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

Proceeding	92062808
Party	Plaintiff Gaia Enterprises, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

GAIA ENTERPRISES, INC.

Petitioner

vs.

COMPASS MINERALS AMERICA, INC.

Registrant

Cancellation No. 92062808

In the Matter of Reg. No. 3963355

Mark: SURE PAWS

Date Registered: May 17, 2011

**RESPONSE TO REGISTRANT’S MOTION TO DISMISS**

Registrant’s motion to dismiss was filed under F.R.Civ.P. 12(b)(6) alleging that Petitioner failed to adequately state its claims. Petitioner disputes Registrant’s contentions and disagrees with its interpretations of applicable law. Petitioner denies each and every assertion of the Registrant and each and every factual statement made by Registrant as they relate to Petitioner’s conduct and allegations.

Additionally, the Registrant has submitted self-serving alleged “evidence” that is irrelevant for the purpose of evaluating the complaint under Registrant’s motion to dismiss. The allegations of the complaint must be considered as being true for the purpose of evaluating the motion.

**REQUIREMENTS FOR STATING A CLAIM**

To state a claim upon which relief can be granted, a plaintiff need only allege sufficient factual matter as would, if proved, establish that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the mark. *Lipton Industries,*

*Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982). Specifically, a complaint must contain sufficient factual matter, accepted as true, that states a claim to relief that is plausible on its face. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In the context of *inter partes* proceedings before the Board, a claim has facial plausibility when the plaintiff pleads factual content that allows the Board to draw a reasonable inference that the plaintiff has standing and that a valid ground for the opposition or cancellation exists. Cf. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). In particular, a plaintiff need only allege “enough factual matter ... to suggest that [a claim is plausible]” and “raise a right to relief above the speculative level.” *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1354 (Fed. Cir. 2010). “The elements of each claim should be stated concisely and directly, and include enough detail to give the defendant fair notice.” *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007); citing Fed. R. Civ. P. 8(e)(1); see also *Harsco Corp. v. Electrical Sciences Inc.*, 9 USPQ2d 1570, 1571 (since function of pleadings is to give fair notice of claim, a party is allowed reasonable latitude in its statement of its claims). “The purpose of a Rule 12(b)(6) motion is to challenge ‘the legal theory of the complaint, not the sufficiency of any evidence that might be adduced’ and ‘to eliminate actions that are fatally flawed in their legal premises and destined to fail ...’” *Fair Indigo LLC*, 85 USPQ2d at 1538; quoting *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, supra at 26 USPQ2d 1041.

Registrant’s motion to dismiss this claim is not well founded. As stated in Rule 8 of the Federal Rules of Civil Procedure:

Rule 8. General Rules of Pleading

(a) Claim for Relief. A pleading that states a claim for relief must contain:

- (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

F.R.Civ.P. 8 is the basis for the Federal principle of notice pleading. Petitioner has met every one of its requirements. Registrant was put on fair notice of the Petitioner's claims.

**FALSE SUGGESTION OF A CONNECTION, DISPARAGEMENT  
AND LIKELIHOOD OF CONFUSION**

Registrant has cited a number of alleged deficiencies in the Petition for Cancellation. On page 5, Registrant says that "Petitioner must allege that its mark so resembles Registrant's mark as to be likely to cause confusion." In paragraph 5 of the Petition, Petitioner stated: "In addition to applying the confusingly similar SURE PAWS mark to the packaging, Registrant also applied the phrase SAFE STEP to the packaging, which is likely to cause even more customer confusion with Petitioner's SAFE PAW trademark." In paragraph 6, Petitioner stated: "Clearly, a consumer is likely to be confused when seeing the similarity of the products." In paragraph 9, Petitioner stated: "The Registrant's intention was to willfully interfere with the Petitioner's business by confusing the public as to source and sponsorship and to try to wrongfully profit off the brand recognition and goodwill that Petitioner had generated for its "SAFE PAW" brand." In paragraph 12, Petitioner stated: "Registrant's SURE PAWS mark, when applied to the Registrant's goods, creates a false and misleading suggestion of a connection with the Petitioner's SAFE PAW marks creating a likelihood of consumer confusion as to the source of Petitioner's goods such that consumers are likely to believe that Respondent is the source of said items." In paragraph 13, Petitioner stated: "As stated above, the Registrant's product that is sold under the confusingly similar trademark SURE PAWS is inferior to the Petitioner's product that is sold under the trademark SAFE PAW." In paragraph 16, Petitioner stated: "Registrant filed the application for the subject trademark for a name that Registrant knew was confusingly similar to the Petitioner's trademarks..." In paragraph 19, Petitioner stated: "Based on the false statements of the Registrant, the USPTO allowed the subject application and registered the confusingly similar mark."

Registrant states on page 5 of the motion that " At no point does Petitioner affirmatively assert that its mark so resembles Registrant's mark as to be likely to cause confusion." Petitioner

believes that it has done so, several times, in the complaint. Respondent was clearly put on notice that Petitioner claims the marks at issue are confusingly similar.

### FRAUD

To plead a claim of fraud, Petitioner must allege that Registrant made a specific false statement of material fact in the course of the involved application and that applicant made such false statement with the intent of deceiving the USPTO into issuing a registration to which applicant is not entitled. See *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009). Under *In re Bose Corp.*, “a trademark is obtained fraudulently under the Lanham Act only if the applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO.” *Id.* at 1941; see also *In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (Identifying a large number and diverse range of goods and services may bring additional potential claims, including fraud or lack of bona fide intent to use). Pursuant to Fed. R. Civ. P. 9(b), any allegations based on “information and belief” must be accompanied by a statement of facts upon which the belief is based. *Asian and Western Classics B.V. v. Selkow*, 92 USPQ2d 1478-1479 (TTAB 2009), citing *Exergen Corp. v. Wal-Mart Stores Inc.*, 91 USPQ2d 1656, 1670 n.7 (Fed. Cir. 2009) . None of Petitioner’s allegations were made on information and belief. 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, 1089 (TTAB 2010), citing *In re Bose*, 91 USPQ2d at 1941.

In paragraphs 14-21 of the Petition for Cancellation, Petitioner alleged, *inter alia*, that “Registrant filed the application for the subject trademark for a name that Registrant knew was confusingly similar to the Petitioner’s trademarks as part of a plan to interfere with the valuable goodwill that the Petitioner has earned through its significant sales and marketing efforts. Registrant’s intent was to confuse the public and the channels of trade in order to disrupt the business of the Petitioner” (para. 16); that “Registrant chose to mislead the USPTO by its statement that ‘...to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in

such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive...’ and allowed the USPTO to rely on this falsehood” (para. 16); that “Registrant fully intended that the USPTO rely on its misrepresentations in order to obtain allowance of is application” (para. 19); that “Registrant’s statements were material to the examination of the application for the mark that is the subject of this proceeding. Registrant knew that its rights were inferior to the rights of the Petitioner and its statements to the opposite are among the most material statements that an applicant can make to the USPTO regarding a trademark application” (para. 18); and, that “The Registrant knowingly made false and material representations of fact in order to induce the PTO to register the “SURE PAWS” mark.”

### CONCLUSION

Petitioner has satisfied the requirements of F.R.Civ.P. Sections 8 and 9(b). Registrant’s motion to dismiss should be denied.

In the event that the Board disagrees, Petitioner respectfully requests leave to amend the Petition for Cancellation.

Respectfully submitted:

Dated: March 31, 2016

By: / Christopher Darrow/  
Christopher Darrow (CA Bar No. 70701)

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## CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2016, I sent a copy of the foregoing Registrant's motion to dismiss to the TTAB via ESTTA and served a copy on the Registrant electronically as follows.

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