

ESTTA Tracking number: **ESTTA557341**

Filing date: **09/03/2013**

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

Proceeding	92057330
Party	Defendant Golden Song Productions, Inc.
Correspondence Address	PHILIP A KANTOR LAW OFFICES OF PHILIP A KANTOR PC 1781 VILLAGE CENTER CIR, STE 120 LAS VEGAS, NV 89134 UNITED STATES prsak@aya.yale.edu
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Philip A. Kantor
Filer's e-mail	prsak@aya.yale.edu
Signature	/Philip A. Kantor/
Date	09/03/2013
Attachments	Reply Memorandum and Declaration of PAK.pdf(168088 bytes)

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

In the matter of Trademark Registration No. 3701971
For the mark WOWGIRLS in Class 25
Date registered October 27, 2009

DAVID McLANE ENTERPRISES, INC.,	:	
Petitioner,	:	Cancellation No. 92057330
v.	:	
GOLDEN SONG PRODUCTIONS, INC.,	:	
Respondent.	:	

**REPLY MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO DISMISS**

A. Background

On July 25, 2013, Respondent Golden Song Productions, Inc. filed its Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) for Failure to State a Claim (“Motion”). Petitioner David McLane Enterprises, Inc. filed its Opposition to the Motion (“Opposition” or “Opp.”) on August 13, 2013, but served the Opposition on Respondent on August 15, 2013. (Declaration of Philip A. Kantor dated September 3, 2013, ¶ 3.) The Opposition concedes that the Petition for Cancellation (“Petition”) was premised on an irrelevant trademark filing by Petitioner, *viz.*, Serial No. 85/353,422. (Opp. at 2.) Yet, Petitioner has not moved to amend the Petition nor provided the Board and Respondent with its proposed amended petition as required by the Federal Rules.

B. The Board has no choice but to dismiss the Petition

Petitioner has conceded that its Petition lacks a proper basis for standing. (*See*, Opp. at 2, fn. 1.) The lion's share of its brief, however, glosses over this fact, arguing a basis for standing and for cancellation of Respondent's registration not stated in the Petition. Respondent submits that this argument cannot overcome the defects of the Petition, and is beside the point. Instead, Petitioner needs to move for leave to amend its Petition in accordance with the Federal Rules. ("Pleadings in a cancellation proceeding may be amended in the same manner and to the same extent as in a civil action in a United States district court." (TMR § 2.115.)) Inexplicably, Petitioner has not done this.

To be sure, Petitioner included a "B" section of its Opposition entitled "In the Alternative, Petitioner Should Be Entitled to Amend its Petition." (Opp. at 7.) This is not sufficient:

Garman did not file a written motion for leave to amend; instead, in her opposition to the motion to dismiss, she merely suggested she should be allowed to amend if the court concluded her pleadings were infirm. This is insufficient. *See Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 370 (10th Cir. 1989) (affirming dismissal of plaintiffs' complaint for failure to state a claim and rejecting plaintiffs' argument the court erred by not addressing their request to amend where plaintiffs included such request only as an alternative form of relief in their opposition to defendants' motion); *see also Calderon v. Kan. Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1187 (10th Cir. 1999) (applying *Glenn* and holding the district court did not abuse its discretion in failing to address plaintiff's request for leave to cure deficiencies in her pleadings "[b]ecause a motion for leave to amend was never properly before it").

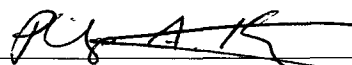
Garman v. Campbell County School District No. 1, 630 F.3d 977, 986 (10th Cir. 2010); *accord*, *In re: 2007 Novastar Financial Inc., Securities Litigation*, 579 F.3d 878, 884-5 (8th Cir. 2009); *Confederate Memorial Association, Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993).

In the circumstances, the Board is left with no alternative but to dismiss the Petition without prejudice for Petitioner to move for leave to amend the Petition and, in connection with the motion, to annex its proposed amended pleading.

C. Conclusion

For all of the foregoing reasons, Respondent respectfully requests that the Petition be dismissed in its entirety.

Respectfully submitted,



Philip A. Kantor

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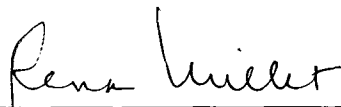
Attorneys for Respondent

Dated: September 3, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 2013, a true copy of Respondent's Reply in Support of Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) for Failure to State a Claim, dated September 3, 2013, along with the Declaration of Philip A. Kantor, dated September 3, 2013, were served by first-class mail, postage prepaid, upon counsel for Petitioner at the address shown below:

GREENBERG TRAURIG, LLP
Attn.: Lauri S. Thompson, Esq. and
Peter Ajemian, Esq.
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, NV 89169



Rena Millet

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

In the matter of Trademark Registration No. 3701971
For the mark WOWGIRLS in Class 25
Date registered October 27, 2009

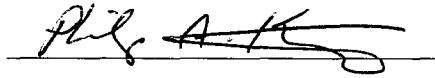
DAVID McLANE ENTERPRISES, INC., :
 Petitioner, : Cancellation No. 92057330
 v. :
GOLDEN SONG PRODUCTIONS, INC., :
 Respondent. :

**DECLARATION OF PHILIP A. KANTOR IN SUPPORT OF
MOTION TO DISMISS UNDER FED.R.CIV.P. 12(b)(6)**

Philip A. Kantor declares under the penalties of perjury:

1. I am counsel to Respondent Golden Song Productions, Inc. in the above-captioned cancellation proceeding.
2. My office address has been Suite 120, 1781 Village Center Circle, Las Vegas, NV 89134 for several years. This is the only address I have used since appearing in this proceeding, and was the address listed for this office in the Motion to Dismiss filed and served on July 25, 2013 ("Motion").
3. Petitioner served its Opposition to the Motion on August 13, 2013 to a different address, namely, 8440 W. Lake Mead Blvd., Suite 202, Las Vegas, NV 89128. The Opposition was returned to Petitioner by the Post Office (*see* Ex. A), and then re-mailed to my office at the correct address on August 15, 2013. Petitioner never corrected the Certificate of Service accompanying the erroneously served Opposition to reflect the actual date of service.

Philip A. Kantor

A handwritten signature in black ink, appearing to read "Philip A. Kantor", is written over a horizontal line.

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Attorneys for Respondent

Dated: September 3, 2013

EXHIBIT A

U.S. POSTAGE PITNEY BOWES



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RECEIVED

AUG 15 2013



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