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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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Date	05/21/2019
Attachments	20190521 BatchTest Reply In Support Of Motion To Strike.pdf(611276 bytes)

**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 TO STRIKE REGISTRANT’S AFFIRMATIVE
DEFENSES**

Petitioner ICware Systems, Inc. dba BatchTest Corporation (“Petitioner”) submits this reply brief in support of its Motion to Strike Registrant’s Affirmative Defenses (“Motion”) and states as follows:

I. BACKGROUND

On March 12, 2019, Petitioner 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 22, 2019, Registrant Ikonix USA LLC (“Registrant”) filed an Answer on April 22, 2019 (the “Answer”) that included an Affirmative Defense of Laches.

Based, inter alia, on a lack of factual basis for Registrant’s affirmative defense, Petitioner moved on April 30, 2019 to strike the affirmative defense. Registrant filed its Opposition/Response To Motion To Strike (“Opposition”) on May 17, 2019.

II. ARGUMENT

In its Opposition, Registrant does not attempt to address the inadequacies in its Answer and wholly fails to offer support for its affirmative defense of laches. Instead, Registrant erroneously claims that it is not required to plead the factual basis for its purported affirmative defense.

1. **Registrant's Affirmative Defense Of Laches Is Immaterial**

Petitioner has made a claim of fraud under Count V of its Petition. Petitioner has also claimed in its Motion that Registrant's Affirmative Defense of Laches is immaterial. The affirmative defense of laches is not applicable in cancellation proceedings which contain a claim of fraud.

Registrant has admitted to paragraph 9 of the Petition in its Answer, that application serial no. 85784793 (the "Application") to register the BATCHTEST trademark was filed on November 21, 2012. The Application included a Verified Statement ("Declaration") by the Registrant's Attorney Mr. Thomas J. Moore that:

"...he/she believes applicant to be entitled to use such mark in commerce; to the best of his/her knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of his/her own knowledge are true; and that all statements made on information and belief are believed to be true."

Registrant has also admitted to paragraph 10 of the Petition in its Answer, that a Statement of Use was filed on October 24, 2013 (the "Statement of Use"), which included a similar verified statement as above.

However, a very basic search for "BATCHTEST" or "(batchtest)[ALL]" on the USPTO database leads to Petitioner's application for "LVremote" trademark with serial number 85237986 (the "LVremote Application"), which was unintentionally abandoned around July of 2012. The specimen used in the LVremote Application (the "Specimen") is attached hereto as Exhibit "A". The Specimen has existed on the USPTO database since November 15, 2011, over a year prior to Registrant's

Application, and it shows Petitioner's "SAT2011" series of test equipment.¹ Towards the bottom of the Specimen, Petitioner has clearly claimed that "BatchTest and Your Inventions Made Bulletproof are trademarks of BatchTest Corporation." The Specimen presents the indisputable and conclusive fact that Petitioner's use of BATCHTEST as its tradename and the claim of BATCHTEST as its trademark existed on the USPTO database prior to and at the time of Registrant's filing of the Application and the Statement of Use.

Along with numerous evidences submitted by Petitioner as exhibits in its Petition, the Specimen supports Petitioner's claim that Registrant ignored Petitioner's prior use of BATCHTEST trademark in fraudulently obtaining the Registration.

In *AVA RUHA CORP. DBA MOTHER'S MARKET & KITCHEN v. MOTHER'S NUTRITIONAL CENTER, INC.*, 113 U.S.P.Q.2d 1575 (T.T.A.B. 2015), the Board has ruled that laches is not an available defense to a fraud claim. As such, Petitioner's Motion to strike should be granted as to Registrant's Affirmative Defense of Laches.

2. Registrant Is Required to Provide Sufficient Detail to Give Petitioner Fair Notice of the Basis for Its Purported Affirmative Defenses.

Registrant erroneously claims that it need not allege the factual basis for its affirmative defenses because it claims to have "provided enough factual detail of the affirmative defense of laches in short and plain statement to provide sufficient notice" to Petitioner as a matter of law. Contrary to Registrant's position, the majority of district courts that have considered pleading standards for affirmative defenses have concluded that they must be alleged with sufficient detail to set forth a plausible claim of relief. *See, e.g., Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1171 (N.D. Cal. 2010) (explaining that "the vast majority of courts presented with the issue have extended *Twombly's* heightened pleading standard to affirmative defenses" (citations omitted)).

In *HCRI TRS Acquirer, LLC v. Iwer*, 708 F. Supp. 2d 687, 691 (N.D. Oh. 2010), the court observed that the rationale underlying *Twombly* rests, in part, on reducing costs related to

¹ Specimen of Petitioner's "SAT1204" series of test equipment was presented as an exhibit in the cancellation Petition. Petitioner's "SAT2011" are smaller and cheaper version of SAT1204, lacking a few key features, secure communications (SSL), and support for Mac OSX.

investigating meritless claims. *HCRI*, 708 F. Supp. 2d at 691 (citation omitted). The court further reasoned that “[b]oilerplate affirmative defenses that provide little or no factual support can have the same detrimental effect on the cost of litigation as poorly worded complaints.” *Id.* at 691 (citation omitted). As a result, the court concluded that affirmative defenses must be pled with enough information to provide a “plausible, factual basis for the assertion[.]” *Id.* (citation omitted). See also *Topline Solutions, Inc. v. Sandler Sys., Inc.*, 2010 WL2998836, *1 (D. Md. July 27, 2010) (finding that an affirmative defense must be pled in a way that is “intelligible, gives fair notice, and is plausibly suggested by the facts” (citation and internal quotation marks omitted)).

In its Answer, Registrant merely recites boilerplate affirmative defenses in rote fashion and fails to provide any factual underpinnings for the defense. As a result, Petitioner has no notice of the facts that allegedly support the asserted defense. Because Registrant has wholly failed to plead a plausible, factual basis for its affirmative defenses, Petitioner’s motion should be granted.

3. Likelihood Of Confusion Is Inevitable

Recording and archiving of test data, using it on spreadsheets or database, logging / analyzing / reviewing of test data, etc are all a subset of Petitioner’s software product features, and in fact, they are all clearly listed on the right-hand side of the Specimen in Exhibit “A”, which has existed on the publicly searchable USPTO database since 2011. In its Answer to paragraph 9 of the Petition, Registrant has admitted to its use of BATCHTEST trademark on “Software for use in testing electrical safety products to ensure compliance with regulations, and to set up electrical safety products for their intended use, and to analyze the results of the tests of electrical safety products; 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.” In other words, Registrant has essentially copied a subset of features from Petitioner’s pre-existing software bearing BATCHTEST trademark, and used it on the Application for the Registration.

In its argument supporting of its laches defense, Registrant cites *Bigfoot 4x4 Inc. v. Bear Foot, Inc.*, 5 U.S.P.Q.2d 1444, 4 (TTAB 1987) where marks in question “BIGFOOT” and “BEAR FOOT” had different spelling, pronunciation, and a quite distinct meaning, which lead the Board to consider it a “close call” and a reasonable doubt. However, here we have Registrant using an identical mark

“BATCATEST”, on identical automation software features, in the same industry of automated electrical testing. Additionally Registrant has also admitted in paragraph 40 of its Answer that it lists LabVIEW based “software drivers” on the National Instruments website, the same medium on which Petitioner has advertised its LabVIEW based software, drivers, and other products & services under trade name and trademark BATCATEST since 2011. As such, it leaves no reasonable debate or doubt that a likelihood of confusion is inevitable in this case, and Registrant has not established any plausible basis to support its claim for laches. Accordingly, Petitioner requests the Board to strike Registrant’s affirmative defense of laches.

III. CONCLUSION

For the reasons stated above, Petitioner BatchTest Corporation respectfully requests the Board to strike each of the purported affirmative defenses so that this proceeding may move forward, or, alternatively, issue judgment on the pleadings as to the alleged affirmative defense.

Respectfully Submitted,

ICware Systems, Inc.

Dated: May 21, 2019

/Dinesh Patel/

Dinesh Patel, President, ICware Systems, Inc.

DBA: BatchTest Corporation

2118 Walsh Ave, Suite 150

Santa Clara, CA 95050

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2019, I served a true and correct copy of the foregoing PETITIONER'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE REGISTRANT'S AFFIRMATIVE DEFENSES to Registrant's counsel Thomas J. Moore by emailing said copy to "mail@baconthomas.com", and by mailing said copy via First Class Mail, postage prepaid to:

Bacon & Thomas, PLLC
625 Slaters Lane, Fourth Floor
Alexandria, Virginia 22314-1176

By: ICware Systems, Inc. dba BatchTest Corporation

Signature: /Dinesh Patel/

Name: Dinesh Patel, President, ICware Systems, Inc.

Date: May 21, 2019

Exhibit A

Specimen on the USPTO, showing Petitioner's
prior use of BATCHTEST

(Found under application for trademark "LVremote" through a basic search on
the USPTO with "(batchtest)[ALL]" criterion)

SAT2011

Synchronizing Automated Tester

BatchTest Systems

Your Inventions Made Bulletproof™

SAT2011 is a smart-tester for automated full testing of manufactured devices including processor & microcontroller based boards and systems. SAT2011 is capable of automatically generating tests as well as requirements which significantly reduces customer effort and time.

Using our patent-pending technology, these testers automatically synchronize test software, requirements, and tests with any DS2011 DataServer found on a local intranet or specified by the tester administrator. This unique feature significantly reduces human-effort in setting up additional testers and

keeping all testers up to date with matching tests & software.

A web-browser based rich User-Interface built with LabVIEW and Adobe Flash is available as a default for SAT2011.

SAT2011 also includes connectivity to our Test Library Servers to download ready-to-use and configurable “template tests” for a quick test development.

Two hardware choices are available for SAT2011: National Instruments PXI and PCIe based PICMG.

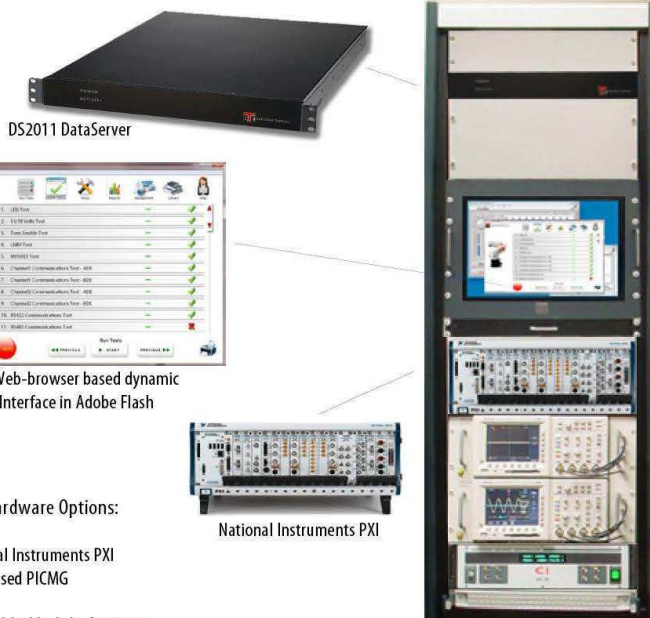


BatchTest Systems is a National Instruments Alliance Partner



Features & Benefits

- A Turn-Key Solution
- Fast, High Performance, & Multi-Tasking
- Enterprise Test Software Suite
- A Cloud-Computing Device
- **LVremote** vibrant Adobe Flash Web Interface
- 5 levels of User Access
- Simultaneous use by multiple users
- Automatically builds Test Specifications
- Automatically generates tests
- Tests automatically optimized for fast test times
- Modular, Configurable, Scalable, Multi-threaded
- Python Scripts Execution
- Remote Control Mode
- Unlimited Device-Under-Test configurations
- Dynamically editable tests
- Extensive Debug Capability:
 - Breakpoints, Pause, Forward, Rewind, Record, & Replay tests
 - Extended Data for Test Recreation
- Version Control; Multiple test versions
- Reports in .PDF, .XLS, .DOC, .TXT, or .XML
- Connectivity with database for data storage
- Compatible with NI-TestStand



DS2011 DataServer



LVremote: Web-browser based dynamic full User-Interface in Adobe Flash



National Instruments PXI

A SAT2011 tester configuration shown with NI-PXI hardware option and a DS2011 DataServer. Test fixture for Device-Under-Test and various sensors are not shown

Available Hardware Options:

- HX National Instruments PXI
- HP PCIe based PICMG

Some Available Module Options:

- E Embedded Microcontroller/Processor Test
- F RF Tests (signal, response, loss, various bands; Zigbee, RFID, GPS, WLAN)
- A Automated Specifications Generation
- R Automated Test Generation
- B Barcode Functionality
- D Test Debug
- C CANbus Tests
- I I²C, SPI, 2-wire Tests
- S RS232 / RS422 / RS485 Serial, USB Tests
- P Python Test Scripts Translator

All SAT2011 systems include USB 2.0 and Gigabit Ethernet connectivity.



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