

**UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451**

Mailed: September 7, 2006

Cancellation Nos. 92045521  
92045641

AMC MORTGAGE CORPORATION

v.

AMERIQUEST MORTGAGE COMPANY

Before Quinn, Hairston and Kuhlke,  
Administrative Trademark Judges.

By the Board:

This case comes up on registrant's motion to dismiss these cancellation proceedings based on petitioner's alleged failure to state a claim for which relief can be granted. Before addressing the merits of the motions to dismiss, it is noted that there are two separate cancellation proceedings between these parties wherein petitioner seeks to cancel two of Ameriquest's registrations. In that both of these registrations are similar and for the same services, and the parties involved are the same, consolidation is appropriate.

Consolidation

A review of the pleadings in the above-identified cancellation proceedings indicates that the parties are the

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same and the proceedings involve substantially identical questions of fact and law.

Since the marks sought to be cancelled here are very similar, on the basis that the marks are confusingly similar, it is believed that these proceedings may be presented on the same record without appreciable inconvenience or confusion. Moreover, the consolidation would be equally advantageous to both parties in the avoidance of the duplication of effort, loss of time, and the extra expense involved in conducting the proceedings individually. See Rule 42(a) of the Federal Rules of Civil Procedure.

The consolidated cases may be presented on the same record and briefs. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). As a general rule, from this point on only a single copy of any paper or motion should be filed herein; but that copy should bear all proceeding numbers in its caption. Exceptions to the general rule of one copy involve stipulated extensions of the discovery and trial dates and briefs on the case, which require additional copies. See Trademark Rules 2.121(d) and 2.128. Accordingly, proceedings are hereby consolidated.

Despite being consolidated, each proceeding retains its separate character. The decision on the consolidated cases shall take into account any differences in the issues raised

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by the respective pleadings and a copy of the decision shall be placed in each proceeding file. The parent case is the cancellation proceeding that was instituted first, 92045521.

Motions to Dismiss

These cases now come up on registrant's motions to dismiss, filed April 12, 2006 and May 5, 2006, respectively, for failure to state a claim upon which relief can be granted.

By way of background, registrant, Ameriquest Mortgage Company, owns U.S. Reg. No. 2862109<sup>1</sup> for the mark AMC WHOLESALE and Reg. No. 2885712<sup>2</sup> for AMC and Design, both for mortgage banking services in International Class 36. AMC

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<sup>1</sup> Specifically, Reg. No. 2862109 issued July 13, 2004 for "Mortgage banking services; mortgage brokerage services; mortgage lending services, namely, loan financing, credit recovery and collection; wholesale and retail mortgage services, namely mortgage procurement for others; maintaining mortgage escrow accounts; and mortgage banking, lending, and brokerage services over the global computer network, and excluding services for financial restructuring of business entities and financial management for businesses." The application was filed December 20, 2002, claiming dates of first use and first use in commerce of June, 2000.

<sup>2</sup> Specifically, Reg. No. 2885712 issued September 21, 2004 for "Mortgage banking services; mortgage brokerage services; mortgage lending services, namely, loan processing, purchasing mortgage loans from real estate and mortgage brokers and correspondent lenders for others, brokering the sale and servicing of mortgage loans to secondary mortgage lenders, and maintenance of mortgage escrow accounts, and excluding services for financial restructuring of business entities and financial management for businesses". The application was filed December 31, 2002, claiming dates of first use and first use in commerce of April, 1997.

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Mortgage Corporation has petitioned to cancel these registrations claiming common law ownership of the marks AMC and AMC MORTGAGE, each used in connection with mortgage banking services, "long prior to any date of first use upon which registrant can rely" (petition at ¶ 3) and that registrant's "mark[s] so resembles petitioner's marks as to be likely, when used in connection with the services set forth in registrant's registration[s], to cause confusion, mistake, or deception within the meaning of Section 2(d) of the Trademark Act." (petition at ¶ 4). Petitioner has also alleged fraud in the applications in that registrant signed the applications knowing, "or should have known", (petition at ¶ 7), that it did not have the exclusive right to use the mark in commerce thereby committing fraud on the Office.

In lieu of an answer to the petitions to cancel, registrant filed motions to dismiss the proceedings under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. As grounds for the motions to dismiss, registrant states that as to the likelihood of confusion count, petitioner's allegations fail to allege the specific date or general time period when it first started using its marks in commerce and its prior use of the marks, and thus the pleadings are not sufficient to state a claim. As to the fraud count, respondent contends that petitioner does not allege that the Office relied on any

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misrepresentations by respondent and has not pleaded any intent on the part of respondent with sufficient particularity. Petitioner responded by contending that it has pleaded facts sufficiently to put respondent on notice of its claims and to allow respondent to answer the complaint.

In deciding a motion to dismiss, the Board must accept all of petitioner's well-pleaded allegations in its petition to cancel as true, and these allegations must be construed liberally and in the light most favorable to petitioner. Fed. R. Civ. P. 8(f). See also, 5A Wright & Miller, Federal Practice and Procedure: Civil 2d Section 1357 (1990). Only if it appears certain that there is no set of facts, which, if proven to be true, would support petitioner's claim, will the Board dismiss the proceeding for insufficiency. See, Stanspec Co. v. American Chain & Cable Co., Inc., 531 F.2d 563, 189 USPQ 420 (CCPA 1976).

Construing the allegations in the petitions, as we must, most favorably to petitioner's position, we find that the petitioner asserts that it offers similar services and uses similar marks in connection with its services prior to respondent's use<sup>3</sup> and that it believes that it will be damaged

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<sup>3</sup> Petitioner's allegation that it has adopted and continuously used its marks "for many years and since long prior to any date of first use upon which registrant can rely" is not the conventional allegation of priority, wherein the party will specifically state when it actually began use of its mark, or

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by the maintenance of respondent's registrations as they create a likelihood of confusion between the marks of the two parties. These pleadings are sufficient to give it standing to bring this action and set forth sufficient allegations to provide a statutory basis upon which to base the action.<sup>4</sup> As for the fraud allegations, while the petition does not contain sufficient allegations to adequately plead fraud on the Office<sup>5</sup>, the complaint stands on the basis of the adequately pleaded grounds of a likelihood of confusion.

In view of the foregoing, respondent's motions to dismiss are denied with respect to the likelihood of confusion claim. The motions to dismiss are granted with respect to the fraud claim. To the extent that petitioner intends to pursue a claim of fraud, it is allowed twenty days from the date hereof to amend the petitions to cancel to plead such a claim with more specificity. Proceedings herein are otherwise suspended

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rely on an application filing date. However, there is no requirement for a party to do so and petitioner's claim of priority is subject to proof, just as one which stated a specific date.

<sup>4</sup> We do not express an opinion as to whether petitioner can prove and ultimately prevail on these issues, as a determination on the merits is not before us.

<sup>5</sup> Fraud upon the Office involves a willful withholding from the Office by an applicant of material information which, if disclosed to the examiner, would have resulted in the disallowance of the registration sought. There is a material legal distinction between a "false" representation and a "fraudulent" one, the latter involving "an intent to deceive, whereas the former may be occasioned merely by a misunderstanding, an inadvertence, a mere negligent omission, or

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pending possible response to this order. Upon resumption, dates, including respondent's time to file answers in each of the cancellation proceedings, will be reset.

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the like." See, Rogers Corp. v. Fields Plastics & Chemicals, Inc., 176 USPQ 280 (TTAB 1972).