

Goodman

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

Mailed: February 22, 2010

Cancellation No. 92051832

MERZ PHARMACEUTICALS, LLC and  
MERZ INCORPORATED

v.

MONTANI COSMETICS INC

Before, Grendel, Walsh and Mermelstein, Administrative  
Trademark Judges.

By the Board:

This case now comes up on respondent's motion to  
dismiss and alternative motion for more definite statement,  
filed January 19, 2010. Petitioners have filed a response  
in opposition thereto.<sup>1</sup>

Respondent argues that petitioners have failed to state  
a claim under Fed. R. Civ. P. 12(b)(6) because petitioners'  
petition to cancel fails to plead "any facts or arguments  
which if proved would overcome the record evidence" of the  
presumption of validity of respondent's registration.  
Respondent also argues that paragraph 9 of the petition,  
which alleges respondent's bad faith, is "vague and

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<sup>1</sup> With its response, petitioner filed an "amended" petition to  
cancel which included the omitted exhibit A. The allegations in  
the amended pleading are otherwise the same as the originally  
filed pleading.

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ambiguous" as it is not clear that petitioners are alleging fraud, and if they are alleging fraud, such a claim is insufficiently pleaded. In the alternative, respondent seeks a more definite statement of petitioners' claims.

In response, petitioners argue that they have stated a claim upon which relief can be granted and have provided a more definite statement by including with their response an "amended" pleading with the omitted exhibit A. Petitioners submit that they have satisfied the pleading requirements by alleging a likelihood of confusion ground for cancellation, supportive facts to support this ground and assertions of damage and injury in paragraphs 1-8. Petitioners argue that respondent's motion to dismiss "has no proper basis" as petitioners are not required to meet their burden of proof at the pleading phase by "presenting evidence or argument" that petitioners can rebut the presumption that the involved registration is valid. With regard to their allegations of bad faith, petitioners advise that this allegation relates to the likelihood of confusion ground and is not a separate fraud ground.

To survive a motion to dismiss, petitioners need only to allege such facts as would, if proved, show (1) that petitioners have standing to petition for cancellation of the registered mark and (2) that a statutory ground for canceling such registration exists. *See Ritchie v. Simpson,*

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170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Lipton Industries, Inc., v. Ralston Purina Co.*, 670 F.2d 1029, 213 USPQ 185 (CCPA 1982). For purposes of a motion to dismiss, all of petitioners' well pleaded allegations in the petition to cancel must be accepted as true. See TBMP § 503.02 (2d ed. rev. 2004).

With regard to the requirements for pleading, Fed. R. Civ. P. 8(a), as made applicable by Trademark Rule 2.116(a), in relevant part requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, "[t]he elements of a claim should be stated concisely, and directly ... and should include enough detail to give the defendant fair notice of the basis for each claim." TBMP § 309.03(a). While the lack of intimation of any facts underlying a claim will justify dismissal, "even vagueness or lack of detail is an inadequate basis for granting a motion to dismiss." *C & F Packing Co. v. IBP Inc.*, 55 USPQ2d 1865, 1872 (Fed. Cir. 2000) citing *McMath v. City of Gary, Ind.* 976 F.2d 1026, 1031 (7th Cir. 1992).

Petitioners in this case have sufficiently pleaded their standing to pursue the petition to cancel by their allegations of damage coupled with their allegations in paragraphs 2-8 of the petition to cancel of ownership of MEDERMA marks, priority, and likelihood of confusion. See *William & Scott Co. v. Earl's Restaurants Ltd.*, 30 USPQ2d

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1870, 1873 n.2 (TTAB 1994) (petitioner's allegations of priority and likelihood of confusion "constitute a legally sufficient pleading" of petitioner's real interest in the proceeding for purposes of standing).

With regard to the likelihood of confusion claim, we find that petitioners have sufficiently alleged facts for priority of use and likelihood of confusion in paragraphs 1-8 of the petition to cancel that if proved, would entitle petitioners to relief. *Cf. Davco Incorporated v. Chicago Rawhide Mfg. Co.*, 224 USPQ 245 (TTAB 1984) (petitioner was entitled to cancellation having properly proved its standing as well as priority of use and likelihood of confusion). Respondent's argument that petitioner has not alleged sufficient facts to challenge the presumption of validity of the involved registration is without merit, as petitioners have alleged priority and likelihood of confusion as the basis for their claim. *Cf. Tony Lama Company, Inc. v. Anthony Di Stefano*, 206 USPQ 176, 183 (TTAB 1980) (in a cancellation based on likelihood of confusion, the presumption of validity includes a presumption of absence of likelihood of confusion which must be rebutted at trial). Lastly, with regard to the allegation of bad faith in paragraph 9, petitioners have made clear that this allegation relates to the likelihood of confusion claim and is not a separate fraud claim. *See e.g., M2 Software Inc.*

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*v. M2 Communications Inc.*, 78 USPQ2d 1944, 1949 (Fed. Cir. 2006) (bad faith considered as a factor in likelihood of confusion analysis). Accordingly, we find the petition to cancel satisfies the notice pleading requirement of Fed. R. Civ. P. 8(a) and gives respondent fair notice of the claims.

In view thereof, respondent's motion to dismiss is denied.

The Board now turns to respondent's alternative motion for more definite statement.

A motion for a more definite statement is appropriate only in those cases where the pleading states a claim upon which relief can be granted, but is so vague or ambiguous that the movant cannot make a responsive pleading in good faith or without prejudice to itself. See Fed. R. Civ. P. 12(e).

After considering the petition to cancel and the arguments of the parties, we find the allegations in the petition to cancel sufficiently definite to enable respondent to frame its answer thereto. Accordingly, respondent's alternative motion for a more definite statement is denied.

Petitioners' amended petition to cancel is accepted.<sup>2</sup>

Proceedings are resumed.

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<sup>2</sup> Petitioners are reminded that exhibits to pleadings are not evidence on behalf of a party unless identified and introduced in evidence as an exhibit during a party's testimony period.

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Respondent's time to answer, the discovery conference, disclosure, discovery and trial dates are reset as follows:

Time to Answer	3/22/10
Deadline for Discovery Conference	4/21/10
Discovery Opens	4/21/10
Initial Disclosures Due	5/21/10
Expert Disclosures Due	9/18/10
Discovery Closes	10/18/10
Plaintiff's Pretrial Disclosures	12/2/10
Plaintiff's 30-day Trial Period Ends	1/16/11
Defendant's Pretrial Disclosures	1/31/11
Defendant's 30-day Trial Period Ends	3/17/11
Plaintiff's Rebuttal Disclosures	4/1/11
Plaintiff's 15-day Rebuttal Period Ends	5/1/11

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.