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

Proceeding	92070823
Party	Plaintiff ICware Systems, Inc. dba BatchTest Corporation
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Registration No. 4,499,170  
For the Mark: BATCHTEST

ICWARE SYSTEMS INC.	)	CANCELLATION NO. 92070823
dba BATCHTEST CORPORATION	)	
	)	
Petitioner,	)	
	)	
V.	)	
	)	
IKONIX USA LLC.	)	
	)	
Registrant.	)	

**PETITIONER’S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION**

Petitioner BatchTest Corporation (“BatchTest”) submits this reply brief in support of its Motion for Reconsideration (“Motion”) and states as follows:

**I. BACKGROUND**

On March 12, 2019, BatchTest filed its Petition For Cancellation (“Petition”) of Trademark Registration Number 4,499,170 (the “Registration”) of the BATCHTEST (the “Mark”) trademark for goods and services in International Class 9. On April 30, 2020, BatchTest filed a Motion for Reconsideration (the "Motion") requesting the Board for a reconsideration of its Order dated March 31, 2020 (the “Order”). Registrant Ikonix USA LLC (“Registrant”) filed an Opposition to Motion for Reconsideration of Petitioner (the “Opposition”) on May 19, 2020.

**II. ARGUMENT**

In its Opposition, Registrant does not attempt to address what it sees as inadequacies in the Motion and wholly fails to offer support for its Opposition. Instead, Registrant merely repeats the

Board's decision that "two fraud claims appear to be contentions that the mark describes a feature or function of the goods and/or services rather than serving as a mark" (20 TTABVUE at page 6), without any attempt to oppose BatchTest's assertion that Board has erred in the said decision. As such Registrant's Opposition to BatchTest's Motion is moot.

Nevertheless, BatchTest submits its Reply in support of the Motion and also responds to Registrant's Opposition, as can be understood.

**1. Registrant's continued issues with BatchTest's Pro Se representation**

Registrant has erroneously fixated on matter not germane to the Motion, specifically BatchTest's Pro Se representation. The entirety of Registrant's reasoning in its Opposition revolves around its baseless assertion that because BatchTest is representing itself, what BatchTest has alleged is beyond Registrant's comprehension, clearly evident from:

"Ikonix notes that ICware is not represented by counsel, but by a corporate officer. As the Board has pointed out to ICware, 'it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in inter partes proceedings before the Board to secure the services of an attorney who is familiar with such matters.' See 12 TTABVUE at page 2. Ikonix hereby responds to the 'Petitioner's Motion for Reconsideration' filed April 30, 2020, **as can be understood**" (emphasis added; 26 TTABVUE page 2).

Registrant does not point to any evidence of procedural or substantive law error by BatchTest in the Motion, or in any of BatchTest's filings. Instead, Registrant has mischaracterized the Board's general recommendation for Pro Se parties to seek help of a counsel, and evidently formed a habit of repeatedly using it as the basis of its arguments instead of presenting supporting facts. The Board regularly issues the said recommendation to all pro se parties, and it is not a basis for Registrant to claim inadequacy in BatchTest's arguments or allegations. Pursuant to 37 C. F. R. §2.127(b) and TBMP §518, BatchTest's Motion is a properly filed document.

On the other hand, Registrant itself had a difficulty understanding basic trademark laws in its previous filings, when Registrant had similarly tried to mislead the Board with baseless assertion that:

“Respondent submits that the Second Amended Petition is not the operative pleading and is not germane to the motion unless allowed by the Board. **Respondent notes that the Board has made Petitioner aware that it is ‘generally advisable ... to secure the services of an attorney’** (page 2 of the Order dated October 3, 2019).” (emphasis added; 19 TTABVUE footnote 1.)

In fact, the Board had corrected Registrant in its Order while stating that:

“Respondent’s argument that Petitioner was not granted leave to file the second amended petition to cancel and thus it is ‘not the operative pleading and not germane to the motion,’ **is mistaken**” (emphasis added).

Furthermore, in regards to Registrant’s “as can be understood” statement, perhaps comprehension is not Registrant’s forte; Registrant also had a difficulty comprehending the meaning of “undisputed” when it erroneously claimed its ownership of the Registration as “undisputed” (14 TTABVUE page 2) despite the fact that the sole purpose of the current proceeding is disputing Registrant’s ownership of the Mark. In another instance Registrant managed to lose its own train of thoughts in the middle of its own written sentences; While presenting arguments against BatchTest’s Not the Rightful Owner claim, Registrant attempted to start with arguing that the third element of the claim was not alleged, but then veered off-course into erroneously dedicating rest of the argument to second element of the claim (14 TTABVUE page 5, first paragraph.)

Pursuant to TBMP 115.01, BatchTest requests that Registrant conduct its business with decorum and courtesy. See under “Conduct of Practitioner”, TBMP 115.01 (“In addition to the requirements specifically applicable to the conduct of practitioners, all parties in matters before the Board, whether represented by counsel or not, are expected to conduct their business with decorum and courtesy”) (emphasis in original).

BatchTest has also noted that Registrant has deliberately and consistently dropped “dba BatchTest Corporation” when addressing BatchTest, despite the fact that current proceeding title is still “ICware Systems, Inc. dba BatchTest Corporation.”

## **2. Registrant’s baseless opposition to BatchTest’s First Fraud Count**

Registrant has falsely claimed that BatchTest “has failed to even plead the requisite intent to mislead the PTO”. Registrant also baldly alleges that BatchTest’s pleadings are “conclusory” and “legally insufficient” without supporting its argument with any evidence whatsoever. BatchTest has not only pleaded Registrant’s intent to mislead the USPTO, but BatchTest has done so methodically with support of a significant amount of direct evidences, which do not require any “speculation, inference or surmise” (In re Bose Corp., 580 F.3d 1240, 1245, 91 USPQ2d 1938 (Fed. Cir. 2009)). Registrant has simply ignored the entirety of BatchTest’s pleadings which make specific allegations with support of direct evidence:

- a. that Registrant has a long history of deceiving the public (16 TTABVUE 21), supported with details of direct evidence from 7 such cases;
- b. that Registrant has long known that it was not making a valid use of the trademark (16 TTABVUE 26), supported with evidence from its 2002 cases involving trademark examining attorneys Ms. Micheli and Ms. Capshaw;
- c. and yet Registrant and its predecessor-in-interest fraudulently filed eleven (11) such applications (16 TTABVUE 30), while providing details of all said 11 cases;
- d. that it was “not an isolated case of an inadvertent mistake or misbelief, but a calculated and aggressive strategy with intent to fraud the USPTO in order to procure and maintain the Registration to which they were not entitled.” (16 TTABVUE 30) As such BatchTest has alleged Registrant’s intent to deceive the USPTO;
- e. that Registrant has done so to unlawfully reserve trademarks “for a broadened scope of goods to which they were not entitled” (16 TTABVUE 33), which adds to Registrant’s state of mind and intent when it filed the Statement of Use and the Section 8 Declaration;
- f. that Registrant and its predecessor-in-interest made fraudulent and deceiving sworn statements to the USPTO (16 TTABVUE 28 and 33) and finally,
- g. that “the USPTO relied upon Respondent’s knowingly false and deceptive statements in issuing and maintaining the Registration.” (16 TTABVUE 35).

As such, BatchTest has pleaded with sufficient details to allege Registrant’s and its predecessor-in-interest’s state of mind when they fraudulently filed the Statement of Use and the Section 8

Declaration, all of which were filed while Registrant and its predecessor-in-interest were being represented by its current counsel Mr. Moore, and which resulted in the Registration and the maintenance of the BATCHTEST mark. More importantly, BatchTest's above mentioned allegations also support the fact that the Board has erred in basing its Decision on a reasoning that is not relevant to BatchTest's Fraud Claims.

Registrant has also attempted to mislead the Board that BatchTest has alleged "insufficiency of a specimen" (26 TTABVUE pages 3 and 4), such is not the case. BatchTest has alleged that Registrant and its predecessor-in-interest "knew that they were not making a valid use of the Mark as a trademark, yet they knowingly made false statements to the USPTO, and deceptively held back the true nature of their usage of the Mark, in order to procure or maintain the registration" (emphasis added; 16 TTABVUE 28), and that "ARI and Registrant knowingly and frequently made fraudulent and deceiving statements to the USPTO" (emphasis added; 16 TTABVUE 33). As such, BatchTest's claims concern the fraudulent sworn statements made by Registrant and its predecessor-in-interest, which deliberately misled the examining attorney and the examining trademark specialist into approving the Registration, despite first issuing Specimen Unacceptable office actions. The current proceeding is not yet in Discovery stage, as such proving all such allegation is premature, however BatchTest has sufficiently alleged its claims while providing specific details of supporting facts. As such this is a case of fraud, and not any ex-parte issue of specimen insufficiency.

Registrant has also attempted to mislead the Board in deliberately mischaracterizing BatchTest's assertion "An examining attorney, especially one lacking relevant technical expertise, would not have known from specimen provided by Registrant, that it merely shows a clickable button" into stating that BatchTest "then somehow suggests that the examining attorney does not have the relevant technical expertise to examine a submitted specimen" (26 TTABVUE page 4). BatchTest has simply alleged, additionally, that Registrant has deceived the USPTO by presenting a misleading specimen supported by fraudulent statements, which deliberately misled the examining attorney and the examining trademark specialist into approving the Registration and the Maintenance of the Mark. A user of Registrant's described goods would not perceive such use of the Mark as a trademark use, a fact an examining attorney or a trademark specialist would have

readily caught if Registrant and its predecessor-in-interest had not deceived them through fraudulent sworn statements. It should be noted that the examining attorney and the trademark specialist in this case had issued Specimen Unacceptable office actions, upon which Registrant and its predecessor-in-interest had filed the fraudulent sworn statements.

Importantly, Registrant has not presented any argument that specifically opposes BatchTest's assertion that the Board has erred in its decision that "two fraud claims appear to be contentions that the mark describes a feature or function of the goods and/or services rather than serving as a mark". As such, BatchTest respectfully submits that in light of the facts, the Board has erred in rendering the decision to strike BatchTest's First Fraud Count with prejudice, and BatchTest requests that the Board reconsider its Decision.

### **3. Registrant's baseless opposition to BatchTest's Second Fraud Count**

In its Opposition, Registrant has made no arguments to support its opposition for BatchTest's Motion for Reconsideration, in regards to its Second Fraud Count. Instead, Registrant recites a portion of BatchTest's allegation (26 TTABVUE, page 4) and then merely repeats its bald and false allegations BatchTest does not "provide any evidence of the state of mind of any person who signed the registration and/or the maintenance document with an alleged intent to deceive the PTO". BatchTest has made sufficient allegations supported by direct evidence that Registrant and its predecessor-in-interest have fraudulently filed the Statement of Use and the Section 8 Declaration, with intent to deceive the USPTO, as described above under Section 2 of this Reply. Registrant's intent is also evident also from BatchTest's allegations that Registrant had filed the fraudulent Section 8 Declaration after the current proceeding had begun (16 TTABVUE 15).

Furthermore, Registrant attempts to mislead the Board once again that BatchTest "attempts to assert a cause of action with respect to examination of the specimens, which is an ex parte issue". As detailed above, BatchTest has not made any such assertion. The fact is that BatchTest has alleged that Registrant and its predecessor-in-interest have "knowingly made a false statement in the SOU" (16 TTABVUE 43), and "made false statements in the Sec8-Declaration" (16 TTABVUE 48). As such, this is a matter of fraud, and not an ex parte issue of specimen deficiency. In fact, BatchTest has not alleged whatsoever that Registrant and its predecessor-in-interest have submitted any specimen in

association with “computer software for recording test data, archiving test data, importing test data into a spreadsheet or database, logging test data, statistically analyzing test data, and reviewing test data” (the “Goods2”), which was half of goods described in the Statement of Use and the Section 8 Declaration. In fact, the USPTO database shows that Registrant and its predecessor-in-interest have never submitted any specimen associated with use of BATCHTEST mark on Goods2. The USPTO only requires an applicant to submit one specimen for each class of goods or services in its application or registration maintenance filing, which Registrant and its predecessor-in-interest used to their advantage in not filing any specimen for Goods2. The fact is that only after issuing Specimen Unacceptable office actions, the examining attorney and the examining trademark specialist relied on sworn statements fraudulently filed by Registrant and its predecessor-in-interest, that “the mark is in use in commerce on or in connection with **all** goods/services” (no emphasis added), as also alleged by BatchTest in the Motion (24 TTABVUE paragraph 13.)

Importantly, Registrant has not presented any argument that specifically opposes BatchTest’s assertion that the Board has erred in its decision that “two fraud claims appear to be contentions that the mark describes a feature or function of the goods and/or services rather than serving as a mark”. As such, BatchTest respectfully submits that in light of the facts, the Board has erred in rendering the decision to strike BatchTest’s Second Fraud Count with prejudice, and BatchTest requests that the Board reconsider its Decision.

### III. CONCLUSION

Pursuant to FRCP 15(a) and TBMP §507.2, “leave must be freely given when justice so requires.” Here, however, Registrant has used the Board’s general recommendation for all Pro Se parties to seek help of a counsel, to easily persuade the Board into allowing only one opportunity for BatchTest to amend its pleading before striking several of BatchTest’s claims with prejudice. Despite Registrant’s mistaken allegations which it based solely on the fact that BatchTest is a Pro Se party (19 TTABVUE footnote 1, and page 2), BatchTest’s last pleadings amendment was done as a Matter of Course, and not upon leave of the Board (20 TTABVUE page 2). The Board decided to strike BatchTest’s Fraud claims based on an erroneous assumption that “The two fraud claims **appear to be** contentions that the mark describes...” (emphasis added; 20 TTABVUE page 6) which has unfairly

prejudiced BatchTest. Furthermore, BatchTest respectfully submits that its First Amended Pleadings were sufficiently pleaded but it filed the Second Amendment to provide an accurate notice to Registrant. As such, BatchTest respectfully submits that the Board has unfairly prejudiced BatchTest in its striking both of BatchTest's Fraud Claims with prejudice, even before the Discovery begins, and that the Board has done so while relying on a reasoning which does not apply to any of BatchTest's Fraud Claim Counts.

For the reasons stated above, Petitioner BatchTest Corporation respectfully requests the Board for a reconsideration of its decision to strike BatchTest's First and Second Fraud Counts, or alternatively, allow BatchTest for a 30-day leave to amend.

Respectfully Submitted,

BatchTest Corporation

Dated: June 8, 2020

/Dinesh Patel/

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the attorney for the other party by email on June 8, 2020 at the following email address:

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Name:           Dinesh Patel, President, BatchTest Corporation          

Date:           June 8, 2020