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

Proceeding	92053446
Party	Defendant U.S. Vision, Inc.
Correspondence Address	US VISION INC 1 HARMON DRIVE GLENDORA, NJ 08029 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
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Attachments	USVisionMotiontoDismissAshley.pdf ( 5 pages )(62859 bytes )

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

AS IP HOLDINGS, INC.,	*	Cancellation No. 92053446
	*	
Petitioner,	*	
	*	
v.	*	In the matter of:
	*	U.S. Reg. No. 3,871,419
U.S. VISION, INC.,	*	for ASHLEY! BY ASHLEY STEWART
	*	
Registrant.	*	
	*	
*   *   *   *   *   *	*	*   *   *   *   *   *

**REGISTRANT U.S. VISION’S MOTION TO DISMISS OR,  
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

Registrant U.S. Vision, Inc. (“U.S. Vision”) hereby files, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, this motion to dismiss Petitioner AS IP Holdings, Inc’s Petition for Cancellation for failure to state a claim upon which relief can be granted. Alternatively, U.S. Vision moves for summary judgment.

**I. INTRODUCTION**

Petitioner seeks to cancel the registration of ASHLEY! BY ASHLEY STEWART, U.S. Reg. No. 3,871,419, for eyewear, under Section 2(d) on the sole allegation that Petitioner is the owner of all rights in the “ASHLEY STEWART Marks or variations thereof.” Reference to the records of the United States Patent and Trademark Office reveals that U.S. Vision owns an incontestable registration for ASHLEY STEWART, U.S. Reg. No. 2,079,473, for eyewear. Because Petitioner is not the sole owner of the right to use ASHLEY STEWART, the grounds for the Petition are not well-pleaded and the Petition should be dismissed.

## **II. STATEMENT OF ALLEGATIONS**

On October 12, 2009, U.S. Vision filed an application for “ASHLEY! BY ASHLEY STEWART” for “Eyewear; Eyewear accessories, namely, straps, neck cords and head straps which restrain eyewear from movement on a wearer; Eyewear cases; Frames for spectacles and sunglasses; Sunglasses.” This mark was registered on November 2, 2010. Pet. at ¶ 4.

Petitioner alleges ownership of U.S. Trademark Reg. No. 2,046,868 for ASHLEY STEWART, for jewelry, women’s clothing, and retail store services in connection with women’s apparel in Classes 14, 25, and 42, granted March 25, 1997; and U.S. Trademark Reg. No. 3,076,982 for ASHLEY STEWART for handbags, purses, wallets, buttons and ornamental novelty pins in Classes 18 and 26, granted April 4, 2006. Pet. at ¶ 2. Petitioner alleges that U.S. Vision does not have the right to use the ASHLEY STEWART mark or variations thereof. Pet. at ¶ 6.

Omitted from the Petition is the fact, evidenced by the USPTO records, that U.S. Vision owns an incontestable registration for ASHLEY STEWART, U.S. Reg. No. 2,079,473, for “eyewear; namely, eyeglasses, contact lenses, eyeglass cases and eyewear accessories; namely, replacement parts for eyeglasses, nose pieces, cushions for nosepieces, and neck straps, in International Class 009” which was granted July 15, 1997, based on first use in commerce in 1992. The facts plead and incorporated by reference to U.S. Vision’s ownership of ASHLEY STEWART support the conclusion that Petitioner does not have exclusive rights to ASHLEY STEWART. Because U.S. Vision’s ASHLEY STEWART registration is more than five (5) years old, it is not subject to cancellation under Section 2(d). Therefore, Petitioner cannot maintain this action against U.S. Vision.

### **III. LEGAL STANDARD**

To withstand a motion to dismiss for failure to state a claim under Rule 12(b)(6), Petitioner must allege facts that, if proved, establish its entitlement to the relief sought. This requires that (1) the petitioner has standing to maintain the proceeding, and (2) a valid ground exists for cancellation of the registration. *See Montecash LLC v. Anzar Enters., Inc.*, 95 USPQ2d 1060, 2010 WL 1847596, \*1 (TTAB May 7, 2010) (citing *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982)). “For purposes of determining such a motion, all of the plaintiff’s well-pleaded allegations must be accepted as true.” *Id.* (citations omitted). However, allegations are not well-pleaded if they contradict facts in “Office records.” *Compagnie Gervais Danone v. Precision Formulations, LLC*, 89 USPQ2d 1251, 2009 WL 34747, \*5 (TTAB January 5, 2009) [precedential] (“The Board will not take as true any allegations contradicting facts in Office records.”).

Ultimately, the purpose of a Rule 12(b)(6) motion is “to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus spare litigants the burdens of unnecessary pretrial and trial activity.” *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 TTAB 2007); *see also Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 1160, 26 USPQ 1038 (Fed. Cir. 1993). Here, the Petition does not contain a valid ground for cancellation of U.S. Vision’s ASHLEY STEWART registration.

### **IV. ARGUMENT: The Petition Fails to State a Claim for Likelihood of Confusion.**

The Petition is predicated entirely upon the allegation that U.S. Vision does not have the right to use the ASHLEY STEWART mark. However, the Petition ignores U.S. Vision’s ownership of the incontestable right to use ASHLEY STEWART for eyewear. *See Ex. A. In Compagnie Gervais Danone v Precision Formulations LLC*, 2009 WL 34747 (January 5, 2009),

in a precedential opinion, the Board held that information available to it from its own records could be relied upon to determine whether an allegation in an opposition had been well pleaded for the purposes of determining a motion to dismiss. There, the Board took notice of the correct filing basis of an application to establish its priority date and granted a motion to dismiss based on the information in its records.

Petitioner's Section 2(d) claim fails as a matter of law under Section 14(3) (15 U.S.C. § 1064) because U.S. Vision's ASHLEY STEWART registration is more than five years old. *Otto Int'l, Inc. v. Otto Kern GMBH*, 83 USPQ2d 1861, 2007 WL 1577524, \*2 (TTAB May 30, 2007) (granting motion to dismiss because the claims seeking cancellation on the grounds that confusion would result from the use of the mark were time-barred).

It is well settled that Section 2(d) is not a ground for cancellation under Section 14 of the Trademark Act because the registration that has been in existence for more than five years. *Carefirst of Maryland, Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492 (TTAB 2005). The Petition is based on an allegation of likelihood of confusion. Pet. at 5. Accordingly, because a claim under Section 2(d) is time-barred under Section 14(3), Petitioner has failed to sufficiently plead any ground for cancellation and U.S. Vision's motion to dismiss should be granted.

## **V. CONCLUSION**

For the foregoing reasons, U.S. Vision, Inc. respectfully requests that its Motion to Dismiss be granted.

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	*	
*   *   *   *   *   *   *   *   *   *   *   *		

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 14th day of February, 2011, a copy of the foregoing Registrant’s Motion to Dismiss or, in the alternative, Motion for Summary Judgments was mailed, first class and postage prepaid, to: Jennifer S. Sickler, Esquire, Gardere Wynne Sewell LLP, 1000 Louisiana, Suite 3400, Houston, TX 77002-50074.

/sherry flax/  
Sherry Flax