

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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BUO

Mailed: March 9, 2018

Cancellation No. 92060383

*Sony Pictures Television Inc.*

*v.*

*Howard H Berger aka Marina Capital  
Partners*

**By the Trademark Trial and Appeal Board:**

On November 21, 2017, Howard H. Berger a/k/a Marina Capital Partners (“Respondent”), filed a voluntary surrender of his Registration No. 4629660 (“the ’660 registration”) without prejudice. The surrender document did not implicate or evidence Petitioner’s consent. 79 TTABVUE. Consequently, the Board issued an order on December 27, 2017, entering judgment against Respondent and granting the petition to cancel in light of Respondent’s voluntary surrender of the ’660 registration without Petitioner’s written consent. 80 TTABVUE (citing Trademark Rule 2.134(a) (“After the commencement of a cancellation proceeding, if the respondent applies for cancellation of the involved registration under section 7(e) of the Act of 1946 without the *written* consent of every adverse party to the proceeding, judgment shall be entered against the respondent.”) (emphasis added)).

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This case now comes up for consideration of Respondent's submission, which the Board construes as a request for reconsideration and motion under Fed. R. Civ. P. 60(b)(1) for relief from the final judgment and to reopen the proceeding.

By way of his submission, Respondent argues that he offered "to 'surrender [his] mark' due to an unfortunate circumstances [sic] experienced by Petitioner's executive involved in [a previously noticed] deposition." 81 TTABVUE 3. Respondent goes on to explain that "it was Petitioner's counsel that provided the voluntary surrender document to Respondent to file with Petitioner's full consent and knowledge." *Id.* Respondent asks "that the Board make the appropriate modifications in their motion and notice," presumably referencing the December 27, 2017 order. *Id.* at 4.

Petitioner contests, "[w]hile Petitioner certainly appreciates the goodwill behind Respondent's gesture of respect for Petitioner's witness, Respondent clearly indicated that he had no further interest in maintaining the disputed registration and therefore Petitioner understood that the pending cancellation would be terminated with prejudice." 82 TTABVUE 2. Petitioner further states that "[w]ithout consulting Petitioner or seeking Petitioner's consent, Respondent changed the surrender to be without prejudice and filed the revised document with the Board." *Id.* at 3. Finally, Petitioner asserts that in any event, "it never asked Respondent to cancel the registration and was fully prepared to produce its witness;" moreover, "Respondent could, of course, still have defended the case and maintained his right to the registration," without the deposition of Petitioner's witness. *Id.*

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Generally, the premise underlying a request for reconsideration, modification or clarification under Rule 2.127(b) is that, based on the facts before it and the prevailing authorities, the Board erred in reaching the order or decision it issued. Such a motion may not properly be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion. Rather, the motion should be limited to a demonstration that based on the facts before it and the applicable law, the Board's ruling is in error and requires appropriate change. *See Vignette Corp. v. Marino*, 77 USPQ2d 1408, 1411 (TTAB 2005). In this case, the change sought by Respondent is “rescind[ing] the ‘Surrender of the Registration’ ... and resum[ption] [of] the proceedings based upon the errors in the proceedings.” 83 TTABVUE 4.

Notwithstanding Respondent's arguments, no error has been committed in the entry of judgment against Respondent. Again, Trademark Rule 2.134(a) provides:

After the commencement of a cancellation proceeding, if the respondent applies for cancellation of the involved registration under section 7(e) of the Act of 1946 without the *written* consent of every adverse party to the proceeding, judgment shall be entered against the respondent. The *written* consent of an adverse party may be *signed* by the adverse party or by the adverse party's attorney or other authorized representative.

(Emphasis added).

Additionally, once a respondent has filed a voluntary surrender, it may not later withdraw that surrender. *See* Trademark Rule 2.172 (“A surrender for cancellation may not subsequently be withdrawn.”); TBMP § 602.02 (June 2017). Any other result would undermine the predictability of the Board's proceedings.

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Inasmuch as Respondent's voluntary surrender filed with the Board did not include any indication of Petitioner's consent, much less the *signed written* consent required by rule, judgment was appropriately entered against Respondent.<sup>1</sup> Moreover, having filed his surrender with the Board, Respondent may not now play a game of "take backs."

Inasmuch as Respondent's request for reconsideration is based upon the erroneous premise that any consent feigned from prior discussions with Petitioner somehow satisfies the requirement for *written* consent, the request must be **DENIED**.

The proceeding is **TERMINATED**. Judgment is entered against Respondent. The petition to cancel is **GRANTED**. Registration No. 4629660 will be cancelled in due course by the Commissioner for Trademarks.

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<sup>1</sup> Indeed, the evidence of the two versions of the document – the version sent from Petitioner to Respondent vis-à-vis the version Respondent filed with the Board, support the conclusion that Petitioner did not consent to a surrender without prejudice. 82 TTABVUE 5 and 79 TTABVUE.