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

Proceeding	92060287
Party	Defendant X/OPEN COMPANY LIMITED
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Date	12/12/2014
Attachments	12-12-14 Mot to Susp Pend Disp of Prior Board Proceeding Between the Parties.pdf(193025 bytes)

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

<p>CHONG TECK CHOY,</p> <p style="text-align: center;">Petitioner</p> <p style="text-align: center;">v.</p> <p>X/OPEN COMPANY LIMITED,</p> <p style="text-align: center;">Respondent.</p>	<p>Cancellation No.: 92060287</p> <p>Mark: UNIX Reg. No.: 1390593 Issued: April 22, 1986</p>
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**RESPONDENT'S MOTION TO SUSPEND
PENDING DISPOSITION OF PRIOR BOARD
PROCEEDING BETWEEN THE PARTIES**

Pursuant to 37 CFR § 2.117(a), Respondent X/Open Company Limited (“X/Open”) requests that this proceeding filed by Petitioner Chong Teck Choy (“Choy”) be suspended pending final determination of the far more advanced proceeding pending between the parties (Cancellation No. 92057631). As discussed further below, the Board’s determination in Cancellation No. 92057631—for which the parties’ trial periods have now closed—may ultimately make this proceeding moot. Accordingly, suspending this proceeding and awaiting the Board’s decision in the earlier-filed action would advance the Board’s overall goal of resolving disputes as efficiently as possible.

I. THE PRIOR PROCEEDING (CANCELLATION NO. 92057631)

On August 1, 2013, X/Open filed a petition to cancel a registration for the mark XIUNIX (Registration No. 4098948) owned by the Petitioner Choy in this case. X/Open’s cancellation petition alleges (1) that Choy’s registration (which was issued based on use in

commerce) was void ab initio for nonuse of the mark on the claimed goods; (2) that a likelihood of confusion exists with X/Open's prior UNIX marks; and (3) that Choy committed fraud on the U.S. Patent and Trademark Office when he materially misrepresented to the USPTO that he was using the XIUNIX mark on the claimed goods. Significantly, Choy answered the cancellation petition without raising any counterclaims against the validity of X/Open's UNIX registrations, and at no time during the sixteen months that proceeding has been pending did Choy move to amend his cancellation petition to assert any such counterclaims. Discovery in Cancellation No. 92057631 closed on April 9, 2014, X/Open's trial period closed on September 6, 2014, and Choy's trial period closed more than a month ago, on November 5, 2014.¹

II. ARGUMENT

Under 37 CFR § 2.117(a), the Board may suspend a proceeding pending the final determination of another Board proceeding in which the parties are involved "which may have a bearing on the case." 37 CFR § 2.117(a); *see also* TBMP § 510 ("Ordinarily, the Board will suspend proceedings in the case before it if the final determination of the other proceeding may have a bearing on the issues before the Board."). Here, the resolution of the prior cancellation action may not only "have a bearing" on the current proceeding, but may be outcome-determinative.

¹ X/Open's rebuttal period is set to close on December 20, 2014.

In particular, Choy's only allegation of standing in the current proceeding is that X/Open's continued registration of UNIX "may be used to adversely affect the continued Registration of [Choy's] Mark and [Choy's] use of the same." *See* Petition to Cancel ¶22. One of X/Open's claims in the earlier cancellation action, however, is that Choy's registration for XIUNIX is void ab initio for non-use. If X/Open prevails on that claim, Choy will have no registration or use to rely on for purposes of standing in the current action. Likewise, if X/Open prevails on its fraud claim in the earlier action, the TTAB would have necessarily found that Choy was not using the mark—which would again undermine any allegation of standing in this case. Choy has offered no evidence in its defense of these claims.

For all these reasons, the determination of the earlier action will clearly have a bearing on the current proceeding. Depending on how the earlier action is resolved by the Board, particularly if it leaves Choy with no registration and/or a finding is made that Choy never used the XIUNIX mark, Choy will be nothing more than an "intermeddler" in the current action and the current action would ultimately have to be dismissed. *See Selection v. Bonton*, 2008 TTAB LEXIS 513, *3-4 (TTAB May 7, 2008) (denying petition to cancel because "the record is devoid of any probative evidence to establish that petitioner is more than a mere intermeddler"); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028-29 (CCPA 1982) ("The purpose in requiring standing is to prevent litigation where there is no real controversy between the parties, where a plaintiff, petitioner or opposer, is no more than an intermeddler.").

III. CONCLUSION

For the foregoing reasons, X/Open respectfully requests that the Board exercise its discretion under 37 CFR § 2.117(a) and suspend this proceeding pending the final determination of Cancellation No. 92057631.

Respectfully Submitted,

Dated: December 12, 2014

/Mark Sommers/
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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing Respondent's Motion to Suspend Pending Disposition of Prior Board Proceeding Between the Parties was served by U.S. mail, postage prepaid, on this 12th day of December 2014, upon Petitioner and counsel for Petitioner at the following addresses of record:

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