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

Proceeding	92048869
Party	Plaintiff Future Media Architects, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Registration Nos. 3,005,595 3,234,089 3,329,817 3,336,431 3,349,665		
FUTURE MEDIA ARCHITECTS, INC.,	:	
	:	Cancellation No. 92/048,869
Petitioner,	:	
	:	
vs.	:	
	:	
IDEASTREAM CONSUMER PRODUCTS, LLC,	:	
	:	
Respondent.	:	

PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Petitioner, Future Media Architects, Inc. (the "FMA"), submits this memorandum of law in opposition to Respondent IdeaStream Consumer Products, LLC's ("IdeaStream") motion to dismiss for failure to state a claim (the "Motion"). As explained below, FMA has more than sufficiently pled grounds for cancellation of Registration Nos. 3,005,595, 3,234,089, 3,329,817, 3,336,431 and 3,349,665 (the "Registrations") and therefore IdeaStream's motion to dismiss should be denied. However, rather than delay this proceeding further, FMA has filed an Amended Petition to Cancel concurrently with this Opposition pursuant to Federal Rule of Civil Procedure 15(a). The Amended Petition to Cancel renders Respondent's Motion moot.

I. FMA HAS SUFFICIENTLY PLED GROUNDS FOR CANCELLATION

A. FMA's Petition for Cancellation Sufficiently States A Claim Against Respondent

For purposes of determining a motion to dismiss, all of FMA's allegations must be accepted as true, and the Petition for Cancellation ("Petition") must be construed in the light

most favorable to FMA. *See* Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 503.02. Dismissal due to an insufficient Petition for Cancellation is appropriate *only* if it appears certain that FMA is entitled to no relief under any set of facts that could be proved in support of its claims. *Id.* In determining the sufficiency of the Petition, it is the Board's duty to examine the Petition in its entirety, construing the allegations contained therein liberally to determine whether it contains any allegations, which, if proved, would entitle FMA to the relief sought.

The elements of a claim should be stated simply, concisely, and directly. Fed. R. Civ. P. 8(e)(1). Evidentiary matters need not be pleaded in the Petition as such matter are matters for proof, not for pleading. *See* TBMP § 309.03(a)(2). Even under the heightened pleading standard of Federal Rule of Civil Procedure 9(b), (though Respondent has not cited any authority to support its position that Rule 9(b) applies to a claim of fraud under the standard set forth in *Medinol*[1]) Petitioner has outlined sufficient allegations for Respondent to understand the claims against it. Indeed, taking FMA's Petition as a whole, it contains sufficient allegations that Respondent made statements that were (1) false, (2) made knowingly, and (3) a material representation.

It seems that Respondent's overly narrow reading of Petitioner's Petition for Cancellation is done for the purpose of being able to state that this proceeding was "meritless" in the pending UDRP proceeding alluded to in Respondent's initial brief. Rather than argue these issues and further delay this proceeding, Petitioner is filing herewith an Amended Petition for Cancellation which it can do as Respondent has not filed an answer in this proceeding. Fed. R. Civ. P. 15(a); *This Little Piggy Wears Cotton v. Piggy Toes*, 2004 TTAB LEXIS 447, *7 (T.T.A.B. July 13,

1 Petitioner notes that the case law relied upon by Respondent significantly predates the *Medinol Ltd. v. Neuro Vasx, Inc.* decision upon which Petitioner bases its claims. 67 U.S.P.Q.2d 1205 (TTAB 2003).

2004). Therefore, Respondent's Motion is moot.

B. FMA Has Standing to Pursue This Matter

In its Motion, IdeaStream asserts that FMA does not have standing to petition for cancellation. This is not true, and reflects a misinterpretation of the standing requirement for Board proceedings as set forth by the Federal Circuit. The "case or controversy" requirement for standing in a federal court do not apply in matters before the Board. *Ritchie v. Simpson*, 170 F.3d 1092, 1094 (Fed. Cir. 1999). To determine standing in a cancellation, the analysis is properly conducted under 15 U.S.C. § 1064, which confers standing on "any person who believes that he is or will be damaged" by a registration. *Id.* at 1095. Therefore, the Lanham Act creates a very broad class of people and entities with standing to pursue a proceeding before the Board.

For example, in *Ritchie*, the Federal Circuit held that the opposer in that case had standing to oppose trademark applications filed by O.J. Simpson for the marks O.J. SIMPSON, O.J., and THE JUICE, based on Ritchie's allegation that registration of the marks "that allegedly are synonymous with wife-beater and wife-murderer" would disparage Ritchie's "alleged belief in a loving and nurturing relationship between husband and wife." *Id.* at 1097. With the holding of *Ritchie* guiding this analysis, it is clear that FMA has both a "real interest" and a "reasonable basis for its belief of damage" to confer standing.

A "real interest" is a "direct and personal stake in the outcome" of the proceeding. *Id.* at 1095. Here, FMA has owned the domain name www.vaultz.com since 2004—which is before Respondent obtained the Registrations. Respondent claims ownership of multiple trademark registrations for the mark VAULTZ. That alone provides Petitioner a sufficient direct and personal stake in the outcome of this proceeding because it has petitioned to cancel the Registrations which Respondent is using to support its claim of exclusive right to use the term

used by Petitioner in its domain name. Petitioner's direct and personal stake is only reinforced by the reality that Respondent is *in fact* trying to assert its alleged rights in its VAULTZ Registrations to hijack Petitioner's domain name. Contrary to Respondent's assertion in its brief, Petitioner has alleged that it would be damaged by the Registrations (in at least two places in the Petition for Cancellation) and specifically mentioned Respondent's assertion of its alleged rights as a grounds for such damage. *See* Introduction and ¶ 15.

Petitioner also has a "reasonable basis for its belief of damage" because Respondent's registrations serve as *prima facie* evidence of its exclusive rights to the mark VAULTZ. As explained above, and conceded by Respondent in its Motion, Respondent is presently asserting its alleged rights and Registrations in a UDRP proceeding to take away Petitioner's domain name. Should this effort be successful, Petitioner will lose its domain name, and therefore it has a reasonable basis for its belief that it will be damaged by Respondent's Registrations, particularly where—as here—it appears that Respondent's Registrations were procured through fraud and Respondent's mark is generic.

II. CONCLUSION

In view of the foregoing, FMA respectfully requests that the Board deny IdeaStream's Motion in its entirety, and allow FMA to continue to move toward resolution of this matter.

Respectfully submitted,

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Dated: March 11, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2008, a copy of the OPPOSITION TO RESPONDENT'S MOTION TO DISMISS was sent via first class mail to the following counsel of record:

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s/Michael Kelly
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