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

Proceeding	92058315
Party	Plaintiff State of Michigan
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

State of Michigan

Petitioner,

v.

M22, LLC,

Registrant

Petitioner's Opposition to
Registrant's Partial Motion to
Dismiss

Petitioner's Submission of
Amended Petition for Cancellation
Pursuant to Rule 15

Reg. Nos.: 3992159
 3348635

Proceeding: 92058315

Petitioner State of Michigan opposes Registrant M22, LLC's partial motion to dismiss its Petition to Cancel in part. The State of Michigan has standing, and its Petition to Cancel properly states a claim for cancelling Registrant's registered marks. Registrant's motion should therefore be denied.

Standard

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 complaint. To withstand a motion to dismiss for failure to state a claim in a Board proceeding, a petitioner need only allege such facts as would, if proved, establish that (1) it has standing, and (2) a valid ground exists for canceling registrant's registrations. The pleading must be examined in its entirety, construing the allegations therein liberally, as required by Fed. R. Civ. P. 8(f), to determine whether it contains any allegations which, if proved, would entitle Petitioner to the relief sought. *See Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); *Kelly Services Inc. v. Greene's Temporaries Inc.*, 25 USPQ2d 1460 (TTAB 1992); and

TBMP 503.02 (2d ed. rev. 2004). For purposes of determining the motion, all of the State of Michigan's well-pleaded allegations must be accepted as true, and the pleading must be construed in the light most favorable to the State. See *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993); *Stanspec Co. v. American Chain & Cable Company, Inc.*, 531 F.2d 563, 189 USPQ 420 (CCPA 1976). Additionally, under the simplified notice pleading rules of the Federal Rules of Civil Procedure, the allegations of a complaint should be "construed so as to do justice." Fed. R. Civ. P. 8(e); *Scotch Whisky Ass'n v. United States Distilled Products Co.*, 952 F.2d 1317, 1319, 21 USPQ2d 1145, 1147 (Fed. Cir. 1991).

Registrant's motion confuses the ability of a party to establish or prove certain facts, with the obligation to allege those facts which, if taken as true, will establish the basis for cancellation.

Standing

When determining the sufficiency of a petitioner's pleading of standing, the Board must decide whether the petition for cancellation alleges sufficient facts to show petitioner has a real interest in the outcome of the proceeding. See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); and *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987) (in pleading stage of proceeding plaintiff must plead facts sufficient to show a real interest in proceedings).

By the Petition to Cancel, the State of Michigan has alleged its use of the M-22 Sign in interstate commerce in association with its roads and associated services

for over 93 years. In that time, the State has developed valuable good will in the M-22 Sign, which symbolizes and represents a significant portion of its tourism industry. As alleged, the M-22 highway is an integral part of the Grand Traverse Bay area and Northern Michigan region, which is home to some of the most popular destinations for recreation, leisure, and relaxation in Michigan. The M-22 Sign embodies and signifies the source of these popular tourist destinations that Michigan maintains and has to offer. Further, the State has used the M-22 Sign in its “Pure Michigan” video advertisement campaign, which is broadcast throughout the United States.¹ Through the State’s commercial use, and through the M-22 Sign’s regulation as a traffic control device, the State has a proprietary interest in the M-22 Sign and a very real personal interest in whether a third party may claim the exclusive right to use that sign as a mark. The continued registration of the M-22 Sign to Registrants, and the associated presumption of exclusive right to use, damages the State of Michigan and presents a means for restricting the State’s use of the M-22 Sign. Private citizens should not be able to enjoin the State from using its own traffic control device in any fashion.

The State of Michigan also has standing based on the Attorney General’s authority under the *parens patriae* doctrine as recognized by the Michigan Supreme Court. In the Michigan Supreme Court case of *In Re Certified Question*, 638 N.W.2d 409, 413 (Mich. 2002), the Court found that the Michigan Attorney General's "most basic purpose" is to litigate "matters on behalf of the people of the

¹ See Fall Color on M-22 Michigan's Most Scenic Highway Ad Campaign by Pure Michigan, available at <http://www.youtube.com/watch?v=QreJo5P6-VY>.

state" under Mich. Comp. Law § 14.28. Here, the State of Michigan, which independently developed and created the M-22 sign, purposefully placed it into the public domain, and specifically prohibited the M-22 sign from being “protected by a patent, trademark, or copyright.” *See Manual on Uniform Traffic Control Devices 2009*, pg. I-1. The continued registration of the M-22 Sign to Registrants, and the associated presumption of exclusive right to use, damages the State of Michigan by preventing other Michigan businesses from utilizing the M-22 Sign to promote their own goods and services, and to promote the region that the M-22 Sign embodies. In fact, Registrant has aggressively sought to enforce the mark against other small Michigan businesses that have utilized similar marks on retail items. The Attorney General has an obligation to protect the rights of Michigan’s citizens, and to enforce its laws, which is the reason that under Michigan law he is notified whenever – as here – the validity of one of the State’s rules or regulations has been called into question. *See Mich. Ct. Rule 2.209(D)* (“When the validity of a Michigan statute or a rule or regulation included in the Michigan Administrative Code is in question in an action to which the state or an officer or agency of the state is not a party, the court may require that notice be given to the Attorney General, specifying the pertinent statute, rule, or regulation.”). By claiming exclusive use of the M-22 Sign, registrant is in direct conflict with Michigan law, which is adversely affecting the State of Michigan, as well as the rights of the people of the State.

Cases brought under Trademark Action Section 2(a) or 2(e) do not require ownership of a trademark registration. A property interest is not an element for standing to cancel a registration under Sections 2(a) and 2(e) of the Trademark Act.

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