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

Proceeding	92062364
Party	Plaintiff Anom Suheri, Anthony Marcotti, Raymond Wilcoxon and D3 Holdings, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Anom Suheri; Raymond Wilcoxen; Anthony)	Petition No. 92062364
Marcotti and D3 Holdings, LLC, a Delaware)	
Limited Liability Company,)	PETITIONERS' OPPOSITION TO
)	RESPONDENT'S MOTION TO
Petitioners,)	DISMISS [DOC. NO. 4]
)	
v.)	
)	
Raihana Heuer,)	
)	
Respondent.)	
)	
)	

PETITIONERS' OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Petitioners Anom Suheri, Raymond Wilcoxen, Anthony Marcotti and D3 Holdings, LLC (“Petitioners”) submit the following Opposition to Respondent Raihana Heuer’s (“Respondent”) Motion to Dismiss.¹ (“MTD”, Doc. No. 4.)

Petitioners respectfully request that the Board deny Respondent’s Motion to Dismiss. As set forth below, and contrary to Respondent’s unsupportable arguments, Petitioners have adequately pleaded standing, harm, priority, likelihood of confusion, fraud, and all other elements required to state the claims for relief sought in their cancellation petition.

¹ The Certificate of Service appended to Respondent’s Motion to Dismiss (Doc. No. 4) indicated that service of the MTD was made by U.S. Express Mail with a courtesy copy by e-mail. Neither a mail copy nor email copy was ever received. Similarly, Petitioners’ counsel never received mail service of Respondent’s Change of Correspondence Address (Doc. No. 5), which included a certification of service by U.S. Express Mail.

I. Introduction

In 2004, Petitioners, Respondent and other individuals founded and began operating a surfing resort in Indonesia. The Founders agreed to name their resort Kandui Resort, which has since become a world-renowned surfers' paradise. Today, Petitioners still own and operate Kandui Resort.

In 2010, Respondent, along with her husband, broke away from Kandui Resort and started a competing resort, which they named Kandui Villas. Respondent's decision to adopt the distinctive KANDUI name was an overt attempt to trade off hard built goodwill that Kandui Resort had created over the years and to lure vacationing surfers over to their new "luxury" version of Kandui Resort, as they have put it.

Respondent's nefarious act was compounded when she inappropriately filed trademark applications to register KANDUI and KANDUI VILLAS – in her own name – claiming resort services and clothing. Respondent never informed Petitioners that she was going to file trademark applications, nor did Petitioners ever agree to their primary competitor using or owning trademark registrations containing KANDUI. Petitioners and Respondent have since attempted to resolve the trademark dispute through various means, but Respondent has become recalcitrant. Petitioners now have no other option than to petition the Board to cancel the Registrations that are not rightfully hers.

Respondent has filed a boilerplate motion to dismiss that – if anything – evidences a fundamental misunderstanding of both the grounds stated in the Petition and clear federal law. Under the liberal pleading rules of the Federal Rules of Civil Procedure, Petitioners have clearly stated claims upon which relief may be granted. The motion therefore lacks merit and should be

summarily denied. If the Board is inclined to grant or partially grant the motion, then Petitioners respectfully request leave to amend the Petition.

II. Legal Standard

In order to withstand a motion to dismiss, a petitioner need only allege such facts which, if proven, would establish that the petitioner is entitled to the relief sought; that is, (1) petitioner has standing to bring the proceeding, and (2) a valid statutory ground exists for cancelling the registrations. *Fair Indigo, LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007). Specifically, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).)

In the context of cancellation proceedings before the Board, a claim is plausible on its face when the petitioner pleads factual content that, if proven, would allow the Board to conclude, or draw a reasonable inference that, the petitioner has standing and that a valid ground for cancellation exists. *Cf. Twombly*, 550 U.S. at 556. In particular, a petitioner need only allege enough factual matter to suggest its claim is plausible and “raise a right to relief above the speculative level.” *Id.* at 555-56. When deciding a motion to dismiss, the Board must accept “all factual allegations in the complaint as true and constru[e] them in the light most favorable to the nonmoving party.” *Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012). Moreover, the Board must “draw all reasonable inferences in favor of the nonmoving party.” *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987).

III. Argument

A. Petitioners Have Adequately Pleaded Standing

A petition to cancel must include (1) a short and plain statement of the reasons why each petitioner believes he will be damaged by the registrations sought to be cancelled, and (2) a short and plain statement of the grounds for cancellation. TBMP § 303.03; TBMP § 309.03(b). The rules require that the petition include enough detail to give the defendant fair notice of the basis for each claim. TBMP § 309.03(a)(2). The elements of each claim should be stated simply, concisely, and directly, and when taken together “state a claim to relief that is plausible on its face.” *Id.*

Petitioners have standing if they believe they are or will be damaged by the registration sought be cancelled. *See* TBMP § 303. “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.” *Id.*

To plead a “real interest,” plaintiff must allege a “direct and personal stake” in the outcome of the proceeding. TBMP § 303.03. There is no requirement that actual damage be pleaded in order to establish standing. *Id.* Allegations must have a “reasonable basis in fact.” *Id.*

1. Petitioners Have Pleaded a Real Interest in the Proceeding

Contrary to Respondent’s unsupported assertions, the Petition makes it clear that Petitioners each have an interest in Kandui Resort, and therefore have a real interest in this proceeding. Petitioners specifically allege that they were among the founders of Kandui Resort. (Petition ¶ 2, Doc. No. 1.) The Petition also includes allegations that Petitioners have operated and continue to operate Kandui Resort: Mr. Marcotti (one of the Petitioners) registered the

domain name www.KanduiResort.com for use in promoting and marketing Kandui Resort; Kandui Resort hosted its first paid guest in 2006, and since 2006 the Petitioners have continuously used KANDUI and KANDUI RESORT in the United States commerce in connection with resort lodging services, dining and bar services, boat charter services, travel planning services, photography and video services, clothing and a retail gift shop. (*Id.* ¶¶ 3-5).

Further, Petitioners Anom Suheri, Anthony Marcotti, and Raymond Wilcoxon specifically allege that they have direct and personal stakes in the outcome of this proceeding because they are among the Founders of Kandui Resort and therefore have common law rights in the KANDUI and KANDUI RESORT marks. (Petition ¶ 19.) Petitioner D3 Holdings, LLC specifically alleges that it has an identical stake in the outcome of these proceedings because it steps into the shoes of its predecessor in interest, Johnny Ocean, was also a Founder of Kandui Resort with common law rights. (*Id.* ¶ 20.) As owners and operators of Kandui Resort, it is clear that each Petitioner has pleaded a real interest in the outcome of this cancellation proceeding, namely, assuring that one rouge minority owner of Kandui Resort (and now direct competitor) does not come to own and control the KANDUI trademark that is not rightfully hers.

At this stage of the proceedings, these allegations are sufficient to establish the standing of each of the Petitioners. Petitioners only need to allege that they have a personal interest in the proceeding different or beyond that of the general public. TBMP § 303.03. Respondent cannot plausibly claim that the aforementioned allegations fail to provide fair notice of Petitioners' real interest in the proceedings. If the Board finds otherwise, then Petitioners request leave to file an amended pleading.

2. Petitioners Have Pleaded a Reasonable Basis for Their Beliefs That They Have and Will Continue to Suffer Damage by the Registrations

The Petition also includes numerous specific allegations that show Petitioners have a reasonable basis claiming they have been and will continue to be damaged by the registrations. The Petition contains the following allegations of harm.

In 2010, Respondent set up a competing resort with the confusingly similar name Kandui Villas. (Petition ¶¶10, 11.) Respondent promotes Kandui Villas in the same or highly similar marketing channels as Kandui Resort. (*Id.* ¶ 14.) Respondent has adopted a nearly identical logo to Petitioner’s Kandui Resort logo. (*Id.* 15.) Respondent’s adoption and use of KANDUI VILLAS as the name of a rival resort located on the same small island has caused damage to Petitioners in the form of lost profits, as guests have been and continue to be lured away from Kandui Resort. (*Id.* 18.) Indeed, there is substantial evidence of actual confusion. (*Id.* 17.) These facts – all specifically pled in the Petition – demonstrate that Respondent is taking business from Petitioners by imitating their brand, and thus, causing damage.

3. Respondent’s Arguments Regarding Standing Fail

Respondent argues that the “Petitioner fails to plead each of the four [Petitioners’] standing to bring the Petition.” (MTD 4.) Respondent concludes, without any explanation or citation to authority, that “[t]his alone is sufficient grounds to grant the instant Motion for lack of standing.” (*Id.*) Respondent is wrong. As explained above, a plain reading of the Petition reveals that each Petitioner has pleaded a real interest in the proceeding and that they have been damaged. (Petition ¶¶ 2, 3, 4, 19, 20.)

Respondent next argues that because “Petitioners have not pleaded any interest in Kandui Resort, the entity to which Petitioners admit is the user of the mark at issue, Petitioners have not plead they would be damaged in any way and thus have failed to plead standing in this case.”

(MTD 6.) Respondent has misread the Petition. As set out above and in the Petition, Petitioners are an association of individuals who own and operate Kandui Resort. (Petition ¶¶ 1-9.) Therefore, Respondent’s argument that Petitioners’ do not “allege any current interest whatsoever in Kandui Resort” is simply a misreading of the allegations set out in the Petition.

Respondent also proffers an inappropriate argument that Petitioners cannot plead that they have a current interest in Kandui Resort because the resort is actually owned by “PT Kandui Resort Mentawai.” (MTD 5 n.1.) The argument is inappropriate because in the context of a motion to dismiss, Respondent cannot attempt to refute Petitioners’ well pled allegations with factual allegations of its own. *See Iqbal*, 556 U.S. at 667.

Respondent goes on to argue that “simply stating that ‘we came up with the name’ and ‘one of us made a website’ is insufficient to plead harm.” (MTD 5.) It is unclear exactly what the argument is here, but Petitioners have made numerous allegations regarding the harm caused by Respondent’s registrations. (Petition ¶¶ 2, 3, 4, 10, 11, 14, 15, 17, 18.) If the Board concludes otherwise, then Petitioners request leave to amend their pleading.

B. Petitioners Have Adequately Pleaded All Grounds for Cancellation

1. Petitioners Have Adequately Pleaded Priority

Respondent next argues that “Petitioners fail to allege any use of the mark at issue, let alone prior use.” (MTD 7.) Specifically, Respondent claims that the only allegation of use in the Petition is that Mr. Marcotti registered a domain for a website on which he placed promotional material for the resort. (*Id.*) Then, Respondent relies on *Couture v. Playdom, Inc.*, 778 F.3d 1379, 1380-81 (Fed. Cir. 2015), to conclude that registration of a domain name does not constitute use under the Lanham Act. (MTD 7.) Regarding the remaining allegations, Respondent argues that the terms “founder” and “they started” are so vague as to render the

Petition inadequate; and suggests that the allegations of use are insufficient to trigger relief under the Lanham Act since the economic activity occurred in Indonesia. (*Id.*)

First, contrary to Respondent's suggestion, the Petition claims numerous allegations of use apart from the registration and use of the www.kanduiresort.com website. Petitioners specifically allege that they have been using KANDUI and KANDUI RESORT in U.S. commerce for resort lodging services, dining and bar services, boat charter services, travel planning services, clothing, souvenirs, a gift shop, and photography and video services. (Petition at ¶ 4-6.) The Petition points out that Petitioners' marks have appeared in numerous publications in the United States, and all of Petitioners' bookings have been made in California. (*Id.* ¶ 7.) The dates of first use pleaded in the Petition in connection with the above goods and services all pre-date Respondent's use in connection with the competing Kandui Villas resort. (*Id.* at ¶ 4-6, 11.) In light of the foregoing, Respondent's position that "Petitioners fail to allege any use of the mark at issue" is simply nonsense.

Second, Respondent's reliance on *Couture* is misplaced. In *Couture*, Mr. Couture registered a domain name and placed promotional material on the website but did not actually offer the services until 2010. 778 F. 3d at 1380. The Federal Circuit held that absent the actual provision of services, there was no "use" of the mark. *Id.* at 1381. *Couture* has absolutely no bearing on the issues here and is off point. Petitioners specifically allege that they actually provided the resort services promoted on their website on the very first paid trip for the resort. (Petition ¶ 4.) Specifically, the Petition states that Kandui Resort welcomed its first paid guests in April 9, 2006, that those guests were all U.S. citizens, and that since that date, Kandui Resort has been continuously offering the services and goods in United States commerce. (Petition ¶¶ 4, 5.)

Third, Respondent's argument that the Petition alleges that only Mr. Marcotti used the marks because he was the one who registered the domain name is perplexing because the Petition clearly says that he registered it "on behalf of the Founders". (Petition ¶ 3). The Petition is consistent in its allegations that use of KANDUI by Petitioners accrued to the benefit of all the Founders (or their successors).

Fourth, Respondent argues that the terms "founder" and "they started" are vague, and therefore the Petition fails to allege that Petitioners have an interest in Kandui Resort. The Petition clearly alleges that Petitioners and Respondent "associated together and started a surfing resort" and agreed to call it Kandui Resort. (Petition ¶¶ 1, 2.) Nothing more is required to show that Petitioners have an interest in Kandui Resort.

Fifth, Respondent's reliance on *Person's Co., Ltd. v. Christman*, 900 F. 2d 1565 (Fed. Cir. 1990) is misplaced. In *Person's*, the appellant relied on its use of the mark in question exclusively in Japan in an attempt to support its claim for priority in the United States. 900 F. 2d at 1568. The Federal Circuit held that use of a mark *exclusively outside* of the United States would not support a priority claim such use is not considered "in commerce" under the Lanham Act. *Id.* at 1568-69 (emphasis added).

Unlike the Appellant in *Person's*, Petitioners have specifically alleged use in United States commerce dating back to April 9, 2006. (Petition ¶¶ 3, 4, 5.) Specifically, Petitioners claim that they have hosted many United States citizens at their resort in Indonesia, that all of the bookings happen in California, and that they widely advertise in publications directed to United States consumers. (*Id.* at ¶ 4, 5, 7, 8.) This type of commerce is sufficient to establish use under the Lanham Act. TMEP § 901.03 ("The scope of federal trademark jurisdiction is commerce that may be regulated by the United States Congress. The types of commerce encompassed in

this definition are interstate, territorial, and between the United States and a foreign country.”); *see Planned Parenthood Federation of America, Inc. v. Bucci*, 42 USPQ2d 1430 (S.D.N.Y. 1997), *aff’d*, 152 F.3d 920 (2d Cir. 1998), *cert. denied*, 525 U.S. 834 (1998) (holding that offering services via the Internet constitutes use in commerce under the Lanham Act since the services are available to a national and international audience who must use interstate telephone lines to access a website). If the Board finds that Petitioners have not pled priority, then Petitioners request leave to amend their pleading.

2. Petitioners Have Adequately Pleaded Likelihood of Confusion

Respondents next argue that “Petitioners admit that there is an affiliation [between Kandui Resort and Kandui Villas] as they have common ownership.” (MTD 8.) This is baffling, since there are no allegations in the Petition of an affiliation between Kandui Resort and Kandui Villas, other than an acknowledgment that Respondent is one of the founders of Kandui Resort. (Petition ¶ 1.) The Petition does not allege who the owner(s) of Kandui Villas are. Regardless, overlapping ownership of two different businesses does not avoid likelihood of confusion. *See* TMEP § 1201.07(a) (registration of confusingly similar marks to separate legal entities is barred by §2(d)); *see also* TMEP § 1201.07(b)(iv) (a §2(d) refusal is still appropriate when circumstances demonstrate that there is no unity of control and no basis for concluding that two parties form a single source). Petitioners’ allegations of likelihood of confusion (Petition ¶¶ 13-18, 24) are otherwise adequate to meet Petitioners’ pleading burden. If the Board finds that Petitioners have not pled likelihood of confusion, then Petitioners request leave to amend their pleading.

3. Petitioners Have Adequately Pleaded That Respondent was Not the Owner of the Marks at the Time of Registration, and That the Registrations Should Therefore be Declared *Void Ab Initio*

Respondent next attacks Petitioners' claim that Respondent was not the rightful owner of the marks in question at the time she filed the applications. (MTD 8.) Specifically, Respondent claims that "Petitioners have not stated any statute in support of such 'ground,' nor provided any other information from which a statutory ground may be deciphered, and are unable to do such as such statute simply does not exist." (*Id.*)

Despite the confident statement, Respondent is again wrong and has presented no authority to support her position. The applicable rules do not require that the pleading cite the statute under which the cause of action is founded. *See Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 346-47 (2014) (holding that a plaintiff need not indicate the particular statutory basis for claims asserted in order to state a claim and survive a motion to dismiss). Nevertheless, the applicable law under which this cause of action is founded is 37 C.F.R. § 2.71(d), which states in part that "[a]n application filed in the name of an entity that did not own the mark as of the filing date of the application is void." Since an applicable statutory ground exists, Respondent's argument fails. If the Board disagrees, then Petitioners request leave to amend their pleading.

4. Petitioners Have Adequately Pleaded Fraud

Respondents make a number of arguments challenging Petitioners' fraud claim, all of which are poor because it is clear that Petitioners have made a prima facie case for fraud. The cases cited by Respondent are off topic and do not apply.

a. Petitioners Have Pleaded a Prima Facie Case for Fraud

Fraud in procuring a trademark registration occurs when an Applicant for registration knowingly makes a false, material representation of fact in connection with an application to

register with the intent of obtaining or maintaining a registration to which it is otherwise not entitled. *In re Bose Corp.*, 580 F.3d 1240; 91 USPQ2d 1938, 1939 (Fed. Cir. 2009); *Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 1 USPQ2d 1483, 1484 (Fed. Cir. 1986). FED. R. CIV. P. 9(b) provides that the circumstances constituting the alleged fraud shall be stated with particularity. *See also King Automotive, Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 212 USPQ 801, 803 (CCPA 1981) (stating that “the pleadings [must] contain explicit rather than implied expressions of the circumstances constituting fraud”). Intent to deceive is an indispensable element of the analysis in a fraud case. *See In re Bose Corp.*, 91 USPQ2d at 1941. Nonetheless, intent, as a condition of mind of a person, may be averred generally. FED. R. CIV. P. 9(B). *See also DaimlerChrysler Corp. v. American Motors Corp.*, 94 USPQ2d 1086, 1088 (TTAB 2010).

Petitioners’ fraud allegation reads as follows:

In each of Respondent’s trademark applications, Respondent declared under oath that she was the rightful owner of the respective trademarks and that she had no knowledge of any “other person, firm, corporation, or association [with] the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely... to cause confusion, or to cause mistake, or to deceive”. Lanham Act § 1 (15 U.S.C § 1051). At the time the applications were filed, Respondent knew that she was not the rightful owner of the KANDUI mark, and knew that adopting KANDUI VILLAS would likely cause confusion, mistake or would deceive consumers. Therefore, Respondent made a false representation to the USPTO with the intent to deceive the USPTO.

(Petition ¶ 22). These allegations are sufficient because they explicitly identify the date, time, and documents in which the allegedly false and material misrepresentations were made; and Respondent declared under oath, at the time of her applications, that she had no knowledge of any other person or association with the right to use the marks. *Moore v. Kayport Package Exp. Inc.*, 885 F.2d 531, 540 (9th Cir.1989) (“A pleading is sufficient under Rule 9(b) if it identifies the circumstances constituting fraud so that a [party] can prepare an adequate answer from the

allegations. . .while statements of time, place, and nature of the alleged fraudulent activities are sufficient, mere conclusory allegations of fraud are insufficient.”)

Petitioners also explicitly allege that Respondent knew that this representation was false and intended to deceive the USPTO, and it can be reasonably inferred from the allegations that Respondent possessed the requisite knowledge and intent for fraud. (Petition ¶ 22.) After becoming an owner of Kandui Resort, Respondent started a competing business and then immediately filed trademark applications in her individual capacity. The timing is not a coincidence – this was a calculated and premeditated move aimed at gaining unfair legal advantage and leverage over Respondent’s former partners at Kandui Resort. It can be reasonably inferred from the circumstances that Respondent knew she did not own exclusive rights to the KANDUI trademark, and intended to deceive the USPTO into granting her registrations that excluded the Petitioners from ownership.² If the Board finds that Petitioners have not pled fraud with particularity, then Petitioners request leave to amend their pleading.

b. Respondent’s Arguments Rely on Inapplicable Legal Authority

Respondent appears to make three separate arguments as to why Petitioners’ fraud claim is insufficient:

1. Petitioner failed to allege facts regarding Respondent’s intent to deceive with particularity.
2. “Petitioner [sic] failed to allege particular facts to establish another user had legal rights in the KANDUI and KANDUI RESORT [sic] superior to Registrant’s rights.”
3. “Petitioner [sic] failed to allege particular facts to establish Registrant knew another user had rights in the KANDUI and KANDUI RESORT marks superior to Registrant.”

² It is notable that the specimen submitted in support of Registration No. [4078032](#) (KANDUI) is from Kandui Villas, a resort that opened in 2010. The first use dates claimed in the accompanying Statement of Use, however, are 2004 and 2006 – dates that can only be attributed to Kandui Resort.

(MTD 9-11.) The first argument is dead on arrival because, as indicated above, Petitioner is not obligated to allege knowledge and intent with particularity. FED. R. CIV. P. 9(b). *See also DaimlerChrysler Corp.*, 94 USPQ2d at 1088.

The remaining two arguments rely on the mistaken belief that Petitioners must plead a “superior” right in the marks in question in order to state a claim for cancellation based on fraud. In support of this position, Respondent relies on two old cases, *Intellimedia Sports, Inc. v. Intellimedia Corp.*, 43 USPQ2d 1206 (TTAB 1997); *Hana Fin., Inc. v. Hana Bank*, 500 F. Supp. 2d 1228 (C.D. Cal. 2007).

It is clear from a review of the seminal *Bose* case that pleading “superior” legal rights is not an element of a fraud claim. *In re Bose Corp.*, 91 USPQ2d at 1939 (Board lists elements of fraud claim, and never mentions superior legal rights as an element). Respondent attempts to apply *Intellimedia* and *Hana* to this case, but both cases predate and conflict with *Bose*. Therefore, to the extent that these holdings conflict with and apparently augment the fraud requirements set out in *Bose*, Petitioners submit that the requirements from *Bose* control. Even if these cases applied, however, Petitioners have still clearly pleaded they have superior rights to Respondent, that Respondent knew of these rights when she filed the applications, and therefore intended to procure a registration to which she was not entitled. (*See generally* Petition). Based on the foregoing, Petitioners’ allegations are clearly sufficient to meet its pleading burden for fraud. If the Board finds otherwise, then Petitioners request leave to amend their pleading.

5. The Petition is Not Moot

Respondent’s final argument is that the Petition is moot because the Petition is brought based on the alleged rights of the Founders, which includes Respondent. (MTD 11.) Therefore,

according to Respondent, the Petition is moot because Respondent “has rights that are at least equal to the Petitioners.” (*Id.*) Again, Respondent is wrong.

Respondent presents no legal authority or argument explaining why Respondent owning a legal interest in the subject marks would make the Petition moot. In fact, one of the fundamental grounds for the Petition is that Respondent was not the correct person to apply for or hold the registrations on behalf of the company. Taken to its logical conclusion, Respondent is arguing that an individual can register a trademark on behalf of a company owned by several individuals because that person has “at least equal” rights in the mark as those other owners. This flies in the face of clear trademark law that provides that if the proper owner of a mark is an entity or association of individuals, it is the entity or association of individuals that is the correct applicant; not the individual. *American Forests v. Barbara Sanders*, 54 USPQ2d 1860, 1864 (TTAB 1999); *Huang v. Tzu Wei Chen Food*, 7 USPQ 2d 1335, 1336 (Fed. Cir. 1988). In light of the foregoing, Petitioners submit that the instant Petition is not moot. If the Board finds otherwise, then Petitioners request leave to amend.

IV. Conclusion

Petitioners’ Petition pleads several claims upon which relief can be granted and therefore Respondent’s Motion to Dismiss should be denied. To the extent that the Board grants or partially grants the Motion, Petitioners respectfully request that the Board grant them leave to amend their pleading. FED. R. CIV. P. 15(a)(2).

Dated: November 18, 2015

Respectfully submitted,

/Joshua J. Richman/

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2015, the foregoing document was sent out for personal service on Respondent's correspondent of record

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The proof of personal service will be separately filed with the Board once obtained.

Dated: November 18, 2015

/Amanda Costa/

Amanda Costa