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

Proceeding	92062039
Party	Defendant Midbrook Industrial Washers, Inc.
Correspondence Address	MIDBROOK INDUSTRIAL WASHERS INC 2080 BROOKLYN ROAD JACKSON, MI 49204 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
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Date	09/28/2015
Attachments	2015.09.28 motion to dismiss petition.pdf(141725 bytes)

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

Vadco Innovations, LLC,
Petitioner,

v.

Midbrook Industrial Washers, Inc.,
a/k/a Crown Industrial Services, Inc.
Respondent.

Cancellation No. 92062039

Registration No. 4402848

Mark: HURRICLEAN

MOTION AND BRIEF TO DISMISS

Registrant and Respondent Midbrook Industrial Washers, Inc. (also known as Crown Industrial Services, Inc.) moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the cancellation petition for failure to state a claim. Petitioner Vadco Innovations, LLC has failed to allege *prima facie* facts sufficient to support its claim of abandonment.

Petitioner generally alleges that its applications for registration of similar marks were refused by the PTO on grounds of likelihood of confusion. However, Petitioner does not appeal the Examiner's refusal to register Petioner's marks. Rather, Petitioner asks this Board to cancel Registration No. 4402848 on grounds that Registrant has abandoned its Hurriclean mark. The operative allegation appears in paragraph 7 of Vadco's Petition:

> While Petitioner does not believe there is a likelihood of confusion in the simultaneous use and registration of its marks and the Registered Mark, and reserves its right to so argue if necessary, on information and belief, Registrant has abandoned use of Registrant's Mark in connection with "cleaning solutions for use incleaning metal articles.

Petition ¶ 7. This allegation is legally deficient under the Trademark Act and Board precedent:

> In order to set forth a cause of action to cancel the registration of a mark which assertedly has been abandoned, plaintiff must allege ultimate facts pertaining to the alleged abandonment. The facts alleged must set forth a *prima facie* case of abandonment by a pleading of at least three consecutive years of non-use or must

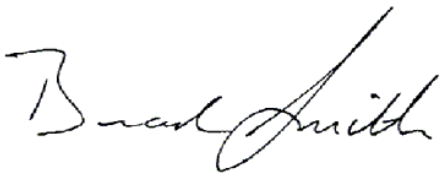
> set forth facts that show a period of non-use less than three years coupled with an intent not to resume use. By so alleging, a plaintiff provides fair notice to the defendant of plaintiff's theory of abandonment.

Otto International Inc. v. Otto Kern GmbH, 83 USPQ2d 1861, 1863 (TTAB 2007) (citations omitted); *see also Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390 (Fed. Cir. 1990); *Clubman's Club Corporation v. Martin*, 188 USPQ 455, 456 (TTAB 1975).

Otto is a precedential opinion on all fours with the instant case. Like the petitioner in that case, Vadco only superficially alleges abandonment on information and belief, fails to allege that the respondent has not used its mark for more than three years, and fails to allege that Respondent has discontinued use of its mark with an intent not to resume use. In *Otto* this Board granted Respondent's Motion to Dismiss for failure to state a claim because of these pleading defects. It should do so here as well.

Petitioner has provided no facts to support its conclusory allegation of abandonment in paragraph no. 7. The Board should dismiss the Petition because the allegation of abandonment is legally insufficient.

Respectfully submitted,



Dated: September 28, 2015

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Certificate of Service

The undersigned hereby certifies that the foregoing Motion to Dismiss and accompanying memorandum were served this 28th day of September, 2015, by depositing copies of the same in the U.S. Mail, postage prepaid, addressed to Petitioner's Counsel as follows:

Kathryn K. Smith
Sherrill Law Ofices PLLC
4756 Banning Avenue, Suite 212
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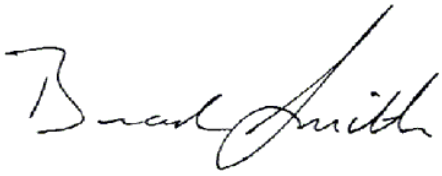

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