

ESTTA Tracking number: **ESTTA636601**

Filing date: **11/03/2014**

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

Proceeding	92057631
Party	Defendant Chong Teck Choy
Correspondence Address	MATTHEW H SWYERS THE TRADEMARK COMPANY PLLC 344 MAPLE AVE WEST, STE 151 VIENNA, VA 22180 UNITED STATES mswyers@TheTrademarkCompany.com
Submission	Other Motions/Papers
Filer's Name	Matthew H. Swyers
Filer's e-mail	mswyers@thetrademarkcompany.com
Signature	/Matthew H. Swyers/
Date	11/03/2014
Attachments	MOTION TO CONSOLIDATE AND SUSPEND CANCELLATION PROCEED- ING.pdf(144172 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
The Trademark Trial and Appeal Board**

Reg. No. 4,098,948  
For the mark XIUNIX  
Registered on November 29, 2011

X/Open Company Limited	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No. 92057631
	:	
Chong Teck Choy,	:	
	:	
Registrant.	:	

**MOTION TO CONSOLIDATE CANCELLATION PROCEEDINGS  
AND MOTION TO SUSPEND CANCELLATION PROCEEDING NO. 92057631**

COMES NOW the Registrant, Chong Teck Choy, (hereinafter “Registrant”) by counsel, The Trademark Company, PLLC, and pursuant to § 511 of the TBMP, hereby files the instant Motion to Suspend the Instant Matter and Consolidate the same with the Petitions to Cancel U.S. Reg. Nos. 1,392,203 and 1,390,593 filed today with the Trademark Trial and Appeal Board. In support thereof, Registrant states as follows:

**Statement of the Case**

On or about August 1, 2013 X/Open filed a Petition to Cancel Choy’s U.S. Registration No. 4,098,948 for the mark XIUNIX. This cancellation proceeding was assigned Proceeding No. 92057631. As basis for the Petition to Cancel against Choy’s U.S. Registration No. 4,098,948, X/Open relied upon its alleged continuous use and ownership of U.S. Trademark Registration No. 1,390,593 for the mark UNIX for use in connection with “computers” in International Class 9 and U.S. Registration No. 1,392,203 also for the mark UNIX authorized for use in connection with “computer programs” in International Class 9. On or about September 9, 2013 Choy filed his Answer and Grounds of Defense in response to X/Opens’ Petition to Cancel.

X/Open’s 30-day Trial Period in Cancellation Proceeding No. 92057631 closed on or about September 6, 2014. During its trial period, X/Open took the deposition of Steve Nunn both pursuant to 37

C.F.R. §§ 2.119(b) 2.123 and as well as a witness under Federal Rules of Civil Procedure 30(B)6. Mr. Nunn testified as to the history of the UNIX Mark and the UNIX specification. During the depositions, the witness gave testimony that X/Opens' Registered UNIX Marks were effectively no longer in use as a source identifier for X/ Opens aforementioned goods or as trademarks but, at best, now serve merely as certification marks beginning in the early 2000's. Counsel for Registrant was not able to verify the witnesses' testimony regarding the Petitioner's non-use of the UNIX Mark until on or about October 15, 2014, when Counsel for Registrant received Steve Nunn's deposition transcript from Counsel for Petitioner.

Based on the Petitioner's witnesses' testimony, Registrant has filed Petitions to Cancel against Petitioner's Federal Trademark Registration No. 1,392,203 and Federal Trademark Registration No. 1,390,593 on the grounds of fraud and abandonment without intent to resume use. The cancellation of Petitioner's aforementioned registrations would eliminate the standing upon which Petitioner filed the Petition to Cancel Registrant's Federal Trademark Registration No. 4,098,948 for the mark XIUNIX.

As of the date of filing of this Motion, the parties' pending Cancellation Proceeding No. 92057631 remains active before the Board with Choy's Trial Period opening on October 6, 2014 and closing on November 5, 2014.

Chong Teck Choy, as the Registrant in Cancellation Proceeding No. 92057631, and Petitioner in Cancellation Proceedings filed today concerning U.S. Registration Nos. 1,392,203 and 1,390,593, now wishes to consolidate the same into one global action under the latest filed action. Moreover, Registrant respectfully requests Cancellation Proceeding No. 92057631 be suspended pending the outcome of the consolidated matters.

#### **Argument**

In deciding upon a motion to consolidate, the Board should weigh the savings in time, effort, and expense, which may be gained from consolidation, against any prejudice or inconvenience that may be caused thereby. TBMP § 511 (*citing World Hockey Ass'n v. Tudor Metal Products Corp.*, 185 USPQ 246

(TTAB 1975) (consolidation ordered where issues were substantially the same and consolidation would be advantageous to both parties).

Although consolidation is discretionary by the Board, it may be ordered upon a motion granted by the Board or upon a stipulation of the parties approved by the Board. TBMP § 511.

When matters are consolidated, the oldest of the consolidated cases will be treated as the “parent” case and the Board should reset the trial and discovery dates for the consolidated proceeding by adopting the trial dates set in the most recently instituted of the cases being consolidated. TBMP § 511.

Accordingly, all proceedings will involve the same parties and substantially identical questions of law of as well as a significant overlap of the facts supporting the applications of the law to the matters before the Board.

In evaluating the instant motion, Registrant asserts that in the interests of judicial economy the requested consolidation will serve to significantly decrease both the Board’s time and effort in presiding over these matters as well as the parties’ respective efforts and expense in prosecuting and/or defending the same. *See World Hockey Ass’n*, 185 USPQ 246.

This request for suspension of Cancellation No. 92057631 is not being done to delay the proceedings, nor will undue prejudice result to the Petitioner as a result of the granting of the same. Rather, given the unique nature of the testimony during the Petitioner’s trial phase, namely, the admission that the relied upon trademarks had been abandoned and, moreover, potentially maintained through fraud upon the Office, it is requested that the instant motion be granted.

In the alternative, if the Board denies the same, it is requested that the Registrant be allowed time to conduct the deposition upon written questions of its lone witness in the instant matter. However, given the circumstances of this matter, it is hoped that this request will be moot.

WHEREFORE for good cause shown it is hereby requested that the instant proceedings be consolidated under the oldest matter, and that Cancellation No. 92057631 be suspended pending the outcome of the consolidated matters.

Respectfully submitted this 3<sup>rd</sup> day of November, 2014.

The Trademark Company, PLLC

/Matthew H. Swyers/  
Matthew H. Swyers, Esq.  
344 Maple Avenue West, Suite 151  
Vienna, VA 22180  
Tel. (800) 906-8626  
Facsimile (270) 477-4574  
mswyers@TheTrademarkCompany.com  
Counsel for Registrant

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
The Trademark Trial and Appeal Board**

Reg. No. 4,098,948  
For the mark XIUNIX  
Registered on November 29, 2011

X/Open Company Limited	:	
	:	
Petitioner,	:	
	:	
vs.	:	Cancellation No.92057631
	:	
Chong Teck Choy,	:	
	:	
Respondent.	:	

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I caused a copy of the foregoing this 3rd day of November 2014, to be served, via first class mail, postage prepaid, upon:

MARK SOMMER  
FINNEGAN HENDERSON FARABOW ET AL  
901 NEW YORK AVE NW  
WASHINGTON, DISTRICT OF COLUMBIA 20001-4413

JACQUELINE M LESSER, Esq.  
BAKER & HOSTETLER LLP  
2929 ARCH ST CIRA CENTRE, 12TH FLOOR  
PHILADELPHIA, PA 19104-2891

/Matthew H. Swyers/  
Matthew H. Swyers