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

Proceeding	92048392
Party	Plaintiff ICU Medical, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ICU MEDICAL, INC.,

Petitioner,

v.

RYMED TECHNOLOGIES, INC.,

Respondent.

Cancellation No. 92048392

Mark: NEUTRAL
Reg. No. 3168566

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Dated: November 12, 2009

MOTION FOR ENTRY OF JUDGMENT

Petitioner ICU Medical, Inc. (“ICU” or “Petitioner”) hereby moves the Board for an Order entering judgment in its favor and cancelling the “NEUTRAL” mark based on the October 8, 2009 order and judgment of the U.S. District Court for the Central District of California in *RyMed Technologies, Inc. v. ICU Medical, Inc.*, Case No. SA CV-07-1199 (DOC) (attached hereto as Exhibit A). *See* Trademark Trial and Appeal Board Manual of Procedure (“TMBP”) § 510.02(b).

BACKGROUND

On November 6, 2007, Petitioner filed a petition to cancel RyMed Technologies, Inc.'s ("RyMed" or "Respondent") mark, Reg. No. 3,168,566 ("the '566 trademark"), "NEUTRAL," on the basis that the mark is "generic" and/or "merely descriptive" of the identified goods and should not have registered as a trademark.

On October 10, 2007, RyMed filed a civil action against ICU in the United States District Court for the Central District of California, *RyMed Technologies, Inc. v. ICU Medical, Inc.*, Case No. SA CV-07-1199 (DOC) alleging, *inter alia*, infringement of the '566 trademark.

On February 14, 2008, Respondent filed a motion with the Board to issue an order suspending the instant cancellation proceeding, pending the disposition of the Civil Action because the claims asserted in the District Court in California involve common legal and factual issues in dispute in the Board proceedings. On April 1, 2008, the Board issued an Order granting Respondent's motion and this Cancellation was suspended pending "final determination" of the Civil Action, and ordered that: "Within twenty days after the final determination of that civil action in California, the interested party should notify the Board so that this case may be called up for appropriate action." Attached as Exhibit B is a copy of the Board's April 1, 2008 Order.

On April 22, 2009, the Court issued an order, attached hereto as Exhibit C, granting ICU's motion for summary judgment on the trademark claims, holding that the "NEUTRAL" mark at issue in this cancellation proceeding is generic and not entitled to any trademark protection.

On October 8, 2009, the Court issued an order granting ICU's counterclaims 1 through 4 for invalidity and cancellation of the "neutral" and "neutral displacement" trademarks, and dismissing as moot counterclaim 5 for non-infringement of the "neutral" and "neutral displacement" trademarks. *See* Exhibit A. The Court further ordered that pursuant to 15 U.S.C. § 1119, that the Director of the Patent and Trademark Office shall cancel U.S. Registration No. 3,168,566 for the term "neutral." *Id.*

On October 8, 2009, the Court also entered final judgment concerning the trademark counterclaims in favor of ICU. Attached hereto as Exhibit D is a copy of the Court's October 8, 2009 judgment.

The deadline for Respondent to file a notice of appeal of the District Court's order and judgment was November 9, 2009. *See* Fed. R. App. Proc. 4(a)(1)(A). RyMed did not file a notice of appeal prior to the deadline.

ARGUMENT


The Board should cancel the '566 trademark in accordance with the Court's order that "pursuant to 15 U.S.C. § 1119, the Director of the Patent and Trademark Office shall cancel U.S. [sic] Registration No. 3,168,566 for the term 'neutral'" *See* Exhibit A.

Furthermore, the Board should issue judgment in favor of Petitioner because the District Court's judgment in the Civil Action in favor of Petitioner has become final and is therefore binding upon the Board. *See* TBMP § 510.02(a) ("To the extent a civil action in a federal district court involves issues in common with those in a proceeding before the Board, the decision of the Federal district court is binding upon the Board.")(citing *Goya Foods Inc. v. Tropicana Products Inc.*, 846 F.2d 848 (2d Cir. 1988); *American Bakeries Co. v. Pan-O-Gold Baking Co.*, 650 F.Supp. 563 (D.Minn. 1986); *Toro Co. V. Hardigg Industries, Inc.*, 187 U.S.P.Q. 689 (T.T.A.B. 1975), *rev'd on other grounds*, 549 F.2d 785 (C.C.P.A. 1977); *Other Telephone Co. v. Connecticut National Telephone Co.*, 181 U.S.P.Q. 125 (T.T.A.B. 1974), *petition denied*, 181 U.S.P.Q. 779 (Comm'r 1974); *Tokaido v. Honda Associates Inc.*, 179 U.S.P.Q. 861 (T.T.A.B. 1973); *Whopper-Burger, Inc. v. Burger King Corp.*, 171 U.S.P.Q. 805 (T.T.A.B. 1971); *Tuvache, Inc. v. Emilio Pucci Perfumes International, Inc.*, 263 F.Supp. 104 (S.D.N.Y. 1967) .

Since RyMed opted not to file a notice of appeal on or before its deadline of November 9, 2009, the District Court's order directing the Director of the Patent and Trademark Office to cancel the '566 trademark for "NEUTRAL" has become final. *See* TMBP § 510.02(b) ("a proceeding is considered to have been fully determined when a decision on the merits of the case (i.e. a dispositive ruling that ends litigation on the merits) has been rendered and no appeal has been filed therefrom, or all appeals filed have been decided.")

Thus, ICU respectfully requests that the Board enter judgment in favor of Petitioner and cancel registration of the '566 trademark.

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