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

Proceeding	92062420
Party	Defendant PGI Polymer, Inc.
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Submission	Motion to Dismiss - Rule 12(b)
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Date	11/23/2015
Attachments	2015-11-23 Final PGI Motion to Dismiss.pdf(196961 bytes) 2015-11-23 Final PGI Motion to Dismiss Brief.pdf(310831 bytes)

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

In Re Registration No. 1,175,550
Mark: Design only
Issued: October 27, 1981

3M Company,	)	
Petitioner,	)	
v.	)	Cancellation No. 92062420
PGI Polymer, Inc.,	)	
Respondent.	)	

RESPONDENT'S
MOTION TO DISMISS

Pursuant to Rule 12(b)(6), Respondent, PGI Polymer, Inc., hereby moves to dismiss the petition for cancellation filed by Petitioner, 3M Company, for failure to state a claim. Petitioner's barebones pleading attempts to set forth a single claim for cancellation, namely cancellation on grounds of abandonment resulting in genericness. However, Petitioner asserts nothing more than "abandonment" and "genericness" as talismans. What Petitioner fails to do in its scanty nine-paragraph petition is to allege *facts* that would support its claim.

As set forth more fully in the accompanying brief, Petitioner has failed to state a plausible claim for cancellation on grounds of abandonment resulting in genericness. The Board should not hesitate to dismiss the petition.

Respectfully submitted,

Dated: November 23, 2015

/s/ Charles M. Landrum

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Attorneys for Respondent, PGI Polymer, Inc.

Certificate of Filing

The undersigned certifies that a copy of the foregoing **RESPONDENT'S MOTION TO DISMISS** has been filed through the Electronic System for Trademark and Trial Appeals, this the 23rd day of November, 2015.

/s/ Neal B. Hayes
An Attorney for Respondent

Certificate of Service

The undersigned counsel of record certifies that a copy of the foregoing **RESPONDENT'S MOTION TO DISMISS** has been served upon Petitioner via U.S. Mail, this the 23rd day of November, 2015, to the following counsel of record:

William G. Barber
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Austin, Texas 78701
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/s/ Neal B. Hayes
An Attorney for Respondent

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3M Company,	)	
Petitioner,	)	
v.	)	Cancellation No. 92062420
PGI Polymer, Inc.,	)	
Respondent.	)	

BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

Respondent, PGI Polymer, Inc., hereby submits its brief in support of Respondent's Motion to Dismiss the petition for cancellation filed by Petitioner, 3M Company, for failure to state a claim. Petitioner's barebones pleading attempts to set forth a single claim for cancellation, namely cancellation on grounds of abandonment resulting in genericness. However, Petitioner asserts nothing more than "abandonment" and "genericness" as talismans. What Petitioner fails to do in its scanty nine-paragraph petition is to allege *facts* that would support its claim.

I. Legal Standard

"To withstand a motion to dismiss for failure to state a claim upon which relief can be granted, a plaintiff need only allege sufficient factual matter that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the mark."

Nike, Inc. v. Palm Beach Crossfit Inc., 116 U.S.P.Q.2d 1025, 2015 WL 5721653 *3 (TTAB Sept. 11, 2015) (*citing Doyle v. Al Johnson's Swed. Rest. & Butik Inc.*, 101 U.S.P.Q.2d 1780, 1782 (TTAB 2012); *Young v. AGB Corp.*, 152 F.3d 1377, 47 U.S.P.Q.2d 1752, 1754 (Fed. Cir. 1998)); see also TBMP § 503.02 (2015). "Specifically, a complaint 'must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Nike*, 2015 WL 5721653 *3 (quoting *Doyle*, 101 U.S.P.Q.2d at 1782; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "In particular, the claimant must allege wellpleaded factual matter and more than '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.' " *Nike*, 2015 WL 5721653 *3 (*quoting Iqbal*, 556 U.S. at 678); *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

A. Abandonment

"A claim for cancellation of a registration may be filed at any time if the registered mark has been abandoned." *French Transit, Ltd. v. The Particular Man*, Canc. No. 9205525, 2015 WL 2170163, at *3–4 (TTAB Apr. 15, 2015) (citing 15 U.S.C. § 1064(3)). "A mark is deemed to be 'abandoned,' … [w]hen any course of conduct of the owner, including acts of omission as well as commission, causes the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark. Purchaser motivation shall not be a test for determining abandonment under this paragraph." 15 U.S.C. § 1127.

"In order to set forth a cause of action to cancel the registration of a mark which assertedly has been abandoned, the plaintiff must allege the ultimate facts pertaining to the alleged abandonment." *Zoba Int'l Corp. v. DVD Format/Logo Licensing Corp.*, Canc. No. 9205182, 2011 WL 1060727, at *4 (TTAB Mar. 10, 2011) (*citing Clubman's Club Corp. v. Martin*, 188 U.S.P.Q. 455, 456 (TTAB 1975)). "In asserting a claim of abandonment by a

licensor, the pleading must set forth facts as to the registrant's conduct, that is, acts of commission or omission which have caused the mark to become the generic name for the goods or services on or in connection with which it is used or otherwise to lose its significance as a mark." *Zoba Int'l*, 2011 WL 1060727, at *4 (citing 15 U.S.C. § 1127); *Woodstock's Enterprises, Inc. (CA) v. Woodstock's Enterprises, Inc. (OR)*, 43 U.S.P.Q.2d 1440, 1446 (TTAB 1997). "Further, if the plaintiff intends to plead that the mark has been abandoned because it has been so commonly used by others as to have lost its significance as an indication of origin, the plaintiff must also allege that the defending party has abandoned the involved mark as a result of such third-party use, or that such third-party use has been made with registrant's knowledge and acquiescence." *Zoba Int'l*, 2011 WL 1060727, at *4 (*citing Garri Publication Associates, Inc. v. Dabora Inc.*, 10 U.S.P.Q.2d 1694, 1698 (TTAB 1988)). "In addition, to properly claim an uncontrolled license, the plaintiff must allege that the licensor retains insufficient quality control or supervision over the use of the mark by the licensees." *Zoba Int'l*, 2011 WL 1060727, at *4 (*citing Woodstock*, 43 U.S.P.Q.2d at 1446).

B. Genericness

"A mark is treated as generic if it refers to the class or category of goods and/or services on or in connection with which it is used." *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 U.S.P.Q.2d 1750, 2013 WL 5407315 *12 (TTAB July 2, 2013) (*citing In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 U.S.P.Q.2d 1807 (Fed. Cir. 2001); *Int'l Assn. of Fire Chiefs v. H. Marvin Ginn Corp.*, 225 U.S.P.Q. 940, 942 n.6 (TTAB 1985), *rev'd on other grounds*, 782 F.2d 987, 228 U.S.P.Q. 528 (Fed. Cir. 1986). "The test for determining whether a mark is generic is its 'primary significance … to the relevant public.' " *Alcatraz Media*, 2013 WL 5407315 at *12 (quoting 15 U.S.C. § 1064(3); *citing In re American Fertility Society*, 188

F.3d 1341, 51 U.S.P.Q.2d 1832 (Fed. Cir. 1999); *Magic Wand Inc.*, 19 U.S.P.Q.2d at 1552 (Fed. Cir. 1991); *Int'l Assn. of Fire Chiefs*, 225 U.S.P.Q. 940.

II. Argument

Petitioner alleges no facts that would support a finding that Respondent's Wavy-Lines Mark "refers to the class or category of goods and/or services on or in connection with which it is used." *Alcatraz Media,* 2013 WL 5407315 *12. And Petitioner alleges no facts regarding the "primary significance … to the relevant public" of Respondent's Wavy-Lines Mark. *Id.* Rather, Petitioner merely alleges that "[n]umerous third parties use the Wavy-Lines Design" and then jump to the conclusion that, "[a]s a result, the Wavy-Lines Design has become generic." [Petition, ¶3]. In fact, Petitioner could not be bothered even with naming a single one of the "numerous" third parties that allegedly use Respondent's Wavy-Lines Mark.

As to the allegations regarding The Clorox Company, Petitioner alleges merely that The Clorox Company resells Respondent's product bearing the Wavy-Lines Mark—a mark that "consists of a design made up of wavy lines continuously extending across the entire surface of the goods" (See U.S. Reg. 1,175,550)—in packaging also having its own branding. This mere fact does not make a plausible claim of abandonment. And yet, this mere fact is all that Petitioner offers.

III. Conclusion

Petitioner has failed to state a plausible claim for cancellation on grounds of abandonment resulting in genericness. This is not pleading; this is throwing a genericness claim against the wall to see if it will stick. The Board should not hesitate to dismiss the petition.

Respectfully submitted,

Dated: November 23, 2015

/s/ Charles M. Landrum

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/s/ Neal B. Hayes
An Attorney for Respondent

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/s/ Neal B. Hayes
An Attorney for Respondent