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

Proceeding	92061796
Party	Plaintiff Spansion LLC
Correspondence Address	BELINDA J SCRIMENTI PATTISHALL MCAULIFFE NEWBURY ET AL LLP 200 S WACKER DR, STE 2900 CHICAGO, IL 60606 UNITED STATES bscrimenti@pattishall.com, and@pattishall.com, pab@pattishall.com,sm@pattishall.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Belinda J. Scrimenti
Filer's e-mail	bscrimenti@pattishall.com, and@pattishall.com, pab@pattishall.com, sm@pattishall.com
Signature	/Belinda J. Scrimenti/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

US Trademark Application Serial No.: 86/462,159 for HYPERX  
Filed: November 22, 2014  
Published: March 10, 2015

US Trademark Application Serial No.: 86/418,063 for HYPERX BLITZ  
Filed: October 8, 2014  
Published: March 10, 2015

Spansion LLC,	)	
	)	
Opposer,	)	Opposition No. 91222728
	)	
v.	)	
	)	
Kingston Technology Corporation	)	(After Answer is Filed, Filings
	)	to be Made in Parent File,
Applicant,	)	Opposition No. 91218100)
_____	)	

**AND**

US Trademark Registration No. 4,721,431 for HYPERX SKYN  
Registered: November 22, 2014

Spansion LLC,	)	
	)	
Petitioner,	)	Cancellation No. 92061796
	)	
v.	)	
	)	
Kingston Technology Corporation	)	(After Answer is Filed, Filings
	)	to be Made in Parent File,
Registrant	)	Opposition No. 91218100)
_____	)	

**SPANSION'S CONSOLIDATED MEMORANDUM IN OPPOSITION TO:**

- 1) KINGSTON'S MOTION TO DISMISS COUNT I OF SPANSION'S SECOND AMENDED NOTICE OF OPPOSITION;**
  - 2) KINGSTON'S MOTION TO DISMISS COUNT II OF SPANSION'S SECOND AMENDED NOTICE OF OPPOSITION; AND**
  - 3) KINGSTON'S MOTION TO DISMISS SPANSION'S SECOND AMENDED PETITION FOR PARTIAL CANCELLATION/LIMITATION**
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## **I. INTRODUCTION**

Following the Board's December 9, 2015 Order, Spansion LLC ("Spansion") amended its Notice of Opposition and Petition for Partial Cancellation/Limitation to more specifically detail competition between Spansion and Kingston Technology Company ("Kingston") and the damage caused to Spansion by Kingston's further attempts to register its allegedly descriptive HYPERX marks. Spansion's Second Amended Notice of Opposition ("Second Amended Notice") and Second Amended Petition for Partial Cancellation/Limitation ("Second Amended Petition") (collectively, "Second Amended Pleadings") set forth its standing in a manner that is both consistent with the Board's Order and the TTAB Manual of Procedure ("TBMP").

In its continued effort to complicate and confuse these matters, however, Kingston once again moved to dismiss Spansion's pleadings – this time, the Second Amended Pleadings – for lack of standing. Kingston's Motions<sup>1</sup> make essentially the same arguments Kingston has made before (this is now the third set of motions to dismiss filed by Kingston), the majority of which are largely irrelevant. Further, in its Motions, Kingston wholly ignores relevant allegations from Spansion's Second Amended Pleadings, misreads material portions of the Board's Order, and (again) improperly attempts to argue the merits. Thus, for the reasons discussed below, Kingston's Motions should be denied.

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<sup>1</sup> As discussed further below (*see infra* p.15, Section III.C.), Kingston (for some reason) chose to file three motions to dismiss against Spansion's two pleadings, contrary to Fed. R. Civ. P. 12(g)(2) (individually, a "Motion"; collectively, "Motions"). Given that the arguments in the three Motions are essentially identical, and in an effort to simplify matters, Spansion is filing a single, consolidated response to Kingston's Motions.

## II. PROCEDURAL BACKGROUND<sup>2</sup>

These proceedings grow out of an opposition filed by Kingston against Spansion's application to register the mark HYPERRAM for certain computer memory products (Parent Opposition 91218100). There, Kingston alleged that the "HYPER" element of Spansion's HYPERRAM mark is descriptive of computer and electronics products, while at the same time asserting that its own use of the term "HYPERX" (with HYPER as the dominant element, combined with the descriptive element "X") for computer and electronics products is distinctive and non-descriptive.

In response, Spansion opposed and petitioned to cancel several Kingston HYPERX-based marks, including HYPERX for mousepads, headphones, and related accessories in Classes 9 and 28 (App. Ser. No. 86/462,159), HYPERX BLITZ for "Mouse pads" in Class 9 (App. Ser. No. 86/418,063), and HYPERX SKYN for gaming mouse pads (Reg. No. 4,721,431). Spansion's opposition against the HYPERX BLITZ mark and petition to cancel the HYPERX SKYN mark sought only to have the term "HYPERX" disclaimed under Section 18 of the Lanham Act, relevant TBMP provisions and caselaw. Spansion did not seek any relief in respect of the terms BLITZ or SKYN. *See* Second Amended Notice of Opposition, Count II and Second Amended Petition.

On August 27, 2015, Kingston filed motions to dismiss Spansion's First Amended Notice of Opposition and First Amended Petition for Partial Cancellation/Limitation. Kingston's

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<sup>2</sup> The background of these consolidated proceedings has been detailed in Spansion's responses to Kingston's prior motions to dismiss. Thus, the background information set forth herein is somewhat abbreviated. If the Board requires more such information, please see Opp. No. 91222728, Spansion's Memorandum in Opposition to Kingston's Motion to Dismiss Amended Notice of Opposition, TTAB Docket No. 9.

motions alleged that Spansion's pleadings failed on standing grounds because Spansion did not directly allege that it was a competitor of Kingston. Kingston also argued that Spansion failed to properly plead damage by alleging only that it was harmed by Kingston's inconsistent positions on the descriptiveness of the term "HYPER" and by Kingston's attempts to create a family of HYPERX marks. Kingston also alleged that Spansion's claim that Kingston's HYPERX mark was descriptive was faulty because Spansion allegedly didn't address the HYPERX term as a whole, provided alleged "descriptive connotations that were irrelevant," and because the claim was allegedly contingent. *See, e.g.,* Opp. No. 91222728, Kingston's Motion to Dismiss Amended Notice of Opposition, TTAB Docket No. 6.

On December 9, 2015, the Board denied Kingston's motions as to the descriptiveness claims, but granted Kingston's motions as to standing. In particular, the Board noted:

While SL alleges that it is "one of the leading manufacturers of computer memory products and embedded systems solutions, including a broad portfolio of flash memory, microcontrollers, mixed-signal and analog products, and system-on-chip solutions," and that "[s]uch products have a wide variety of applications, including in connection with consumer electronics, industrial and automotive applications," these assertions fall short of alleging that SL has a business need to use the applied-for and registered terms to describe its goods, that its goods are the same or related to those offered by KTC or are within its normal zone of expansion, or simply that SL is a competitor of KTC. The Board is left to surmise this conclusion from SL's listing of goods.

Board's December 9, 2015 Order at p. 8 (emphasis added). As to the descriptiveness claims, the Board found them to be properly pleaded and chastised Kingston for (again) attempting to argue the merits of the claims. *Id.* at p. 11.

On December 18, 2015, Spansion filed its Second Amended Pleadings. These pleadings provided specific, detailed allegations regarding competition between the parties, the relatedness of the parties' products, and how Kingston's HYPERX marks damage Spansion. *See, e.g.,*

Spansion's Second Amended Notice, ¶¶ 2-5 and 23-27; Spansion's Second Amended Petition, ¶¶ 2-5 and 20-24.

On January 6, 2016, Kingston filed three similar Motions to dismiss — one against Count I of the Second Amended Notice of Opposition (re the mark HYPERX), one against Count II of the Second Amended Notice of Opposition (re the mark HYPERX BLITZ), and one against the Second Amended Petition for Partial Cancellation. In all three Motions, Kingston argues that Spansion does not have a “real interest” in the proceedings because Spansion’s allegations of competition are “indefinite” and because the Board allegedly already “rejected” Spansion’s position on competition. Kingston also argues in all three Motions that Spansion cannot claim to be damaged by Kingston taking “inconsistent” positions on the descriptiveness of the term “HYPER” or by Kingston’s attempt to create a family of HYPERX marks. In the latter two Motions, Kingston also claimed that Spansion lacks a “real interest” in the proceedings because it has not claimed that Kingston’s HYPERX BLITZ and HYPERX SKYN marks are descriptive in their entireties.

### **III. ARGUMENT**

In order to withstand a motion to dismiss, Spansion’s Amended Pleadings need only “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In the context of an *inter partes* proceeding, a claimant “need only allege such facts as would, if proved, establish that [the claimant] is entitled to the relief sought, that is, that 1) [the claimant] has standing to maintain the proceeding, and 2) a valid ground exists for [the claim].” *See Petroleos Mexicanos v. Intermix S.A.*, 97 USPQ2d 1403, 1404 (TTAB 2010). In determining the sufficiency of the pleading, “all of the [claimant’s] well-pleaded allegations must be accepted as true, and the

complaint must be construed in the light most favorable to [the claimant]. The pleading must be construed so as to do justice, as required by Fed. R. Civ. P. 8(e).” *Id.* at 1405. *See also Ritchie v. Simpson*, 170 F.3d 1092, 1097 (Fed. Cir. 1999) (“For purposes of ruling on a motion to dismiss for want of standing, a reviewing court must accept as true all well-pled and material allegations of the complaint, and must construe the complaint in favor of the complaining party.”).

Moreover, the motion to dismiss stage is not an opportunity to examine the merits of a proceeding or determine whether the opposer or cancellation petitioner’s claims can be proved at trial. *See* TBMP § 503.02 (“Whether a plaintiff can actually prove its allegations is a matter to be determined not upon motion to dismiss, but rather at final hearing or upon summary judgment.”). *See also Hall v. Bed Bath & Beyond, Inc.*, 705 F.3d 1357, 1364 (Fed. Cir. 2013) (“Whether the facts as plausibly pleaded can be proved is a matter for trial.”); *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 827(7th Cir. 2015) (“The relevant question under these cases is *not* whether a complainant’s factual allegations are true, but rather whether the complaint contains sufficient factual matter, *accepted* as true, to state a claim to relief that is plausible on its face.” (emphasis in original, internal quotations omitted)).

**A. Spansion Has a Real Interest in This Proceeding.**

To properly plead standing, Spansion must show that it has a “real interest” in the proceeding. TBMP § 309.03(b); *Ritchie*, 170 F.3d at 1095. The “real interest” requirement essentially means that the opposer/petitioner must have “a personal stake” in the proceeding and “is more than a mere intermeddler.” *Ritchie*, 170 F.3d at 1095. In discussing this “real interest” requirement, the TBMP provides in pertinent part:

Any person who believes it is or will be damaged by registration of a mark has standing to file a complaint. At the pleading stage, all that is required is that a plaintiff allege facts sufficient to show a “real interest” in the proceeding, and a “reasonable basis” for its belief that it would suffer some kind of damage if the mark is registered. . . . To plead a “real interest,” plaintiff must allege a “direct and personal stake” in the outcome of the proceeding. The allegations in support of plaintiff’s belief of damage must have a reasonable basis “in fact.” ...

[T]here is no requirement that actual damage be pleaded or proved, or that plaintiff show a personal interest in the proceeding different or “beyond that of the general public” in order to establish standing or to prevail in an opposition or cancellation proceeding. A real interest in the proceeding and a reasonable belief of damage may be found, for example, where plaintiff pleads (and later proves): ...

For example, when descriptiveness or genericness of the mark is in issue, plaintiff may plead (and later prove) its standing by alleging that it is engaged in the sale of the same or related products or services (or that the product or service in question is within the normal expansion of plaintiff’s business) and that the plaintiff has an interest in using the term descriptively in its business. (That is, plaintiff may plead that it is a competitor.) (emphasis added).

TBMP § 309.03(b). For standing purposes, then, the term “competitor” is construed broadly to include related products and services or those within the natural expansion of a plaintiff’s business.

Under these standards, Spansion clearly has alleged a “personal stake” and a “real interest” in these proceedings — at a minimum, Spansion’s allegations establish that it is an indirect competitor of Kingston for the goods at issue, and that its ability to use “HYPER”-based terms in its business would be negatively impacted by Kingston’s registration of the HYPERX marks at issue.

**1. Spansion’s Pleadings Directly Address the Issues Raised in the Board’s December 9, 2015 Order.**

In its December 9, 2015 Order, the Board indicated that Spansion’s prior attempt to plead standing left too much for the Board to “surmise” from Spansion’s general allegations about its line of business. *See* Board’s December 9, 2015 Order at p. 8. In response, Spansion’s Second

Amended Pleadings provide specific allegations with substantial detail about competition between the parties. These include at least the following:

- Spansion’s embedded systems are incorporated by its customers into products that compete with and/or are related to the Kingston products at issue. *See* Spansion’s Second Amended Notice, ¶ 2; Spansion’s Second Amended Petition, ¶ 2.
- Spansion’s flexible microcontrollers are used to provide touchpad controls in various products, and such touchpads often take the place of a traditional mouse. *See* Spansion’s Second Amended Notice, ¶ 3; Spansion’s Second Amended Petition, ¶ 3.
- Spansion’s parent company, Cypress Semiconductor Corporation, also produces embedded systems that are often used to provide trackpad functionality in computer products, again in place of a traditional mouse. *See* Spansion’s Second Amended Notice, ¶ 4; Spansion’s Second Amended Petition, ¶ 4.
- Spansion often licenses its trademarks to its customers to use in connection with the customer’s end product. *See* Spansion’s Second Amended Notice, ¶ 5; Spansion’s Second Amended Petition, ¶ 5.
- Spansion, its customers, or both of them, are competitors of Kingston. *See* Spansion’s Second Amended Notice, ¶ 24-25; Spansion’s Second Amended Petition, ¶ 21-22.
- Spansion’s products are incorporated into products that compete with or are related to the Kingston products at issue. *See* Spansion’s Second Amended Notice, ¶ 24-25; Spansion’s Second Amended Petition, ¶ 21-22.
- The Kingston products at issue are within the natural expansion of the business of Spansion, its customers, or both of them. *See* Spansion’s Second Amended Notice, ¶ 24-25; Spansion’s Second Amended Petition, ¶ 21-22.

These allegations do not leave anything for Kingston or the Board to “surmise.” Indeed, in its Motions, Kingston essentially concedes that Spansion’s specific allegations “expand on” and “verif[y]” the more general allegations of Spansion’s first amended pleadings. *See* Kingston’s Motions to Dismiss, pp. 5-6.

In an attempt to circumvent the import of Spansion’s detailed allegations, Kingston argues that the Board’s December 9, 2015 Order explicitly “rejected” Spansion’s line of argument. *See* Kingston’s Motions to Dismiss, p. 5. In other words, Kingston does not read the Board’s Order as saying that Spansion’s prior pleadings did not provide sufficient detail as to

competition. Rather, Kingston erroneously “interprets” the Board’s Order as saying that Spansion’s allegations about competition could *never* be sufficient, regardless of how much detail Spansion were to provide.

But Kingston’s argument completely ignores the salient part of the Board’s Order, namely that Spansion’s prior pleadings required the Board to “surmise” that there was competition simply from Spansion’s general allegations about its line of business. *See* Board’s December 9, 2015 Order at p. 8. Indeed, while Kingston’s Motions provide a long quotation from the Board’s Order, Kingston omitted the key sentence – namely, that “[t]he Board is left to surmise [that the parties are competitors] from [Spansion’s] listing of goods.”<sup>3</sup> *Compare* Kingston’s Motions to Dismiss at. p. 5 *with* Board’s December 9, 2015 Order at p. 8. Such a statement by the Board is not a “rejection” of Spansion’s position as Kingston claims, but rather a clear suggestion that Spansion must provide more detail if it chose to amend its pleadings, which the Order permitted. In its Second Amended Pleadings, Spansion did so. Kingston’s Motions should, therefore, be denied.

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<sup>3</sup> Not only does Kingston misread the Board’s Order and omit the key language from its quote, it also materially misquotes the Order. In the block quote on page 5 of Kingston’s Motion to Dismiss Count I, Kingston inserted the phrase “audio peripherals and mouse pads” (the Kingston goods in the proceedings at issue) in multiple locations in place of the word “goods.” *Compare* Kingston’s Motion to Dismiss Count 1, p. 5 *with* Board’s December 9, 2015 Order at p. 8 (which refers merely to Spansion’s “goods,” not Kingston’s goods). This change to the Board’s language – which Kingston does not acknowledge by, for example, putting the changed language in brackets – deceptively suggests that the Board ruled that Spansion could only have standing if its “goods” were in fact “audio peripherals and mouse pads.” That is not what the Board said, nor what its ruling meant.

**2. Spansion is Harmed Even if Only its Customers Are Kingston's Direct Competitors.**

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As noted above, Spansion's Second Amended Pleadings set forth in detail how Spansion's products are incorporated into end products that compete with, or are related to, the Kingston products at issue in this proceeding. *See supra* pp. 7-9, Section III.A.1. These allegations specifically plead how Spansion's customers are direct competitors of Kingston for the sale of the same or related products to those at issue in these proceedings. Further, the allegations demonstrate that Spansion is, at a minimum, an indirect competitor of Kingston – the end products that incorporate Spansion's products compete for sales with Kingston's products, meaning that any negative impact on the sales of Spansion's customers will also be felt by Spansion. *See, e.g.*, Spansion's Second Amended Notice, ¶¶ 2-5 and 24-25; Spansion's Second Amended Petition, ¶¶ 2-5 and 21-22. These allegations show that Spansion has a "personal stake" in these proceedings and is not a mere "intermeddler." *See Ritchie*, 170 F.3d at 1095.

Kingston argues, however, that Spansion's allegations of competition are "indefinite" because they state that "Spansion *and/or* its customers" compete with Kingston. *See* Kingston's Motions to Dismiss, pp. 4-5. According to Kingston, these allegations "provide[] one possibility that Spansion is not a competitor of Kingston." *Id.* As it has done before, Kingston places primacy on one small phrase in Spansion's pleadings ("and/or") at the expense of all of Spansion's other allegations about competition. This is improper. *See* TBMP § 503.02 (noting that when considering a motion to dismiss "it is the duty of the Board to examine the complaint in its entirety ..."). *See also Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007) (on a motion to dismiss, "[t]he pleading must be examined in its entirety ...").

When read in their entirety, Spansion's allegations show multiple ways in which the parties could be said to be "competitors" – either Spansion is a direct competitor of Kingston,

Spansion's customers are direct competitors of Kingston (making Spansion an indirect competitor, as explained above), or both Spansion and its customers are direct competitors of Kingston. Any of these scenarios are sufficient to give Spansion standing. *See Southwire Co. v. Kaiser Aluminum & Chem. Corp.*, 196 U.S.P.Q. 566, 572 (TTAB 1977) (Opposer need only "show that it is engaged in the same or a *similar* business as applicant and that damage to it will ensue if fair use of the term by it *or its customers* to describe their goods will be denied by the registration sought.") (emphasis added). Kingston's argument seems to suggest that Spansion must allege that it is a "direct" competitor of Kingston, but the fact that standing is allowed in cases involving "related" goods, or where the products at issue are within the "natural expansion" of a company's business, shows that "direct" competition is unnecessary. *See, e.g.*, TBMP § 309.03(b) (as also quoted in Section III.A., *supra* p. 7).

Kingston also suggests that Spansion's "and/or" pleading is improper. Admittedly Spansion's pleading of competition between the parties is done in the alternative. But such alternative pleading does not render Spansion's allegations vague or "indefinite." Rather, such pleading is clearly acceptable under the Federal Rules of Civil Procedure (*see* Fed. R. Civ. P. 8(d)(2)) and the Board's prior rulings in this case. *See* Board's December 9, 2015 Order at p. 10 (finding Spansion's alternative pleading acceptable, and noting that "a plaintiff may also set forth two or more statements of a claim alternatively or hypothetically ...").

**3. It is Irrelevant Whether Kingston's HYPERX BLITZ and HYPERX SKYN Marks Are Descriptive in their Entireties.**

As is clearly stated in Count II of Spansion's Second Amended Notice and in Spansion's Second Amended Petition, Spansion does not seek any remedy against Kingston's full HYPERX BLITZ and HYPERX SKYN marks. Rather, Spansion merely seeks to have a disclaimer entered for the term "HYPERX" should the Board determine that "HYPERX" is merely descriptive. *See*

Spancion's Second Amended Notice, Count II, ¶¶ 34-39; Spancion's Second Amended Petition, Count I, ¶¶ 25-30. These claims are supported by the Lanham Act and the TBMP, both of which allow for claims of partial opposition or cancellation.<sup>4</sup> See 15 U.S.C. § 1068; TBMP § 309.03(d). See also Opposition No. 91218100, Board's July 24, 2015 Order at pp. 5-6 ("Just as the registration of a mark may be opposed (or cancelled ...) on the Section 2(e)(1) ground that the entire mark ... is merely descriptive ..., so too it may be on the ground that an undisclaimed portion of the mark is merely descriptive ... (and the mark should not be registered without a disclaimer of that portion).") (citing *Kellogg Co. v. Pack'em Enters., Inc.*, 14 U.S.P.Q.2d 1545, 1549 (TTAB 1990)).

Despite the clear authority underlying Spancion's ability to assert such claims, Kingston argues that Spancion lacks a "real interest" in these claims because it does not allege that the marks HYPERX BLITZ and HYPERX SKYN are descriptive in their entireties. See Kingston's Motion to Dismiss Count II of the Second Amended Notice of Opposition, at pp. 6-7; Kingston's Motion to Dismiss Second Amended Petition for Cancellation, at pp. 6-7. If Kingston were correct, it would be impossible to seek partial cancellation of a mark based on the ground that only a portion of the mark (and not the whole mark) was descriptive and lacked a disclaimer, as there would be no standing for such a challenge absent an allegation the mark was descriptive in its entirety. The authorities noted above show that Kingston is clearly wrong – such claims are permissible. As all Spancion seeks is the imposition of a disclaimer against the "HYPERX"

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<sup>4</sup> Indeed, the Board has already allowed Spancion to go forward with a similar claim seeking a disclaimer of the term "HYPERX" in Kingston's registration of HYPERX BEAST (Reg. No. 4,452,249). See Opposition No. 91218100, Board's Order, December 9, 2015, pp. 10-11, TTAB Docket No. 28.

element of Kingston's HYPERX BLITZ and HYPERX SKYN marks, Spansion need not allege that the BLITZ and SKYN elements are descriptive in order to have standing.

**B. Spansion's Pleading of Damage is in Accord with the Standards Set Forth in the TBMP.**

In addition to showing a "real interest" in the case, the test for standing also requires a plaintiff to show that it has "a 'reasonable basis' for its belief that it would suffer some kind of damage if the mark is registered." TBMP § 309.03(b) (citing *Ritchie*, 170 F.3d at 1095). In the context of a claim that the subject mark is descriptive, among the ways a plaintiff can plead damage<sup>5</sup> is by alleging that it is a "competitor" – merely as a seller of related products – and that it "has an interest in using the term descriptively in its business." TBMP § 309.03(b) (as also quoted in Section III.A., *supra* p. 7).

Spansion's specific allegations of damage are set forth in Paragraphs 26-27 of the Second Amended Notice and Paragraphs 23-24 of the Second Amended Petition. In the first of those paragraphs, Spansion alleges: "Spansion and/or its customers currently use HYPER-based terms in connection with the marketing and sale of their products, and have an interest in continuing to do so." Hence, Spansion has pleaded damage in a manner that is consistent with the pleading standards laid out in the TBMP.

As appears to be a common pattern, in arguing that Spansion failed to adequately allege damage, Kingston's Motions to Dismiss wholly ignore the relevant pleaded allegations (noted above). Instead, Kingston bases its position about Spansion's allegations of damage on two

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<sup>5</sup> The TBMP sets a forth an exemplary, but non-exhaustive, list of ways of pleading damage. *See* TBMP § 309.03(b).

arguments that are largely recycled from Kingston's prior motion to dismiss – namely that Spansion's allegations about Kingston's "inconsistent pleadings" and Kingston's attempts to expand its family of HYPERX marks are insufficient to show that Spansion is damaged. *See, e.g.,* Kingston's Motion to Dismiss Count I of the Second Amended Notice of Opposition, at pp. 6-10.

Kingston's arguments miss the point entirely and are, ultimately, completely irrelevant.<sup>6</sup> Spansion pleaded the allegations about Kingston's inconsistent positions and expansion of its family of marks to help explain additional ways that Spansion is damaged by Kingston's applications and registrations, but that does not mean they are the *only* ways that Spansion is damaged. Indeed, Spansion's Second Amended Pleadings include multiple allegations showing how Spansion is damaged.<sup>7</sup> Included among these is Spansion's allegation, cited above, about

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<sup>6</sup> In addition to being irrelevant, Kingston's arguments in its section on damage are largely improper. As it has previously done, Kingston dedicates the majority of this section of its Motions to discussing why its positions are not inconsistent and why Spansion is not damaged by Kingston's expansion of its family of marks. As the Board has already reminded Kingston on two prior occasions, these types of merits-based arguments are improper at the motion to dismiss stage. *See* Opposition No. 91218100, Board's July 24, 2015 Order at pp. 2-3, TTAB Docket No. 21; Board's December 9, 2015 Order at pp. 10-11, TTAB Docket No. 28.

<sup>7</sup> Spansion is most certainly damaged by Kingston's attempt to expand its family of HYPERX marks. It is fundamental that, the broader a family of marks becomes, the more it strengthens the rights of the owner of the common element of the family, to the detriment of other users of the same (or similar) element for marks for related goods. Likewise, the stronger the family becomes, the less related the goods need to be for the rights of the owner of the family to conflict with the rights of other users in the same (or even, different) international class. *See, e.g., McDonald's Corp. v. McClain*, 37 USPQ2d 1274, 1276 (TTAB 1995) ("[I]n view of the strength of opposer's famous family of marks, and the fact that opposer uses its marks, and licenses its marks, on a wide variety of goods and services ... consumers are likely to believe that opposer is connected to applicant's operation in some way."); *Chips "N Twigs, Inc. v. Chip-Chip, Ltd.*, 414 F. Supp. 1003, 1016 (E.D. Pa. 1976) (noting that a family of marks is "entitled to protection from use of confusingly similar marks even on non-competing goods, especially where the goods are related in character.").

its need to use HYPER-based terms in its business. This allegation, standing alone, is sufficient to confer standing on Spansion, regardless of the sufficiency of the other allegations of damage. *See* TBMP § 309.03(b) (noting that a plaintiff need only establish its entitlement to standing on one ground).

**C. Kingston's Violation of Fed. R. Civ. P. 12(g)(2) and Pattern of Complicating these Proceedings.**

Finally, Spansion notes that Kingston's Motions to Dismiss Spansion's Second Amended Notice are, at least, technically in violation of Fed. R. Civ. P. 12(g)(2). That Rule provides that "a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion." Fed. R. Civ. P. 12(g)(2). For some reason, rather than filing a single motion to dismiss Spansion's Second Amended Notice, Kingston filed two separate motions against that pleading – one seeking dismissal of Count I, the other seeking dismissal of Count II. The two Motions are largely the same, with just one additional argument in the Motion against Count II, which argument is also found in the Motion to dismiss Spansion's Second Amended Petition. Filing in this way was completely unnecessary, and only serves to increase the time and effort involved in reviewing and responding to the Motions. Accordingly, at a minimum, the second-filed Motion (as to Count II of the Second Amended Notice) should be summarily denied as a violation of Rule 12(g)(2). Moreover, the Board may in its discretion deny both Motions in light of this conduct.

Further, Kingston's Motions continue a pattern seen in Kingston's earlier filings – Kingston ignores relevant allegations in Spansion's pleadings and/or takes them out of context, misquotes and misreads the Board's Orders, and dedicates large sections of its Motions to

arguing the merits. These tactics further contribute to an increase in the time and expense of this proceeding incurred, not only by the parties, but by the Board as well.

**IV. CONCLUSION.**

Spansion's Second Amended Pleadings provide specific allegations regarding Spansion's standing to maintain these proceedings. Spansion's allegations of competition between the parties are detailed and specific, and show that Spansion has a "personal stake" and a "real interest" in these proceedings. Further, Spansion directly alleges its reasonable belief that Kingston's applications and registration will cause it damage in a manner that complies with the TBMP. As such, Spansion's Second Amended Notice and Second Amended Petition fairly and completely respond to the issues raised by the Board in its December 9, 2015 Order. Kingston's Motions to Dismiss should be denied.

Respectfully submitted,

PATTISHALL, McAULIFFE, NEWBURY,  
HILLIARD & GERALDSON LLP

Date: January 26, 2016

By: /Belinda J. Scrimenti/

Belinda J. Scrimenti

Andrew N. Downer

Paul A. Borovay

200 South Wacker Drive, Suite 2900

Chicago, IL 60606

(312) 554-8000

bscrimenti@pattishall.com

adowner@pattishall.com

pborovay@pattishall.com

Attorneys for Opposer/Petitioner, Spansion LLC

**CERTIFICATE OF SERVICE**

I, Belinda J. Scrimenti, hereby certify that a true and accurate copy of the foregoing:

**SPANSION'S CONSOLIDATED MEMORANDUM IN OPPOSITION TO:**

- 1) KINGSTON'S MOTION TO DISMISS COUNT I OF SPANSION'S SECOND AMENDED NOTICE OF OPPOSITION;
- 2) KINGSTON'S MOTION TO DISMISS COUNT II OF SPANSION'S SECOND AMENDED NOTICE OF OPPOSITION; AND
- 3) KINGSTON'S MOTION TO DISMISS SPANSION'S SECOND AMENDED PETITION FOR PARTIAL CANCELLATION/LIMITATION

was served by first class mail, postage prepaid, with a courtesy copy by email, this 26th day of January 2016, on the following counsel for Applicant and Registrant Kingston Technology Corporation:

John D. McConaghy  
Novak Druce Connolly Bove + Quigg LLP  
North Tower Suite 2300  
333 South Grand Avenue  
Los Angeles, CA 90071-1504

By: /Paul A. Borovay/  
Paul A. Borovay