BULKY DOCUMENTS

(Exceeds 100 pages)

Filed: 5/27/2011

Title: PETTITIONER'S MOTION AND MEMORANDUM FOR SUMM. JUDGMENT; PETITIONER'S NOTICE OF RELIANCE; AND DEC. OF JEFFREY KAPLAN IN SUPPORT.

Part 1 of 1

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

Cancellation No. 92053030

Jeffrey Kaplan

Petitioner,

v.

Mark: ASPERGUM
Registration No. 792,115

Insight Pharmaceuticals L.L.C.

Respondent

72/205, 129

PETITIONER'S FILING OF BULKY MATERIAL WITH THE BOARD

Dear Sir/Ma'am:

Due to the size of this document we could not scan it into the TTAB on line submission service.

Please kindly scan and submit to the Board for their review.

Respectfully submitted,

Jeffrey Kaplan, Petitioner

5/24/11

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

Cancellation No. 92053030

Jeffrey Kaplan

Petitioner,

v.

Mark: ASPERGUM
Registration No. 792,115

Insight Pharmaceuticals L.L.C.

Respondent

_____/

PETITIONER'S MOTION AND MEMORANDUM FOR SUMMARY JUDGMENT;
PETITIONER'S NOTICE OF RELIANCE;
AND DECLARATION OF JEFFREY KAPLAN IN SUPPORT

Petitioner, Jeffrey Kaplan, ("Kaplan") pursuant to Rule 56(c) of the Federal Rules of Civil Procedure and Rule 2.127 of the Trademark Rules of Practice moves the Board for an Order Granting Summary Judgment in its favor on all claims asserted against the Respondent, Insight Pharmaceuticals L.L.C. ("Insight") on the ground that there are no genuine issues of material fact precluding Summary Judgment in its favor as follows:

The Summary Judgment Standard

The Summary Judgment procedure is a pretrial device to dispose of cases on which there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. (*See Buffett v. Chi-Chis, Inc.* 226 USPQ 428 (TTAB 1985); *Block Drug Co. v. Morton-Norwich Products Inc.* 202 USPQ 157) (TTAB 1979) Entry of summary judgment is appropriate only where there are no genuine disputes as to material facts and judgment may be rendered as a matter of law based on undisputed facts. (*See Sweats fashions v. Panill Knitting* Co. 833 F. 2d 1560, 4 USPQ2d 1793) (Fed. Cir. 1987)

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Parties Introduction:

"Kaplan" is the President of Retrobrands U.S.A. Inc., an active for profit Florida Corporation- www.retrobrands.net, in business since 2010 which acquires and then through extensive marketing efforts and financial commitment, licenses famous and iconic abandoned brands for re-launching to the public. This successful business model has allowed dozens of once "warehoused" trademarks to be re-launched to the public and has allowed abandoned trademarks to be removed from the cluttered trademark registry. (*See* Declaration of Jeffrey Kaplan at ¶2-3) Some trademark examples that "Kaplan" has successfully acquired and are now being re-launched to the public are Datril ™, Hai-Karate™, Di-Gel™, Modess™ and Hidden Magic™ (*See* Declaration of Jeffrey Kaplan at ¶4)

"Insight" is a large manufacturing and marketer based in Langhorne, Pennsylvania. They offer to the public leading non-prescription medications that aid users in dealing with common ailments. Some products are Anacin®, Allerest®, Sucrets®, Nix® and many other popular brands. "Insight" products and brands are available at most leading retailers, drug, supermarkets and mass merchandisers throughout the United States. (*See* Declaration of Jeffrey Kaplan at ¶5)

"Insight" currently owns the Federal trademark "ASPERGUM" for chewing gum containing aspirin Registration No. 792,115. (*See* Declaration of Jeffrey Kaplan at ¶6)

Brief Statement of Facts

"Kaplan" filed on September 10th 2010 an intent- to- use application for the trademark ASPERGUM (Application Serial No, 85126700) based on its bona fide intent to use the trademark in commerce. Believing that the existing Federal Registration for ASPERGUM was invalid due to abandonment, "Kaplan" subsequently filed a Petition to Cancel Federal Registration number 792,115. (*See* Declaration of Jeffrey Kaplan at ¶7)

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Respondent as part of their answer denied they abandoned their mark. Respondent also submitted affirmative defenses that stated:

(1) Petitioner would not be damaged by Respondent's registration, (2) Respondent did not abandon their mark, (3) Petitioner did not have an actual intent to use the mark in commerce and (4) Petitioner has not and will not suffer damage or harm by Registration No. 792,115 remaining on the Principal Register. Petitioner subsequently filed a motion to strike all of Respondent's affirmative defenses but the Board only agreed to strike affirmative defense number three (3).

Undisputed Fact That Petitioner Has Clearly Established Standing

Definition of Standing:

As per TBMP 309.03(b): Any person who believes it is or will be damaged by registration of a mark has standing to file a complaint. (*See* Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063 and 1064, and TBMP § 303) (Who May Oppose or Petition).

At the pleading stage, all that is required is that a plaintiff allege facts sufficient to show a "real interest" in the proceeding, and a "reasonable basis for belief of damage." (*See Ritchie v. Simpson,* 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999) and *Lipton Industries, Inc. v. Ralston Purina Co.,* 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

To plead a "real interest", plaintiff must allege a "direct and personal stake" in the outcome of the proceeding.(*See Ritchie v. Simpson*, supra at 1026. *See* also *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d1024, 213 USPQ 185, 189) (CCPA 1982) The allegations in support of plaintiff's belief of damage must have a reasonable basis in fact. (*See Ritchie v. Simpson,* supra at 1027 (citing *Universal Oil Products v. Rexall Drug & Chemical Co.,* 463 F.2d 1122, 174 USPQ 458, 459-60 (CCPA 1972) and stating that the belief of damage alleged by plaintiff must be more than a subjective belief).

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