

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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General Contact Number: 571-272-8500

BUO

Mailed: May 25, 2016

Cancellation No. 92062880

*Poulsen Roser A/S*

*v.*

*Paramount Brand Roses, Inc.*

**By the Trademark Trial and Appeal Board:**

On December 29, 2015, Poulsen Roser A/S (“Petitioner”) filed a petition to cancel Registration No. 1980921 (“the ’921 registration”) owned by Paramount Brand Roses, Inc. (“Respondent”), for the mark PARAMOUNT, in standard character format, specifically as to its use with “live plants and flower seeds,” in International Class 031.<sup>1</sup>

The petition to cancel alleges that the registration should be cancelled based upon Respondent’s abandonment of its mark with respect to the claimed goods, under Trademark Act Section 45, 15 U.S.C. § 1127. In support of its ground for cancellation, Petitioner alleges, “Respondent ceased using PARAMOUNT in connection with live plants and flower seeds on or about January 1, 2009.” 1 TTABVue 3.

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<sup>1</sup> Issued June 18, 1996, from an application filed May 22, 1995. Respondent’s combined Declaration of Use and Application for Renewal under Trademark Act Sections 8 and 9, 15 U.S.C. §§ 1058 and 1059, was accepted on April 13, 2006.

In lieu of filing an answer, Respondent, on February 8, 2016, filed the present motion under Fed. R. Civ. P. 12(b)(6), to dismiss the petition to cancel for failure to state a claim upon which relief may be granted. Respondent argues that “[w]ith the exception of a fleeting reference to the November 30, 2015 cease and desist letter it received from [Respondent], Petitioner failed to allege facts that demonstrate the source of its alleged interest in this action;” and that “Petitioner has failed to allege facts that set forth a *prima facie* case of abandonment, which has deprived [Respondent] of fair notice regarding Petitioner’s theory of abandonment.” 4 TTABVUE 7 and 9.

Petitioner contests this motion, arguing that “it is beyond dispute that receipt of a cease and desist letter asserting rights in the mark at issue is sufficient to confer standing,” and that it has adequately “alleged facts that plausibly demonstrate that Respondent abandoned the trademark PARAMOUNT.” 5 TTABVUE 2 and 5. The motion is fully briefed.

### ***Motion to Dismiss***

A motion to dismiss for failure to state a claim upon which relief may be granted is a test solely of the legal sufficiency of a complaint.<sup>2</sup> *See Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir.

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<sup>2</sup> Accordingly, the exhibits attached to Respondent’s brief will not be considered. *See* Trademark Rule 2.122(c). If Respondent wants to rely on this evidence in support of a motion or at trial, it must be properly submitted at the appropriate time.

Indeed, it is unnecessary for either party to attach a copy of the involved registration certificate or file. The file of an application or registration that is the subject of a Board *inter partes* proceeding forms part of the record of the proceeding without any action by the parties, and reference may be made to the file by any party for any relevant and competent purpose. Trademark Rule 2.122(b)(1). *See also, The Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626 (Fed. Cir. 2009).

1993). In order to withstand such a motion, a complaint need only allege such facts as would, if proven, establish that the plaintiff is entitled to the relief sought; that is, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid statutory ground exists for cancelling the registration. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998). The complaint need only “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009). For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of the plaintiff’s well-pleaded allegations must be accepted as true, and the complaint must be construed in a light favorable to plaintiff. *See Advanced Cardiovascular Sys.*, 26 USPQ2d at 1041. Petitioner is not under a burden to prove its case in its petition to cancel. *Enbridge, Inc. v. Excelerate Energy Ltd. P’ship*, 92 USPQ2d 1537, 1543 n.10 (TTAB 2009).

- *Standing*

At the pleading stage all that is required of a plaintiff is to 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 remains registered. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). The starting point for a standing determination in a cancellation proceeding is Trademark Act Section 14, which provides that “[a] petition to cancel a registration of a mark, stating the grounds relied upon, may, upon payment of the prescribed fee,

be filed . . . by any person who believes that he is or will be damaged . . . by the registration of a mark on the [P]rincipal [R]egister.” Section 14 thus establishes a broad doctrine of standing; by its terms, the statute requires only that a person have a belief that he would suffer some kind of damage if the mark remains registered. *NSM Res. Corp. v. Microsoft Corp.*, 113 USPQ2d 1029, 1032 (TTAB 2014).

Petitioner has sufficiently pleaded its standing to bring this action by pleading facts regarding the cease and desist letter received from Respondent. Indeed, there would be no reason for Respondent to send such a letter if not for Respondent’s own belief that Petitioner’s continued use of a similar mark on its goods would impinge on Respondent’s rights, which may be construed as a statement that Petitioner is a competitor of Respondent. Therefore, inasmuch as Petitioner has alleged that it “is a leading global breeder and developer of roses” and that “Respondent [in its cease and desist letter] alleges that Petitioner has advertised its roses under the PARAMOUNT name,” Petitioner has pleaded facts regarding its standing to bring this dispute. *See Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1760-61 (TTAB 2013) (citing *Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549, 1553 (TTAB 2009) (competitors have standing); *IpcO Corp. v. Blessings Corp.*, 5 USPQ2d 1974, 1976-77 (TTAB 1988) (cease and desist letter sent by applicant found sufficient to demonstrate opposer’s standing)). Through these allegations, Petitioner has adequately pleaded a real interest in the outcome of this proceeding and that it is not a “mere intermeddler.” *See Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1107 (TTAB 2007).

Because Petitioner has sufficiently pleaded its standing, it has the right to assert any appropriate grounds for cancellation in this proceeding. *See Enbridge Inc.*, 92 USPQ2d at 1543 n.10 (citing *Liberty Trousers Co., Inc. v. Liberty & Co., Ltd.*, 222 USPQ 357, 358 (TTAB 1983) (averments of priority, likelihood of confusion and resulting damage accepted to show petitioner's standing with respect to pleaded grounds of fraud and abandonment)).

- *Abandonment*

“There are two elements to an abandonment claim that a plaintiff must [allege and subsequently] prove: nonuse of the mark and intent not to resume use.” *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1042 (TTAB 2012). However, a *prima facie* showing of abandonment may be established where the alleged nonuse has ensued for three years or more. *See* 15 U.S.C. § 1127; *ShutEmDown Sports*, 102 USPQ2d at 1042.

Petitioner alleges, *inter alia*, that:

- Respondent ceased using PARAMOUNT in connection with live plants and flower seeds on or about January 1, 2009.
- Respondent intended not to resume use of PARAMOUNT in connection with live plants and flower seeds.
- Respondent did not intend to resume use of the PARAMOUNT mark for at least a three-year period immediately following the date on which Respondent ceased use of the PARAMOUNT mark.

1 TTABVUE 3, ¶¶ 8-10.

The Board finds these allegations rise above the speculative level and are sufficient to allege abandonment. *See ShutEmDown Sports*, 102 USPQ2d 1036, 1042(TTAB 2012) (abandonment of three years non-use may be measured three years from filing date of application for a registration; abandonment may be found when party has not used the mark and has no intention of doing so). Despite, Respondent's arguments to the contrary, Petitioner's theory of the case is clear – that is, as of January 1, 2009, and period more than three years ago, Respondent ceased using the mark PARAMOUNT in connection with the goods specified in the involved registration without an intent to resume such use.

It is important to note again that Petitioner need not prove its case in its petition to cancel. *Enbridge*, 92 USPQ2d 1537, n.10. Inasmuch as Petitioner has alleged nonuse from a specific date for a period of at least three years, it has sufficiently supported its allegation with facts that, if taken as true, would indicate Respondent legally abandoned use of its mark. *See Trademark Act Section 45*, 15 U.S.C. § 1127; *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390 (Fed. Cir. 1990). The Board will not consider Respondent's arguments and evidence regarding the veracity or merits of Petitioner's claims in determining this motion to dismiss.<sup>3</sup>

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<sup>3</sup> Indeed, if Respondent's contentions are valid, it will take little discovery to disprove the asserted allegations, especially where the information necessary to disprove those allegations should already be in Respondent's possession.

Accordingly, Respondent's motion to dismiss for failure to state a claim upon which relief may be granted is **DENIED** with respect to Petitioner's claims of standing and abandonment.

***Schedule***

The proceeding is **RESUMED**. Respondent is allowed **TWENTY DAYS** from the mailing date of this order to file its answer to the petition to cancel. Conferencing, disclosure, discovery, and trial dates are reset as follows:

Deadline for Discovery Conference	<b>7/1/2016</b>
Discovery Opens	<b>7/1/2016</b>
Initial Disclosures Due	<b>7/31/2016</b>
Expert Disclosures Due	<b>11/28/2016</b>
Discovery Closes	<b>12/28/2016</b>
Plaintiff's Pretrial Disclosures	<b>2/11/2017</b>
Plaintiff's 30-day Trial Period Ends	<b>3/28/2017</b>
Defendant's Pretrial Disclosures	<b>4/12/2017</b>
Defendant's 30-day Trial Period Ends	<b>5/27/2017</b>
Plaintiff's Rebuttal Disclosures	<b>6/11/2017</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>7/11/2017</b>

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.