

ESTTA Tracking number: **ESTTA869111**

Filing date: **01/04/2018**

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

Proceeding	92067173
Party	Defendant The Cato Corporation
Correspondence Address	THE CATO CORPORATION 8100 DENMARK ROAD CHARLOTTE, NC 28273 UNITED STATES
Submission	Other Motions/Papers
Filer's Name	Kathryn G. Cole
Filer's email	katecole@mvalaw.com, minniekim@mvalaw.com, jeffreygianelli@mvalaw.com
Signature	/Kathryn G. Cole/
Date	01/04/2018
Attachments	1-4-18 Cato Motion for Acceptance of Late Filed Response.pdf(176211 bytes)

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

WINDSOR SMITH PTY LTD.,)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92067173
)	
THE CATO CORPORATION,)	
)	
Respondent.)	
<hr/>		

**MOTION FOR ACCEPTANCE OF LATE-FILED RESPONSE
TO PETITION FOR CANCELLATION**

Pursuant to 37 C.F.R. § 2.114(a), Federal Rule of Civil Procedure 55(c), and Trademark Trial and Appeal Board Manual of Procedure § 312, Respondent The Cato Corporation (“Respondent”) files this Motion for Acceptance of Late-Filed Response to Petition for Cancellation in response to the Notice of Default issued by the Board on December 14, 2017. In lieu of an answer, Respondent has prepared a Motion to Dismiss based on the doctrine of claim preclusion. Respondent respectfully requests that the Board set aside the Notice of Default, and accept its Motion to Dismiss, for the reasons set forth below.

Petitioner Windsor Smith Pty Ltd. (“Petitioner”) filed its Petition for Cancellation (the “Petition”) on October 18, 2017, seeking the cancellation of Respondent’s U.S. Trademark No. 2,218,837 for the LIPSTICK mark (“Respondent’s Registration”). Prior to Petitioner’s filing of the Petition, Respondent had filed a Revocation of Attorney/Domestic Representative and/or Appointment of Attorney/Domestic Representative on August 18, 2015, in order to update the Attorney of Record and Correspondent for Respondent’s Registration to reflect Henry B. Ward, III, Moore & Van Allen PLLC, 100 North Tryon Street, Suite 4700, Charlotte, North Carolina 28202. (*See* Revocation and/or Appointment, attached hereto at Exhibit 1). For reasons

unknown, the correspondent address was not updated properly, and the correspondent address is listed as 8100 Denmark Road, Charlotte, North Carolina 28273 on Respondent's Registration. When Petitioner subsequently filed this Petition, the Notice of Institution dated October 25, 2017, was not mailed to the proper correspondent address. Neither Respondent nor Respondent's counsel received the Notice of Institution or a copy of the Petition. Respondent's answer was due on December 4, 2017, but Respondent only became aware of the Petition on or around December 13, 2017, when Respondent came across the Petition while searching the Board proceedings for an unrelated matter.

The entry of default may be set aside upon a showing of good cause. Fed. R. Civ. P. 55(c); TBMP § 312.02. Good cause "is usually found when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action." TBMP § 312.02. Moreover, in view of "the policy of the law to decide cases on their merits," the entry of a default judgment for failure to timely respond is disfavored, and the Board "tends to resolve any doubt in the matter in favor of the defendant." *Id.*

Respondent's failure to file a timely response was due to an unforeseen administrative mistake, of which Respondent was previously unaware, and not a result of willful conduct or gross neglect. Upon learning of its default, Respondent took action immediately by filing this Motion for Acceptance of Late-Filed Response to Petition for Cancellation. Respondent is also filing its response to the Petition, a motion to dismiss in lieu of an answer, concurrently herewith. (*See* Respondent's Motion to Dismiss, attached hereto at Exhibit 2). Petitioner will not be substantially prejudiced by a delay of less than a month, as the discovery deadlines are currently

stayed.¹ Further, the deadlines can be reset by the Board to remedy any potential prejudice. *See H.J. Heinz Company v. The Taco Maker, Inc.*, 2001 TTAB LEXIS 271, at *3 (TTAB Mar. 26, 2001) (finding no prejudice where the 74-day delay “can be rectified by a restorative resetting of the testimony periods”). Finally, Respondent has a meritorious defense to the Petition. As stated in Respondent’s Motion (*see* Exhibit 2), the Petition—which involves the same cause of action, parties, and facts as Petitioner’s previous petition for cancellation against Respondent’s Registration—is indisputably barred by the doctrine of claim preclusion. *See id.* (finding that merely submitting a “not frivolous” answer was adequate to show “a meritorious defense” at this stage); TBMP § 312.02 (“The showing of a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint.”).

Respondent has demonstrated that all three considerations to establish good cause are satisfied here, and as such, there is good cause to set aside entry of default. *See River West Brands LLC v. Diamond Products Co.*, 2003 TTAB LEXIS 306, at *5 (finding good cause and accepting answer as timely); *Heinz*, 2001 TTAB LEXIS 271, at *3 (granting motion for acceptance of late-filed answer); *Paolo Associates Ltd. Partnership v. Bodo*, 21 USPQ2d (BNA) 1899 (Comm’r 1990) (affirming Board’s decision finding good cause and accepting answer as timely). Accordingly, Respondent respectfully requests that the Board grant Respondent’s Motion for Acceptance of Late-Filed Response to Petition for Cancellation, set aside the Notice of Default, and make Respondent’s Motion to Dismiss of record.

¹ As stated in the Notice of Default, “the parties’ obligations ... are effectively stayed.”

Date: January 4, 2018

/Kathryn G. Cole/

Kathryn G. Cole
Minnie Kim
MOORE & VAN ALLEN PLLC
Suite 4700
100 North Tryon Street
Charlotte, NC 28202
Telephone: (704) 331-1000
Facsimile: (704) 409-5659
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minniekim@mvalaw.com

*Attorneys for Respondent The Cato
Corporation*

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing *MOTION FOR ACCEPTANCE OF LATE-FILED RESPONSE TO PETITION FOR CANCELLATION* has been served on counsel for Petitioner by forwarding said copy on the 4th day of January 2018, via email to the Opposer at the address of record:

Matthew A. Homyk
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103
mhomyk@blankrome.com

*Attorneys for Petitioner
Windsor Smith Pty Ltd.*

Date: January 4, 2018

/Kathryn G. Cole /
Kathryn G. Cole

EXHIBIT 1

Revocation of Attorney/Domestic Representative and/or Appointment of Attorney/Domestic Representative

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	75407103
REGISTRATION NUMBER	2218837
LAW OFFICE ASSIGNED	LAW OFFICE 108
MARK SECTION	
MARK	LIPSTICK
ATTORNEY SECTION	
ORIGINAL ADDRESS	Wendi E. Sloane BDCN-0030 200 W. Madison Street, Suite 3900 Chicago Illinois (IL) 60606 US 312-984-3100 312-984-3150 trademarks@bfkn.com
NEW ATTORNEY ADDRESS	
STATEMENT TEXT	By submission of this request, the undersigned REVOKES the power of attorney currently of record, as listed above, and hereby APPOINTS the following new attorney:
NAME	Henry B. Ward, III
FIRM NAME	Moore & Van Allen PLLC
STREET	100 North Tryon Street, Suite 4700
CITY	Charlotte
STATE	North Carolina
COUNTRY	United States
POSTAL/ZIP CODE	28202
PHONE	704-331-1000
FAX	704-331-1159
EMAIL	hbw-ptotmcorrespondence@mvalaw.com
ATTORNEY AUTHORIZED TO COMMUNICATE VIA E-MAIL	YES
NEW OTHER APPOINTED ATTORNEYS	Dickson M. Lupo, J. Mark Wilson, W. Kevin Ransom, Jim Edwards, Jeffrey Gray, Patrick Horne, Arlene D. Hanks, Ellen A. Rubel and F. Emmett Weindruch
NEW CORRESPONDENCE ADDRESS	
NAME	Henry B. Ward, III

FIRM NAME	Moore & Van Allen PLLC
STREET	100 North Tryon Street, Suite 4700
CITY	Charlotte
STATE	North Carolina
COUNTRY	United States
POSTAL/ZIP CODE	28202
PHONE	704-331-1000
FAX	704-331-1159
EMAIL	hbw-ptotmcorrespondence@mvalaw.com
AUTHORIZED TO COMMUNICATE VIA E-MAIL	YES
OTHER APPOINTED ATTORNEY	Dickson M. Lupo, J. Mark Wilson, W. Kevin Ransom, Jim Edwards, Jeffrey Gray, Patrick Horne, Arlene D. Hanks, Ellen A. Rubel and F. Emmett Weindruch
SIGNATURE SECTION	
SIGNATURE	/Christin J. Resiche/
SIGNATORY NAME	Christin J. Reische
SIGNATORY DATE	08/18/2015
SIGNATORY POSITION	VP, General Counsel, Asst Secretary
FILING INFORMATION SECTION	
SUBMIT DATE	Tue Aug 18 14:51:25 EDT 2015
TEAS STAMP	USPTO/RAA-XX.XXX.XXX.XXX- 20150818145125133458-8582 0926-5405e71df44483e3de4d 62dc7ba1f76cc35ffc5ad7cfc 682080cb752bfbe297-N/A-N/ A-20150817111339037758

Revocation of Attorney/Domestic Representative and/or Appointment of Attorney/Domestic Representative

To the Commissioner for Trademarks:

MARK: LIPSTICK

SERIAL NUMBER: 75407103

REGISTRATION NUMBER: 2218837

The original attorney

Wendi E. Sloane

BDCN-0030

200 W. Madison Street, Suite 3900

Chicago Illinois 60606

US

312-984-3100

312-984-3150

trademarks@bfkn.com

Original Correspondence Address :

Wendi E. Sloane

Barack Ferrazzano Kirschbaum & Nagelberg LLP

200 W. Madison Street, Suite 3900

Chicago Illinois 60606

US

312-984-3100

312-984-3150

trademarks@bfkn.com

By submission of this request, the undersigned REVOKES the power of attorney currently of record, as listed above, and hereby APPOINTS the following new attorney: In addition, any additional previously-appointed attorneys that are currently listed in the application are replaced with the new "Other Appointed Attorneys" listed below.

Newly Appointed Attorney:

Henry B. Ward, III

Moore & Van Allen PLLC

100 North Tryon Street, Suite 4700

Charlotte, North Carolina 28202

United States

704-331-1000

704-331-1159

hbw-ptotmcorrespondence@mvalaw.com

Other Appointed Attorneys:

Dickson M. Lupo, J. Mark Wilson, W. Kevin Ransom, Jim Edwards, Jeffrey Gray, Patrick Horne, Arlene D. Hanks, Ellen A. Rubel and F. Emmett Weindruch

The following is to be used as the correspondence address:

Henry B. Ward, III

Moore & Van Allen PLLC

100 North Tryon Street, Suite 4700

Charlotte, North Carolina 28202

United States

704-331-1000

704-331-1159

hbw-ptotmcorrespondence@mvalaw.com

Signature: /Christin J. Resiche/ Date: 08/18/2015
Signatory's Name: Christin J. Reische
Signatory's Position: VP, General Counsel, Asst Secretary

Serial Number: 75407103
Internet Transmission Date: Tue Aug 18 14:51:25 EDT 2015
TEAS Stamp: USPTO/RAA-XX.XXX.XXX.XXX-201508181451251
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/A-N/A-20150817111339037758

EXHIBIT 2

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

WINDSOR SMITH PTY LTD.,)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92067173
)	
THE CATO CORPORATION,)	
)	
Respondent.)	
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RESPONDENT’S MOTION TO DISMISS

Pursuant to 37 C.F.R. § 2.116(a) and § 2.127, and Federal Rule of Civil Procedure 12(b)(6), Respondent The Cato Corporation (“Respondent”) respectfully moves to dismiss the Petition for Cancellation filed by Petitioner Windsor Smith Pty Ltd. (“Petitioner”), for failure to state a claim upon which relief can be granted. In support of its Motion to Dismiss, Respondent submits the following memorandum and accompanying documents.

MEMORANDUM OF LAW

INTRODUCTION

Petitioner has filed this Petition for Cancellation—just over a year after its first Petition for Cancellation against Respondent was dismissed with prejudice—seeking the cancellation of Respondent’s U.S. Trademark Registration No. 2,218,837 for the mark LIPSTICK (“Respondent’s Registration”). The basis for Petitioner’s claim is the same as that raised in its first petition, namely, that Respondent has abandoned its LIPSTICK mark. Petitioner’s abandonment claim is not only the same cause of action asserted in Petitioner’s prior proceeding against Respondent’s Registration, it is also based on the same supporting facts previously alleged. By asserting the same cause of action against the same party and same Registration, based on the same set of alleged

facts, Petitioner has essentially “renewed” its first proceeding against Respondent’s Registration. This constitutes an impermissible attempt to relitigate a claim that has already been dismissed with prejudice. *See Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 107 USPQ2d 1167, 1171 (Fed. Cir. 2013) (“[A]ttempts at second litigation chances” are barred by claim preclusion). The requirements for the application of the doctrine of res judicata are satisfied here to bar Petitioner’s subsequent proceeding. As such, Petition for Cancellation No. 92067173 should be dismissed with prejudice for failure to state a claim.

FACTUAL BACKGROUND

On December 4, 2015, Petitioner filed its first Petition for Cancellation, No. 92062761, against Respondent’s Registration, alleging that Respondent had abandoned its LIPSTICK mark. Petitioner subsequently filed its Amended Petition to Cancel Registration (hereinafter, the “First Petition”, attached hereto at Exhibit A) on February 1, 2016, again asserting only a claim of abandonment. Shortly after the discovery period opened, the First Petition was suspended pending settlement negotiations between Petitioner and Respondent. Petitioner ultimately withdrew the First Petition with prejudice by filing its Withdrawal of Cancellation Proceeding (attached hereto at Exhibit B) on August 8, 2016. On August 29, 2016, the Board entered a decision dismissing the First Petition with prejudice (attached hereto at Exhibit C).

A little over a year later, on October 18, 2017, Petitioner filed the instant Petition for Cancellation, No. 92067173 (hereinafter, the “Second Petition”), again seeking cancellation of Respondent’s Registration for the mark LIPSTICK, based on the same abandonment claim. A comparison of the First Petition and the Second Petition demonstrates that, not only is Petitioner bringing the same cause of action, the supporting allegations underlying the abandonment claim are nearly verbatim. The only additional fact in the Second Petition is an alleged “follow-up use

investigation completed by Petitioner’s investigator on or about October 17, 2017,” which alone is insufficient to state a claim of abandonment. (*See* Second Petition ¶¶ 3-7).

The Second Petition involves the same parties, the same cause of action, the same set of facts, and even the same counsel representing the parties. In view of the Board’s entry of a final judgment on the merits in the First Petition, Respondent respectfully submits that the doctrine of res judicata bars this duplicative Second Petition. Accordingly, Respondent is entitled to judgment as a matter of law, and the present Second Petition should be dismissed for failure to state a claim.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a petition for cancellation must be dismissed where a petitioner fails to allege in its complaint “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)); TBMP § 503.02. Specifically, in order to survive a motion to dismiss, the petition must allege facts that, if proved, would establish that (1) the petitioner “has standing to maintain the proceeding, and (2) a valid ground exists for cancellation of the registration.” *Montecash LLC v. Anzar Enters.*, 95 U.S.P.Q.2d (BNA) 1060, 1062 (T.T.A.B. May 7, 2010). In very limited circumstances, such as a motion to dismiss based on claim preclusion, the Board may treat a motion to dismiss relying on matters outside the pleadings as a motion for summary judgment. TBMP § 503.04; *see Zoba International Corp. v. DVD Format/LOGO Licensing Corp.*, 98 USPQ2d (BNA) 1106, 1108 (TTAB 2011) (treating motion to dismiss based on res judicata as motion for summary judgment).

ARGUMENT

I. Petitioner's Second Petition is Barred By the Doctrine of Res Judicata.

Pursuant to the doctrine of res judicata, generally known as claim preclusion, “[a] valid and final judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim and encompasses claims that were raised or could have been raised in the earlier action.” *Urock Network, LLC v. Sulpasso*, 115 USPQ2d 1409, 1409-10 (TTAB 2015). A second proceeding will be barred by claim preclusion if the following three factors are met: “(1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first.” *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1324 (Fed. Cir. 2008). As explained in further detail below, each of the requirements for claim preclusion is met here, and Petitioner is barred from bringing the abandonment claim in its Second Petition.

A. The Parties to the Second Petition are Identical to the Parties to the First Petition.

As reflected in the Board filings from the First Petition (*see* Exhibits A-C), Windsor Smith Pty Ltd. was the Petitioner, and The Cato Corporation was the Respondent. Likewise, in the Second Petition, Windsor Smith Pty Ltd. is the Petitioner, and The Cato Corporation is the Respondent. There can be no dispute that there is identity of parties in the First and Second Petitions. As such, the first prong of claim preclusion is satisfied here.

B. The Board Entered a Final Judgment on the Merits on Petitioner's Abandonment Claim in the First Petition.

There can be no dispute that the Board dismissed the First Petition with prejudice pursuant to Petitioner's withdrawal. (*See* Exhibits B-C). The Board's dismissal order “operates as a final judgment on the merits of” the First Petition. *Chutter, Inc. v. Great Concepts, LLC*, 119 USPQ2d (BNA) 1865, 1868 (TTAB 2016) (“Unquestionably, the Board's order dismissing the Prior

Proceeding with prejudice was a final judgment that may give rise to claim preclusion.”). The second prong of claim preclusion is satisfied.

C. Petitioner’s Second Abandonment Claim is Based on the Same Set of Transactional Facts as the First Abandonment Claim.

Under the doctrine of claim preclusion, a plaintiff is barred from a “subsequent assertion of the same transactional facts” to relitigate a claim that was raised or could have been raised in the earlier proceeding. *Vitaline Corporation v. General Mills, Inc.*, 891 F.2d 273, 274-75 (Fed. Cir. 1989). In both the First Petition and Second Petition, Petitioner seeks the cancellation of Respondent’s Registration alleging that Respondent has abandoned its LIPSTICK mark. Both of Petitioner’s abandonment claims are “based on the same set of transactional facts”—namely, that (1) based on Petitioner’s use investigation, Respondent does not currently use, and has not used since July 27, 2011, its LIPSTICK mark in commerce; and (2) based on conversations with Kobe Miller and Petitioner’s investigator, as well Petitioner’s alleged use investigation, Respondent does not intend to resume use of its LIPSTICK mark in commerce.¹ Accordingly, Petitioner’s first and second abandonment claims are, in fact, the same claims. Petitioner’s second abandonment claim not only could have been raised in the First Petition, it was raised when Petitioner asserted its first abandonment claim.

The only additional fact in the Second Petition is the alleged “follow-up” use investigation completed by Petitioner’s investigator on or about October 17, 2017. (Second Petition ¶¶ 3-7). This factual allegation “fail[s] to constitute new or different transactions that would prevent the application of claim preclusion to [Petitioner’s] abandonment claims.” *Zoba*, 98 USPQ2d at 1112. Specifically, Petitioner cannot reasonably dispute that the alleged “follow-up” investigation

¹ Respondent denies Petitioner’s claims of non-use and lack of intent to resume use.

completed in October 2017 is part of the “series of connected transactions” set forth in support of the First Petition. *Id.*² The alleged investigation completed in October 2017 is not only “related to” Petitioner’s allegations in its First Petition, it “exemplify[ies]” Petitioner’s prior abandonment claim that Respondent does not currently use, has not used since July 27, 2011, and does not intend to resume use of its LIPSTICK mark in commerce. *Id.* at 1113. Thus, Petitioner’s Second Petition—which is “based on the same, or nearly the same, factual allegations” as its First Petition—“comprise the same core [or nucleus] of operative facts” from the First Petition. *Id.* at 1111, 1114 (dismissing second proceeding with prejudice as barred under doctrine of res judicata). The final prong of claim preclusion is satisfied here.

Furthermore, to the extent Petitioner’s second abandonment claim are “based on events occurring before” the First Petition, the issue of abandonment has already been “alleged and denied....” *Wild Pigs Motorcycle Club v. R & R Enter.*, 2000 TTAB LEXIS 262, at *9 (2000). The “dismissal of the [First Petition] estops [Petitioner] from pleading th[e] same issue[] as a ground for cancellation of [Respondent’s] registration.” *Id.* (finding claims barred under claim preclusion and granting judgment); *see also Red Diamond, Co. v. Nat’l Sportswear Inc.*, 2017 TTAB LEXIS 122, at *16 (Mar. 23, 2017) (same). Accordingly, Respondent respectfully submits that the doctrine of res judicata applies here to bar Petitioner’s Second Petition.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court grant Respondent’s Motion to Dismiss, and dismiss Petition for Cancellation, No. 92067173, with prejudice.

² Notably, further demonstrating that the allegations of the First Petition and Second Petition are interrelated, Petitioner itself calls the alleged October 2017 investigation a “follow-up” to its previous investigation alleged in the First Petition. (Second Petition ¶¶ 3-7).

Date: January 4, 2018

/Kathryn G. Cole/

Kathryn G. Cole
Minnie Kim
MOORE & VAN ALLEN PLLC
Suite 4700
100 North Tryon Street
Charlotte, NC 28202
Telephone: (704) 331-1000
Facsimile: (704) 409-5659
Email: katecole@mvalaw.com
minniekim@mvalaw.com

*Attorneys for Respondent The Cato
Corporation*

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing *RESPONDENT'S MOTION TO DISMISS* has been served on counsel for Petitioner by forwarding said copy on the 4th day of January 2018, via email to the Opposer at the address of record:

Matthew A. Homyk
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103
mhomyk@blankrome.com

*Attorneys for Petitioner
Windsor Smith Pty Ltd.*

Date: January 4, 2018

/Kathryn G. Cole /
Kathryn G. Cole

EXHIBIT A

ESTTA Tracking number: **ESTTA724096**

Filing date: **02/01/2016**

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

Proceeding	92062761
Party	Plaintiff Windsor Smith Pty Ltd.
Correspondence Address	TIMOTHY D PECSENYE BLANK ROME LLP ONE LOGAN SQUARE PHILADELPHIA, PA 19103-6998 UNITED STATES pecsenye@blankrome.com, mhomyk@blankrome.com
Submission	Motion to Amend Pleading/Amended Pleading
Filer's Name	Matthew A. Homyk
Filer's e-mail	mhomyk@blankrome.com, pecsenye@blankrome.com
Signature	/matthew homyk/
Date	02/01/2016
Attachments	amended petition.pdf(45622 bytes)

As grounds of this Petition, it is alleged that:

1. Petitioner is the owner of the Application No. 86/112,575 for the mark LIPSTIK, filed on November 7, 2013.

2. The Examining Attorney responsible for Petitioner's pending Application has cited Registrant's mark as a basis for refusing to register Petitioner's mark under Section 2(d) of the Trademark Act.

REGISTRANT HAS ABANDONED ITS MARK

3. Upon information and belief, including a conversation held between Registrant's employee Kobe Miller and Petitioner's investigator on or about October 27, 2015, neither Registrant nor its predecessors in interest currently uses the LIPSTICK mark in commerce in the United States and, therefore, U.S. Registration No. 2,218,837 is subject to cancellation.

4. Upon information and belief, including a conversation held between Registrant's employee Kobe Miller and Petitioner's investigator on or about October 27, 2015, Registrant no longer uses its mark in connection with the goods recited in U.S. Registration No. 2,218,837 in the United States and, therefore, its Registration is subject to cancellation.

5. Upon information and belief, including a use

investigation report ordered by Petitioner's investigator dated October 27, 2015, neither Registrant nor its predecessors in interest has used the LIPSTICK mark in commerce in the United States since July 27, 2011 in connection with the goods recited in U.S. Registration No. 2,218,837, and, therefore, U.S. Registration No. 2,218,837 is subject to cancellation for at least three consecutive years of non-use.

6. Upon information and belief, including a use investigation report ordered by Petitioner's investigator dated October 27, 2015, neither Registrant nor its predecessors in interest used the LIPSTICK mark in commerce in the United States during the three-year period between December 4, 2012 and December 4, 2015 in connection with the goods recited in U.S. Registration No. 2,218,837, and, therefore, U.S. Registration No. 2,218,837 is subject to cancellation for at least three consecutive years of non-use.

7. Upon information and belief, including a conversation held between Registrant's employee Kobe Miller and Petitioner's investigator on or about October 27, 2015, Registrant does not currently intend to resume use of the LIPSTICK mark in commerce in the United States in connection with the goods recited in U.S.

Registration No. 2,218,837 and, therefore, U.S. Registration No. 2,218,837 is subject to cancellation.

8. Upon information and belief, Registrant has "abandoned" U.S. Registration No. 2,218,837 pursuant to 15 U.S.C. § 1127.

9. For the reasons set forth above, Petitioner believes that it is or will be damaged by the continued registration of Registrant's Mark, and thus Registrant's registration should be canceled.

WHEREFORE, Petitioner prays that Registration No. 2,218,837 be canceled and that this Petition for Cancellation be sustained in favor of Petitioner.

Respectfully submitted,

WINDSOR SMITH PTY LTD.

Dated: February 1, 2016

By: 

Timothy D. Pecsénye
Matthew A. Holyk
Its Attorneys

BLANK ROME LLP
One Logan Square
Philadelphia, PA 19103-6998
(215) 569-5619

CERTIFICATE OF SERVICE

I, Matthew A. Homyk, do hereby certify that I have on this 1st day of February, 2016 served via first class United States mail, postage prepaid, the foregoing PETITION TO CANCEL REGISTRATION to the following:

Kathryn G. Cole
Moore & Van Allen PLLC
100 North Tryon Street, Suite 4700
Charlotte, North Carolina 28202-4003



Matthew A. Homyk

EXHIBIT B

ESTTA Tracking number: **ESTTA762998**

Filing date: **08/08/2016**

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

Proceeding	92062761
Party	Plaintiff Windsor Smith Pty Ltd.
Correspondence Address	TIMOTHY D PECSENYE BLANK ROME LLP 1 LOGAN SQ PHILADELPHIA, PA 19103-6998 UNITED STATES mhomyk@blankrome.com, pecsenye@blankrome.com
Submission	Withdrawal of Petition to Cancel
Filer's Name	Matthew A. Homyk
Filer's e-mail	pecsenye@blankrome.com, mhomyk@blankrome.com
Signature	/matthew homyk/
Date	08/08/2016
Attachments	withdrawal lipstick.pdf(42957 bytes)

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

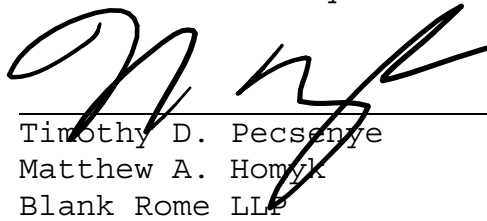
Windsor Smith Pty Ltd.,	:	
an Australia corporation	:	
	:	
Petitioner,	:	Reg. No.: 2,218,837
v.	:	Canc. No.: 92062761
	:	
The Cato Corporation,	:	
a Delaware corporation,	:	
	:	
Registrant.	:	
	:	

Hon. Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

WITHDRAWAL OF CANCELLATION PROCEEDING

Pursuant to 37 C.F.R. § 2.134(a), Petitioner Windsor Smith Pty Ltd., an Australia corporation, hereby withdraws the instant cancellation proceeding, namely, Cancellation No. 92062761, with prejudice.

Date: August 8, 2016

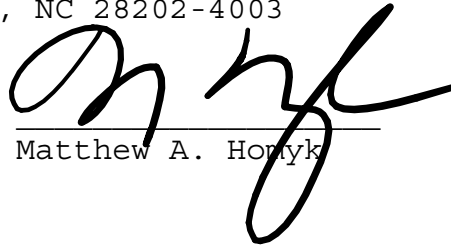
Windsor Smith Pty Ltd.
By: 

Timothy D. Pecszenye
Matthew A. Homyk
Blank Rome LLP
One Logan Square
Philadelphia, PA 19103
(215) 569-5619
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The Undersigned, hereby certifies that on the 8th day of August, 2016, he caused a copy of the foregoing WITHDRAWAL OF CANCELLATION PROCEEDING to be served by first class mail on:

KATHRYN G COLE
MOORE & VAN ALLEN PLLC
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EXHIBIT C

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

VV

Mailed: August 29, 2016

Cancellation No. 92062761

Windsor Smith Pty Ltd.

v.

The Cato Corporation

By the Trademark Trial and Appeal Board:

On August 8, 2016, Petitioner filed a withdrawal of the petition to cancel with prejudice. In view thereof, the petition to cancel is dismissed with prejudice.