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

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|---------------------------|---|
| Proceeding | 92062860 |
| Party | Defendant Dr. Tom Miles |
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| Submission | Motion to Dismiss - Rule 12(b) |
| Filer's Name | Tom Miles |
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| Signature | /Thos I Miles/ |
| Date | 09/02/2016 |
| Attachments | THIRD motion to dismiss petition to cancel 92062860.pdf(253513 bytes) |

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

International IP Holdings, LLC

Petitioner,

v.

Tom Miles

Registrant,

For the wordmark: REAL ENERGY (IC 029)

In the matter of Trademark Registration No. 4,534664

Publication Date: October 15th, 2013

Cancellation Proceeding: 92062860

**REGISTRANT’S MOTION TO DISMISS SECOND
AMENDED PETITION TO CANCEL**

In accordance with *Fed. R. Civ. P. 12(b)(6)*, Registrant, acting pro se, moves to dismiss International IP Holding’s Second Amended Petition to Cancel filed on August 5th, 2016. Registrant, Tom Miles, moves, pursuant to *Fed. R. Civ. P. 12(b)(6)*, for entry of an Order granting its Motion to Dismiss (“Motion”), with prejudice and without leave to amend, for failure to state a claim upon which relief can be granted.

INTRODUCTION

IIPH’s Amended Petition to Cancel, once again, for the third time, fails to allege any factual matter, and contains no specific relevant facts to substantiate a claim of legal standing in this case. Accordingly, The Board should dismiss, with prejudice, the Second Amended Petition

to Cancel on the ground that it fails “to state a claim upon which relief can be granted,” FRCP 12(b)(6).

I. STATEMENT OF FACTS

Petitioner claimed two grounds for its original Petition to Cancel, December 15th, 2015 (as stated on the ESTTA cover page), 1.) The term and registered mark, REAL ENERGY, is Merely Descriptive, 2e(1). 2.) The term and registered mark, REAL ENERGY, is Deceptively Misdescriptive, 2e(1). Although Registrant vehemently denies the validity of either claim, for the purpose of this Motion, respondent concedes to the Board’s most recent ruling made on this case, see summary, (12 TTABVUE 7), still in the pleading stage. Specifically, that the claim of “merely descriptive” is adequately pleaded as of the Second Amended complaint, and the claim of “Deceptively Misdescriptive” is still improperly pleaded, to date, in both the original, the First, and the Second Amended Complaints.

Defendant’s First Motion to Dismiss resulted in a re-pleading (First Amended Complaint) by Petitioner on February, 10th, 2016, (6 TTABVUE), without waiting for a Board ruling on the Motion. Then on March 21st, 2016, Defendant filed a Second Motion to Dismiss (8 TTABVUE), which was granted by the Board on July 6th, 2016, on two grounds - lack of standing in this case, and failure to adequately plead the claim of Deceptively Misdescriptive. (12 TTABVUE). Then on August 5th, 2016, Petitioner filed its Second Amended Complaint in this proceeding, (13 TTABVUE).

ARGUMENT

A. Standard For Dismissal

A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of the allegations set forth in a pleading. To survive a motion to dismiss under Fed. R. Civ. P 12(b)(6), a plaintiff need only allege sufficient factual content that, if proved, would establish that 1) the plaintiff has standing to maintain the proceeding, and 2) a valid ground exists for opposing or cancelling the mark. *Doyle v. Al Johnson’s Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012), citing *Young v. AGB Corp.*, 152 F.3d 1377, 47 1 6 TTABVUE 2. UNITED STATES PATENT AND TRADEMARK OFFICE Trademark Trial and Appeal Board P.O. Box 1451 Alexandria, VA 22313-1451

General Contact Number: 571-272-8500 Cancellation No. 92062860 2 USPQ2d 1752, 1754 (Fed. Cir. 1998). See also TBMP § 503.02 (2016). Specifically, a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In particular, the claimant must allege well-pleaded factual matter and more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” to state a claim plausible on its face. *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

B. Petitioner Lacks Standing In This Petition

The Board recently dismissed the First Amended Complaint on July 6th 2016 (12 TTABVUE 3-4), on grounds of lack of standing, specifically: “*Petitioner does not allege its interest in using REAL ENERGY descriptively in its business with sufficient factual detail so as to sufficiently allege that it has a real interest in whether the subject registration is cancelled. Petitioner alleges that it is and has been engaged in offering goods that are “related to” those identified in the subject registration. Based on the subject registration, it is apparent that said goods are “dried fruit mixes; dried fruits; dried fruits in powder form; dried vegetables; dried vegetables in powder form; nut-based snack foods;” however for standing purposes Petitioner does not set forth the goods (or services) that it manufactures or offers for sale with sufficient specificity to provide Respondent with fair and adequate notice of the industry in which Petitioner operates, the nature of Petitioner’s business, whether and the manner and extent to which it is a competitor of Respondent, and the specific reason (if any) for its need to use the terms “real energy” in its business on its unspecified goods (or in connection with its unspecified services).*” (12 TTABVUE 3-4)

Petitioner's Second Amended Complaint still lacks sufficient factual matter and therefore, The Motion to Dismiss should be granted. The Second Amended Complaint has not corrected any of the flawed claims for standing found in the Original Complaint or First Amended Complaint. The goods are still unspecified and unrelated to Registrant's and the status of Petitioner's intentions are still vague.

The purpose of the standing requirement is to avoid litigation where there is no real controversy between the parties, i.e., to weed out intermeddlers. Without presenting even a hint of facts, evidence, or proof of such allegations of use or plans to use the Mark (Real Energy), it is

fair to view IHP as an intermeddler here, see (*Lipton Industries, Inc. v. Ralston Purina Co.*, 213 USPQ 185, 189 (CCPA 1982)). The original Petition to Cancel, filed December 15th, 2015, and subsequent Amendments is both misleading and improper. Petitioner did NOT plead as a petitioner engaged in the manufacture and sale of goods which are related to those identified in the subject registration, (*American Vitamin Products Inc. v. Dowbrands Inc.*, 22 U.S.P.Q.2d 1313 (TTAB 1992)). Unlike the petitioner in *American*, petition was NOT engaged in the manufacture and sale of any goods and there were no facts available regarding this intent that would provide a basis for cancellation at the time of the petition to cancel.

Although Petitioner has not corrected its pleading, Petitioner has made one new claim in the latest Amendment. Specifically, petitioner alleges it “*has used, contemplated use, and/or plans to use the phrase “real energy” descriptively as part of its marketing efforts for its dietary supplements under the 5-HOUR ENERGY and 5-HOUR ENERGY Protein brands*” (13 TTABVUE p. 2). In light of the Board granting Defendant’s Second Motion to Dismiss this case, due to lack of standing, IHP has now decided, presumable because all other attempts to prove standing were denied by the Board, that it has a bona fide interest in the phrase “real energy.” However, at this point (third pleading), it should have been incumbent on the Petitioner to divulge the most basic facts or clarification of this new information to avoid yet another dismissal. Specifically, IHP should have clarified which of the three scenarios is true (contemplation of use, planning of use, or actual use), and then followed up with a very basic piece of fact or evidence to satisfy the issue of standing in this case. Where, when, or how did IHP consider the mark, plan to use the mark, or actually use the mark REAL ENERGY? In particular, the claimant should have alleged well-pleaded factual matter and more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” to state a claim plausible on its face. *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). Petitioner identified its standing vaguely as intending to pursue the phrase REAL ENERGY in its marketing. Standing is a threshold issue that must be present at the time of pleading. For petitioner to allege in its pleading that 5-Hour Energy is going to completely retool their marketing strategy to use the term REAL in a way inconsistent with its corporate strategy is not plausible without some real facts alleged to support this inconsistency. Petitioner’s generalized intent to take some action sometime in the future with regards to selling

real food and using the phrase real energy, is on its face a lack of bona fide intent. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1443 (TTAB 2012).

To be clear here, IIPH has missed the mark on many fronts with regard to standing:

- 1.) It is clear that 5-Hour Energy was not making related goods at the time of this Petition. (see board ruling, July 6th 2016 (12 TTABVUE 3-4)
- 2.) It is clear that 5-Hour Energy's new drink is also not vaguely related to the food produced by defendant's company, REAL ENERGY.
- 3.) Even if IIPH can properly claim that the new product line constitutes related goods, which it can't, the products were not being produced at the time of the original complaint, necessary to prove standing.
- 4.) IIPH's claim to have an interest in the term "real energy," does not meet the bare minimums of factual matter necessary to claim standing.
- 5.) Even if IIPH had properly pleaded its standing here, which it didn't, with the claim of "use/or potential use of "REAL ENERGY," this argument is legally insufficient, and not timely.
- 6.) IIPH did not make any substantive alterations to its fatally flawed First Amended complaint, save the addition of an attempt to claim it has a vague interest in the term "real energy."

The time to adequately plead standing has come and gone. Therefore, The Board should move to dismiss, with prejudice, without leave to amend, the Second Amended Petition to Cancel on the ground that it fails "to state a claim upon which relief can be granted," FRCP 12(b)(6), due to a lack of standing in this case.

C. Petitioners failure to state a claim for Deceptively Misdescriptive

Petitioners third attempt to plead the same invalid arguments for "Deceptively Misdescriptive" must not be well received by the Board. It is respectfully requested that the Board not allow IIPH a fourth attempt to plead this claim, beyond what it has most recently claimed here:

"Alternatively, Registration '664 is misdescriptive under Section 2(e)(1) if Registrant's Mark is used on goods comprised of artificial or not genuine ingredients or that it does not provide "real energy" because consumers are likely to believe the misrepresentation that the goods are comprised of genuine and nonartificial ingredients or provides genuine and non-artificial energy." (13 TTABVUE p. 3)

CONCLUSION

In conclusion, IIPH's third improper pleading of this Petition rather than having any legal merit, represents nothing more than gamesmanship, intimidation, and retaliatory action. To summarize, Plaintiff has filed three complaints all of which fail to adequately plead standing in this case, in accordance with *Fed. R. Civ. P. 12(b)(6)*. Reasonable minds would agree that surely IIPH would have given a thread of evidence if it had indeed used the mark REAL ENERGY presently or in the past. IIPH's expectation of The Board's acceptance of this last ditch effort to claim a personal interest in the use of the mark REAL ENERGY, without any facts or substance whatsoever, is a demonstration of audacity that should not be tolerated, and not rewarded with another gracious offer from the Board to plead their complaint for a fourth time. To add insult to injury, it is respectfully submitted that the Board consider that Petitioner, is at best, chronically overreaching its IP rights, and at worst, routinely using this forum as a tool to apply intimidation in an attempt to eliminate fair competition in the marketplace. Defendant is not surprised that IIPH has had such difficulty pleading standing in this proceeding, given the extreme substantial difference in goods between the two parties. The success of this motion hinges entirely on the lack of standing in this case, not on the lack of descriptiveness of REAL ENERGY, or why Plaintiff has had such difficulty with plausibility. Hence, Registrant prays that the Petition to Cancel Registration No. 4,534664 be dismissed with prejudice, without leave to plead its case for a fourth time, and further apply whatever fair, just, and equitable relief this Honorable Board deems appropriate.

Respectfully submitted Pro Se,

Date: September 2, 2016

By Registrant: /Thos. I. Miles/

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2016, the foregoing was served upon Petitioner by first class mail:

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By: /Thos. I Miles/

Date: September 2, 2016

Registrant, Tom Miles

Exhibit #1

Below is a listing of the only fifteen marks in the history of the USPTO to apply for the phrase REAL ENERGY (or a translation of such) in any combination. All applications, without exception, were clearly found to not be merely descriptive or deceptively misdescriptive by any of the examiners, regardless of registration difficulties, such as infringement. Registrant happens to have two such live applications (86049631, 85938514) and two live registrations (85528823, 85898317) comprising these 15 applications.

(Please note, the live/dead status of all these marks is wholly insignificant here, in that this chart is only a demonstration of the consistent opinion of the USPTO that REAL ENERGY is not a merely descriptive phrase regarding Registrants four marks (in bold) or the other 11 marks ever applied for).

| Mark Number | Serial Number and registration No. where applicable | Mark | Examiner's Office Action claim of merely descriptive or deceptively misdescriptive 2(e)(1) | Live or Dead |
|-------------|---|---|--|--------------|
| 1 | 8552882 4419225 | REAL ENERGY | NO | LIVE |
| 2 | 85898317 4534664 | REAL ENERGY | NO | LIVE |
| 3 | 85938514 | RE | NO | LIVE |
| 4 | 86049631 | RE REAL ENERGY REAL FOOD...FOR REALLY BUSY | NO | LIVE |
| 5 | 85241754 | VERO ENERGY | NO | DEAD |
| 6 | 85038518 | REAL ENERGY | NO | DEAD |
| 7 | 78491049 | REAL ENERGY FOR REAL PEOPLE | NO | DEAD |
| 8 | 78208171 | REAL ENERGY | NO | DEAD |
| 9 | 77769087 3744454 | REAL FOOD, REAL ENERGY | NO | LIVE |
| 10 | 76146141 | REAL ENERGY | NO | DEAD |
| 11 | 76118415 2573061 | REAL ENERGY | NO | DEAD |
| 12 | 75432706 | REAL ENERGY | NO | DEAD |
| 13 | 75038954 2060720 | REAL ENERGY | NO | DEAD |
| 14 | 73713764 | REAL ENERGY | NO | DEAD |
| 15 | 77046257 1509892 | REAL NRG | NO | DEAD |

