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

Proceeding	92067982
Party	Defendant Adam Summers
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Submission	Motion to Amend/Amended Answer or Counterclaim
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Signature	/Alisa C. Simmons/
Date	06/07/2019
Attachments	Registrant Motion to Amend Answer to First Amended Petition to Cancel.pdf(162214 bytes) Exhibit A Redline of Answer to First Amended Petition to Cancel.pdf(197644 bytes) Exhibit B - First Amended Answer to Petition for Cancellation-20937-143024.pdf(191731 bytes)

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

PARADISE INTERNATIONAL INC.,

Petitioner,

v.

ADAM SUMMERS

Registrant.

Reg. No.: 4423790
Reg Date: October 29, 2013
Mark: TRUERATINGS

Cancellation No. 92067982

**REGISTRANT'S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND
DEFENSES TO THE FIRST AMENDED PETITION TO CANCEL**

Registrant Adam Summers, by and through his counsel Fitch Even Tabin & Flannery LLP, requests leave pursuant to 37 C.F.R. 2.115, Fed. R. Civ. P. 15(a), and §507 of the Trademark Trial and Appeal Board Manual of Procedure to file its Amended Answer and Defenses to First Amended Petition to Cancel (“Amended Answer”). In the Amended Answer, the Registrant corrects for the record his answer to Paragraph 10 of the First Amended Petition to Cancel. With this Motion, the Registrant provides both redlined and clean copies of its Amended Answer as Exhibits A and B to this Motion.

During the October 24, 2018, discovery conference conducted by telephone discussion, the counsel for Petitioner asked the counsel for the Registrant about the Registrant’s answer to the allegations in Paragraph 10 in its Answer and Defenses to the First Amended Petition to Cancel (TTABVUE 9). Paragraph 10 of the First Amended Petition to Cancel (TTABVUE 7) alleged, “Respondent had not used the Respondent’s Mark in commerce on any of the goods or services

identified in Respondent's Application on or prior to the first-use date of February 1, 2008 set forth therein." (Emphasis added.) The counsel for Petitioner explained to counsel for the Registrant that the allegation in Paragraph 10 was asking whether the Registrant had used its mark on or prior to the date of first use alleged in Registrant's registration. Upon the counsel for Petitioner identifying that detail and explaining the question to counsel for the Registrant, counsel for the Registrant realized that an error had been made in the Registrant's answer to Paragraph 10 of the First Amended Petition to Cancel. The Registrant had overlooked and misunderstood the first portion of the allegation (meaning the part of the allegation about it not having used its mark on the date of first use alleged in the registration record). During the October 24, 2018, telephone conference, the counsel for the Registrant informed counsel for Petitioner of the error and communicated that she had misread and not appreciated fully the question being asked in Paragraph 10 of the First Amended Petition to Cancel (having focused on only the "prior to the date of first use alleged" wording in Paragraph 10 of the First Amended Petition to Cancel), and would need to file an amended answer to correct the error.

During the discovery phone conference, the counsel for the Registrant informed the counsel for Petitioner that the Registrant was using its mark as of the date of first use listed in the Registrant's registration (i.e., on the date of first use alleged) and that the Registrant would need to file a corrected answer. During the October 24, 2018, telephone discussion, the counsel for the Petitioner graciously communicated to the counsel for the Registrant that the Petitioner consents to the Registrant filing with the Board a corrected answer to the First Amended Petition to Cancel. The Registrant now files this motion with the Board to put on record its corrected answer to Paragraph 10 of the First Amended Petition to Cancel.

“Leave to amend pleadings must be freely given when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party.” *Hurley International LLC v. Volta*, 82 USPQ2d 1339, 1341 (T.T.A.B. 2007); Fed. R. Civ. P. 15(a); TBMP §507.02. The Board liberally grants leave to amend pleadings at any stage of a proceeding when justice so requires. *Focus 21 Int’l, Inc. v. Kasei Kogyo Kabushiki Kaisha*, 22 USPQ2d 1316, 1318 (T.T.A.B. 1992). In the present circumstances, the Registrant needs to correct and clarify its answer to an allegation in the First Amended Petition to Cancel. Permitting the Registrant to make this correction and clarification serves the purposes of justice in that the Parties and the Board need the Registrant’s pleadings to be accurate. The Petitioner is also not prejudiced by this filing. The Petitioner took no discovery in this proceeding during the discovery period, so the Petitioner has not been denied discovery on facts or issues relevant to the case. Also as set forth above, Petitioner knew that the Registrant would be filing this Motion and presenting its corrected answer, and Petitioner previously communicated its consent to the Registrant’s filing of its corrected answer during the discovery conference. As a result of the foregoing circumstances, the Registrant respectfully submits that the Petitioner is not prejudiced by the granting of this Motion.

The Registrant respectfully submits that its Motion for Leave to File Amended Answer and Defenses to the First Amended Petition to Cancel conforms to the requirements of Fed. R. Civ. P. 15(a) and should therefore be granted. The Registrant respectfully requests that the Board grant Registrant’s Motion and enter the Registrant’s Amended Answer and Defenses to the First Amended Petition to Cancel and that the Board suspend the case pending its decision on this Motion.

Respectfully submitted,
ADAM SUMMERS

June 7, 2019

s/Alisa C. Simmons/
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Attorneys for Registrant

CERTIFICATE OF SERVICE

I, Alisa C. Simmons, one of the attorneys for the Registrant, hereby certify that a copy of the foregoing REGISTRANT’S MOTION FOR LEAVE TO FILE AMENDED ANSWER AND DEFENSES TO THE FIRST AMENDED PETITION TO CANCEL was served by email upon Petitioner at its address of record set forth below:

Adam E. Engel
THE ENGEL LAW GROUP, PLLC
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New York, NY 10016
aee@elgpllc.com
Attorney for Petitioner

on this 7th day of June, 2019.

s/Alisa C. Simmons/
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Attorneys for Registrant

EXHIBIT A—REDLINE OF REGISTRANT’S ANSWER

20937-143024

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AMENDED ANSWER AND DEFENSES TO FIRST AMENDED PETITION TO CANCEL

Registrant Adam Summers, by and through his counsel Fitch Even Tabin & Flannery LLP, files and provides his Answer and Defenses to the Petition for Cancellation as follows:

1. PARADISE INTERNATIONAL INC. (“Paradise Int’l.” or “Petitioner”) (application for registration originally filed on behalf of True Rating Inc; applicant change form filed Feb. 22, 2018), a company organized and existing under the laws of the State of New York with its principal place of business at 159-19 Hillside Ave., Jamaica, NY 11432, believes that it has been and will be damaged by the continued presence on the Principal Register of Registration No. 4,423,790 (“Respondent’s Registration”), dated October 29, 2013, for the trademark “TrueRatings” (SCM) (“Respondent’s Mark”) in Class 35 for:

[a]n interactive web site for users to review and rate internet content, people, companies, products and/or services utilizing a software application to award points whereby web site users are eligible to exchange points earned for promotional items consisting of coupons, rebates, discounts or special offerings on goods and/or service provided by web site sponsors; Attorney referrals; Audit support services, namely, review and analysis of a company's sales, as well as the preparation, organization and presentation of the documents and data requested by a government body, and advice on government audit processes, policies and strategy; Business consulting services, namely, providing a turnkey business solution for reviewing products and services, planning documentation and workflow, hiring technical writers, managing projects for business purposes,

tracking user satisfaction, and running usability studies for business purposes; Business consulting services, namely, providing a turnkey solution for reviewing product and service documentation and workflow, managing projects for business purposes, tracking user satisfaction, and running usability studies for business purposes; Health care cost review; Health care utilization and review services; Promoting the goods and services of others by providing a website featuring coupons, rebates, price-comparison information, product reviews, links to the retail websites of others, and discount information; Providing a web site featuring statistical data on physicians' performance for the purpose of assisting prospective patients in making physician selection decisions; Providing business research services, namely, researching dental patient insurance information for dental offices; Providing independent ratings and reviews of other businesses for commercial purposes. Providing independent review of clinical trials for business purposes; Providing information on the topic of promoting patient, physician and employee satisfaction via a global computer network and

in Class 42 for

[p]roviding a website featuring temporary use of non-downloadable software allowing website users to post ratings, reviews and recommendations on employers and employees and places of employment for use by employees, employers, business owners, and consumers; providing a website featuring temporary use of non-downloadable software allowing website users to post ratings, reviews and recommendations on products and services for commercial purposes.

ANSWER: The Registrant's Registration No. 4423790 speaks for itself. Registrant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of paragraph 1 and therefore denies them.

2. Petitioner Paradise Int'l has used and continues to use "TrueRating.com" and "TrueRating" on the web as mark(s)¹ for their services, at www.truerating.com, and specifically in connection with "[e]lectronic commerce services, namely, providing information about products via telecommunication networks for advertising and sales purposes."

ANSWER: Registrant lacks knowledge or information sufficient to form a belief about the truth of the allegations of paragraph 2 and therefore denies them.

3. On May 31, 2017 Petitioner filed a U.S. trademark application for registration of the mark "TureRating.com" for services in Class 35 in the U.S. Patent & Trademark Office ("PTO"). The application was assigned Serial No. 87470035 (the "TrueRating.com Application"). On August 29, 2017 the PTO Examining Attorney refused to register the TureRating.com Application based on a likelihood of confusion with Respondent's Mark under

Section 2(d) of the Lanham Act.

ANSWER: Registrant lacks knowledge or information sufficient to form a belief about the truth of the allegations of paragraph 3 and therefore denies them.

4. Dr. Summers is a successful practicing plastic surgeon.

ANSWER: Registrant admits the allegations of paragraph 4.

5. Dr. Summers is listed, in his personal capacity, as the owner of the mark in the trademark application for the Respondent's Mark ("Respondent's Application").

ANSWER: Registrant admits the allegations of paragraph 5.

6. Dr. Summers is listed, in his personal capacity, in the "Correspondence Information" section of Respondent's Application.

ANSWER: Registrant admits the allegations of paragraph 6.

7. Every statement and claim regarding use set forth in Respondent's Application was based solely on Dr. Summers's alleged activities and uses of the Respondent's Mark. There is not a single statement or claim regarding use that purports to refer to the activities of any other person. Dr. Summers was not relying on information from any other person when filling out Respondent's Application – all of the statements and claims come from Dr. Summers's firsthand knowledge.

ANSWER: Registrant admits that every statement and claim regarding use set forth in his application that resulted in Registration No. 4423790 was based solely on Dr. Summers' activities and uses of his TRUERATINGS mark and those who he licensed and authorized to use his mark. Registrant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of paragraph 7, which allegations are unclear, and therefore denies them.

8. Dr. Summer signed, in his personal capacity, Respondent's Application, and thereby personally attested under oath to the truthfulness of all the statements and claims set forth therein.

ANSWER: Registrant admits the allegations of paragraph 8.

9. Dr. Summers has not established any business entity to engage in any of the goods and services listed in Respondent's Application.

ANSWER: Registrant denies the allegations of paragraph 9.

10. Respondent had not used the Respondent's Mark in commerce on any of the goods or services identified in Respondent's Application on or prior to the first-use date of February 1, 2008 set forth therein.

ANSWER: ~~Registrant admits the allegations of paragraph 10.~~ Registrant admits that he had not used his TRUERATINGS mark prior to the first-use date of February 1, 2008, set forth in Registration No. 4,423,790. Registrant denies the remaining allegations of paragraph 10.

11. Respondent has never used the Respondent's Mark as a trademark in commerce on the services recited in the Respondent's Application, and has certainly never used the Respondent's Mark on *all* of the services recited in the Respondent's Application.

ANSWER: Registrant denies the allegations of paragraph 11 that he has never used his TRUERATINGS mark as a trademark in commerce on the services recited in Registration No. 4423790. Registrant denies the allegations of paragraph 11 that he has never used his TRUERATINGS trademark on all of the services recited in Registration No. 4423790.

12. Respondent had full knowledge that his original application to the USPTO, which resulted in the Respondent's Registration, was riddled with falsehoods and grossly overstated his use of the Respondent's Mark.

ANSWER: Registrant denies the allegations of paragraph 12.

13. Respondent knowingly submitted and attested to these falsehoods with the intent of acquiring a registration to which he knew he was not entitled, and with the intent of deceiving the USPTO.

ANSWER: Registrant denies the allegations of paragraph 13.

14. Respondent's Registration was therefore improperly acquired through fraud on the USPTO.

ANSWER: Registrant denies the allegations of paragraph 14.

15. Respondent's Registration is also therefore void *ab initio* based on non-use of the Respondent's Mark.

ANSWER: Registrant denies the allegations of paragraph 15.

16. Because the Respondent has never used the Registrant's Mark in commerce, and because Petition [*sic*] has continuously used its mark and continues to do so, Petition [*sic*] must be deemed the senior user and must be granted priority over the Respondent's Mark.

ANSWER: Registrant denies the allegations of paragraph 16 that he has never used his TRUERATINGS trademark in commerce. Registrant denies the allegations of paragraph 16 that the Petitioner has continuously used its mark and continues to do so. Registrant denies the allegations of paragraph 16 that Petitioner must be deemed the senior user. Registrant denies the allegations of paragraph 16 that Petitioner must be granted priority over his TRUERATINGS trademark in Registration No. 4423790.

17. Petitioner has been and continues to be harmed by the Respondent's Registration because, among other things, the TrueRating.com Application has been refused and the Petitioner's efforts to develop its mark and related business have been and will continue to be hampered by the Respondent's threats and interference.

ANSWER: Registrant denies the allegations of paragraph 17.

AFFIRMATIVE DEFENSES

For its defenses, Registrant states:

1. Petitioner's Petition for Cancellation fails to state a claim upon which relief may be granted. Petitioner has never owned a trademark consisting of "TrueRating.com" or "TrueRating."
2. Petitioner's claims are barred by the doctrines of acquiescence and consent.

3. Petitioner's claims are barred by the doctrine of laches.

4. Petitioner has unclean hands, trying to claim trademark rights in "TrueRating.com" and "TrueRating" despite prior knowledge of Registrant's TRUERATINGS trademark, registration and common law trademark rights.

Registrant reserves its right to amend its answer to assert any defense or counterclaim that is later discovered in this proceeding.

WHEREFORE, Registrant Adam Summers, by and through counsel, respectfully requests that the Board enter judgment in Registrant's favor, dismiss the Petition for Cancellation with prejudice, and grant all other and further relief to which Registrant is entitled.

Respectfully submitted,
ADAM SUMMERS

~~September 26, 2018~~ June 7, 2019

s/Alisa C. Simmons/
Alisa C. Simmons
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Attorneys for Registrant

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Adam E. Engel
THE ENGEL LAW GROUP, PLLC
280 Madison Avenue – Suite 705
New York, NY 10016
aee@elgpllc.com
Attorney for Petitioner

on this ~~26-7~~⁷th day of ~~September~~ **June**, ~~2018~~ **2019**.

s/Alisa C. Simmons/
Alisa C. Simmons
Sherri N. Blount
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Attorneys for Registrant

Exhibit B

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[a]n interactive web site for users to review and rate internet content, people, companies, products and/or services utilizing a software application to award points whereby web site users are eligible to exchange points earned for promotional items consisting of coupons, rebates, discounts or special offerings on goods and/or service provided by web site sponsors; Attorney referrals; Audit support services, namely, review and analysis of a company's sales, as well as the preparation, organization and presentation of the documents and data requested by a government body, and advice on government audit processes, policies and strategy; Business consulting services, namely, providing a turnkey business solution for reviewing products and services, planning documentation and workflow, hiring technical writers, managing projects for business purposes,

tracking user satisfaction, and running usability studies for business purposes; Business consulting services, namely, providing a turnkey solution for reviewing product and service documentation and workflow, managing projects for business purposes, tracking user satisfaction, and running usability studies for business purposes; Health care cost review; Health care utilization and review services; Promoting the goods and services of others by providing a website featuring coupons, rebates, price-comparison information, product reviews, links to the retail websites of others, and discount information; Providing a web site featuring statistical data on physicians' performance for the purpose of assisting prospective patients in making physician selection decisions; Providing business research services, namely, researching dental patient insurance information for dental offices; Providing independent ratings and reviews of other businesses for commercial purposes. Providing independent review of clinical trials for business purposes; Providing information on the topic of promoting patient, physician and employee satisfaction via a global computer network and

in Class 42 for

[p]roviding a website featuring temporary use of non-downloadable software allowing website users to post ratings, reviews and recommendations on employers and employees and places of employment for use by employees, employers, business owners, and consumers; providing a website featuring temporary use of non-downloadable software allowing website users to post ratings, reviews and recommendations on products and services for commercial purposes.

ANSWER: The Registrant's Registration No. 4423790 speaks for itself. Registrant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of paragraph 1 and therefore denies them.

2. Petitioner Paradise Int'l has used and continues to use "TrueRating.com" and "TrueRating" on the web as mark(s)¹ for their services, at www.truerating.com, and specifically in connection with "[e]lectronic commerce services, namely, providing information about products via telecommunication networks for advertising and sales purposes."

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7. Every statement and claim regarding use set forth in Respondent's Application was based solely on Dr. Summers's alleged activities and uses of the Respondent's Mark. There is not a single statement or claim regarding use that purports to refer to the activities of any other person. Dr. Summers was not relying on information from any other person when filling out Respondent's Application – all of the statements and claims come from Dr. Summers's firsthand knowledge.

ANSWER: Registrant admits that every statement and claim regarding use set forth in his application that resulted in Registration No. 4423790 was based solely on Dr. Summers' activities and uses of his TRUERATINGS mark and those who he licensed and authorized to use his mark. Registrant lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations of paragraph 7, which allegations are unclear, and therefore denies them.

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9. Dr. Summers has not established any business entity to engage in any of the goods and services listed in Respondent's Application.

ANSWER: Registrant denies the allegations of paragraph 9.

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ANSWER: Registrant admits that he had not used his TRUERATINGS mark prior to the first-use date of February 1, 2008, set forth in Registration No. 4,423,790. Registrant denies the remaining allegations of paragraph 10.

11. Respondent has never used the Respondent's Mark as a trademark in commerce on the services recited in the Respondent's Application, and has certainly never used the Respondent's Mark on *all* of the services recited in the Respondent's Application.

ANSWER: Registrant denies the allegations of paragraph 11 that he has never used his TRUERATINGS mark as a trademark in commerce on the services recited in Registration No. 4423790. Registrant denies the allegations of paragraph 11 that he has never used his TRUERATINGS trademark on all of the services recited in Registration No. 4423790.

12. Respondent had full knowledge that his original application to the USPTO, which resulted in the Respondent's Registration, was riddled with falsehoods and grossly overstated his use of the Respondent's Mark.

ANSWER: Registrant denies the allegations of paragraph 12.

13. Respondent knowingly submitted and attested to these falsehoods with the intent of acquiring a registration to which he knew he was not entitled, and with the intent of deceiving the USPTO.

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14. Respondent's Registration was therefore improperly acquired through fraud on the USPTO.

ANSWER: Registrant denies the allegations of paragraph 14.

15. Respondent's Registration is also therefore void *ab initio* based on non-use of the Respondent's Mark.

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ANSWER: Registrant denies the allegations of paragraph 16 that he has never used his TRUERATINGS trademark in commerce. Registrant denies the allegations of paragraph 16 that the Petitioner has continuously used its mark and continues to do so. Registrant denies the allegations of paragraph 16 that Petitioner must be deemed the senior user. Registrant denies the allegations of paragraph 16 that Petitioner must be granted priority over his TRUERATINGS trademark in Registration No. 4423790.

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Adam E. Engel
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Attorney for Petitioner

on this 7th day of June, 2019.

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Attorneys for Registrant