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

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Mailed: September 25, 2008

Cancellation No. 92048869

Future Media Architects, Inc.

v.

IdeaStream Consumer Products, LLC

Before Seeherman, Bucher, and Cataldo, Adminstrative Trademark Judges:

By the Board:

This case comes up on respondent's motion, filed March 14, 2008, to dismiss the amended petition to cancel for failure to state a claim upon which relief can be granted. Petitioner opposes the motion.

On February 11, 2008, Future Media Architects, Inc. filed a petition to cancel five registrations for the mark VAULTZ owned by respondent, each registration covering different types of storage device or container, on the ground that the registrations were obtained by fraud.

After respondent filed a motion to dismiss the petition to cancel for failure to state a claim, alleging that the petition to cancel did not state with particularity which statements made in connection with each registration were fraudulent, petitioner filed an opposition to the motion to dismiss, and a motion to accept the accompanying amended petition to cancel, which adds allegations to its fraud claim, and a separate claim that the mark VAULTZ is generic as applied to respondent's various goods. The March 14, 2008 motion to dismiss, presently before us, is directed toward petitioner's amended petition for cancellation.

A party to an inter partes proceeding before the Board may amend its pleading once as a matter of course at any time before a responsive pleading is served. Fed. R. Civ. P. 15(a). Accordingly, petitioner's amended petition to cancel is accepted. The Board will give no further consideration to the original petition to cancel, or the related motion to dismiss directed thereto.

MOTION TO DISMISS AMENDED PETITION TO CANCEL

To withstand a motion to dismiss for failure to state a claim under Rule 12(b)(6), a petition to cancel need only allege such facts as would, if proven, establish petitioner's standing to maintain the proceeding and a ground or grounds for refusing registration to respondent.

See Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000). To plead its standing to bring its claims, petitioner need only allege that it has a real interest, that is, a personal stake, in the outcome of the proceeding. *See Ritchie v. Simpson*, 50 USPQ2d 1023 (Fed. Cir. 1999).

Here, although respondent's motion seeks dismissal of the amended petition to cancel in its entirety, respondent's motion makes no arguments regarding the pleading of petitioner's standing or the new claim that the term VAULTZ is generic as applied to respondent's goods. We find that dismissal is inappropriate on these grounds inasmuch as the amended petition to cancel adequately pleads standing and a claim that the mark VAULTZ is generic.

Turning to the fraud claim, we note that the amended petition to cancel includes separate allegations pertaining to each registration of respondent.[1] The allegations for each registration are essentially the same, and allege the relevant facts regarding the underlying application for each registration, and that respondent made false statements in the statement or allegation of use which were material to subsequent approval of the application.

[1] The petition to cancel features fraud allegations in ¶¶ 2-9 for Registration No. 3349665, ¶¶ 10-15 for Registration No. 3336431, ¶¶ 16-21 for Registration No. 3329817, ¶¶ 22-27 for Registration No. 3234089, and ¶¶ 28-33 for Registration No. 3005595.

With respect to the legal sufficiency of the claim, fraud in procuring a trademark registration occurs when an applicant for registration knowingly makes false, material representations of fact in connection with an application to register. *Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986). Here, respondent's motion to dismiss contends that it is unclear whether petitioner alleges that the mark was not in use on all goods as of the alleged date of first use, which is not sufficient to state a fraud claim (*Western Worldwide Enterprises Group Inc. v. Qinqdao Brewery,* 17 USPQ2d 1137, 1141 (TTAB 1990)), or whether petitioner alleges that the mark was not in use on all goods as of the date the statement or allegation of use was filed, which is sufficient to state a fraud claim (*Herbaceuticals Inc. v. Xel Herbaceuticals Inc.*, 86 USPQ2d 1572, 1577 (TTAB 2008)).

Reading the petition to cancel in its entirety, we believe that respondent has been given adequate notice that petitioner's fraud ground is based on the claim that respondent failed to use its mark with all the goods listed in the statement or allegation of use at the time that the statement or allegation of use was filed, and that the petition to cancel specifies which goods listed in the statement or allegation of use were not in use as of that date. In particular, we construe the petition to cancel to

assert that, with respect to Registration No. 3349665, respondent was not using its mark for binders for storing MP3s, cases for protecting and storing MP3 players, wearable portable cases for audio/video products with or without built-in headphones, cases for protecting and storing mobile phones, PDA holders, and wheeled computer carrying cases when it filed its Statement of Use; that, with respect to Registration No. 3336431, respondent was not using its mark for clip boards or wall-mounted file folders when it filed its Statement of Use; that, with respect to Registration No. 3329817, respondent was not using its mark for metal tool boxes when it filed its Statement of Use; that, with respect to Registration No. 3234089, respondent was not using its mark for camera cases when it filed its Statement of Use; and that, with respect to Registration No. 3329817, respondent was not using its mark for CD/DVD protective storage cases and protective cover sleeves when it filed its Amendment to Allege Use.

Because we find that the amended petition to cancel pleads petitioner's standing and statutory claims of genericness and fraud, respondent's motion to dismiss is denied.[2]

[2] If the Board has misconstrued petitioner's claims, petitioner is ordered to file, within fifteen days from the mailing date of this order, an amended petition to cancel which specifies, as to each registration, the particular goods with which petitioner asserts that respondent was not using the mark

Respondent is allowed until thirty days from the mailing date of this order to file its response to the amended petition to cancel.

Proceedings herein are resumed, and conference, disclosure, discovery, and trial dates are reset below.

Deadline for Discovery Conference	**11/24/08**
Discovery Opens	**11/24/08**
Initial Disclosures Due	**12/24/08**
Expert Disclosures Due	**4/23/09**
Discovery Closes	**5/23/09**
Plaintiff's Pretrial Disclosures	**7/7/09**
Plaintiff's 30-day Testimony Period Ends	**8/21/09**
Defendant's Pretrial Disclosures	**9/5/09**
Defendant's 30-day Testimony Period Ends	**10/20/09**
Plaintiff's Rebuttal Disclosures	**11/4/09**
Plaintiff's 15-day Rebuttal Testimony Period Ends	**12/4/09**

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 the taking of testimony. Trademark Rule 2.125.

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

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when the statement or allegation of use was filed. If such an amended petition to cancel is filed, respondent is allowed until

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:
http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf
http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:
http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm

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thirty days from service of the amended petition to cancel to file its answer.