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Filing date: **05/26/2021**

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

Proceeding	92076846
Party	Plaintiff Picture Engine Company, Inc
Correspondence Address	JON CARLSON PICTURE ENGINE COMPANY, INC 550 LYKINS AVE BOULDER, CO 80304 UNITED STATES Primary Email: treerock@icloud.com No phone number provided.
Submission	Opposition/Response to Motion
Filer's Name	Jon Carlson
Filer's email	treerock@icloud.com
Signature	/joncarlson/
Date	05/26/2021
Attachments	responsetoMTD2.pdf(86871 bytes)

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

In re Trademark Reg. No. 6255115 Mark: AUCTION SNIPER Reg. Date: Jan. 26, 2021

Picture Engine Company, Inc., Petitioner)

v.

OpenSky Project, Inc., Defendant)

Cancellation No. 92076846

PETITIONER’S OPPOSITION TO DEFENDANT’S MOTION TO DISMISS

A motion to dismiss under Rule 12(b)(6) is solely a test of the sufficiency of a complaint. *Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *NSM Research Corp. v. Microsoft Corp.*, 113 USPQ2d 1029, 1032 (TTAB 2014).

I the Petitioner, have been in use and have claimed copyright on “Auction Sniper for Ebay” as an app on Apple’s App Store for iPhone/other devices, and also on a second store: Apple’s Mac App Store for Mac OS since May/April of 2013.

The defendant placed an app on the app store in 2015 as is my understanding, and applied for a trademark in 2020, and was granted that trademark this year, I was not in violation of any trademark that I was aware of in 2013. Nor of any prior use when I decided on the name, I was not relying on any other company’s trademark or copyright, except ebay’s, (which I gained verbal consent for using the name “ebay” in the the form of “.... for ebay” in same time period. I became aware of the defendant’s trademark in about April of this year as the defendant requested Apple to remove my apps. With in only a few days of my learning of the existence of the trademark, I filed a request to cancel this trademark in good faith. As I have been in use of this name for 7 or 8 years before the trademark was even applied for.

This shows at least sufficiency of the complaint/cancelation request.

To withstand a motion to dismiss, a plaintiff need only allege sufficient factual content that, if proved, would allow the Board to conclude, or draw a reasonable inference, that the plaintiff has standing to maintain the proceeding, and a valid ground exists for opposing or cancelling the

registration. Doyle v. Al Johnson's Swedish Restaurant & Butik Inc., 101 USPQ2d 1780 (TTAB 2012) (citing Young v. AGB Corp., 152 F.2d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); TBMP § 503.02 (2016).

Specifically, a complaint must allege sufficient facts which, accepted as true, “state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic v. Twombly, 550 U.S. 544 (2007).

I the Petitioner, accordingly state that I have been in use of the name “Auction Sniper for Ebay” for about 8 yrs since may/April of 2013 which can be backed up by Apple Inc. since I have records of submissions to the App stores referred to. To the best of my knowledge, I certify that this is true and correct information provided. I also certify that to the best of my knowledge, I only became aware of the defendant’s trademark in about April of this year. TD granted in 2021, 8 years after my first use of this name.

CONCLUSION

For these reasons, Petitioner respectfully requests that the Board deny Applicant’s Motion to Dismiss.

Respectfully submitted, by

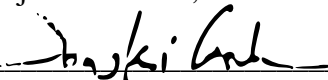
Jon Carlson 

Picture Engine Company, Inc. of Boulder Colorado, treerock@icloud.com.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing

“In opposition of motion to dismiss” has been served on (OpenSky Project, Inc. through NICHOLAS S KUHLMANN) by forwarding said copy via email to: (nkuhlmann@hjlawfirm.com, amueller@hjlawfirm.com).

Signature  /joncarlson/

Jon Carlson

Date 5/26/2021