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

Proceeding	92060308
Party	Defendant Corcamore, LLC
Correspondence Address	CHARLES L THOMASON 55 W 12TH AVE COLUMBUS, OH 43210 UNITED STATES thomason@spatlaw.com
Submission	Other Motions/Papers
Filer's Name	Charles L. Thomason
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Signature	/Charles L. Thomason/
Date	07/14/2015
Attachments	Sprout_R11_Mo_07_14_2015.pdf(32529 bytes) Sprout_Corc_Decl_CLT_R11Mo_07_14_2015.pdf(25057 bytes) Sprout_Corc_R11_Order_07_14_2015.pdf(21545 bytes)

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

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

ELECTRONICALLY SERVED

NOTICE OF RULE 11 MOTION OF RESPONDENT-REGISTRANT.

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 nonmonetary sanctions pursuant Rule 11(b)(2), FED. R. CIV. PROC., applicable here pursuant to TBMP 527.02.

Reliance will be placed on the Declaration filed herewith, along with the memorandum of points and authorities, submitted hereinbelow.

Respectfully submitted,

14 JULY 2015

~ S ~ /Charles L. Thomason/
Charles L. Thomason
55 W. 12th 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 for nonmonetary sanctions pursuant Rule 11(b)(2), FED. R. CIV. PROC., applicable here pursuant to TBMP 527.02, because within the 21-day safe harbor the Petitioner did not correct pleaded averments and factual assertions that lack evidentiary support.

This Rule 11 Motion is Germane to the Pending Rule 12 Motions.

Petitioner has based its standing contention on a theory that “Respondent’s machines,” meaning “vending machines,” compete with petitioner’s brick & mortar grocery stores.¹ Petitioner extends that theory to claim it has a direct “commercial interest” it believes may be damaged by the registration of respondent’s mark. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945, 55 U.S.P.Q.2d 1842, 1844 (Fed. Cir. 2000).

The petitioner’s assertions that respondent *owns* vending machines or *operates* vending machines, lack “evidentiary support” and indeed are unsupportable. These mistaken or incorrect factual assertions about the respondent’s business bear directly on the motions challenging the petitioner’s standing.² For those reasons, an Order should issue for petitioner to show cause as to these assertions, which would serve to move the matter forward.

This motion is germane to the unresolved issues raised in motions pending before the Board. Respondent requests that Rule 11 relief be granted.

¹ ¶11 of SFM’s First Amended Petition alleges that “Respondent’s vending machines offer a variety of products, including the same or similar products than those offered at retail ...specifically Sprouts Farmers Markets.”

² Petitioner’s Response, dated June 18, 2015, complains of Respondent’s vending machines and the “Respondent’s conduct, namely its use of a registration for the SPROUT mark on vending machines selling food, is proximately causing injury to SFM.”

Rule 11 Nonmonetary Sanctions.

Civil Rule 11(b)(2), FED. R. CIV. PROC., applicable here per TBMP 527.02, “requires that counsel certify they have made a reasonable inquiry into whether their `factual contentions have evidentiary support.” *Source Vagabond Sys. Ltd. v. Hydrapak, Inc.*, 753 F.3d 1291, 1298, 111 U.S.P.Q.2d 1015, 1020 (Fed. Cir. 2014). “[A]ccuracy in factual representations is expected” in cancellation actions. *The Clorox Co. v. Chemical Bank*, 40 U.S.P.Q.2d 1098, n. 9 (TTAB 1996), citing Rule 11. “If a pleading, motion or other paper is signed in violation of this rule, the Board may upon motion or upon its own initiative, enter an appropriate sanction.” *Carrini, Inc. v. Carla Carini S.R.L.*, 57 U.S.P.Q.2d 1067 (T.T.A.B. 2000).

The nonmonetary sanction appropriate here is an Order for petitioner to Show Cause why the pleaded assertions about “Respondent’s machines” exist and/or compete with SFM, and its arguments about those assertions, should not be stricken, Rule 11(c)(1), and petitioner precluded from presenting or contesting the issue, Rule 11(c)(3). That relief avoids a skewed result on the threshold issue of standing, which now is before the Board.

More than 21 Days Notice.

Since this matter was docketed, and more than once, the undersigned has clearly indicated to petitioner’s counsel the error in or the falseness of petitioner’s assertions about “Respondent’s [vending] machines”. See Declaration filed herewith. Nothing has been done to correct the error and the record. Moreover, the Petitioner has refused the requests for it to voluntarily provide *anything* that it believes supports its mistaken assertions about “Respondent’s machines” - which are non-existent. *Id.*

The specifics and mistaken assertions were raised in a telephone call with petitioner's counsel in early May, and after no correction was made, a Rule 11 motion notice was sent on June 22, 2015. Now, more than 21 days later, respondent moves under Rule 11 for an Order to Show Cause.

Entry of an Order to Show Cause is An Appropriate Nonmonetary Sanction.

Attorneys before the Board have an affirmative duty to make reasonable inquiry into both the facts and the law relevant to their pleadings and motions prior to signature. See Advisory Committee Notes to 1983 Amendment to Rule 11. Here, the petitioner pleaded the existence of vending machines that are "Respondent's machines" which it alleges compete with SFM's grocery stores. Those averments lack evidentiary support, and apparently, those were not affirmatively checked out before the pleadings were signed.

Now, more than 21 days after having been made aware that these averments lack evidentiary support, the petitioner persists in making the same assertions in its motion papers. The "1993 amendment to Rule 11 emphasizes an attorney's continuing obligations to make inquiries, and thus the rule allows sanctions when an attorney continues 'insisting upon a position after it is no longer tenable' " (quoting Fed.R.Civ.P. 11 Advisory Committee's note). *Phonometrics, Inc. v. Economy Inns of America.*, 349 F.3d 1356, 1362, 68 U.S.P.Q.2d 1906, 1910 (Fed. Cir. 2003)(claim "lacked evidentiary support"). Even now, 21 days after the Rule 11 issued were raised to petitioner's counsel, the factual assertions that are not and never were "tenable," remain uncorrected.

If these averments are unsupportable, then those should be stricken, and the absence of evidentiary support would impact the ruling on whether petitioner lacks standing.

Relief Requested.

Respondent requests an Order to Show Cause. Petitioner should be required to show cause why the Board should not strike the assertions that there are “Respondent’s machines,” viz., vending machines owned or operated by respondent that compete with SFM’s brick and mortar grocery stores. If cause is not shown, then Petitioner should be ordered precluded from making any such assertion, and from relying on any evidence related to the stricken assertions.

A proposed form of Order is submitted herewith.

Respectfully submitted,

14 JULY 2015

~ S ~ /Charles L. Thomason/

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

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 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: 14 JULY 2015

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

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Corcamore, LLC	}	Registration No. 3708453
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Respondent-Registrant.	}	

ELECTRONICALLY SERVED

**DECLARATION IN SUPPORT OF RULE 11 MOTION OF
RESPONDENT-REGISTRANT.**

CHARLES L. THOMASON, of full age, declares:

1. I am an attorney at law in the State of Ohio, and a registered patent attorney. I make this declaration upon personal knowledge and based upon relevant admissible documents.
2. This matter regards the Respondent’s registered service mark SPROUT for “vending machine services.”
3. As counsel for Respondent-Registrant, I am fully familiar with the “vending machine services” identified by its registered SPROUT mark.
4. After reasonable inquiry, I can state affirmatively that Respondent-Registrant does not own or operate vending machines.
5. Averments in the Petition and First Amended Petition, that “Respondent’s vending machines offer a variety of products, including the same or similar products than those offered at retail ...specifically [at] Sprouts Farmers Markets” lack evidentiary support. There are no vending machines that are “Respondent’s vending machines.”

6. Arguments made by petitioner, in regard to the motion challenging its standing, about Respondent's vending machines and the "Respondent's conduct, namely its use of a registration for the SPROUT mark on vending machines selling food, is proximately causing injury to SFM" lack evidentiary support.

7. Soon after the pleadings were closed, and more than once, the undersigned has clearly indicated to petitioner's counsel the error in or the falseness of petitioner's assertions about "Respondent's [vending] machines". The specifics and mistaken assertions were noted in a telephone call with petitioner's counsel in early May. As recently as June 22, 2015, a Rule 11 motion notice was sent to petitioner's counsel.

8. Now, more than 21 days after notice was communicated, respondent has moved under Rule 11 for an Order to Show Cause.

9. I make this Declaration in support of the Rule 11 motion for an Order to Show Cause.

I make this Declaration in accordance with 28 U.S.C. §1746.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 14, 2015.

~ S ~ Charles L. Thomason
Charles L. Thomason

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of July, 2015, I electronically filed the foregoing Declaration in Support of the 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: 14 JULY 2015

~ S ~ /Charles L. Thomason/
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Respondent-Registrant.	}	

[PROPOSED]

ORDER ON RULE 11 MOTION OF RESPONDENT-REGISTRANT.

Respondent Corcamore LLC having moved for nonmonetary sanctions pursuant Rule 11(b)(2), FED. R. CIV. PROC., applicable here pursuant to TBMP 527.02, for an Order to Show Cause, and for good cause shown:

- I. The motion is hereby granted, and
- II. Petitioner shall forthwith SHOW CAUSE why its averments about “Respondent’s machines” and contentions that respondent owns or operates vending machines, should not be stricken from the record, and why petitioner should not be precluded from making such averments or from relying on evidence related thereto; and,
- III. Petitioner shall show cause within ten (10) days of the date of this Order.

DATE:

For the Board