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

Proceeding	92049206
Party	Defendant FACEBOOK, INC.
Correspondence Address	FACEBOOK, INC. 156 UNIVERSITY AVENUE PALO ALTO, CA 94301 UNITED STATES
Submission	Reply in Support of Motion
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Date	06/27/2008
Attachments	Reply ISO Motion to Strike.pdf ( 4 pages )(108357 bytes )

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

THINK COMPUTER CORPORATION

Petitioner,

v.

FACEBOOK, INC.,

Respondent.

Cancellation No. 92049206

Mark: FACEBOOK

Reg. No. 3,122,052

Reg. Date: July 25, 2006

**REPLY IN SUPPORT OF MOTION TO STRIKE AMENDED PETITION**

**I. INTRODUCTION**

Petitioner indisputably filed and served the Amended Petition for Cancellation (“Amended Petition”) without obtaining the Board’s permission or Facebook’s prior written consent, as Federal Rule of Civil Procedure 15(a) requires. Despite Petitioner’s suggestion to the contrary, there is no exception to this rule merely because Facebook moved to dismiss Petitioner’s fraud claim as inadequate.

In the interest of brevity, Facebook will not repeat the tortured chronology of Petitioner’s pleadings, other than to note that, after Facebook moved to strike Petitioner’s Amended Petition, Petitioner responded. It is to that response, and in support of its opening Motion to Strike, that Facebook submits this reply.

**II. THE BOARD SHOULD STRIKE THE AMENDED PETITION TO CANCEL**

The simple fact is that Petitioner was required to obtain either the written consent of Facebook, or leave of the Board before filing its Amended Petition. Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 507.02. In its response to the Motion to Strike,

Petitioner admits that it did not seek leave of the Board to amend, and did not obtain, or even attempt to obtain, Facebook's written consent prior to filing its Amended Petition. Petitioner attempts to cure this procedural failing by arguing that Facebook impliedly consented to its filing the Amended Petition.

Petitioner's argument is without merit. TBMP § 507 and FRCP 15(a) require written consent of the adverse party prior to filing an amended pleading after a responsive pleading has been filed. Not only did Facebook not invite Petitioner's amendment, but the applicable rules do not allow for an amended pleading merely if the opposing party *implies, suggests* or *invites* an amended pleading. For Petitioner to interpret the rules in this manner illustrates yet another disregard of the Board's established rules and procedures.<sup>1</sup>

Petitioner's argument that Facebook was in default at the time of this filing – and therefore has no standing to bring its Motion to Strike – is similarly meritless. Although Petitioner correctly points out that the Board's Institution Order lists an answer date of May 26, 2008 (a holiday), Federal Rule of Civil Procedure 6 permitted Facebook to answer the Petition on the first court day following the holiday. Thus, Facebook's Answer, filed on May 27, was timely.

Finally, Facebook notes that the Amended Petition does not "satisfy the stated concerns" of Facebook, as Petitioner suggests. *See* Response, at 2-3. Rather, the newly-alleged false statements to the USPTO are either: (1) a repetition of unadorned conclusory allegations in the original Petition; (2) statements that have nothing to do with the theory of fraud in the

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<sup>1</sup> Facebook appreciates that Mr. Greenspan is permitted to represent Think *pro se* in these proceedings, however, he must follow proper procedure like any other litigant. If Mr. Greenspan fails to do so, the Board may disqualify him as a representative for Petitioner. *See* 37 C.F.R. §10.130; *and* 37 C.F.R. §10.20 *et. seq.*

procurement of the subject mark; or (3) in the same vein, statements made to individuals or entities *other than* the USPTO (which obviously can have no bearing on the claim of procuring the mark through false and misleading statements). Petitioner's alleged fraud claim remains bereft of the requisite particularity mandated by Fed. R. Civ. Proc. 9, and his last minute efforts to save the claim through his procedurally infirm "amendment" must be rejected.

### III. CONCLUSION

Because Petitioner filed its Amended Petition without leave of the Board, and without the required written consent, Facebook respectfully requests that the Board strike Petitioner's Amended Petition in its entirety.

Dated: June 21, 2008

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Registrant's *REPLY IN SUPPORT OF MOTION TO STRIKE AMENDED PETITION* was mailed, first-class postage prepaid, to Petitioner:

Think Computer Corporation  
Attn: Aaron Greenspan  
884 College Avenue  
Palo Alto, CA 94306-1303

Date: June 27, 2008

  
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Delma Edwards