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

Proceeding	92077100
Party	Defendant Peace Of Mind Home Health Care Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

A PEACE OF MIND HOME CARE, LLC Petitioner v. PEACE OF MIND HOME HEALTH CARE INC. Respondent.	Cancellation No. 92077100 Mark: PEACE OF MIND Registration No. 3859940 Issued: October 12, 2010

REPLY BRIEF IN SUPPORT OF RESPONDENT'S
MOTION TO DISMISS PETITION TO CANCEL

Respondent Peace of Mind Home Health Care Inc. d/b/a "Peace of Mind, Inc" ("Peace of Mind") submits this Reply Brief In Support of Respondent's Motion to Dismiss Petition to Cancel Registration No. 3029738 pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 12(b)(6), Fed. R. Civ. P. 8(a), Fed. R. Civ. P. 9(b), Trademark Board Manual of Procedure ("TBMP") 503.02, and Trademark Rule 2.116(a). 7 TTABVUE (the "Motion" or "Mov. Br.")

I. INTRODUCTION

In its opposition to the Motion, Petitioner defends its spurious abandonment claim based on alleged "third-party use", even though the only "third-party use" that Petitioner identifies is its own infringing use of A PEACE OF MIND HOME CARE. *See* Opp. Br. at 8; 1 TTABVUE 3 ¶ 3. Petitioner also continues to pursue its dubious fraud claim even though it cannot identify a fraudulent misstatement, relying instead on a Massachusetts state law statute that cannot support fraud on the USPTO.

Throughout its opposition, Petitioner improperly claims that Respondent Peace of Mind has misled the Board, miscited cases, and misquoted statutes. Despite these ad hominem attacks,

it is Petitioner that has engaged in willful deception through its adoption and infringing use of a PEACE OF MIND-formative mark, which causes consumer confusion and harms the public.

As Petitioner's claims are both without merit and futile, the Petition should be dismissed with prejudice.

II. ARGUMENT

A. Petitioner's Fraud Claim Should Be Dismissed

In its Motion, Peace of Mind makes several arguments in support of dismissal of Petitioner's fraud claim: (1) Petitioner fails to allege any specific misrepresentations (Mov. Br. at 4-5), (2) Petitioner's argument premised on alleged Massachusetts licensure requirements for "hospice programs" is flawed because Petitioner does not allege that Respondent offers the kinds of services that a "hospice program" provides (*id*. at 5-6), (3) the Board will not rule on the legality of Peace of Mind's services under state law, which precludes Petitioner's fraud claim (*id*. at 6), and (4) Petitioner fails to allege deceptive intent. *Id*. at 6-7.

Petitioner's Opposition fails to address Respondent Peace of Mind's first, third, and fourth arguments in support of dismissal of Petitioner's fraud claim. Accordingly, the Board should grant the Motion and dismiss the fraud claim at least because Petitioner makes no effort to address these arguments, and thus has failed to rebut them. *See Capital Speakers Inc. v. Capital Speakers Club of Washington D.C. Inc.*, 41 U.S.P.Q.2d 1030, 1033 (TTAB 1996) (granting respondent's motion for summary judgment because "petitioner has failed to address respondent's argument"); *Nike, Inc. v. Gregory A. Bordes*, Opposition No. 91178960, 2009 WL 4086583, at *8 (TTAB Sept. 30, 2009) ("It was applicant's duty, in response to opposer's motion for summary judgment, to establish that applicant has one or more valid affirmative defenses and that genuine issues of fact exist, for resolution by trial, in regard to such defenses. Applicant, however, has failed to do so."); *see also Daniel v. City of Matteson*, No. 09-CV-3171, 2011 WL

198132, at *6 (N.D. Ill. Jan. 18, 2011) (granting motion to dismiss where the court found Plaintiff "makes no effort to rebut Defendants' argument"); *Parsi v. Daioleslam*, 595 F. Supp. 2d 99, 105 (D.D.C. 2009) (accepting defendant's argument that plaintiffs made "no effort to rebut" defendant's argument); *Brown v. Cosby,* 433 F. Supp. 1331, 1342 (E.D. Pa. 1977) (granting motion to dismiss where Plaintiff made "no effort to rebut" Defendant's arguments).

As to the second argument, Petitioner claims in its Opposition Brief that:

> ***Respondent attempts to mislead the Board*** by failing to advise the Board that the actual text of the applicable statute for hospice care in Massachusetts which specifically states that "[t]hese services shall include, but not be limited to, physician's services, nursing care provided by or under the supervision of a registered nurse, social services, volunteer services and counseling services provided by professional or volunteer staff under professional supervision". (Id. emphasis added).

Opp. Br. at 6 (emphasis added). Peace of Mind has not misled or attempted to mislead the Board regarding the Massachusetts statute,[1] which supports Respondent Peace of Mind's position that it does not need a license to offer its hospice services. Mov. Br. at 5-6. Petitioner emphasizes the statutory language "*but not be limited to*" (*see* Opp. Br. at 6 (italics in original)), apparently to demonstrate that "physician's services" are not the only services in a "hospice program" as defined by Massachusetts law. Opp. Br. at 6. Yet that is irrelevant. Massachusetts law enumerates certain minimum requirements for a program to qualify as a "hospice program," e.g., "physician's services." That is apparent from Petitioner's quotation of the Massachusetts law as well as the full text of the statute. *See* Opp. Br. at 6 (Massachusetts law defines a "hospice program" to consist of services that "***shall include***, but not be limited to, physician's services" (*see id.*) (emphasis added and removed from original)); *see also* Exhibit 1.

[1] For the Board's consideration, the full text of the Massachusetts statute is attached as Exhibit 1.

Because Massachusetts law says that a "hospice program" "shall include" "physician's services" (Exhibit 1), and because Respondent Peace of Mind does not offer physician's services, Respondent Peace of Mind does not offer a "hospice program" under Massachusetts law. *See* Mov. Br. at 5. Indeed, Petitioner does not even allege that Respondent Peace of Mind offers a "hospice program", nor does Petitioner allege that Respondent offers the requisite services for Respondent to qualify as a "hospice program" under Massachusetts law, e.g., "physician's services". Thus, Petitioner has not plausibly alleged that Respondent Peace of Mind is subject to licensure requirements for a "hospice program" under Massachusetts law. *See* Mov. Br. at 5-6. And because Petitioner has not plausibly alleged that Respondent is subject to licensure, it cannot plausibly allege that Respondent made unlicensed or unlawful use of the PEACE OF MIND mark (1 TTABVUE 6 ¶ 19), that Respondent was not using the mark during the relevant time periods (*id*. at 5 ¶ 14; 7 ¶ 33), or that its representations to the PTO regarding its use of the mark were false (*id*. at 6 ¶ 24; 8 ¶ 38).

In sum, despite Petitioner's ad hominem attacks, and baseless claims that Peace of Mind has attempted to "mislead the Board", Opp. Br. at 6, it is clear that Petitioner's fraud claim lacks merit. Accordingly, such claim should be dismissed.

B. Petitioner's Abandonment Claim Should Be Dismissed[2]

In its Motion, Peace of Mind argues that dismissal of Petitioner's abandonment claim is warranted because Petitioner fails to allege non-use, lack of intent to resume use, or facts

[2] In support of its abandonment claim, Petitioner again claims that Peace of Mind has misled the Board, claiming that Peace of Mind "selectively omitted the second half of the definition of trademark 'abandonment' in their Motion to Dismiss" (Opp. Br. 7). Tellingly, Petitioner does not cite the page of Peace of Mind's brief where this alleged selective omission occurred. In fact, 15 U.S.C. § 1127 is not cited anywhere in the Motion, selectively or otherwise. Petitioner's "selective[] omi[ssion]" allegation is yet another false, ad hominem attack that can serve only to distract the Board from the merits of Peace of Mind's Motion. Opp. Br. at 7.

supporting naked licensing. Mov. Br. at 7-9. In its Opposition Brief, Petitioner argues that "any course of conduct of the owner" that "causes the mark to lose its significance as a mark" can support abandonment under 15 U.S.C. § 1127. Opp. Br. at 7. Petitioner asserts that its allegations, "if proven, would show that Respondent's trademark has lost significance as a source identifier." Opp. Br. at 7. Petitioner points to its own use, claiming this constitutes "third-party use" that supports abandonment. Opp. Br. at 8.[3]

While Petitioner accurately cites the text of 15 U.S.C. § 1127, which includes within the definition of abandonment "any course of conduct" that "causes the mark to lose its significance as a mark", Petitioner does not allege any facts at all about Respondent Peace of Mind's "course of conduct", let alone facts that support abandonment. Instead, Petitioner relies on a number of conclusory allegations. *See, e.g.*, 1 TTABVUE 9-10, ¶¶ 44-53 (alleging in support of abandonment that (i) third parties use the mark (without identifying any) and (ii) the mark fails to indicate source (a legal conclusion)). No specific facts are alleged in support of abandonment.

The absence of specific allegations regarding Peace of Mind's "course of conduct" strongly supports dismissal in view of Petitioner's heavy burden to prove abandonment through allegations that the mark has lost its significance as a trademark:

> To prove [genericness], the challenger must surmount the difficult hurdle of proving that the mark has become a generic name of these goods or services. While this has occurred in the past as a result of lack of diligent enforcement, it is the exception. ***To prove the second possibility that the designation has lost its significance as a mark, the burden of proof is even higher.*** The rule as discussed above is that: "Only when all rights of protection are extinguished is there abandonment." That is, the challenger must prove a negative: there are absolutely no signs of life in the designation as an indicator of origin.

[3] Indeed, the only "third-party use" Petitioner identifies is Petitioner's own use of A PEACE OF MIND HOME CARE. Opp. Br. at 8; 1 TTABVUE at 3 ¶ 1. Yet Petitioner is not a "third party" but a party to this case. Moreover, Petitioner cites no authority for the unlikely proposition that a petitioner can rely solely on its own infringing "third-party use" to plead abandonment.

§ 17:17. "Abandonment" by failure to prosecute infringers, 3 McCarthy on Trademarks and Unfair Competition § 17:17 (5th ed.) (emphasis added); *see also Wallpaper Mfrs., Ltd. v. Crown Wallcovering Corp*., 680 F.2d 755, 214 USPQ 327, 335-336 (CCPA 1982) ("Only when all rights of protection are extinguished is there abandonment" based on a defendant's course of conduct). Against this heavy burden, Petitioner does not allege a single third-party use of the PEACE OF MIND mark at issue in this proceeding. Rather, Petitioner's abandonment claim relies solely on its own alleged use of the mark A PEACE OF MIND HOME CARE. *See* 1 TTABVUE 3 at ¶ 1. Even accepting that allegation as true, it does not support a plausible claim of abandonment. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.")

What remains of Petitioner's allegations in support of its abandonment claim are conclusory assertions devoid of specific factual allegations. Such allegations cannot "unlock the doors of discovery." *See* Mov. Br. at 8-9 (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009)). Indeed, Petitioner's allegations in support of abandonment, e.g., vague and generalized third-party use (1 TTABVUE 11-12, ¶¶ 56-59, 65) and allegations that PEACE OF MIND "does not serve to distinguish Registrant" (*id*. at 11, ¶ 60), "does not indicate the source of services" (*id*. at ¶ 62), or "does not serve as a source identifier" (*id*. at ¶ 63), are conclusory.[4] Without

[4] Petitioner misconstrues Peace of Mind's brief and the Supreme Court's *Iqbal* decision. Petitioner says that "the portion of the *Iqbal* case referenced by Respondent focuses on 'legal conclusions'". Opp. Br. at 8. The sentence Peace of Mind cites in its Moving Brief reads as follows: "Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679 (2009). While Petitioner tries to rewrite the *Iqbal* decision by adding "legal" before "conclusions", the Supreme Court broadly rejected "mere conclusory statements"; it did not distinguish between conclusory *legal* statements and conclusory *factual* statements. *See id.* (emphasis added). Because Petitioner's claims rest on conclusory assertions, *Iqbal* supports their dismissal.

more, Petitioner's abandonment claim must be dismissed. *See, e.g., Amtgard Int'l v. Aughts LLC*, Proceeding No. 9206841, 2019 WL 1916119 at *3 (TTAB Apr. 26, 2019) ("Petitioner's claim does not allege that Respondent's failure to police infringers or supervise licensees has caused the involved mark to lose its significance, nor does the claim allege any facts as to either licensing or failure to police.")

III. CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the Board dismiss the Petition for Cancellation in its entirety with prejudice and without leave to amend.

Respectfully Submitted,

Dated: August 30, 2021

By: /Christopher P. Foley/

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing REPLY BRIEF IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS PETITION TO CANCEL was served by e-mail on August 30, 2021 on counsel for Petitioner at the following address of record:

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Exhibit 1

M.G.L.A. 111 § 57D

§ 57D. Hospice programs; licensure; limitations

Effective: July 1, 2014

Currentness

The department shall, after a public hearing, promulgate rules and regulations for the licensing and conduct of hospice programs. A hospice program means palliative and supportive care and other services provided by an interdisciplinary team under the direction of an identifiable hospice administration to terminally ill patients with a limited life-expectancy and their families. Services shall be provided to meet the physical, emotional and spiritual needs experienced during the course of their illness, death and bereavement at home, in the community and in facilities.

These services shall include, but not be limited to, physician's services, nursing care provided by or under the supervision of a registered nurse, social services, volunteer services and counseling services provided by professional or volunteer staff under professional supervision. Hospice is a centrally coordinated program ensuring continuity and consistency of home and inpatient care provided directly through an inpatient facility operating under its hospice license or through an agreement.

The department shall issue for a term of 2 years and renew for a like term a license to maintain a hospice program to any organization it considers responsible and suitable to maintain such a program. The department may issue not more than 8 licenses under this section to maintain an inpatient hospice program and shall promulgate regulations to govern the issuance of licenses to such programs. Hospice program licensees shall be subject to suspension, revocation or refusal to renew for cause. The department shall determine the fee and renewal of the license. Prior to issuing a new license, and every 4 years thereafter, the department, in consultation with the Hospice and Palliative Care Federation of Massachusetts, shall review the number of inpatient hospice facilities operating under this section, as well as the demand for such facilities, and make recommendations on the appropriate number of inpatient hospice facility licenses that should be available in the commonwealth. The department shall report its recommendations to the executive office of health and human services and the joint committee on public health.

A hospice program may not operate in the state or use the word "hospice" or "Hospice Program" without a hospice license issued by the commissioner.

A person not licensed to provide hospice services under this chapter shall not use the word "hospice" in a title or description of a facility, organization, program, service provider or services or use any words, letters, abbreviations or insignia indicating or implying that the person holds a license to provide hospice services.

Credits

Added by St.1984, c. 432, § 1. Amended by St.2002, c. 283, § 1; St.2014, c. 165, § 139, eff. July 1, 2014.

M.G.L.A. 111 § 57D, MA ST 111 § 57D
Current through Chapter 26 of the 2021 1st Annual Session.

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