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

Proceeding	92077100
Party	Plaintiff A Peace Of Mind Home Care LLC
Correspondence Address	JEFFREY STURMAN STURMAN LAW LLC PO BOX 371706 DENVER, CO 80237 UNITED STATES Primary Email: tm-docket@sturmanlaw.com 720-772-1724
Submission	Opposition/Response to Motion
Filer's Name	Jeffrey Sturman
Filer's email	info@sturmanlaw.com
Signature	/Jeffrey Sturman/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>A Peace Of Mind Home Care LLC, Petitioner,</p> <p style="text-align:center">v.</p> <p>Peace of Mind Inc., Respondent.</p>	<p>Cancellation Proceeding No. 92077100</p> <p>Trademark Registration No. 3,859,940 Trademark: PEACE OF MIND</p>
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Petitioner’s Response to Respondent’s Motion to Dismiss

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On July 19, 2021, Peace Of Mind Home Health Care Inc. (“Respondent”), filed a Motion to Dismiss a Petition to Cancel that was filed by A Peace Of Mind Home Care LLC (“Petitioner”). Petitioner by and through Petitioner’s undersigned counsel, responds to the Motion to Dismiss as follows.

- I. Argument
 - A. Standard of Review for Motion to Dismiss

The Federal Rules of Civil Procedure provide for the filing of motion to dismiss a complaint when such motion is filed prior to a responsive pleading. See Fed. R. Civ. P. 12(b)(6). In evaluating a motion to dismiss, the central issue is whether, in the light most favorable to the

plaintiff, the complaint states a valid claim for relief.” Bombardier Aero v. Ferrer, Poirot Wansbrough, 354 F.3d 348, 351-352 (5th Cir. 2003) (quoting St. Paul Mercury Ins. Co., 224 F.3d at 440 n. 8); A Wright & Miller, Federal Practice and Procedure: Civil 2d § 1357 (1990). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974).

“A motion made under Rule 12(b)(6) challenges the legal theory of the complaint, not the sufficiency of any evidence that might be adduced.” Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc., 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); see also Lewis Silkin LLP v. Firebrand LLC, 129 USPQ2d 1015, 1016 (TTAB 2018); Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG, 36 USPQ2d 1221, 1222 (TTAB 1995). Respondent cites *Advanced Cardiovascular* for the premise that motions to dismiss “spare litigants the burdens of unnecessary pretrial and trial activity”. However, Respondent’s brief leaves out the next sentence, in which the court stated that “[s]uch a motion, which cuts off a claimant at the threshold, must be denied “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). See also Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984); Scheuer v. Rhodes, 416 U.S. at 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90. The self-serving and untested testimony of a single party who claims to represent Respondent does not meet the standard of “beyond doubt”.

Dismissing a petition to cancel on the grounds that the claims as set forth are insufficient, is only proper in cases where the petitioner is not entitled to relief upon proof of any of the facts as alleged. See Stanspec Co. v. American Chain & Cable Co., Inc., 531 F.2d 563, 189 USPQ 420 (CCPA 1976). In evaluating a motion to dismiss, all material allegations of the complaint shall be accepted as true. See Hishon v. King & Spalding, 467 U.S. at 73, 104 S.Ct. at 2232. A petitioner’s factual allegations need only “raise a right to relief above the speculative

level”. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 92 (2007). In order to overcome a 12(b)(6) motion to dismiss, a party need only allege facts that, once proved, would demonstrate that they are entitled to the requested relief, more specifically that, they have legal standing to bring the complaint and valid legal grounds exist that support the granting of the relief sought. See Fair Indigo LLC v. Style Conscience, 85 USPQ2d 1536, 1538 (TTAB 2007); Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998). Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

A. Petitioner’s Entitlement to a Statutory Cause of Action

“A ‘cause of action’ consists of two elements: operative facts and the right or power to seek and obtain redress for infringement of a legal right which those facts show.” Corcamore, LLC v. SFM, LLC, 978 F.3d 1298, 1304 (Fed. Cir. 2020) (citing See 1A C.J.S. Actions § 53); see also ‘Cause of Action’, Black’s Law Dictionary (11th ed. 2019) (“A group of operative facts giving rise to one or more bases for suing.”). In order to establish that a party is entitled to bring a statutory cause of action under Section 14 of the Trademark Act, “a party must demonstrate (i) an interest falling within the zone of interests protected by the statute and (ii) proximate causation”. Id. at 1303 (citing Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 129–34, 134 S.Ct. 1377 (2014)). There is no difference in such requirements for a cancellation proceeding versus an opposition proceeding. See Selva & Sons, Inc. v. Nina Footwear, Inc., 705 F.2d 1316, 1325, 217 USPQ 641 (Fed. Cir. 1983).

Meeting the requirements of the zone-of-interests test is “not especially demanding”. Corcamore, LLC v. SFM, LLC, 978 F.3d at 1303 (quoting Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. at 130, 134 S.Ct. at 1389; see also Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak, 567 U.S. 209, 225, 132 S. Ct. 2199, 2210, 183 L. Ed. 2d 211, 225 (2012)). The United States Supreme Court has noted that the requirements of the

zone-of-interests test and the “real-interest” test share a similar purpose and application.” Id. at 1305.

“The purpose of the zone-of-interests test is to ‘foreclose [] suit only when a plaintiff’s interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue.’” Id. at 1303 (quoting Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. at 130, 134 S.Ct. at 1389. Similarly the “real interest” test serves to “distinguish [parties demonstrating a real interest] from mere intermeddlers or . . . meddlesome parties acting as self-appointed guardians of the purity of the Register.” Id., 978 F.3d at 1305 (quoting Selva & Sons, Inc. v. Nina Footwear, Inc., 705 F.2d at 1325–26, 217 USPQ 641. Moreover, “the benefit of any doubt goes to the plaintiff”. Id. at 1303 (quoting Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. at 130, 134 S.Ct. at 1389. The second part of the test, “the proximate-cause requirement generally bars suits for alleged harm that is ‘too remote’ from the defendant’s unlawful conduct”. Id. (quoting Lexmark Int’l, Inc. v. Static Control Components, Inc., 572 U.S. at 133, 134 S.Ct. at 1389.

At the pleading stage a petitioner need only demonstrate “a personal interest in the outcome of the case beyond that of the general public. Jewelers Vigilance Comm. v. Ullenberg Corp., 823 F.2d 490, 493, 2 USPQ2d 2021 (Fed. Cir. 1987) (citing Lipton Indus., Inc. v. Ralston Purina Co., 670 F.2d at 1028, 213 USPQ at 188; see also Estate of Biro v. Bic Corp., 18 USPQ 1382, 1385 (TTAB 1991). Petitioner has alleged “a distinct and palpable injury” to themselves, not solely the general public. See Warth v. Seldin, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975). Petitioner has brought forth a cause of action that Respondent’s trademark does not serve as a source identifier in connection with Respondent’s services when offered by Respondent. Further, Petitioner’s claims are based upon Petitioner’s own use of a trademark that is extremely similar to Respondent’s and in connection with similar services. Therein, Petitioner has set forth allegations that Petitioner has an equal right to use the term “Peace of

Mind” in connection with the services at issue. See Jewelers Vigilance Comm. v. Ullenberg Corp., 823 F.2d at 493, 2 USPQ2d 2021 (citing Dewalt, Inc. v. Magna Power Tool Corp., 289 F.2d 656, 129 USPQ 275 (CCPA 1961). Moreover, “the Lanham Act ‘requires only a belief of damage resulting from the [] registration, and while that belief must have some reasonable basis in fact, this statutory provision . . . has been liberally construed”. Jewelers Vigilance Comm. v. Ullenberg Corp., 823 F.2d at 493, 2 USPQ2d 2021 (citing Universal Oil Prod. Co., 463 F.2d at 1124, 174 USPQ at 459-60); see also Tanners' Council of America, Inc. v. Gary Industries Inc., 440 F.2d 1404, 1406-1407, 58 CCPA 1201, 1203-1204 (CCPA 1971).

As Petitioner has established their entitlement to a statutory cause of action, Petitioner is entitled to rely on any of the grounds of Section 2 of the Lanham Act in seeking to cancel the Subject Trademark Registration. See Id. (citing Lipton Indus., Inc. v. Ralston Purina Co., 670 F.2d at 1031, 213 USPQ at 190; see also Warth v. Seldin, 422 U.S. at 501, 95 S.Ct. at 2206.

B. Petitioner’s Fraud Claims are Valid

Respondent asserts that Petitioner has improperly equated “hospice care programs” with “hospice care services”. Respondent asserts that “Massachusetts law narrowly defines a “hospice program” to include specific services, e.g., “physician’s services” that Respondent does not provide. Mass. Gen. Laws Ann. ch. 111, § 57D. In seeking to overcome Petitioner’s well pleaded claims, 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). Respondent’s claims regarding the trademark registrations of other parties cannot support a trademark registration that was obtained fraudulently by Respondent. The subject trademark registration can only be evaluated on its own merits.

Despite Respondent's claims in regards to Petitioner's allegations, Petitioner has no intention to mislead the Board regarding this matter. On the contrary, Petitioner has made it a point to rely upon the statutory text as written, in its entirety. Section 57D is worded in such a manner to include a broad range of parties who may provide hospice care services, specifically including the words "other services" and "shall include, but not be limited to". The statute defines a "hospice program" as "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". (*Id.* emphasis added). Respondent, without any basis, seeks to claim that its services cannot possibly fall under the applicable statute, despite the broad manner in which the statute has been drafted.

Rule 9 of the Federal Rules of Civil Procedure does not eliminate the basic notion of a pleading. Petitioner need not set forth evidence at this stage of the proceeding. Petitioner has set forth allegations of fraud in Petitioner's Petition to Cancel with particularity and specificity. Petitioner's allegations are plausible when evaluated as they are set forth.

C. Petitioner's Abandonment Claims are Valid

In their Motion to Dismiss¹, Respondent asserts that Petitioner's claims for abandonment must fail because Petitioner did not allege that Respondent has ceased use of the trademark at issue, without intent to resume such use. However, Petitioner selectively omitted the second half of the definition of trademark "abandonment" in their Motion to Dismiss. Section 45 of the Lanham Act states that, "[a] mark shall be deemed to be 'abandoned' if either of the following occurs: . . . (2) When any course of conduct of the owner, including acts of omission . . . causes the mark to lose its significance as a mark." 15 U.S. Code § 1127. Petitioner has set forth allegations that, if proven, would show that Respondent's trademark has lost significance as a source identifier in connection with Respondent's services. Despite, Respondent's statements to

¹ See TTABVUE 7 at p.12.

the contrary, Petitioner's claims regarding third party use of the trademark at issue, are not based upon speculation, nor guesswork.

Respondent cites *Iqbal* for support in their quest to avoid discovery in this matter.² However, the portion of the *Iqbal* case referenced by Respondent, focuses on "legal conclusions". See *Ashcroft v. Iqbal*, 556 U.S. 662, 678-679, 129 S.Ct. 1937 (2009). Petitioner does not seek to rest upon any legal conclusion in their Petition to Cancel, nor a "mere possibility". *Id.* at 679. Respondent's legal premise is founded upon a misunderstanding of the rules and requirements for pleading. A pleading is a legal instrument to inform an opposing party of the claims being made against them, not a vehicle for presenting evidence of such claims. Moreover, Petitioner has specified that Petitioner is one of the third parties that has caused Respondent's trademark to lose significance, and thereby be considered abandoned. Therefore, Respondent's claim that Petitioner does not identify a single third party who is using the trademark at issue or one very similar to such trademark, is unfounded. Further, the dominant, and literal portion of Petitioner's trademark is "Peace of Mind". Therefore, it is plausible that third party use of the term Peace of Mind, (even without the design portion of the trademark) in connection with the services at issue, has caused such term to lose its significance as a trademark in connection with such services.

II. Conclusion

To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570; *Iqbal*, 556 U.S. at 697 (2009). Petitioner has clearly set forth allegations which go beyond "the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 662, 678

² See TTABVUE 7 at p.5.

(citing Twombly, 550 U.S. at 556). Therefore, a complaint is not required to set out “detailed factual allegations,” but it must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.” Id., at 555.

Petitioner’s allegations in regards to the lack of distinctiveness of the trademark at issue, and Petitioner’s allegations of ongoing use of the PEACE OF MIND trademark, are sufficient to establish their entitlement to a statutory cause of action in this matter. Eastman Kodak Co. v. Bell & Howell Document Management Products Co., 23 USPQ2d 1878, 1879 (TTAB 1992), aff’d 994 F.2d 1569, 26 USPQ2d 1912 (Fed. Cir. 1993) (see also 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 20:11 (4th ed. WESTLAW update 2011)). Petitioner has set forth a valid claim to cancel the subject trademark registration. Therefore, as Petitioner has properly pleaded grounds and established standing for at least one of their claims, they may also assert any other sufficient legal claims that have a reasonable basis in fact. See Petroleos Mexicanos v. Intermix S.A., 97 USPQ2d 1403, 1406 (TTAB 2010) (citing Lipton Indus., Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ at 188; Enbridge Inc. v. Excelerate Energy LP, 92 USPQ2d 1537, 1543 n.10 (TTAB 2009), citing Liberty Trouser Co., Inc. v. Liberty & Co., 222 USPQ 357, 358 (TTAB 1983)).

Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. Iqbal, 556 U.S. 662. Petitioner has provided more than “a short and plain statement of the claim” establishing their right to relief in this matter. The allegations specified in Petitioner’s Petition to Cancel are more than “enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555. Further, Petitioner’s claims are “construed so as to do justice.” Fed. R. Civ. P. 8(e). It is not “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”. Conley v. Gibson, 355 U.S. at 45-46, 78 S.Ct. at 101-02.

Therefore, Petitioner respectfully asks the Board to deny Respondent’s Motion to Dismiss Petitioner’s Petition to Cancel.

Dated: August 09, 2021

Respectfully submitted,
A Peace Of Mind Home Care LLC,

By their attorney
/s/ Jeffrey Sturman
Jeffrey Sturman, Esq.
Sturman Law, LLC
8700 E. Jefferson Ave # 371706
Denver, CO 80237
tm-docket@sturmanlaw.com
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Jeffrey Sturman, as attorney for Petitioner, A Peace of Mind Home Care, LLC, hereby certify that a true and complete copy of Petitioner's Response to Registrant's Motion to Dismiss Petitioner's Petition to Cancel has been served upon attorneys for Peace Of Mind Home Health Care Inc., via email, on August 09, 2021, at the following email addresses: docketing@finnegan.com, christopher.foley@finnegan.com, samuel.eichner@finnegan.com, TTAB-Legal-Assistants@finnegan.com, mark.sommers@finnegan.com.

/s/ Jeffrey Sturman
Jeffrey Sturman, Esq.
Sturman Law, LLC
8700 E Jefferson Ave # 371706
Denver, CO 80237
Phone: 720-772-1724
tm-docket@sturmanlaw.com
Attorney for Petitioner