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

Proceeding	92049206
Party	Plaintiff Think Computer Corporation
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**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

**RESPONSE TO  
RESPONDENT'S MOTION TO  
STRIKE**

Mark: FACEBOOK

Reg. No. 3,122,052

Reg. Date: July 25, 2006

**RESPONSE TO MOTION TO STRIKE**

**I. INTRODUCTION**

Respondent, Facebook, Inc., has filed a Motion to Strike against Petitioner, Think Computer Corporation, attempting to strike Petitioner's Amended Petition to Cancel. Respondent reasons that it was never specifically asked for consent to file an Amended Petition to Cancel, and that therefore the amended filing was "out of turn."

**II. STATEMENT OF FACTS**

On April 15, 2008, Petitioner filed its initial Petition to Cancel regarding Respondent's FACEBOOK mark. The following day, April 16, 2008, the Trademark Trial and Appeal Board ("TTAB") set the deadline for Respondent to reply to the Petition to Cancel with its Answer as "DUE FORTY DAYS after the mailing of this order." The deadline was stated as May 26, 2008 in writing and on-line via the TTAB web site. Respondent did not file its Answer on or before May 26, 2008, yet in its Motion to Strike, Respondent calls the filing of its Answer "timely."

Pursuant to § 310.03(b) of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), which states, "Thus, when a Board notification allows the defendant 40 days from the mailing date of the notification in which to file an answer to the complaint, the answer is due on or before the 40th day, not on the 45th day," Respondent's filing was not timely. As a result of its

failure to file a timely Answer, Respondent is actually in default and lacks the standing to file any further motions. 37 CFR § 2.106(a); *see also* TBMP §§ 508 and 312.01. To date, Respondent has not provided a good reason for its untimely filing.

Simultaneous with the untimely filing of its Answer, Respondent also filed an untimely Motion to Dismiss Count III of Petitioner's Petition to Cancel. In this motion, Respondent contended that Petitioner had failed to state a claim pursuant to rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. Disagreeing with the premise of its argument but giving Respondent the benefit of the doubt nonetheless, Petitioner sought to address Respondent's concerns. On June 2, 2008, Petitioner filed both a reply brief, its Response to Motion to Dismiss Count III of Petition for Cancellation, and an actual amended Petition to Cancel.

Respondent erroneously states that both of these documents were filed on June 3, 2008. In fact, Petitioner filed both documents on June 2, 2008. In so doing, Respondent demonstrates a consistent inability to keep track of dates and deadlines.

### **III. THE BOARD SHOULD NOT STRIKE THE AMENDED PETITION TO CANCEL**

Respondent cites a portion of TBMP § 507.02 to defend its claim that Petitioner's Amended Petition to Cancel was filed "out of turn." Respondent bases its skewed interpretation of the rule on a small fragment of the full text. In fact, a more complete reading of TBMP § 507.02 would continue where Respondent left off: "leave must be freely given when justice so requires. In view thereof, the Board liberally grants leave to amend pleadings at any stage of a proceeding when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party or parties."

Petitioner did not require any leave in order to amend its pleading in order to satisfy the stated concerns of Respondent in its Motion to Dismiss Count III of Petition for Cancellation, thereby speeding up the proceedings and eliminating the possibility of prejudicing the rights of any adverse party through unnecessary delay, so only Respondent's consent was necessary as a prerequisite to amend. The filing of Petitioner's amended petition did not transpire suddenly or without cause; rather, it was proffered directly in response to Respondent's written motion nominally requesting further clarification of the charges in Count III of Petitioner's Petition to Cancel. Therefore, by asking that "Think must allege with particularity the claimed false and misleading representation that Facebook made in obtaining its federal trademark registration and the factual circumstances showing that Facebook made the (unspecified) misrepresentation with knowledge of its falsity," Respondent had already implicitly given its written consent to an amended filing, making a request for leave from the TTAB unnecessary, and another request for consent from Respondent equally unnecessary.

Respondent now vaguely insists that Petitioner's Amended Petition to Cancel does not satisfy any of its stated concerns. This general disparagement by Respondent of any and all of Petitioner's attempts to move forward with proceedings is all the more reason why any direct attempt to secure the additional, explicit consent of Respondent to amend the Petition to Cancel would have been a futile endeavor. In fact, Count III of the Amended Petition to Cancel cites extremely specific names, dates, and locations in connection with alleged acts of fraud, and it cites specific ways in which Petitioner has already been damaged. If successfully proved, these facts will clearly establish that Petitioner has standing to maintain the proceeding, and that valid grounds exist for cancelling Respondent's registration. *See Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Furthermore, when determining if Respondent's motion to dismiss for failure to state a claim upon which relief can be granted, each one of Petitioner's substantive allegations in its Amended Petition to Cancel must be accepted as true, and the Amended Petition to Cancel must be construed in the light most favorable to Petitioner. *See 5A Wright & Miller, Federal Practice and Procedure: Civil 2d § 1357* (1990).

Respondent's corporate executives have unusually high media exposure, and the specific charges contained within Count III directly implicate Respondent's executives in improper behavior. In other words, the stakes for Respondent are high, so it will do anything it can, including contradicting its own motions requesting clarification, to avoid the scrutiny it deserves before the TTAB.

#### IV. CONCLUSION

For all of the aforementioned reasons, Think respectfully requests that the Board deny Respondent's motion.

Respectfully submitted,

THINK COMPUTER CORPORATION

Dated: June 12, 2008

By \_\_\_\_\_

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**CERTIFICATE OF MAILING AND SERVICE**

I certify that on June 12, 2008, the foregoing RESPONSE TO MOTION TO STRIKE is being electronically transmitted to:

Trademark Trial and Appeal Board  
Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

It is further certified that on June 12, 2008, the foregoing RESPONSE TO MOTION TO STRIKE is being served by mailing a copy thereof by first-class mail addressed to:

Cooley Godward Kronish LLP  
Five Palo Alto Square  
4th Floor  
3000 El Camino Real  
Palo Alto, CA 94306-2155

By \_\_\_\_\_

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