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

Proceeding	92045521
Party	Defendant AMERIQUEST MORTGAGE COMPANY AMERIQUEST MORTGAGE COMPANY 1100 Town & Country Road, 11th Floor Orange, CA 92868
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Submission	Motion to Dismiss - Rule 12(b)
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Attachments	AMC WHOLESALE - Cancellation - Motion to Dismiss.pdf (7 pages)

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

In the Matter of Registration No. 2,862,109
Registration Date: July 13, 2004

AMC MORTGAGE CORPORATION,)	
)	
Petitioner,)	
vs.)	
AMERIQUEST MORTGAGE COMPANY,)	
)	
Registrant.)	

Cancellation No. 92045521
Registration No. 2862109
MOTION TO DISMISS

**REGISTRANT AMERIQUEST MORTGAGE COMPANY'S MOTION TO DISMISS
FOR PETITIONER'S FAILURE TO STATE A CLAIM**

I. INTRODUCTION

Petitioner AMC Mortgage Corporation ("Petitioner") in its Petition for Cancellation, filed on or about February 13, 2006 ("Petition"), fails to state a viable claim for which relief can be granted and to which Registrant Ameriquest Mortgage Company ("Registrant") can answer or respond, as Petitioner has failed to plead either of its causes of action with the required elements and/or specificity. This lack of clarity and this failure to properly include the requisite elements or factual basis renders it impossible for Registrant to respond to such allegations. As such, Registrant respectfully requests that this Board grant its Motion to Dismiss and dismiss Petitioner's Petition in its entirety with prejudice.

II. PETITIONER'S ALLEGATIONS

In its Petition Petitioner alleges:

1. Petitioner is the owner of the marks AMC and AMC MORTGAGE in connection with various mortgage lending services. (Petition, paragraph 1);
2. Registrant owns Registration No. 2,862,109 for the mark AMC WHOLESALE for use in connection with various mortgage lending service and other lending/banking services. (Petition, paragraph 2);
3. Petitioner alleges that "for many years and since long prior to any date of first use upon which Registrant can rely" it adopted and has continuously

- used its marks. (Petition, paragraph 3);
4. Petitioner alleges that Registrant's marks "resembles Petitioner's Marks" so "as to be likely, when used in connection with the services set forth in Registrant's registration, to cause confusion, mistake or deception..." (Petition, paragraph 4);
 5. Petitioner alleges that Registrant signed and filed its application to register the AMC WHOLESale mark on December 20, 2002 stating that no other person had the right to use the applied for mark as to cause confusion, mistake or to deceive. (Petition, paragraph 6);
 6. Petitioner alleges on "information and belief" that Registrant knew that it did not have exclusive right to the AMC WHOLESale mark. (Petition, paragraph 7); and
 7. Petitioner alleges that "Registrant committed fraud on the United States Patent and Trademark Office by virtue of knowing, false, material claims it made regarding its exclusive right to use AMC WHOLESale in connection with the services set forth in the Application." (Petition, paragraph 8).

III. ARGUMENT

A. LEGAL STANDARD FOR A MOTION TO DISMISS

A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint. *See, e.g., Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993) (Rule 12(b)(6) challenges the legal theory of the complaint not the sufficiency of the evidence that might be adduced); *Space Base Inc. v. Stadis Corp.*, 17 USPQ2d 1216 (TTAB 1990); and *Consolidated Natural Gas Co. v. CNG Fuel Systems, Ltd.*, 228 USPQ 752 (TTAB 1985).

In order to withstand such a motion, a pleading need only allege such facts as would, if proved, 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 ground exists for canceling the subject registration. *See Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); *Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theaters*, 56 USPQ2d 1538 (TTAB 2000); *Kelly Services Inc. v. Greene's Temporaries Inc.*, 25 USPQ2d 1460 (TTAB 1992); *Hartwell Co.*

v. Shane, 17 USPQ2d 1569 (TTAB 1990); *Consolidated Natural Gas Co. v. CNG Fuel Systems, Ltd.*, *supra*; *Intersat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154 (TTAB 1985); and *Springs Industries, Inc. v. Bumblebee Di Stefano Ottina & C.S.A.S.*, 222 USPQ 512 (TTAB 1984).

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 the light most favorable to the plaintiff. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1027 (Fed. Cir. 1999); *Young v. AGB Corp.*, *supra*; and *Intellimedia Sports Inc. v. Intellimedia Corp.* 43 USPQ2d 1203 (TTAB 1997). *See also Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, *supra*; and *Stanspec Co. v. American Chain & Cable Company, Inc.*, 531 F.2d 563, 189 USPQ 420 (CCPA 1976). Dismissal for insufficiency is appropriate only if it appears certain that the plaintiff is entitled to no relief under any set of facts that could be proved in support of its claim. *See Young v. AGB Corp.*, *supra*; *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, *supra*; and *Kelly Services Inc. v. Greene's Temporaries Inc.*, *supra*.

Whenever the sufficiency of any complaint has been challenged by a motion to dismiss, it is the duty of the Board to examine the complaint in its entirety, construing the allegations therein liberally, as required by Fed. R. Civ. P. 8(f), to determine whether it contains any allegations, which, if proved, would entitle the plaintiff to the relief sought. *See Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theaters*, *supra*; *Intellimedia Sports Inc. v. Intellimedia Corp.*, *supra*; *Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 USPQ2d 1711 (TTAB 1993); and *Kelly Services Inc. v. Greene's Temporaries Inc.*, *supra*. *See also Delta Tire Corp. v. Sports Car Club of America, Inc.*, 186 USPQ 431 (TTAB 1975) and *National Semiconductor Corp. v. Varian Associates*, 184 USPQ 62 (TTAB 1974).

As demonstrated below, even upon a liberal construction of the Petitioner's allegations in its Petition, Petitioner has failed to assert a valid ground for canceling Registrant's Registration.

B. PETITIONER FAILS TO STATE A CLAIM FOR LIKELIHOOD OF CONFUSION

In order for Petitioner to properly allege a likelihood of confusion, pursuant to Section

2(d) of the Act, 15 U.S.C. § 1052(d), Petitioner must assert (and then prove at trial) that Registrant's mark, as applied to its goods or services, so resembles Petitioner's previously used or registered mark or its previously used trade name as to be likely to cause confusion, mistake, or deception.

Petitioner must plead (and later prove) priority of use. "In order to properly assert priority, a plaintiff must allege facts showing proprietary rights in its pleaded mark that are prior to defendant's rights in the challenged mark." See TBMP Section 309.03(c) and cases cited therein. "Such rights may be shown by, for example, ownership of an application with a filing date (or a registration with an underlying application filing date) prior to any date of first use on which defendant can rely; prior trademark or service mark use; or prior use analogous to trademark or service mark use." *Id.*

In the present action, Petitioner (1) fails to allege the specific date (or even the general time period) when it first started to use the mark in commerce; and (2) prior use of its marks in commerce. Petitioner merely makes a blanket allegation that "for many years and long since prior to any date of first use upon which Registrant can rely..." This self serving statement does not show a proprietary right that is prior to Registrant's rights in its AMC WHOLESALE mark and Registration. The language in the Petition is so vague and ambiguous that it cannot be ascertained when or how the Petitioner's marks were used or are being used in commerce. As such, it is impossible for Petitioner to state a claim for likelihood of confusion and it is impossible for Registrant to Answer such a vague and ambiguous allegation.

C. **PETITIONER FAILS TO PLEAD ITS FRAUD COUNT WITH THE REQUISITE SPECIFICITY**

1. **Petitioner Failed to Properly Allege Facts Constituting a Reliance of the PTO on Statements Made by Registrant in its Application**

Petitioner fails to properly allege the elements of fraud. Rule 9(b), FRCP, requires that in any averment of fraud, the circumstances constituting fraud are to be stated with particularity. As stated by the Board in *Rogers Corporation v. Fields Plastics & Chemicals, Inc.*, 176 USPQ 280 (TT&A Bd., 1972): "Fraud, within its onerous connotation, implies some intentional deceitful practice or act designed to obtain something that the party practicing such deceit would

not otherwise have been entitled. To relate this to the concept of fraud upon the Patent Office, it signifies a willful withholding from the Patent Office by an applicant or registrant of material information or facts which, if transmitted and disclosed to the examiner, would have resulted in the disallowance of the registration sought."

Nowhere in its Petition does Petitioner allege reliance on the part of the Patent and Trademark Office on the information contained in Registrant's Application.

Petitioner's claim fails to state that Registrant's Registration was obtained fraudulently as Registrant's Application for the mark was false and misrepresented "the exclusive right to use" the mark in commerce. Petitioner does not allege that the Patent and Trademark Office, relied on those misrepresentations and, based on that reliance, allowed Registrant's mark and subsequently issued registration for it. This does not allege fraud with the sufficient particularity required to state a viable claim.

2. Petitioner has Failed to Plead an Intent to Deceive

The concept of fraud on the Patent and Trademark Office signifies a willful withholding from the Office by an applicant or registrant of material information or facts which, if transmitted or disclosed to the Examiner, would have resulted in disallowance of the registration sought. A fraudulent representation consequently involves intent to deceive and must be distinguished from a false representation, which may be occasioned by a misunderstanding or inadvertence, a mere negligent omission, or the like. *See World Hockey Assoc. v. Tudor Metal Products Corp.*, 185 USPQ 246 (TTAB 1975); and *Rogers Corp. v. Fields Plastics & Chemicals, Inc.*, 176 USPQ 280 (TTAB 1972). Moreover, as stated above, Rule 9(b), FRCP, requires that in any averment of fraud, the circumstances constituting fraud **are to be stated with particularity**.

Paragraph 7 of the Petition insufficiently states that Petitioner "[o]n information and belief, when Registrant signed and filed the Application, Registrant knew or should have known that it did not have the exclusive right to use the mark in commerce in connection with the services set forth in the Application." These allegations by petitioner fall short of the standard of particularity required as well as insufficiently alleging intent to deceive the Examiner and that the misrepresentations resulted in the issuance and maintenance of respondent's registration.

Petitioner fails to state any intent on part of Registrant to defraud the Patent and Trademark Office. See *World Hockey Assoc., supra*.

3. Petitioner Fails to Provide Any Specific Allegation that the Registrant's Application was a Fraudulent Misrepresentation

While Rule 9(b) does not require the pleading of detailed evidentiary matters, it is unequivocal and well established that Petitioner must state with sufficient specificity the factual bases for its allegations of Registrant's fraudulent misrepresentation to the PTO. See *Northern Eng'r & Plastics Corp. v. Blackhawk Molding Co.*, 189 USPQ 734 (N.D.Ill.1975).

Petitioner, in its Petition argues an inference that Registrant had knowledge of Petitioner's alleged right to the AMC WHOLESALE mark (or marks similar thereto) at the time Registrant filed its Application. However, Rule 9(b) requires that the pleadings contain explicit rather than implied expression of the circumstances constituting fraud. Petitioner failed to explicitly offer any circumstances constituting fraud and cannot do so. As such, Petitioner fails to state a viable claim for fraud against Registrant on which relief can be granted.

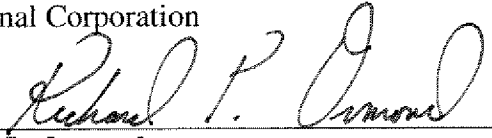
IV. CONCLUSION

Petitioner has filed a de minimus Petition against Registrant in the hopes that Registrant will be discouraged from maintaining its registered mark. The dearth of necessary facts and the failure to properly plead the requisite elements for any of its claims for relief demonstrate that Petitioner has little to stand on and cannot sufficiently plead or prove a viable cause of action against Registrant's Registration. As such, Registrant respectfully requests that this Board dismiss Petitioner's Petition in its entirety with prejudice.

Dated: April 12, 2006

BUCHALTER NEMER
A Professional Corporation

By: _____


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Proof of Service

I hereby certify that on this 12th day of April 2006, a true and correct copy of the foregoing **REGISTRANT AMERIQUEST MORTGAGE COMPANY'S MOTION TO DISMISS FOR PETITIONER'S FAILURE TO STATE A CLAIM** was served by first class mail, postage prepaid, to Petitioner's attorney at the following address:

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