

ESTTA Tracking number: **ESTTA675152**

Filing date: **05/29/2015**

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

|                        |  |
|------------------------|--|
| Proceeding             | 92060308   |
| Party                  | Defendant<br>Corcamore, LLC  |
| Correspondence Address | CHARLES L THOMASON<br>55 W 12TH AVE<br>COLUMBUS, OH 43210<br>UNITED STATES<br>thomason@spatlaw.com |
| Submission             | Other Motions/Papers   |
| Filer's Name           | Charles L. Thomason  |
| Filer's e-mail         | thomason@spatlaw.com   |
| Signature              | /Charles L. Thomason/  |
| Date                   | 05/29/2015   |
| Attachments            | Sprout_TTAB_reconsiderationMo_05_29_2015a.pdf(322252 bytes )                                       |

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

SFM, LLC, }  
Petitioner, } Cancellation No: 92 060308  
v. }  
Corcamore, LLC } Registration No. 3708453  
Respondent-Registrant. }

---

ELECTRONICALLY SERVED

**NOTICE OF  
MOTION OF RESPONDENT-REGISTRANT FOR RECONSIDERATION.**

**TO:** Nicole M. Murray, Esq.  
Quarles & Brady LLP  
300 N. LaSalle St., Suite 4000  
Chicago, IL 60654  
Email: *Nicole.Murray[at]quarles[dot]com*

**PLEASE TAKE NOTICE** that the Respondent Corcamore LLC moves for reconsideration pursuant to TBMP Section 518, and Trademark Rule 2.127(b).

Reliance will be placed on the memorandum of points and authorities, submitted hereinbelow.

Respectfully submitted,

29 MAY 2015

~ S ~ /Charles L. Thomason/  
Charles L. Thomason  
55 W. 12<sup>th</sup> Ave.  
Columbus, OH 43210  
Email: *Thomason[at]spatlaw[dot]com*  
Telep. (502) 349-7227  
Attorney for Respondent-Registrant

MEMORANDUM OF POINTS AND AUTHORITIES

Respondent-registrant, Corcamore LLC, moves pursuant to 37 CFR 2.127(b) and TBMP 518, for reconsideration of parts of the decision entered April 30, 2015.

First, reconsideration is requested as to the Petitioner's lack of standing. The decision overlooks, or failed to consider, *Belmora LLC v. Bayer Consumer Care AG*, --- F.Supp.3d --- (E.D. Va. Feb. 6, 2015), where the U.S. District Court reversed 110 U.S.P.Q.2d 1623 (TTAB 2014), specifically reversing, "the TTAB's holding that Bayer had standing to seek cancellation of the registration of Belmora's FLANAX mark under Section 14(3) because Bayer lacks standing to sue pursuant to *Lexmark* as Bayer's interests do not fall within the zone of interests Congress intended to protect under Section 14(3) and Bayer did not sufficiently plead economic injury or an injury to business reputation proximately caused by Belmora's use of the FLANAX mark."

The *Belmora* decision accepts the argument, rejected here in the April 30<sup>th</sup> decision, that standing to seek cancellation requires one to meet the "zone of interests" and "proximate cause" requirements of *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, --- U.S. ----, 109 USPQ2d 2062, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014).

The decision here overlooks that the Supreme Court stated that the "zone of interests" assessment is a "requirement of general application" that presumptively determines whether any statutory "remedy created" by Congress is available to the pleader. *Lexmark*, 109 USPQ2d at 2068. It also was overlooked that: "To be sure, a plaintiff who does not compete with the defendant will often have a harder time establishing proximate causation," and so, a harder time to plausibly plead standing. *Lexmark*, 109 USPQ2d at 2070.

The decision here on standing should be reconsidered, also on the ground that it relies on dicta in *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270 (Fed. Cir. 2014). The record of that appeal shows that both parties' briefs already were submitted before the decision was rendered in *Lexmark*.

For these reasons, on the applicable law and the facts of record here, the April 30<sup>th</sup> ruling on standing is in error and requires appropriate change to conform to *Belmora* and *Lexmark*.

Second, reconsideration is requested of the ruling about a "controlled license." The Petition does not plead a "controlled" license, and so that ruling rests on an assumption. *Iqbal*, 556 U.S. at 678 ("naked assertions" are insufficient at the pleading stage). Moreover, the assumption of a "controlled" license was why *Mayle v. Felix*, 545 U.S. 644, 125 S.Ct. 2562, 162 L.Ed.2d

582 (2005) was overlooked or not considered in the April 30<sup>th</sup> decision. Reconsideration of the "controlled" licensee assumption should also take account of the lesson in *Lexmark* that the necessary "showing is generally not made when the [alleged, proscribed action] produces injuries to a fellow commercial actor [such as a licensee] that in turn affect" the one who pleads for the statutorily-created remedy. *Lexmark*, 109 USPQ2d at 2069.<sup>1</sup> In other words, the pleader may not assert the standing of another. For these reasons, on the applicable law and the facts of record here, the Board's ruling on relation back is in error and requires appropriate change

#### CONCLUSION

Reconsideration respectfully is requested on the parts of the April 30<sup>th</sup> decision about which the *Lexmark*, *Belmora* and *Mayle* cases should be recognized as the governing precedent.

Date: 29 MAY 2015

~ S ~ /Charles L. Thomason/  
Charles L. Thomason  
Attorney for Respondent-Registrant  
Corcamore LLC

---

<sup>1</sup> Indeed, *Belmora*, following *Lexmark*, is stronger precedent than the non-precedential *Cabot* ruling that Petitioner cited as ground for asserting the standing of an affiliate.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of May, 2015, I electronically filed the foregoing Notice of Motion, and mailed a copy to the attorneys for the Petitioner, directed to the address of the attorney indicated below:

Nicole M. Murray, Esq.  
Quarles & Brady LLP  
300 N. LaSalle St., Suite 4000  
Chicago, IL 60654

Date: 29 MAY 2015

~ S ~ /Charles L. Thomason/  
Charles L. Thomason