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

Proceeding	91187958
Party	Defendant Tajanko, Darius
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Submission	Motion to Dismiss - Rule 12(b)
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Date	01/16/2009
Attachments	Motion to Dismiss Opposition.pdf (5 pages)(16846 bytes)

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

In the Matter of Application Serial No. 77519040
Filed: July 10, 2008
For Mark: iVote
Published in the Official Gazette on December 9, 2008

INFOMEDIA, INC.)	
)	Opposition No. 91187958
Opposer)	
)	MOTION TO DISMISS
)	OPPOSITION FOR FAILURE
)	TO STATE A CLAIM UPON
)	WHICH RELIEF CAN BE
)	GRANTED
v.)	
)	
DARIUS TAJANKO)	
)	
)	
Applicant)	
)	

Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3514

Pursuant to 37 C.F.R. sections 2.127 and 2.116(a), Federal Rule of Civil Procedure 12(b)(6), and Trademark Trial and Appeal Board Manual of Procedure (TBMP) sections 503.01-501.04, Applicant hereby moves to dismiss Opposer's opposition for failure to state a claim upon which relief can be granted.

MEMORANDUM

1. INTRODUCTION

This is an opposition to Applicant's intent-to-use application filed on July 10, 2008. Opposer has filed an opposition under section 2(d) based on the allegation it commenced use of

the mark iVote on August 17, 2008. Applicant now moves to dismiss the opposition.

Applicant's Motion to Dismiss Opposition should be granted because Opposer does not have standing to oppose registration of Applicant's trademark. Further, Opposer does not validly plead a statutory ground for opposing Applicant's registration.

2. STANDING

Opposer has no standing to assert its opposition to Applicant's trademark registration. According to sections 303.03 and 309.03(a)(2) and (b) of the TBMP, the Opposer must have standing to oppose Applicant's trademark registration. Standing requires that the Opposer have a "real interest" in the proceeding. *See* TBMP 309.03(b). A real interest consists of a "direct and personal stake" in the proceeding. *See* TBMP 309.03(b); *Zirco Corp. v. American Telephone and Telegraph Co.*, 21 U.S.P.Q.2d, 1542 (T.T.A.B. 1991).

Opposer does not have standing because Opposer does not own any trademark rights that could plausibly be damaged by Applicant's registration. Opposer owns no such trademark rights because Applicant's mark has nationwide priority over Opposer's mark. The Lanham Act grants Applicant's mark nationwide priority. The relevant section of the Lanham Act reads as follows:

Contingent on the registration of a mark on the principal register provided by this chapter, the filing of the application to register such mark shall constitute constructive use of the mark, conferring a right of priority, nationwide in effect, on or in connection with the goods or services specified in the registration against any other person except for a person whose mark has not been abandoned and who, prior to such filing - (1) has used the mark; (2) has filed an application to register the mark which is pending or has resulted in registration of the mark; or (3) has filed a foreign application to register the mark on the basis of which he or she has acquired a right of priority, and timely files an application under section 1126(d) of this title to register the mark which is pending or has resulted in registration of the mark. 15 U.S.C. § 1057(c) (2009).

Opposer cannot rely on its allegation that it commenced use of its mark prior to Applicant to establish a cognizable claim of damage where such use came after Applicant's July 10, 2008, filing date. Applicant filed application number 77519040 for registration on the Principal

Register on July 10, 2008. The Notice of Opposition alleges that Opposer began to use its trademark on August 17, 2008, and filed its trademark application on October 30, 2008. *See* Notice of Opposition ¶¶ 3 and 4. Both are after Applicant’s constructive use priority date of July 10, 2008. There is no allegation that Opposer owns an application that falls within the third exception provided above. Opposer thus owns no trademark rights that could be damaged or injured by registration of Applicant’s trademark.

Opposer’s lack of any trademark rights that could be damaged by Applicant’s registration means that Opposer lacks a “real interest” and a “direct and personal stake” that are necessary to have standing to oppose Applicant’s registration. Consequently, Opposer’s opposition should be dismissed.

3. GROUNDS

Opposer alleges no valid ground to support its opposition to Applicant’s registration. Here, Opposer identifies as grounds for the opposition, “Priority and likelihood of confusion” under Trademark Act Section 2(d). *See* Notice of Opposition. The Notice of Opposition, however, fails to state a cognizable claim under section 2(d). As discussed above in the context of Opposer’s lack of standing, Opposer has failed to allege a valid claim of priority. Opposer’s alleged priority date of August 17, 2008, is after Applicant’s July 10, 2008, priority date. The absence of a valid ground to oppose Applicant’s trademark registration means that Opposer’s opposition must be dismissed. *See Zirco Corp. v. American Telephone and Telegraph Co.*, 21 U.S.P.Q.2d 1542 (T.T.A.B. 1991).

4. CONCLUSION

Opposer’s opposition should be dismissed because Opposer does not have standing or a valid ground with which to oppose the registration of Applicant’s trademark. Opposer lacks

standing and grounds because Opposer owns no trademark rights that could potentially be damaged by registration of Applicant's trademark. This is because the undisputed facts prove that Applicant's trademark is entitled to nationwide priority over Opposer's trademark. As a result, no set of facts that could be proven by Opposer in support of its claim would entitle it to the relief that it seeks. Therefore, the opposition should be dismissed for failure to state a claim upon which relief can be granted.

Respectfully submitted,
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CERTIFICATE OF TRANSMISSION

I HEREBY CERTIFY that this correspondence is being electronically transmitted to the United States Patent and Trademark Office on January 16, 2009.

By: /David L. Bea/
David L. Bea

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a copy of the foregoing MOTION TO DISMISS OPPOSITION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED to be sent via first class, postage-paid mail to Opposer's attorney of record, Kevin E. Houchin, Houchin & Associates, P.C., 425 West Mulberry, Suite 105, Fort Collins, CO 80521 and by e-mailing a copy to kevin.houchin@houchinlaw.com on January 16, 2009.

By: /David L. Bea/
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