.) Inasmuch as the information regarding use/lack of use is

¹ The Interlocutory Attorney treated Petitioner's Petition for Cancellation as if such information that is generally obtained through discovery must be available and pleaded in the complaint. The *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036 (TTAB 2012) case was cited by the Interlocutory Attorney at footnote 7, pages 7-8 of the December 30, 2015 Order. The Board stated in that case regarding nonuse / abandonment: "Such separate pleading of a nonuse claim, while preferable, is not, however, critical, and the Board has found applications to be void *ab initio* even when nonuse was not pleaded as a separate claim or issue. (citations omitted)."

clearly within the knowledge of Respondent, the Respondent is not prejudiced by the lack of specificity as to each and every item. Only with the benefit of discovery during the proceeding can Petitioner obtain that specific information that was inappropriately required by the Order at this stage.

Respondent contends (Brief, page 3) as follows: “SBG argues that *Shutemdown Sports, Inc. v. Carl Dean Lacy*, 102 U.S.P.Q.2d 1036 (P.T.O. February 22, 2012) permits non-use as grounds for cancellation. This is incorrect. In *Shutemdown*, the Board sustained an abandonment claim, which is a different claim than non-use, and one that Petitioner did not plead.” Respondent further contends that Petitioner failed to plead the elements of abandonment relating to the lack of specific goods on which FTI had not used the involved REVO marks, and FTI had no intent to resume use. Respondent’s contentions are unsupported by the facts.

Regarding the Interlocutory Attorney’s discussion of Petitioner’s non-use claim and his citation to a case involving a Madrid Protocol based application, SBG cited and accurately presented the facts and relevance of the *ShutEmDown* case. See page 5 of SBG’s Request for Reconsideration. If FTI’s Partial Motion to Dismiss was granted on Reconsideration, SBG alternatively and properly requested leave to amend the Petition for Cancellation to include claims of non-use as a claim of abandonment or that the involved registrations (as applications) were void *ab initio*.

To further clarify the Board’s precedential decision in *ShutEmDown v. Lacy*, Petitioner offers the following Board findings and holdings in that case: Lacy admitted nonuse of its mark on 109 of 113 items identified in the goods recited in the involved registration; and ShutEmDown established a *prima facie* case of abandonment based on nonuse for the four items of goods allegedly in use, and it was not rebutted by Lacy. Turning to ShutEmDown’s fraud

claim, the Board stated: “Because we find that respondent’s allegation of use of his mark in commerce for the identified goods, at the time of filing of his application was false, we hold that the application was void *ab initio*, and we need not decide the fraud claim.” ... “The law is clear that an application can be held void if the plaintiff pleads and proves either fraud or nonuse of a mark for all identified goods or services prior to the application filing date. (citations omitted.) Here, we acknowledge that the petition for cancellation did not include a separate claim alleging that respondent’s nonuse of the mark at the time of filing rendered the application void *ab initio*. Nonetheless, paragraphs 11 and 13 of the petition for cancellation clearly put respondent on notice that petitioner had alleged nonuse by respondent, in particular, ‘on all recited goods at the time of the application’ (¶ 13). Such separate pleading of a nonuse claim, while preferable, is not, however, critical, and the Board has found applications to be void *ab initio* even when nonuse was not pleaded as a separate claim or issue. (citations omitted).” In the case now before the Board, SBG’s Petition for Cancellation, Paragraphs 23, 32, and 41 clearly put FTI on notice that SBG specifically alleged nonuse.

The Board, in deciding a Motion to Dismiss Under Rule 12(b)(6), should limit the decision to the legal sufficiency of Petitioner’s claims. The merits of Petitioner’s claims are not an issue at this juncture. The allegations in SBG’s Petition for Cancellation contain “sufficient factual matter...to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

Respondent argues for the first time in its Brief in opposition to Petitioner’s Request for Reconsideration, that the Petition for Cancellation should be denied with prejudice, and Petitioner should not be allowed leave to amend the pleading, even though the December 30, 2015 Interlocutory Attorney order allowed amendment (albeit inappropriately limited).

Respondent originally filed a Partial Motion to Dismiss. Yet, Respondent now asks the Board to cut Petitioner off with no opportunity to plead and later present its case on the merits. The Board should not allow this.

Respondent complains that Petitioner did not file an Amended Petition within the time frame set in the December 30, 2015 Interlocutory Attorney's Order. However, Petitioner is entitled to file a Request for Reconsideration in accordance with the Trademark Rules. In a case such as this, where Petitioner believes the Order was not well-founded, Petitioner should not be punished for filing the Request for Reconsideration. Respondent also complains (Brief, page 3): "By waiting until nearly the deadline to amend to file its Motion [sic] for Reconsideration, SBG has already delayed the conclusion of this matter significantly." This attack is interesting inasmuch as Respondent acknowledges that Petitioner filed its Request for Reconsideration prior to Petitioner's deadline for acting in the case. Again, Petitioner is entitled to file submissions on or before the deadlines set by the Board. Respondent's argument that Petitioner has caused significant delay is specious.

Finally, it is generally the policy of the law to decide cases on the merits. It would be prejudicial and unfair to Petitioner if Petitioner is not allowed to obtain a three judge panel decision on Respondent's Partial Motion to Dismiss. In this regard, it is noted that this case has already been delayed to comply with TTAB standard procedures at the request of Respondent.² The same approach is applicable here. Respondent will have the opportunity to present its case at the appropriate time.

² In the June 2, 2015 Board order (by three judges) granting Respondent's FRCP 60(b)(6) motion, the Board stated the following at page 7 - relating to Board practice when mail is returned as undeliverable: Because the Board did not follow its standard procedures following the return of the institution notice, we find that there are extraordinary circumstances that warrant relief from judgment under Rule 60(b)(6).

Petitioner respectfully requests the Board, through a panel of three Administrative Trademark Judges, vacate the Interlocutory Attorney's December 30, 2015 Order, grant Petitioner's Request for Reconsideration, and deny Respondent's Partial Motion to Dismiss. Alternatively, Petitioner respectfully requests that its time to file an Amended Petition for Cancellation be re-set.

Respectfully submitted,

SBG REVO HOLDINGS, LLC

Date: March 3, 2016

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the forgoing **PETITIONER'S REPLY BRIEF IN SUPPORT OF REQUEST FOR RECONSIDERATION** was served on counsel for Respondent, this 3rd day of March 2016, by sending same via first class mail, postage prepaid, to:

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