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

Baxley

Mailed: July 29, 2009

Cancellation No. 92051104

NSM Resources Corporation

v.

Mountain Hardwear, Inc.

Before Grendel, Rogers, and Bergsman,
Administrative Trademark Judges

By the Board:

Mountain Hardwear, Inc. ("respondent") has registered the mark MOUNTAIN HARD WEAR in standard character form for "all purpose sports bags, athletic bags, carrying bags, backpacks, fannypacks, sports packs, waist packs, and drawstring pouches" in International Class 18.[1]

NSM Resources Corporation ("petitioner"), which is appearing *pro se* herein, filed a petition to cancel respondent's registration. The electronic cover sheet of the petition to cancel ostensibly indicates that petitioner seeks cancellation of respondent's registration on the following grounds: 1) the mark consists of immoral or scandalous matter, is deceptive, and falsely suggests a connection with petitioner, all under Trademark Act Section

2(a), 15 U.S.C. Section 1052(a); 2) priority and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d); and 3) dilution under Trademark Act Section 43(c), 15 U.S.C. Section 1125(c). The salient allegations of the petition to cancel are set forth as follows.

> Petitioner … owns at least the following: the Registered Trademark No. 3310854 for the mark HUCK DOLL namely for toys and accessories and the Registered Trademark No. 3435920 for the mark HUCK namely for clothing and footwear.
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> …
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> 2. [Respondent] has refused to acknowledge the validity of [petitioner's] NSM Trademarks, namely [petitioner's] NSM brand names HUCK and HUCK DOLL and coincidentally [respondent] named one of its Mountain Hard Wear backpacks "huckster."
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> 3. Upon information and belief, [respondent] began selling backpacks using the name "huckster" as early as 2009. [Respondent's] use of "huckster" has damaged [petitioner's] Trademarks by creating confusion as to the source and identity of the goods.
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> 4. [Respondent] defends its selection of the brand name "huckster" to sell Mountain Hard Wear backpacks. By doing so, [respondent] refuses to acknowledge that [respondent] sells brand name products, and thereby [respondent] contradicts the value of its own Mountain Hard Wear backpack Trademark registration.
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> 5. The Registrant has not expressly agreed to cease use of the sale of Mountain Hard Wear Wear "huckster" backpacks and the Registrant has not provided any information regarding the sales volume or distribution of these "huckster" backpacks to [petitioner].

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[1] Registration No. 3120463, issued June 25, 2006, and alleging June 8, 2005 as the date of first use anywhere and the date of first use in commerce.

> 6. [Respondent] has refused to settle claims within a mistaken allocation [sic] at the very least in using "huckster" to sell Mountain Hard Wear backpacks. In this way, [respondent] proves it does not regard its Mountain Hard Wear brand name as a plausible Trademark on its own.

In lieu of an answer, respondent, on June 25, 2009, filed a motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6). The motion has been fully briefed.

Such motions are solely a test of the legal sufficiency of a complaint.[2] See, e.g., *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993). A complaint is legally sufficient if it alleges such facts as, if proved, would establish that the plaintiff is entitled to the relief sought, i.e., (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying or canceling the registration. In deciding such a motion, the Board must accept as true all well-pled and material allegations of the complaint, and must construe the complaint in favor of the complaining party. See *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987). Unfortunately, most of

[2] Accordingly, we have not considered the matters outside of the pleadings that petitioner submitted as exhibits to its brief in opposition to respondent's motion. See TBMP Section 503.04 (2d ed. rev. 2004). Further, the arguments and exhibits that petitioner has submitted regarding alleged settlement proposals are not properly before the Board. See Fed. R. Evid. 408.

petitioner's allegations are immaterial to the ostensible claims regarding the involved registration.

Turning to the issue of petitioner's standing to maintain this proceeding, the starting point for our determination of whether petitioner has properly pleaded allegations that, if proved, would establish its standing is Trademark Act Section 14(a), 15 U.S.C. Section 1064(a). Section 14(a) provides that "[a] petition to cancel a registration of a mark ... may ... be filed as follows by **any person who believes that he is or will be damaged ... by the registration of a mark** on the principal register." (emphasis added) Section 14 establishes a broad class of persons who are proper petitioners; by its terms, the statute only requires that a person have a reasonable belief that he would suffer some kind of damage if the mark were to remain registered. In short, petitioner must have a real interest in the proceeding, i.e., a personal interest in the outcome of the proceeding, *and* a *reasonable* basis for a belief of damage. See, e.g., *Universal Oil Prod. Co. v. Rexall Drug & Chem. Co.*, 463 F.2d 1122, 1123, 174 USPQ 458, 459 (CCPA 1972).

We agree with respondent that petitioner has not adequately pleaded its standing to seek cancellation of respondent's registration. Petitioner's belief of damage, as set forth in the petition to cancel, is based entirely

upon respondent's asserted use of the term HUCKSTER on backpacks, which is immaterial to this proceeding involving a registration for an entirely different mark. Because petitioner has failed to allege that it is or will be damaged by respondent's maintenance of the registration for the involved mark, petitioner has failed to allege a both a personal interest in the outcome of this proceeding and a reasonable belief of damage.

We further agree that petitioner has failed to plead any material ground for cancellation of the involved registration. Although the electronic cover sheet for the petition to cancel indicates that petitioner intends to pursue claims under Trademark Act Sections 2(a), 2(d), and 43(c), 15 U.S.C. Section 1052(a), 1052(d), and 1125(c), petitioner has failed to set forth even a minimal factual basis for any of these claims. See generally TBMP Section 309.03(c) (2d ed. rev. 2004). While the text of the petition to cancel suggests a theoretical claim that respondent's registered mark does not function as a mark for any product on which respondent allegedly uses, in addition to the registered mark, the term HUCKSTER, petitioner has failed to plead clearly such a claim, or a plausible basis in the law for any such claim.[3] Based on the foregoing, we

[3] Even if we assume for sake of argument that respondent uses HUCKSTER as a mark on backpacks in conjunction with, or in close proximity to, its registered MOUNTAIN HARD WEAR mark, any claims

find that petitioner has failed to state a claim upon which relief can be granted.

In view thereof, we hereby grant respondent's motion to dismiss for failure to state a claim upon which relief can be granted. Nonetheless, the Board freely grants leave to amend pleadings found, upon challenge under Fed. R. Civ. P. 12(b)(6), to be insufficient. Accordingly, petitioner is allowed until **twenty days** from the mailing date of this order to file an amended pleading consistent with the discussion above, failing which the petition to cancel will be dismissed with prejudice.

Any amended petition must be based on a belief of damage arising solely from the registration of the involved MOUNTAIN HARD WEAR mark, independent of the HUCKSTER mark. Petitioner is advised that it should not file an amended petition for the purpose of obtaining a more favorable

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in this proceeding must be based on the MOUNTAIN HARD WEAR mark as set forth in the registration, and not upon respondent's actual use of the mark in conjunction with unregistered matter. Cf. *United Foods Inc. v. J.R. Simplot Co.*, 4 USPQ2d 1172 (TTAB 1987).

Moreover, inasmuch as respondent's registered mark is nearly identical to its name, the registered mark would appear to be a house mark. Respondent's purported HUCKSTER mark would appear then to be used as a source identifier for a specific model of backpack. It is common knowledge that parties may use house marks in close proximity with product marks. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (Factor 9 recognizes the existence of house marks, family marks and product marks). Thus, it does not follow under the law that, merely because respondent may use HUCKSTER to identify a specific model of backpack, respondent's house mark MOUNTAIN HARD WEAR does not function as a trademark.

resolution of the parties' purported dispute involving respondent's HUCKSTER mark. Moreover, any asserted claims must be cognizable under the law and based on material facts. See Fed. R. Civ. P. 11(b); Patent and Trademark Office Rule 10.18.