ESTTA Tracking number: **ESTTA238887**

Filing date: **09/25/2008**

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

Proceeding	92048869
Party	Defendant IdeaStream Consumer Products, LLC
Correspondence Address	James R Menker Holley & Menker, PA PO Box 331937 Atlantic Beach, FL 32202 UNITED STATES eastdocket@holleymenker.com
Submission	Motion to Suspend for Civil Action
Filer's Name	James R. Menker
Filer's e-mail	eastdocket@holleymenker.com
Signature	/jmenker/
Date	09/25/2008
Attachments	9-25-2008 Motion to Suspend - 92048869.pdf (3 pages)(148548 bytes) 4-4-2008 FMA Complaint.pdf (9 pages)(539243 bytes) 5-7-2008 ICP Answer.pdf (11 pages)(70913 bytes) 7-21-2008 Order Dismissing Count II - vaultz-com.pdf (7 pages)(164887 bytes) 8-18-2008 Amended Complaint.pdf (11 pages)(43904 bytes) 9-4-2008 ICP Answer to Amended Complaint.pdf (11 pages)(89717 bytes)

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

Future Media Architects, Inc.	)	
	)	Cancellation No. 92048869
Petitioner,	)	
	)	Reg. No. 3005595
v.	)	Reg. No. 3234089
	)	Reg. No. 3329817
IdeaStream Consumer Products, LLC,	)	Reg. No. 3336431
	)	Reg. No. 3349665
Registrant.	)	

P.O. Box 1451
Alexandria, VA 22313-1451

MOTION TO SUSPEND

Pursuant to TBMP Section 510.02(a), Registrant, IdeaStream Consumer Products, LLC, hereby moves for an indefinite suspension of the above-identified cancellation pending the final determination of an ongoing civil action between the parties, Case 0:08-cv-60496-WPD Future Media Architects, Inc. v. IdeaStream Consumer Products LLC. Copies of the pleadings are attached. This civil action in the United States District Court for the Southern District of Florida involves issues in common with those in the instant cancellation proceeding. Copies of the pleadings are attached.

Respectfully submitted,

IDEASTREAM CONSUMER PRODUCTS, LLC

By: _____
James R. Menker

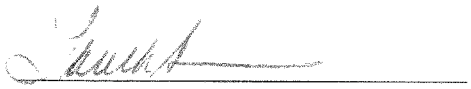
Registrant's Attorneys

Holley Menker, P.A.
PO Box 331937
Atlantic Beach, FL 32233
(904) 247-2620
eastdocket@holleymenker.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO SUSPEND has been served on the attorneys for Applicant by mailing said copy on September 25, 2008, via first class mail, postage prepaid to:

James E. Rosini
KENYON & KENYON LLP
One Broadway
New York, NY 10004



Laura K. Greer

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

FUTURE MEDIA ARCHITECTS, INC.,

Plaintiff,

v.

08-60496-CIV-JORDAN/MCALILEY

Case No.:

IDEASTREAM CONSUMER PRODUCTS LLC,

JURY TRIAL REQUESTED

Defendant.

_____/

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff, Future Media Architects, Inc. (hereinafter referred to as "FMA" or "Plaintiff"), by its attorneys, as and for its Complaint against Defendant IdeaStream Consumer Products LLC (hereinafter referred to as "IdeaStream" or "Defendant"), alleges as follows, upon knowledge with respect to itself and its own acts, and upon information and belief as to all other matters:

Nature of Action and Subject Matter Jurisdiction

1. This action seeks a Declaratory Judgment of Compliance with the Anti-Cybersquatting Protection Act under Section 43(d) of the Lanham Act, 15 U.S.C. § 1114 *et seq.* Plaintiff further seeks a Declaratory Judgment of Non-Infringement of registered and common law trademark rights under 28 U.S.C. §§ 2201-2202, 15 U.S.C. §§ 1114 and 1125(a). This action also seeks cancellation of registered United States trademarks under Section 37 of the Lanham Act, 15 U.S.C. § 1119, and Sections 14 and 15 of the Lanham Act, 15 U.S.C. § 1064 *et seq.*

2. Subject matter jurisdiction over this action is conferred upon this Court: (i) pursuant to 28 U.S.C. §§ 2201 and 2202, because it involves a request for declaratory

judgment in a case of actual controversy; and (ii) pursuant to 28 U.S.C. §§ 1331 and 1338, and 15 U.S.C. §§ 1114 and 1125, because, *inter alia*, the suit concerns rights under the Lanham Act. Alternatively, this Court has jurisdiction pursuant to 28 U.S.C. § 1332.

Personal Jurisdiction and Venue

3. This Court has personal jurisdiction over Defendant because Defendant agreed to submit to the jurisdiction of this Court when it initiated an administrative proceeding pursuant to the Internet Corporation for Assigned Names and Numbers' ("ICANN") Uniform Dispute Resolution Policy ("UDRP"), on or about January 22, 2008. The Registrar, Moniker Online Services, LLC, has a principal office located in this district at 20 SW 27th Avenue, Suite 201, Pompano Beach, Florida 33069.

The Parties

4. Plaintiff FMA is an Internet development company with a business address at P.O. Box 71, Road Town, Tortola, British Virgin Islands.

5. On information and belief, Defendant IdeaStream is Delaware limited liability company with a place of business at 4011 Brookpark Road, Parma, Ohio 44134.

Facts Common to All Claims for Relief

6. FMA is a leading Internet development company. It develops its own Internet properties, Internet portals and technology.

7. FMA's own development projects include, for example:

> MP3.tv, a music community portal that was launched by FMA in January 2002. This website enjoys hits from well over 30,000 unique visitors a day from more than 120 countries.

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Telephone (305) 448-7089 • Telecopier (305) 446-6191

> DJ.net, a portal for DJs who require a web presence and want to network with other professionals in their industry. This site was launched by FMA in February 2003 and is also available as a search engine to locate a DJ.
>
> OXiDE.com, FMA's own search engine.

8. FMA does not engage in development for third parties.

9. As part of its business, FMA is the owner of approximately 100,000 domain names.

10. FMA does not sell its domain names, and does not purchase domain names with the intention of selling them.

11. In fact, anyone contacting FMA regarding the purchase of a domain name is automatically sent the following email:

> Dear Sir/ Madam,
> To individuals and entities interested in purchasing a domain name from FMA, we regret to advise you that pursuant to the Company's Policy and Strategic Planning, all domain names owned by Future Media Architects, Inc. are not for sale at this time. We do not anticipate this policy changing in the near future.

12. One of the domain names owned by FMA is <www.vaultz.com> (the "Domain Name").

13. FMA registered the Domain Name on February 10, 2004, predating the registration dates of Defendant's U.S. trademark registrations for VAULTZ.[1]

14. FMA regularly acquires unclaimed, random common word domain names. In doing so, FMA's sole motivation is to acquire and use available random common word domain names to market its own Internet development properties, such as DJ.net.

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[1] Defendant's earliest registration date for its U.S. registrations for VAULTZ is October 11, 2005. The remainder of Defendant's registrations did not issue until 2007.

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15. Prior to receiving notice from Defendant, FMA was unaware of Defendant's alleged rights in and to the term "vaultz".

16. On or about August 17, 2007, Defendant, through its counsel, G. Todd Whitcomb of Smith, Gambrell & Russell, LLP, requested that Plaintiff immediately transfer the Domain Name to Defendant. In the event that Plaintiff failed to do so, Defendant warned, "We are preparing to file a Uniform Domain Registration Protocol [*sic*] Complaint to contest your registration of vaultz.com."

17. Plaintiff, through its counsel, Michael Kelly of Kenyon & Kenyon LLP, responded to Defendant's August 17, 2007 letter, denying infringement of Defendant's mark and informing Defendant that, *inter alia*, Plaintiff had registered the Domain Name well before the registration dates of Defendant's VAULTZ mark, including its U.S. registrations.

18. Plaintiff heard nothing further from Defendant until it received notice that Defendant had filed a Complaint for Transfer of domain registration with the National Arbitration Forum ("NAF"), pursuant to ICANN's UDRP, on or about January 8, 2008.[2]

19. On January 15, 2008, Plaintiff reiterated that its registration date of the Domain Name predated the registration dates for Defendant's VAULTZ mark. In addition, due to irregularities, e.g., several withdrawn Statements of Use, in the prosecution of its U.S. registrations for VAULTZ, Plaintiff stated that such registrations may be vulnerable to a cancellation action.

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[2] The January 8, 2008 Complaint was rejected by NAF because Defendant failed to provide required information. Defendant corrected its error and re-filed the Complaint on or about January 22, 2008.

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Telephone (305) 448-7089 • Telecopier (305) 446-6191

20. Since Defendant had attempted to use its U.S. registrations for VAULTZ against Plaintiff to obtain Plaintiff's Domain Name, Plaintiff filed a Petition for Cancellation (Cancellation Proceeding No. 92048869) before the Trademark Trial and Appeal Board of the U.S. Patent & Trademark Office. This opposition proceeding is currently pending.

21. Upon information and belief, Defendant had not used its mark in U.S. commerce in connection with all of the goods recited in the description of goods in its U.S. registrations for VAULTZ[3]

22. On March 24, 2008, the NAF panel informed the parties and the Registrar, Moniker Online Services, LLC, and ordered the transfer of the Domain Name from Defendant to Plaintiff. Pursuant to ICANN policy, the transfer was postponed for ten (10) business days to allow Defendant time in which to bring a federal action to stay the proceeding.

23. Plaintiff's ownership of the Domain Name does not infringe any rights that Defendant may allegedly own.

24. Plaintiff has never had a bad faith intent to profit from the Domain Name or exercised bad faith in any manner.

25. Plaintiff did not register the Domain Name in bad faith.

26. Plaintiff has a right to own and use the Domain Name as it did not register it in bad faith.

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[3] Reg. Nos. 3,349,665; 3,336,431; 3,234,089; and 3,005,595.

27. Defendant's alleged VAULTZ mark is not distinctive now, and was not distinctive when Plaintiff registered the Domain Name.

28. Defendant's alleged VAULTZ mark is not famous now, and was not famous when Plaintiff registered the Domain Name.

29. Plaintiff's ownership of the Domain Name is not likely to cause confusion with any rights allegedly owned by Defendant.

30. Plaintiff has always believed, and continues to believe that the use of the domain name was a fair use or otherwise lawful, as the term "vaultz" is not distinctive of any one source or entity.

COUNT I

DECLARATION THAT PLAINTIFF'S OWNERSHIP OF THE DOMAIN NAME DOES NOT VIOLATE ANY OF DEFENDANT'S ALLEGED RIGHTS

31. FMA repeats and realleges each and every allegation contained in paragraphs 1 through 30 of this Complaint as though fully set forth herein.

32. By reason of the existence of an actual and justiciable controversy as discussed herein, FMA is entitled to a declaratory judgment that its ownership of the Domain Name does not violate any rights owned by Defendant. Accordingly, Plaintiff seeks a declaration of the Court that its ownership of the Domain Name does not violate any rights owned by Defendant.

COUNT II

REQUEST FOR CANCELLATION OF U.S. TRADEMARK REGISTRATIONS

33. FMA repeats and realleges each and every allegation contained in paragraphs 1 through 30 of this Complaint as though fully set forth herein.

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34. Upon information and belief, Defendant had not used its mark in U.S. commerce in connection with all of the goods recited in the goods description of its U.S. registrations for VAULTZ.[4] Accordingly, Plaintiff requests that the Court cancel Registration Nos. 3,349,665; 3,336,431; 3,329,817; 3,234,089; and 3,005,595, pursuant to Section 37 of the Lanham Act, 15 U.S.C. § 1119.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff FMA demands judgment against Defendant IdeaStream for:

A. a declaration that the order of the Arbitration Panel ordering Moniker Online Services, LLC to transfer the Domain Name is null and void as Plaintiff's ownership of the Domain Name does not violate the Anti-Cybersquatting Consumer Protection Act;

B. a declaration of the Court that Plaintiff's ownership of the Domain Name does not violate any rights owned by Defendant;

C. a declaration of the Court that Defendant's Reg Nos. Nos. 3,349,665; 3,336,431; 3,329,817; 3,234,089; and 3,005,595 were procured and maintained as a result of false declarations and allegations of material facts Defendant knew or should have known were false, and therefore, that such registrations be cancelled and removed from the Principal Register pursuant to 15 U.S.C. § 1119;

D. an injunction prohibiting Defendant from alleging or threatening that Plaintiff's use of the Domain Name or the term "vaultz" does violate any federal, state, or

[4] Reg. Nos. 3,349,665; 3,336,431; 3,234,089; and 3,005,595.

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common law trademark rights owned by Defendants, including without limitation, prohibiting Defendant from seeking transfer of the Domain Name via any means;

E. requiring Defendant to account and pay over to Plaintiff all damages sustained by Plaintiff;

F. an award of costs and reasonable attorneys' fees; and

G. such other and further relief as the Court may deem equitable and proper.

Date: April 4, 2008

Respectully submitted,

LOTT & FRIEDLAND, P.A.

Leslie J. Lott, Esq.
Florida Bar No. 182196
Jaime S. Rich, Esq.
Florida Bar No. 30932
355 Alhambra Circle, Suite 1100
Coral Gables, Florida 33134
Telephone: (305) 448-7089
Fax: (305) 446-6191
Email: ljlott@lfiplaw.com
Email: jrich@lfiplaw.com

and

KENYON & KENYON LLP

James E. Rosini (JR 7791)
Mimi K. Rupp (MR 0007)
One Broadway
New York, New York 10004
Telephone: (212) 425-7200
Fax: (212) 425-5288
Email: jrosini@kenyon.com
Email: mrupp@kenyon.com

Attorneys for Plaintiff
Future Media Architects, Inc.

FILED by D.C.
ELECTRONIC
APR. 4, 2008
STEVEN M. LARIMORE
CLERK U.S. DIST. CT.
S. D. OF FLA. - MIAMI

JS 44 (Rev. 11/05)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.) **NOTICE: Attorneys MUST Indicate All Re-filed Cases**

I. (a) PLAINTIFFS

Future Media Architects, Inc.

DEFENDANTS

Ideastream Consumer Products, LLC

(b) County of Residence of First Listed Plaintiff Tortola, BVI
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorney's (Firm Name, Address, and Telephone Number)

Leslie J. Lott, Esq.
Lott & Friedland, P.A., 355 Alhambra Circle, Suite 1100
Coral Gables, FL 33134, Telephone: 305-448-7089

Attorneys (If Known)

(d) Check County Where Action Arose: ☐ MIAMI- DADE ☐ MONROE ☑ BROWARD ☐ PALM BEACH ☐ MARTIN ☐ ST. LUCIE ☐ INDIAN RIVER ☐ OKEECHOBEE ☐ HIGHLANDS

FTL 08CV 60496-Jordan/McAliley

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☑ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs.	☒ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health		☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other		☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	SOCIAL SECURITY	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 730 Labor/Mgmt.Reporting & Disclosure Act	☐ 863 DIWC/DIWW (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	☐ 864 SSID Title XVI	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General		☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty		☐ 871 IRS—Third Party 26 USC 7609	☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other			☐ 900Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights			☐ 950 Constitutionality of State Statutes
	☐ 440 Other Civil Rights	☐ 555 Prison Condition			

V. ORIGIN (Place an "X" in One Box Only)

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Re-filed- **(see VI below)** ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. RELATED/RE-FILED CASE(S). (See instructions second page):

a) Re-filed Case ☐ YES ☑ NO JUDGE

b) Related Cases ☐ YES ☑ NO DOCKET NUMBER

VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause **(Do not cite jurisdictional statutes unless diversity)**:

Declaratory Judgment and cancellation of trademark registration

LENGTH OF TRIAL via _____ days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☑ Yes ☐ No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE

SIGNATURE OF ATTORNEY OF RECORD

DATE
April 4, 2008

FOR OFFICE USE ONLY
AMOUNT $350.00 RECEIPT# 978146 IFP

04/04/08

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 08-60496-CIV-JORDAN/McALILEY

FUTURE MEDIA ARCHITECTS, INC.,

Plaintiff,

v.

IDEASTREAM CONSUMER PRODUCTS LLC,

Defendant

DEFENDANT IDEASTREAM CONSUMER PRODUCTS LLC'S ANSWER, DEFENSES AND COUNTERCLAIM

IdeaStream Consumer Products, LLC (hereinafter referred to as "ICP" or "Declaratory Defendant"), through its undersigned attorneys, hereby answers the Complaint for Declaratory Judgment ("Complaint") filed by Future Media Architects, Inc. (hereinafter referred to as "FMA" or "Declaratory Plaintiff") and as its affirmative defenses and counterclaims, ICP states as follows:

Nature of Action and Subject Matter Jurisdiction

1. Admitted.

2. Admitted.

Personal Jurisdiction and Venue

3. Admitted.

The Parties

4. ICP is without sufficient information to admit or deny the allegations of Paragraph 4 of the Complaint and, therefore, denies them.

5. Admitted.

Facts Common to All Claims for Relief

6. ICP is without sufficient information to admit or deny the allegations of Paragraph 6 of the Complaint and, therefore, denies them.

7. ICP is without sufficient information to admit or deny the allegations of Paragraph 7 of the Complaint and, therefore, denies them.

8. ICP is without sufficient information to admit or deny the allegations of Paragraph 8 of the Complaint and, therefore, denies them.

9. ICP is without sufficient information to admit or deny the allegations of Paragraph 9 of the Complaint and, therefore, denies them.

10. ICP is without sufficient information to admit or deny the allegations of Paragraph 10 of the Complaint and, therefore, denies them.

11. ICP is without sufficient information to admit or deny the allegations of Paragraph 11 of the Complaint and, therefore, denies them.

12. ICP admits that FMA is the current registrant of the domain name <vaultz.com> (the "Domain Name" or "vaultz.com"). ICP is, however, without sufficient information to admit or deny the remaining allegations of Paragraph 12 of the Complaint and, therefore, denies them.

13. ICP is without sufficient information to admit or deny the allegations of Paragraph 13 of the Complaint and, therefore, denies them.

14. ICP is without sufficient information to admit or deny the allegations of Paragraph 14 of the Complaint and, therefore, denies them.

15. ICP is without sufficient information to admit or deny the allegations of Paragraph 15 of the Complaint and, therefore, denies them.

16. Admitted.

17. ICP admits that in a letter dated October 23, 2007, FMA, through its counsel, indicated that it would not transfer the Domain Name to ICP because, *inter alia*, FMA purportedly registered the Domain Name before the issuance of ICP's U.S. trademark registrations. ICP denies the remaining allegations of Paragraph 17 of the Complaint.

18. ICP is without sufficient information to admit or deny the allegations of Paragraph 18 of the Complaint and, therefore, denies them.

19. ICP admits that counsel for FMA sent a letter to counsel for ICP dated January 15, 2008 repeating the inconsequential assertion that FMA registered the Domain Name prior to the issuance of ICP's United States registrations for its VAULTZ® mark and spuriously suggested that some perceived "irregularities suggest [sic] that several of [ICP's] registrations may be susceptible to cancellation…"). ICP denies the remaining allegations of Paragraph 19 of the Complaint.

20. ICP admits that FMA filed a Petition to Cancel with the Trademark Trial and Appeal Board of the United States Patent and Trademark Office seeking the cancellation of five of ICP's federal registrations, Reg. Nos. 3005595, 3234089, 3329817, 3336431 and 3349665, for its VAULTZ® mark. ICP is, however, without sufficient information to admit or deny the remaining allegations of Paragraph 20 of the Complaint and, therefore, denies them.

21. Denied.

22. Denied.

23. Denied. FMA's ownership and use of the Domain Name infringes on ICP's trademarks rights in its VAULTZ® mark.

24. Denied.

25. Denied.

26. Denied.

27. Denied. ICP's VAULTZ® mark is inherently distinctive.

28. Denied.

29. Denied.

30. Denied. ICP's VAULTZ® mark is inherently distinctive and identifies ICP as the source of home and office storage products and media storage products.

COUNT I

31. ICP incorporates by reference its responses to the allegations of Paragraphs 1-30 of the Complaint, inclusive.

32. Denied.

All allegations not specifically admitted herein should be deemed denied.

COUNT II

Count II is the subject of ICP's Motion to Dismiss being filed concurrently herewith. Therefore, ICP believes that no Answer is required. To the extent that an Answer is required, ICP incorporates by reference its responses to the allegations of Paragraphs 1-32 of the Complaint, inclusive, and denies the allegations of paragraph 34.

AFFIRMATIVE DEFENSES

ICP alleges the following affirmative defenses to the Complaint. In asserting these affirmative defenses, ICP does not assume the burden to establish any fact or proposition where that burden is properly imposed on FMA.

1. FMA has failed to state a claim upon which relief may be granted.

2. FMA's claims are barred by the doctrine of unclean hands.

3. ICP presently has insufficient knowledge or information on which to form a belief as to whether they may have additional, as yet unstated, defenses available. ICP reserves the right to assert additional defenses that are revealed by further investigation or by discovery.

COUNTERCLAIM

Counterclaimant ICP brings the following counterclaims against Counter-defendant FMA.

Nature of Action and Subject Matter Jurisdiction

1. This is a counterclaim for cyberpiracy arising out of FMA's bad faith intent to profit from the VAULTZ® mark through FMA's registration and use of the vaults.com domain name that is identical to ICP's VAULTZ® trademark.

2. This Court has subject matter jurisdiction over this counterclaim under 28 U.S.C. §§ 1331 and 1338, and pursuant to Section 43(d) of the Lanham Act, 15 U.S.C. § 1125.

Personal Jurisdiction and Venue

3. This Court has jurisdiction over FMA. FMA agreed to submit to personal jurisdiction in this Court by filing its Complaint.

4. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and (c).

The Parties

5. ICP is a limited liability company organized under the laws of Delaware with a place of business at 4011 Brookpark Road, Parma, Ohio 44134.

6. On information and belief, FMA is a shell company using the address of attorney Charles Patrick Kerins at P.O. Box 71, Road Town, Tortola, British Virgin Islands.

7. On information and belief, FMA is the alter ego of Thunayan K AL-Ghanim a Kuwaiti citizen with an address at P.O. Box 68, AL Souq AL Dakhili, Kuwait 1525. On

information and belief, Mr. AL-Ghanim is currently residing in Virginia.

Facts Common to All Claims for Relief

8. ICP is a consumer products company that designs and sells numerous products including Snap-N-Store® and VAULTZ® storage boxes, among others.

9. Since February 2003, ICP has been selling products in the U.S. bearing the VAULTZ® mark. ICP has also sold its VAULTZ®-branded products in numerous countries throughout the world including Austria, Australia, Belgium, Denmark, Finland, France, Germany, Greece, Hong Kong, Ireland, Italy, Japan, Mexico, The Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland and The United Kingdom.

10. ICP is the owner of the VAULTZ® mark. ICP owns numerous U.S. trademark registrations for its VAULTZ® mark, including Reg. Nos. 3005595, 3234089, 3329817, 3336431 and 3349665. ICP also owns registrations for its VAULTZ® mark in Australia, the European Community, Hong Kong, Japan, Mexico, New Zealand, Norway, Russia, Switzerland and Turkey and owns pending applications to register its mark in Canada and China.

11. ICP's VAULTZ® mark is a coined term and is inherently distinctive as applied to ICP's products.

12. On information and belief, FMA registered the domain name <vaultz.com> (hereinafter the "Domain Name") on February 10, 2004, well after ICP began using its mark in North America and well after ICP filed applications to register its VAULTZ® mark in the U.S., Canada, Mexico and the European Community.

13. The Domain Name consists of a second level domain name which is identical to ICP's VAULTZ® mark. The Domain Name registered by FMA is identical or confusingly similar to ICP's VAULTZ® trademark.

14. FMA has no rights or legitimate interests in respect of the Domain Name. FMA does not own any trademark rights in the Domain Name and is not commonly known by the Domain Name.

15. FMA is not making a legitimate noncommercial or fair use of the Domain Name and is instead using the Domain Name for commercial gain by misleadingly diverting ICP's customers.

16. FMA has not used the Domain Name in connection with a *bona fide* offering of goods or services. Instead, FMA used the Domain Name to post hyperlinks to ICP's products as well as to the products of ICP's competitors.

17. FMA registered, has used and is using the Domain Name in bad faith.

18. ICP incorporates and realleges paragraphs 1 through 17 of these Counterclaims.

19. This is an action brought under the Anti-Cyber-squatting Consumer Protection Act ("ACPA"), codified as Section 43(d) of the Lanham Act, 15 USC § 1125(d).

20. ICP is the owner of a mark as defined in 15 U.S.C. § 1125(d)(1)(A).

21. ICP's VAULTZ® mark is distinctive and was distinctive at the time FMA registered the Domain Name.

22. The Domain Name is identical or confusingly similar to ICP's VAULTZ® mark.

23. On information and belief, FMA, with a bad faith intent to profit from ICP's VAULTZ® mark, registered, trafficked in, and/or used the Domain Name.

24. As a direct and proximate result of the foregoing acts by FMA, ICP has suffered damages in an amount to be determined at trial and is entitled to recover its costs and fees in this action as well as an award of statutory damages in the amount of not less than $1,000 and not more than $100,000 pursuant to 15 U.S.C. § 1117(d). ICP is also entitled to the transfer of the

Domain Name to its control pursuant to 15 U.S.C. § 1125(d)(1)(c).

PRAYER FOR RELIEF

WHEREFORE, Declaratory Defendant ICP requests the following relief:

A. For dismissal of the Declaratory Plaintiff's action with prejudice;

B. For an order of this Court that Declaratory Plaintiff shall take no relief from its complaint;

C. For an order of this Court compelling the Declaratory Plaintiff to transfer all ownership in the Domain Name to Declaratory Defendant, or in the alternative for cancellation of the Domain Name;

D. For Preliminary and Permanent Injunctive Relief enjoining the Declaratory Plaintiff from further use of the Domain Name;

E. For an accounting setting forth all revenues and profits received by Declaratory Plaintiff in connection with the use of Declaratory Defendant's trademark, including without limitation all sales and advertising revenues, click-through fees and/or profits received by Declaratory Plaintiff from the website located at the Domain Name;

F. For general and special damages against Declaratory Plaintiff or, in the alternative, for statutory damages in an amount not less than $1,000, nor in excess of $100,000;

G. For an award of Declaratory Defendant's costs and attorneys' fees herein incurred; and

H. For such further and other relief including declaratory relief, equitable relief, and damages, as the Court deems fair and just.

DEMAND FOR JURY TRIAL

ICP demands a trial by jury on FMA's Complaint and ICP's Counterclaim for all issues

so triable.

Date: May 7, 2008

Respectfully submitted,

s/ Denise B. Crockett
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May 2008, I electronically filed a copy of the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Denise B. Crockett
Denise B. Crockett (Florida Bar No. 0327913)

SERVICE LIST

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Case No. 08-60496-CIV-JORDAN/McALILEY
United States District Court, Southern District of Florida

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-60496-CIV-DIMITROULEAS

FUTURE MEDIA ARCHITECTS, INC.,

Magistrate Judge Rosenbaum

Plaintiff,

vs.

IDEASTREAM CONSUMER PRODUCTS LLC,

Defendant
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNT II OF PLAINTIFF'S COMPLAINT

THIS CAUSE is before the Court upon Defendant IdeaStream Consumer Products LLC's Motion to Dismiss Count II of Plaintiff's Complaint [DE-5]. The Court has carefully considered Defendant's Motion, Plaintiff's Memorandum of Law in Opposition [DE-20], Defendant's Reply Memorandum in Support [DE-28], the underlying Complaint [DE-1], and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiff, Future Media Architects, Inc. ("FMA"), is an Internet development company that currently owns approximately 100,000 domain names. FMA states that it regularly acquires unclaimed common word domain names with the sole intention "to market its own Internet development properties." (Compl. ¶ 14). FMA also alleges that it does not sell its domain names, nor does it purchase domain names with the intention to sell them. Defendant, IdeaStream Consumer Products LLC ("ICP"), is "a consumer products company that designs and sells

numerous products including Snap-N-Store and VAULTZ® storage boxes, among others. (Def.'s Mot. 2).

FMA acquired the domain name www.vaultz.com ("domain name") and registered it on February 10, 2004. FMA alleges that prior to receiving notice from ICP it was unaware of ICP's rights to the term "vaultz." ICP alleges to have sold products in the United States bearing the VAULTZ® mark ("mark") since February 2003. ICP currently has several trademark registrations with the United States Patent and Trademark Office ("USPTO") for the mark. FMA alleges that it registered the domain name prior to ICP obtaining trademark registrations for the mark.

ICP contacted FMA to request that FMA immediately transfer the domain name to ICP. When FMA refused, ICP initiated a Uniform Domain Name Resolution Policy proceeding against FMA in January of 2008. The proceeding alleged that FMA was a cybersquatter that had no rights to use the "vaultz" name and that FMA was using the domain name in bad faith. In March 2008, the National Arbitration Forum issued a decision and ordered that the domain name be transferred to ICP. ICP alleges that despite the arbitration order FMA has yet to transfer the domain name. FMA subsequently filed a cancellation proceeding at the USPTO against all of ICP's VAULTZ® registrations alleging that ICP perpetrated fraud against the USPTO in procuring the registrations. That proceeding is still pending.

II. DISCUSSION

On April 4, 2008, FMA filed a Complaint with this Court seeking a declaratory judgment and cancellation of ICP's VAULTZ® registrations. Count II of the Complaint alleges that ICP fraudulently obtained its VAULTZ® registrations because it did not use the mark on all the goods

it recited in its application and Statements of Use to the USPTO. ICP filed the instant Motion to Dismiss Count II of the Complaint under Federal Rule of Civil Procedure 12(b)(6) and 9(b) for failure to plead fraud with sufficient particularity.

A. Motion to Dismiss Standard

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the allegations of the complaint must be taken as true and must be read to include any theory on which the plaintiff may recover. See Linder v. Portocarrero, 963 F.2d 332, 336 (11th Cir. 1992) (citing Robertson v. Johnston, 376 F.2d 43 (5th Cir. 1967)). To survive a motion to dismiss, the plaintiff must articulate "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007) (abrogating Conley v. Gibson, 355 U.S. 41 (1957)). "Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 1969.

Rule 9(b) states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The purpose of the particularity requirement in Rule 9(b) is to notify defendants as to the "precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1370-71 (11th Cir. 1997) (internal citations and quotations omitted). Rule 9(b), however, must be read in conjunction with Rule 8(a), which requires pleading in a short, plain statement of grounds on which relief is entitled. Id.

B. FMA's Complaint did not plead fraud with the requisite particularity under Rule 9(b)

With respect to any registered mark, "[f]raud occurs when an applicant makes knowingly

false, material representations of fact in connection with an application for a registered mark. . . . The party seeking to cancel a mark bears the burden of proving the alleged fraud by clear and convincing evidence." Angel Flight of Ga., Inc. v. Angel Flight Am., Inc. 522 F.3d 1200, 1209 (11th Cir. 2008). "Allegations of trademark fraud must be stated with particularity in accordance with Fed. R. Civ. P. 9(b); a general allegation of fraud without an accompanying recitation of details in insufficient." Oreck Corp. v. Thomson Consumer Elecs., Inc., 796 F. Supp. 1152, 1159 (S.D. Ind. 1992); Accord King Auto., Inc. v. Speedy Muffler King, Inc., 667 F.2d 1008, 1010 (C.C.P.A. 1981).

> Rule 9(b) may be satisfied if the complaint sets forth: (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants 'obtained as a consequence of the fraud.'

Brooks, 116 F.3d at 1371; Cooper v. Blue Cross & Blue Shield of Fla., Inc., 19 F.3d 562, 568 (11th Cir. 1994) ("The plaintiff's complaint must allege the details of the defendants allegedly fraudulent acts, when they occurred, and who engaged in them").

FMA has failed to meet the particularity pleading requirements of Fed. R. Civ. P. 9(b). FMA states in Count II of the Complaint, "Upon information and belief, Defendant had not used its mark in U.S. commerce in connection with all of the goods recited in the goods description of its U.S. registrations for VAULTZ®. Accordingly, Plaintiff requests that the Court cancel Registration Nos. 3,349,665; 3,336,431; 3,329,817; 3,234,089; and 3,005,595, pursuant to Section 37 of the Lanham Act, 15 U.S.C. §1119." (Compl. ¶ 34). FMA further states that the aforementioned registrations "were procured and maintained as a result of false declarations and

allegations of material facts Defendant knew or should have know were false, and therefore, that such registrations be cancelled and removed from the Principal Register pursuant to 15 U.S.C. §1119." (Compl. ¶ C). The final mention of fraud in the Complaint is a vague statement that ICP had withdrawn some of its Statements of Use while procuring its registrations, but this statement fails to identify which Statements of Use were withdrawn and how such a withdrawal would even constitute a fraudulent act against the USPTO. The remainder of the Complaint is devoid of any further information regarding the alleged fraud.

FMA's allegations of fraud are conclusory and are not pled with the requisite particularity under Fed. R. Civ. P. 9(b). There is no mention of precisely what statement (or whether there was more than one statement) was made in the Statements of Use that was fraudulent. The Complaint does not even identify in which Statement of Use the purported fraudulent statement/s can be found. The Complaint does not set forth the date upon which the fraud occurred, the place it occurred, or the person/s responsible for it. Most importantly, the Complaint does not allege the content of the fraudulent statement (e.g. which goods ICP claimed were in use, but really were not). Therefore, Count II of the Complaint does not meet the pleading requirements set forth by Fed. R. Civ. P. 9 (b) and Brooks and therefore must be dismissed for failure to plead fraud with particularity.

FMA points to Medinol Ltd. v. Neuro Vasx, Inc., 67 U.S.P.Q. 2d 1205 (T.T.A.B. 2003) and Top Producer Sys., Inc. v. Software Sciences Ltd., 1997 WL 723049 (D. Or. July 21, 1997) to support its proposition that it has pled fraud with the requisite particularity. But Medinol was a summary judgment case that did not address the pleading requirements of Fed. R. Civ. P. 9(b). Medinol, 67 U.S.P.Q.2d at 1208. In addition, Medinol had identified precisely what item was

listed in the Statement of Use that was not being used in commerce by Neuro Vasx. Id. FMA has failed to do the same.

In Top Producer Sys., Inc., the court held that the defendant had sufficiently pled fraud "by identifying a ***specific*** document, the ***date*** it was filed with the Patent and Trademark Office, ***and*** the ***alleged misrepresentations***, namely that the plaintiff failed to disclose that the term 'producer' had become generic." Top Producer Sys., Inc., 1997 WL 723049, at *3 (emphasis added). FMA has not met these pleading requirements. FMA's Complaint fails to identify which document contains a fraudulent misrepresentation. Five Statements of Use were attached to FMA's Memorandum in Opposition to ICP's Motion to Dismiss, and even that Motion failed to identify which specific attached Statement of Use contained the fraudulent misrepresentation. FMA's Complaint sets forth no date upon which the alleged fraud occurred, and it fails to state with particularity the alleged misrepresentation (e.g. which goods ICP claimed were in use, but really were not).

Therefore, the Court finds that FMA's Complaint has failed to plead fraud with sufficient particularity and hereby grants ICP's Motion to Dismiss Count II of the Complaint under Rule 12(b)(6) and Rule 9(b) of the Federal Rules of Civil Procedure. The Court will, however, grant FMA leave to amend to correct this pleading deficiency. Forbus v. Sears Roebuck & Co., 30 F.3d 1402, 1405 (11th Cir. 1994) ("District courts have broad discretion to grant or deny leave to amend. . . In the absence of undue delay, bad faith, dilatory motive or undue prejudice, leave to amend is routinely granted.").

III. CONCLUSION

Accordingly, for the foregoing reasons, it is **ORDERED AND ADJUDGED** as follows:

1) Defendant IdeaStream Consumer Products LLC's Motion to Dismiss Count II of the Complaint [DE-5] is hereby **GRANTED**;

2) Count II of the Complaint is dismissed without prejudice to be re-filed on or before August 18, 2008.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 18th day of July, 2008.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No.: 08-60496-DIMITROULEAS

FUTURE MEDIA ARCHITECTS, INC.,

Plaintiff,

Jury Trial Requested

v.

IDEASTREAM CONSUMER PRODUCTS LLC,

Defendant.
_____/

AMENDED COMPLAINT

Plaintiff Future Media Architects, Inc. (hereinafter referred to as "FMA" or "Plaintiff"), by its attorneys, Kenyon & Kenyon LLP, as and for its Complaint against defendant IdeaStream Consumer Products LLC (hereinafter referred to as "IdeaStream" or "Defendant"), alleges as follows, upon knowledge with respect to itself and its own acts, and upon information and belief as to all other matters:

Nature of Action and Subject Matter Jurisdiction

1. This action seeks a Declaratory Judgment of Compliance with the Anti-Cybersquatting Protection Act under Section 43(d) of the Lanham Act, 15 U.S.C. § 1114 *et seq.* Plaintiff further seeks a Declaratory Judgment of Non-Infringement of registered and common law trademark rights under 28 U.S.C. §§ 2201-2202, 15 U.S.C. §§ 1114 and 1125(a). This action also seeks cancellation of registered United States trademarks under Section 37 of the Lanham Act, 15 U.S.C. § 1119, and Sections 14 and 15 of the Lanham Act, 15 U.S.C. § 1064 *et seq.*

2. Subject matter jurisdiction over this action is conferred upon this Court: (i) pursuant to 28 U.S.C. §§ 2201 and 2202, because it involves a request for declaratory judgment in a case of actual controversy; and (ii) pursuant to 28 U.S.C. §§ 1331 and 1338, and 15 U.S.C. §§ 1114 and 1125, because, *inter alia*, the suit concerns rights under the Lanham Act. Alternatively, this Court has jurisdiction pursuant to 28 U.S.C. § 1332.

Personal Jurisdiction and Venue

3. This Court has personal jurisdiction over Defendant because Defendant agreed to submit to the jurisdiction of this Court when it initiated an administrative proceeding pursuant to the Internet Corporation for Assigned Names and Numbers' ("ICANN") Uniform Dispute Resolution Policy ("UDRP"), on or about January 22, 2008.

The Parties

4. Plaintiff FMA is an Internet development company with a business address at P.O. Box 71, Road Town, Tortola, British Virgin Islands.

5. On information and belief, Defendant IdeaStream is Delaware limited liability company with a place of business at 4011 Brookpark Road, Parma, Ohio 44134.

Facts Common to All Claims for Relief

6. FMA is a leading Internet development company. It develops its own Internet properties, Internet portals and technology.

7. FMA's own development projects include, for example:

> MP3.tv, a music community portal that was launched by FMA in January 2002. This website enjoys hits from well over 30,000 unique visitors a day from more than 120 countries.

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DJ.net, a portal for DJs who require a web presence and want to network with other professionals in their industry. This site was launched by FMA in February 2003 and is also available as a search engine to locate a DJ.

OXiDE.com, FMA's own search engine.

8. FMA does not do development for third parties.

9. As part of its business, FMA is the owner of approximately 100,000 domain names.

10. FMA does not sell its domain names, and does not purchase domain names with the intention of selling them.

11. In fact, anyone contacting FMA regarding the purchase of a domain name is automatically sent the following email:

Dear Sir/ Madam,

To individuals and entities interested in purchasing a domain name from FMA, we regret to advise you that pursuant to the Company's Policy and Strategic Planning, all domain names owned by Future Media Architects, Inc. are not for sale at this time. We do not anticipate this policy changing in the near future.

12. One of the domain names owned by FMA is <www.vaultz.com> (the "Domain Name").

13. FMA registered the Domain Name on February 10, 2004, predating the registration dates of Defendant's U.S. registrations for VAULTZ.[1]

14. FMA has regularly acquired as many unclaimed random common word domain names. In doing so, FMA sole motivation is to acquire and use available random

[1] Defendant's earliest registration date for its U.S. registrations for VAULTZ is October 11, 2005. The remainder of Defendant's registrations did not issue until 2007.

common word domain names to market its own Internet development properties such as DJ.net.

15. Prior to receiving notice from Defendant, FMA was unaware of Defendant's alleged rights in and to the term "vaultz".

16. On or about August 17, 2007, Defendant through its counsel, G. Todd Whitcomb of Smith, Gambrell & Russell, LLP, requested that Plaintiff immediately transfer the Domain Name to Defendant. In the event that Plaintiff failed to do so, Defendant warned, "We are preparing to file a Uniform Domain Registration Protocol [sic] Complaint to contest your registration of vaultz.com."

17. Plaintiff through its counsel, Michael Kelly of Kenyon & Kenyon LLP, responded to Defendant's August 17, 2007 letter, denying infringement of Defendant's mark and informing Defendant that, *inter alia*, Plaintiff had registered the Domain Name well before the registration dates of its registrations for VAULTZ, including its U.S. registrations.

18. Plaintiff heard nothing further from Defendant until it received notice that Defendant had filed a Complaint for Transfer of domain registration with the National Arbitration Forum ("NAF"), pursuant to ICANN's UDRP, on or about January 8, 2008.[2]

19. On January 15, 2008, Plaintiff reiterated that its registration date of the Domain Name predated the registration dates for Defendant's VAULTZ mark. In addition, due to irregularities in the prosecution of its U.S. registrations for VAULTZ, Plaintiff stated that such registrations may be vulnerable to a cancellation action.

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[2] The January 8, 2008 Complaint was rejected by NAF because Defendant failed to provide required information. Defendant corrected its error and re-filed the Complaint on or about January 22, 2008.

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20. Since Defendant had attempted to use its U.S. registrations for VAULTZ against Plaintiff to obtain Plaintiff's Domain Name, Plaintiff filed a Petition for Cancellation (No. 92048869) before the Trademark Trial and Appeal Board of the PTO. This opposition proceeding is currently pending.

21. Upon information and belief, Defendant had not used its mark in U.S. commerce in connection with all of the goods recited in the goods description of the following U.S. registrations for VAULTZ: Reg. Nos. 3,349,665 (the "'665 Reg."); 3,336,431; 3,234,089; and 3,005,595.

22. On March 24, 2008, informed the parties and the registrar, Moniker Online Services, LLC, having its principal place of business at 20 SW 27th Avenue, Suite 201, Pompano Beach, Florida 33069, the NAF panel ordered the transfer from Defendant to Plaintiff. Pursuant to ICANN policy, the transfer was postponed for ten (10) business days to allow Defendant time in which to bring a federal action to stay the proceeding.

23. Plaintiff's ownership of the Domain Name does not infringe any rights that Defendant may allegedly own.

24. Plaintiff has never had a bad faith intent to profit from the Domain Name or exercised bad faith in any manner.

25. Plaintiff did not register the Domain Name in bad faith.

26. Plaintiff has a right to own and use the Domain Name as it did not register it in bad faith.

27. Defendant's alleged VAULTZ mark is not distinctive now, and was not distinctive when Plaintiff registered the Domain Name.

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28. Defendant's alleged VAULTZ mark is not famous now, and was not famous when Plaintiff registered the Domain Name.

29. Plaintiff's ownership of the Domain Name is not likely to cause confusion with any rights allegedly owned by Defendant.

30. Plaintiff has always believed, and continues to believe that the use of the domain name was a fair use or otherwise lawful, as the term "vaultz" is not distinctive of any one source or entity.

COUNT I

DECLARATION THAT PLAINTIFF'S OWNERSHIP OF THE DOMAIN NAME DOES NOT VIOLATE ANY OF DEFENDANT'S ALLEGED RIGHTS

31. FMA repeats and realleges each and every allegation contained in paragraphs 1 through 30 of this Complaint as though fully set forth herein.

32. By reason of the existence of an actual and justifiable controversy as discussed herein, FMA is entitled to a declaratory judgment that its ownership of the Domain Name does not violate any rights owned by Defendant. Accordingly, Plaintiff seeks a declaration of the Court that its ownership of the Domain Name does not violate any rights owned by Defendant.

COUNT II

REQUEST FOR CANCELLATION OF U.S. TRADEMARK REGISTRATION

33. FMA repeats and realleges each and every allegation contained in paragraphs 1 through 32 of this Complaint as though fully set forth herein.

34. Upon information and belief, Defendant has not used its mark in U.S. commerce in connection with all of the goods recited in the goods description of its U.S.

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'665 Reg. for VAULTZ. Accordingly, Plaintiff requests that the Court cancel the '665 Reg., pursuant to Section 37 of the Lanham Act, 15 U.S.C. § 1119.

35. Upon information and belief, Defendant filed a Statement of Use on or about August 8, 2007 for Serial No. 78/698,422 (the "'422 Application"). Under penalty of perjury, counsel for Defendant, James R. Menker, Esq., submitted a sworn declaration in connection with the August 8, 2007 Statement of Use, that Defendant was not using the VAULTZ designation in connection with the following goods:

> computer stylus, CD/DVD storage racks and MP3 accessories, namely, wireless headsets, speakers, ear phones, earplugs, wireless earpiece, headsets, protective cases, holders, carriers, straps, bands, cords, audio cables, speakers, sound enhancers, extension cables, speaker and headphone splitters, electrical wire connectors, automobile electrical power adaptors for mp3 players, wireless audio transmitters, FM radio transmitters, tuners, chargers, battery chargers, voice recorders, data links, media readers, microphones, docking stations, cassette adapters, batteries, battery packs, auxiliary battery packs, and remote controls

36. On December 4, 2007, the '422 Application registered and received the '665 Reg.

37. The goods currently set forth in the '665 Reg. are as follows:

> computer stylus; camera cases; camcorder cases; CD/DVD storage racks; CD/DVD storage albums; CD and DVD storage cases; CD/DVD protective storage cases; storage cabinets specially adapted for holding and storing CDs and DVDs; filing cabinets specially adapted for holding and storing CDs and DVDs; CD/DVD storage wallets; CD/DVD protective cover sleeves; CD and DVD storage binders; binders for storing electronic and digital media including CDs, DVDs, diskettes, console games, media disks, cassettes, MP3s, video games and computer games; media storage containers, namely, disc storage containers; plastic cases used as security devices for protecting and securing CDs, DVDs and other magnetic and electronic media from theft; 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; computer carrying cases; and wheeled computer carrying cases; and MP3 accessories, namely, wireless headsets, speakers,

ear phones, earplugs, wireless earpiece, headsets, protective cases, holders, carriers, straps, bands, cords, audio cables, speakers, sound enhancers, extension cables, speaker and headphone splitters, electrical wire connectors, automobile electrical power adaptors for mp3 players, wireless audio transmitters, FM radio transmitters, tuners, chargers, battery chargers, voice recorders, data links, media readers, microphones, docking stations, cassette adapters, batteries, battery packs, auxiliary battery packs, and remote controls.

38. Upon information and belief, Defendant had not used its alleged mark in U.S. commerce in connection with all the goods recited in the goods description for the '665 Reg.

39. At all times relevant to this proceeding, Defendant knew or should have known that it had not used the alleged mark in connection with all the goods listed in the '665 Reg.

40. Therefore, Defendant has maintained and continues to maintain the '665 Reg. which Defendant knew or should have known was false and improperly granted.

41. Accordingly, Defendant has maintained the '665 Reg. through means of fraud.

42. Defendant cannot cure its acts of fraud and the resulting '665 Reg. is void and subject to cancellation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff FMA demands judgment against Defendant IdeaStream for:

A. a declaration that the order of the Arbitration Panel ordering Moniker Online Services, LLC to transfer the Domain Name does not violate the Anti-Cyber squatting Consumer Protection Act;

B. a declaration of the Court that Defendant's ownership of the Domain Name does not violate any rights owned by Plaintiff;

C. a declaration of the Court that Defendant's Reg No. 3,349,665 was maintained though means of fraud, and therefore such registration be cancelled and removed from the Principal Register pursuant to 15 U.S.C. § 1119;

D. an injunction prohibiting Defendant from alleging or threatening that Plaintiff's use of the Domain Name or the term "vaultz" does violate any federal, state, or common law trademark rights owned by Defendants, including without limitation, prohibiting Defendant from seeking transfer of the Domain Name via any means;

E. requiring Defendant to account and pay over to Plaintiff all damages sustained by Plaintiff;

F. an award of costs and reasonable attorneys' fees; and

G. such other and further relief as the Court may deem equitable and proper.

Dated: August 18, 2008

LOTT & FRIEDLAND, P.A.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the referenced date, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the Manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 08-60496-CIV-DIMITROULEAS/ROSENBAUM

FUTURE MEDIA ARCHITECTS, INC.,

Plaintiff,

v.

IDEASTREAM CONSUMER PRODUCTS LLC,

Defendant.

DEFENDANT IDEASTREAM CONSUMER PRODUCTS LLC'S ANSWER, DEFENSES AND COUNTERCLAIM

IdeaStream Consumer Products, LLC (hereinafter referred to as "ICP" or "Declaratory Defendant"), through its undersigned attorneys, hereby answers the Amended Complaint filed by Future Media Architects, Inc. (hereinafter referred to as "FMA" or "Declaratory Plaintiff").

Nature of Action and Subject Matter Jurisdiction

1. Admitted.

2. Admitted.

Personal Jurisdiction and Venue

3. Admitted.

The Parties

4. ICP is without sufficient information to admit or deny the allegations of Paragraph 4 of the Amended Complaint and, therefore, denies them.

5. ICP admits that it is a limited liability company organized under the laws of Delaware but denies the remaining allegations of Paragraph 5 of the Amended Complaint. ICP's currently has a place of business at 812 Huron Road, Suite 390, Cleveland, Ohio 44115.

Facts Common to All Claims for Relief

6. ICP is without sufficient information to admit or deny the allegations of Paragraph 6 of the Amended Complaint and, therefore, denies them.

7. ICP is without sufficient information to admit or deny the allegations of Paragraph 7 of the Amended Complaint and, therefore, denies them.

8. ICP is without sufficient information to admit or deny the allegations of Paragraph 8 of the Amended Complaint and, therefore, denies them.

9. ICP is without sufficient information to admit or deny the allegations of Paragraph 9 of the Amended Complaint and, therefore, denies them.

10. ICP is without sufficient information to admit or deny the allegations of Paragraph 10 of the Amended Complaint and, therefore, denies them.

11. ICP is without sufficient information to admit or deny the allegations of Paragraph 11 of the Amended Complaint and, therefore, denies them.

12. ICP admits that FMA is the current registrant of the domain name <vaultz.com>. ICP is, however, without sufficient information to admit or deny the remaining allegations of Paragraph 12 of the Amended Complaint and, therefore, denies them.

13. ICP is without sufficient information to admit or deny the allegations of Paragraph 13 of the Amended Complaint and, therefore, denies them.

14. ICP is without sufficient information to admit or deny the allegations of Paragraph 14 of the Amended Complaint and, therefore, denies them.

15. ICP is without sufficient information to admit or deny the allegations of Paragraph 15 of the Amended Complaint and, therefore, denies them.

16. Admitted.

17. ICP admits that in a letter dated October 23, 2007, FMA, through its counsel, indicated that it would not transfer the Domain Name to ICP because, *inter alia*, FMA registered the Domain Name before the issuance of ICP's U.S. trademark registrations. ICP denies the remaining allegations of Paragraph 17 of the Amended Complaint.

18. ICP is without sufficient information to admit or deny the allegations of Paragraph 18 of the Amended Complaint and, therefore, denies them.

19. ICP admits that counsel for FMA sent a letter to counsel for ICP dated January 15, 2008 repeating the inconsequential assertion that FMA registered the Domain Name prior the issuance of ICP's United States registrations for its VAULTZ® mark and spuriously suggested that some perceived "irregularities suggest [sic] that several of [ICP's] registrations may be susceptible to cancellation..."). ICP denies the remaining allegations of Paragraph 19 of the Amended Complaint.

20. ICP admits that FMA filed a Petition to Cancel with the Trademark Trial and Appeal Board of the United States Patent and Trademark Office seeking the cancellation of five of ICP's federal registrations, Reg. Nos. 3005595, 3234089, 3329817, 3336431 and 3349665, for its VAULTZ® mark. Although the cancellation proceeding is currently pending, ICP has filed motions to dismiss FMA's Petition to Cancel for failure to state a claim upon which relief can be granted and for failure to plead fraud with the required particularity of Rule 9(b) of the Federal Rules of Civil Procedure. ICP is, however, without sufficient information to admit or deny the remaining allegations of Paragraph 20 of the Amended Complaint and, therefore, denies them.

21. Denied.

22. Denied.

23. Denied. FMA's ownership and use of the Domain Name infringes on ICP's trademarks rights in its VAULTZ® mark.

24. Denied.

25. Denied.

26. Denied.

27. Denied. ICP's federally and internationally registered VAULTZ® mark is inherently distinctive.

28. Denied.

29. Denied. Upon information and belief, FMA's ownership and use of the Domain Name is likely to cause confusion with ICP's VAULTZ® mark.

30. Denied. ICP's VAULTZ® mark is inherently distinctive and identifies ICP as the source of home and office storage products and media storage products.

COUNT I

31. ICP incorporates by reference its responses to the allegations of Paragraphs 1-30 of the Amended Complaint, inclusive.

32. Denied.

COUNT II

Count II is the subject of ICP's second Motion to Dismiss being filed concurrently herewith. Therefore, ICP believes that no Answer is required. To the extent that an Answer is required, ICP incorporates by reference its responses to the allegations of Paragraphs 1-32 of the Amended Complaint, inclusive and denies the allegations of Paragraph 33-42.

All allegations not specifically admitted herein are deemed denied.

AFFIRMATIVE DEFENSES

ICP alleges the following affirmative defenses to the Amended Complaint. In asserting these affirmative defenses, ICP does not assume the burden to establish any fact or proposition where that burden is properly imposed on FMA.

1. FMA has failed to state a claim upon which relief may be granted.

2. FMA's claims are barred by the doctrine of unclean hands.

3. ICP presently has insufficient knowledge or information on which to form a belief as to whether it may have additional, as yet unstated, defenses available. ICP reserves the right to assert additional defenses that are revealed by further investigation or by discovery.

COUNTERCLAIM

Counterclaimant ICP brings the following counterclaim against Counter-defendant FMA.

Nature of Action and Subject Matter Jurisdiction

1. This is a counterclaim for cyberpiracy arising out of FMA's bad faith intent to profit from the VAULTZ® mark through FMA's registration and use of the vaults.com domain name that is identical to ICP's VAULTZ® trademark.

2. This Court has subject matter jurisdiction over this counterclaim under 28 U.S.C. §§ 1331 and 1338, and pursuant to Section 43(d) of the Lanham Act, 15 U.S.C. § 1125.

Personal Jurisdiction and Venue

3. This Court has jurisdiction over FMA. FMA agreed to submit to personal jurisdiction in this Court by filing its Complaint.

4. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and (c).

The Parties

5. ICP is a limited liability company organized under the laws of Delaware with a place of business at 812 Huron Road, Suite 390, Cleveland, Ohio 44115.

6. On information and belief, FMA is a shell company using the address of attorney Charles Patrick Kerins at P.O. Box 71, Road Town, Tortola, British Virgin Islands.

7. On information and belief, FMA is the alter ego of Thunayan K. AL-Ghanim a Kuwaiti citizen with an address at P.O. Box 68, AL Souq AL Dakhili, Kuwait 1525. On information and belief, Mr. AL-Ghanim is currently residing in Virginia.

The Facts and Claim for Relief

8. ICP is a consumer products company that designs and sells numerous consumer products including SNAP-N-STORE® and VAULTZ® storage containers, among others.

9. Since February 2003, ICP has been selling products in the U.S. bearing the VAULTZ® mark. ICP has also sold its VAULTZ® branded products in numerous countries throughout the world including Austria, Australia, Belgium, Denmark, Finland, France, Germany, Greece, Hong Kong, Ireland, Italy, Japan, Mexico, The Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland and The United Kingdom.

10. ICP is the owner of the VAULTZ® mark. ICP owns numerous U.S. trademark registrations for its VAULTZ® mark, including Reg. Nos. 3005595, 3234089, 3329817, 3336431 and 3349665. ICP also owns registrations for its VAULTZ® mark in Australia, Canada, the European Community, Hong Kong, Japan, Mexico, New Zealand, Norway, Russia, Switzerland and Turkey and owns pending applications to register its mark in China.

11. ICP's VAULTZ® mark is a coined term and is inherently distinctive as applied to ICP's consumer products.

12. On information and belief, FMA registered the domain name <vaultz.com> (hereinafter the "Domain Name") on February 10, 2004, well after ICP began using its mark in North America and well after ICP filed applications to register its VAULTZ® mark in the U.S., Canada, Mexico and the European Community.

13. The Domain Name consists of a second level domain name which is identical to ICP's VAULTZ® mark. The Domain Name registered by FMA is identical or confusingly similar to ICP's VAULTZ® trademark.

14. FMA has no rights or legitimate interests in respect of the Domain Name. FMA does not own any trademark rights in the Domain Name and is not commonly known by the Domain Name.

15. FMA is not making a legitimate noncommercial or fair use of the Domain Name and is instead using the Domain Name for commercial gain by misleadingly diverting ICP's customers.

16. FMA has not used the Domain Name in connection with a bona fide offering of goods or services. Instead, FMA used the Domain Name to post hyperlinks to ICP's products as well as to the products of ICP's competitors.

17. FMA registered, has used and is using the Domain Name in bad faith.

18. This is an action brought under the Anti-Cyber-squatting Consumer Protection Act ("ACPA"), codified as Section 43(d) of the Lanham Act, 15 USC § 1125(d).

19. ICP is the owner of a mark as defined in 15 U.S.C. § 1125(d)(1)(A).

20. ICP's VAULTZ® mark is distinctive and was distinctive at the time FMA registered the Domain Name.

21. The Domain Name is identical or confusingly similar to ICP's VAULTZ® mark.

22. On information and belief, FMA, with a bad faith intent to profit from ICP's VAULTZ® mark, registered, trafficked in, and/or used the Domain Name.

23. As a direct and proximate result of the foregoing acts by FMA, ICP has suffered damages in an amount to be determined at trial and is entitled to recover its costs and fees in this action as well as an award of statutory damages in the amount of not less than $1,000 and not more than $100,000 pursuant to 15 U.S.C. § 1117(d). ICP is also entitled to the transfer of the Domain Name to its control pursuant to 15 U.S.C. § 1125(d)(1)(c).

PRAYER FOR RELIEF

WHEREFORE, Declaratory Defendant requests the following relief:

A. For dismissal of the Declaratory Plaintiff's action with prejudice;

B. For an order of this Court that Declaratory Plaintiff shall take no relief from its complaint;

C. For an order of this Court compelling the Declaratory Plaintiff to transfer all ownership in the Domain Name to Declaratory Defendant, or in the alternative for cancellation of the Domain Name;

D. For Preliminary and Permanent Injunctive Relief enjoining the Declaratory Plaintiff from further use of the Domain Name;

E. For an accounting setting forth all revenues and profits received by Declaratory Plaintiff in connection with the use of Declaratory Defendant's trademark, including without limitation all sales and advertising revenues, click-through fees and/or profits received by such Declaratory Plaintiff from the website located at Domain Name;

F. For general and special damages against Declaratory Plaintiff or, in the alternative, for statutory damages in an amount not less than $1,000, nor in excess of $100,000;

G. For an award of Declaratory Defendant's costs and attorneys' fees herein incurred; and

H. For such further and other relief including declaratory, equitable relief and damages, as the Court deems fair and just.

DEMAND FOR JURY TRIAL

ICP demands a trial by jury on FMA's Amended Complaint and ICP's Counterclaim for all issues so triable.

Dated: September 4, 2008

Respectfully submitted,

s/ Denise B. Crockett
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September 2008, I electronically filed a copy of the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Denise B. Crockett
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SERVICE LIST

Future Media Architects, Inc. v. IdeaStream Consumer Products LLC
Case No. 08-60496-CIV-DIMITROULEAS/ROSENBAUM
United States District Court, Southern District of Florida

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