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

Proceeding no.	92085380
Party	Plaintiff Holy Cow Restaurant Inc
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

Holy Cow Restaurant, Inc., *Petitioner,* v. Harry Caray Ltd., *Registrant.*	**Cancellation No. 92085380**

OPPOSITION TO REGISTRANT'S MOTION TO DISMISS

Petitioner Holy Cow Restaurant Inc. ("Petitioner"), by and through its undersigned counsel, hereby opposes the motion of registrant Harry Caray Ltd. ("Registrant") seeking to dismiss Petitioner's Petition for Cancellation on the basis of Federal Rule of Civil Procedure 12(b) ("Registrant's Motion"), and respectfully requests Registrant's Motion be denied. In the alternative, in the event the Board grants Registrant's Motion, Petitioner respectfully requests leave to file an amended pleading.

I. Standard for Motion to Dismiss

A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of the allegations set forth in a pleading. To survive a motion to dismiss under Fed. R. Civ. P 12(b)(6) for failure to state a claim upon which relief can be granted, Petitioner need only allege sufficient factual content that, if proved, would allow the Board to

conclude, or to draw a reasonable inference, that (1) Petitioner has standing to maintain the proceeding, and (2) a valid ground exists for cancelling the mark. TBMP § 503.02; *see also Covidien LP v. Masimo Corp.*, 109 U.S.P.Q.2D (BNA) 1696, 1697 (TTAB 2014). For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to plaintiff. *Fair Indigo LLC v. Style Conscience*, 85 U.S.P.Q.2D (BNA) 1536, 1538 (TTAB 2007).

II. Petitioner Has Standing

Registrant's Motion does not contest Petitioner's standing, and indeed the Petitioner does have standing in this cancellation proceeding by virtue of Registration Nos. 2216797 and 3141729 (each a "Registration" and collectively, the "Registrations") having been cited against Petitioner's U.S. Trademark Application Serial Nos. 97006584 for HOLY HALAL COW and 98069272 for HOLY BURGERS COW.

III. The Allegations of the Petition for Cancellation, if Proved, Would Provide Valid Ground for Cancellation

Petitioner's Petition for Cancellation contains factual allegations that, if proved true during the course of this proceeding, would provide valid ground for the cancellation of the Registrations at issue. That is all that is required at the pleading stage. TBMP § 503.02. Registrant's Motion provides no basis on which the Petition for Cancellation may be found legally insufficient, discussing instead at length matters irrelevant to the present motion.

When nonuse of a trademark continues for at least three (3) years in interstate commerce, as is the case here, the lack of use is prima facie evidence of abandonment. *See* C*ity National Bank v. OPGI Management GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1676-79 (TTAB 2013) (abandonment of a registration based on over three years of nonuse where respondent did not use

mark with recited services since at least the issuance date of the involved registration and where the nature of the use shown by respondent did not constitute use in commerce). A service mark is considered to be used in commerce on services when it is "used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State." *See United Global Media Group, Inc. v. Tseng*, 112 U.S.P.Q.2D (BNA) 1039, 1044-1045 (TTAB 2014). However, use of a designation or slogan to convey advertising or promotional information, rather than to identify and indicate the source of the services, is not service mark use. *See In re Standard Oil Co.*, 275 F.2d 945, 125 USPQ 227 (C.C.P.A. 1960) (GUARANTEED STARTING found to be ordinary words that convey information about the services, not a service mark for the services of "winterizing" motor vehicles); *In re Gilbert Eiseman, P.C.*, 220 USPQ 89 (TTAB 1983) (IN ONE DAY not used as source identifier but merely as a component of advertising matter that conveyed a characteristic of applicant's plastic surgery services). Accordingly, a specimen or other use examples showing a mark used *not* as a trademark, but as a mere phrase on advertising or promotional information, as in the case at hand, would not constitute use in commerce of the service mark.

Here, Petitioner alleges, *inter alia*, that:

4. Online research failed to reveal any evidence of the Registered Marks being used in relation to the Registered Services.

5. Respondent's website at https://www.harrycarays.com/ does not identify any use of HOLY COW! for the Registered Services in the United States.

6. On information and belief, Respondent has failed to use the Registrations for the Registered Services in U.S. interstate commerce in connection with the sale of the Registered Services for a period of at least three (3) years, establishing prima facie evidence of abandonment.

Petition for Cancellation, Docket #1, at ¶ ¶ 4-6.

Such allegations constitute a legally sufficient pleading of Petitioner's claim that Registrant's does not now, nor has it for at least a period of the last three years, used in commerce the mark reflected in the Registrations to identify and indicate the source of the services identified in the Registrations, and accordingly, that the marks of the Registrations have been abandoned. Registrant's Motion demands further "factual averments" in support of Petitioner's Petition for Cancellation, including affirmative evidence that Registrant is not using the marks of the Registrations. But contrary to the Registrant's suggestion, "proof" of online research or other findings in support of the Petitioner's claims are not necessary at this stage. Should the Petitioner's allegations in Petitioner's Petition for Cancellation, including those pleaded on information and belief, be proven true during the course of this proceeding, Petitioner will prevail on its claim and the Registrations will be cancelled. *See Lewis Silkin LLP v. Firebrand LLC*, 129 U.S.P.Q.2D (BNA) 1015, 1016 (TTAB 2018) (holding petition for cancellation wherein salient allegations were based "on information and belief" to be legally sufficient). Accordingly, Registrant's Motion must be denied.

Other than Registrant's mistimed demands for proof at the pleading stage, Registrant's Motion largely ignores the legal sufficiency of Petitioner's allegations, offering no correct and substantive arguments as to why Petitioner's allegations could possibly be legally insufficient. Registrant does not identify a single element that has not been pleaded by Petitioner. Instead, Registrant submits one (1) screenshot of the phrase "Holy Cow! Thanks for stopping by!" on Registrant's website, which in fact does not show trademark use for the services in the Registrations at all, in an apparent attempt to show why the Board should ultimately find for Registrant in this proceeding. "Whether the plaintiff will be able to prove its trademark claims is a matter for trial … and is irrelevant to assessment of the legal sufficiency of the complaint." *Lewis Silkin LLP*, 129 U.S.P.Q.2D (BNA) 1020-1021, *quoting Guess? IP Holder LP v. Knowluxe LLC*,

116 USPQ2d 2018, 2019 (TTAB 2015). Petitioner denies the factual and legal conclusions arrived at by Registrant in Registrant's Motion and welcomes the opportunity to demonstrate that Petitioner's allegations are true during the course of this proceeding.

IV. Conclusion

In light of the foregoing, Petitioner respectfully requests the Board deny Registrant's Motion and allow the above-captioned cancellation to proceed. In the alternative, in the event the Board grants Registrant's Motion, Petitioner respectfully requests leave to file an amended pleading.

Respectfully submitted,

JAYARAM PLLC

Dated: August 8, 2024

By: / /

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing OPPOSITION TO REGISTRANT'S MOTION TO DISMISS was served by e-mail on Registrant on Thursday, August 8, 2024 at the following address:

CHARLES T. RIGGS JR.
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Dated: August 8, 2024

By: / Samuel T Kilb /
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