

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

MBA

Mailed: September 16, 2011

Cancellation No. 92054315

Revive Franchising LLC

v.

The FRS Company

Michael B. Adlin, Interlocutory Attorney:

On September 12, 2011, respondent filed a motion to dismiss the original petition for cancellation, alleging that: (1) petitioner failed to sufficiently allege its standing; and (2) petitioner's "fifth cause of action"¹ fails to state a claim upon which relief may be granted. On the same day, petitioner filed: (1) a [proposed] amended petition for cancellation which includes new allegations related to standing, without also filing a motion for leave to amend; and (2) a "request for correction of TTAB records," based on petitioner's assumption that the Board entered respondent's motion and petitioner's [proposed] amended petition "out of sequence."² On September 14, 2011, respondent opposed

¹ While petitioner's pleading identifies five "causes of action," it appears that the five "causes of action" in fact state only three grounds for cancellation: descriptiveness (Causes 1-3); genericness (Cause 4); and fraud (Cause 5).

² Because it is clear from respondent's September 14, 2011 filing and the teleconference that respondent received notice of petitioner's filings, any noncompliance with Trademark Rule 2.119

petitioner's "request for correction." On September 16, 2011, the Board held a teleconference with the parties to discuss the situation, in which Carl Oppedahl appeared on petitioner's behalf and Jonathan A. Hyman appeared on respondent's behalf.

During the teleconference, the parties reached agreement on several issues as follows: (1) petitioner withdraws its "request for correction," and accordingly, petitioner's [proposed] amended petition was filed as a matter of course under Fed. R. Civ. P. 15(a)(1)(B) and is now petitioner's operative pleading herein; (2) respondent, as suggested in its opposition to the "request for correction," now requests consideration of its motion to dismiss only to the extent that motion seeks dismissal of petitioner's fraud claim, identified as the "fifth cause of action;" (3) petitioner's response to the motion to dismiss the fraud claim is due within **TWENTY DAYS** of September 16, 2011; and (4) respondent's reply brief, if any, is due in accordance with Trademark Rule 2.127(a). The parties' agreement is approved and the Board appreciates the parties' cooperation in framing the substantive issues in a procedurally efficient manner.

In any event, proceedings herein are suspended pending disposition of respondent's motion for partial dismissal, filed September 12, 2011. Any paper filed during the pendency

is of no consequence. However, going forward, the parties should serve each other through their counsel of record.

Cancellation No. 92054315

of this motion which is not relevant thereto will be given no consideration. See Trademark Rule 2.127(d).
