

ESTTA Tracking number: **ESTTA773927**

Filing date: **09/30/2016**

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

Proceeding	92059939
Party	Defendant Anytime Realty, LLC
Correspondence Address	NATHAN P SUEDMEYER LARSON & LARSON PA 11199 69TH ST N LARGO, FL 33773-5504 UNITED STATES tmdocket@larsonpatentlaw.com
Submission	Opposition/Response to Motion
Filer's Name	Nathan P. Suedmeyer
Filer's e-mail	tmdocket@larsonpatentlaw.com
Signature	/Nathan P. Suedmeyer/
Date	09/30/2016
Attachments	Response to Petitioners Motion for Sum Jud - Anytime.pdf(165787 bytes ) Exhibit A - Sangsuwan_final_v2.pdf(391497 bytes )

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

ANYTIME REALTY, LLC,

Petitioner,

v.

ANYTIME REALTY, LLC,

Registrant.

Cancellation No. 92059939

Mark: ANYTIME REALTY

Registration No. 4,180,871

Registration Date: July 24, 2012

**COMBINED OPPOSITION TO PETITIONER'S CROSS-MOTION FOR SUMMARY  
JUDGMENT AND REPLY BRIEF IN SUPPORT OF REGISTRANT'S MOTION FOR  
SUMMARY JUDGMENT**

Registrant, Anytime Realty, LLC, pursuant to the Board's order dated August 31, 2016, submits this combined opposition to Petitioner's cross-motion for summary judgment and reply in support of summary judgment against Petitioner, Anytime Realty, LLC.

**MEMORANDUM OF LAW**

The parties' motions for summary judgment ask the Board to decide the same legal issue—whether Respondent's use of its ANYTIME REALTY mark for real estate services for real property located solely in Florida constitutes use in commerce, as defined by the Trademark Act. In its motion for summary judgment, Registrant presents its legal contentions and argues that Registrant's use constitutes use in commerce. Registrant respectfully requests that the Board incorporate the legal authority and arguments Registrant asserts in its summary judgment motion into this response, as if fully asserted herein. Incorporating Registrant's legal authority and argument alleviates the need for Registrant to re-hash the arguments in this opposition to Petitioner's motion.

Registrant explains below why Petitioner’s argument is misplaced and conflicts with federal precedent holding that the real estate industry substantially affects interstate commerce.

### Argument

Petitioner’s argument fails because it applies an incorrect legal framework and misconstrues the legal issue. Each of Petitioner’s arguments is addressed in turn.

#### **A. Petitioner applies the wrong legal framework.**

Congress regulates local real estate activities because the industry has a substantial effect on interstate commerce. Congress has the “power to regulate purely local activities . . . that have a substantial effect on interstate commerce.”<sup>1</sup> Petitioner erroneously contends that use in commerce exists only if intrastate use directly affects a type of commerce that Congress may regulate.<sup>2</sup> The U.S. Supreme Court has departed from the distinction between “direct” and “indirect” effects on interstate commerce, and in some cases, explicitly rejects the distinction.<sup>3</sup> An overview of the evolution of the rule away from the “direct/indirect distinction” to the current rule requiring a “substantial effect on interstate commerce” is instructive.

Federal precedent departs from the direct/indirect distinction. In 1935, the U.S. Supreme Court characterized the distinction between direct and indirect effects of intrastate transactions upon interstate commerce.<sup>4</sup> The Court held that “[a]ctivities that affected interstate commerce directly were within Congress’ power; activities that affected interstate commerce indirectly were beyond Congress’ reach.”<sup>5</sup> “Two years later, in the watershed case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), the Court . . . departed from

---

<sup>1</sup> *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

<sup>2</sup> Petitioner’s Cross-Motion for Summary Judgment, p. 5, ¶ 1 (August 31, 2016) (citing *Larry Harmon Pictures Corp. v. Williams Rest. Corp.*, 929 F.2d 662, 667 (Fed. Cir. 1991)).

<sup>3</sup> See generally *U.S. v. Lopez*, 514 U.S. 549, 558 (1995).

<sup>4</sup> *U.S. v. Lopez*, 514 U.S. 549, 555 (1995) (citing *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 550 (1935)).

<sup>5</sup> *Id.*

the distinction between ‘direct’ and ‘indirect’ effects on interstate commerce.”<sup>6</sup> “The Court held that intrastate activities that ‘have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions’ are within Congress’ power to regulate.”<sup>7</sup> In 1942, the Court in *Wickard v. Filburn*, explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, stating:

[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as “direct” or “indirect.”<sup>8</sup>

By departing from the direct/indirect distinction, the Court “ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause.”<sup>9</sup> “[T]he doctrinal change . . . reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.”<sup>10</sup> Today, the Court “identifie[s] three broad categories of activity that Congress may regulate under its commerce power.”<sup>11</sup> The categories Congress may regulate are:

1. “the use of the channels of interstate commerce[;]”<sup>12</sup>
2. “the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . [;]”<sup>13</sup> and
3. “those activities that substantially affect interstate commerce.”<sup>14</sup>

---

<sup>6</sup> *Id.* (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)).

<sup>7</sup> *Id.* (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

<sup>8</sup> *Id.* at 556. (quoting *Wickard v. Filburn*, 317 U.S. 111, 125 (1942)).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 558.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 559.

Here, Petitioner artificially constrains “use in commerce” within the meaning of the Trademark Act by relying on the Court’s earlier, and now revised, distinction between direct and indirect effects on interstate commerce. The correct rule to apply is one determining whether local real estate substantially affects interstate commerce. This rule affords Registrant the expanded authority of Congress’ commerce power recognized by the Court. By applying the wrong rule to its argument, Petitioner’s analysis is flawed. This is because Petitioner’s argument is grounded neither in proper authority nor scope. Registrant stands on its argument and the authority of the Fifth Circuit in *Groome*.<sup>15</sup> *Groome* holds that real estate transactions implicate an entire commercial industry involving capital outlay, financing and mortgage arrangements, profit, debt and investment considerations; all of which have a substantial effect on interstate commerce.<sup>16</sup> Because Petitioner applies the wrong rule, Petitioner’s motion should be denied, and summary judgment should be granted in favor of Registrant.

**B. Petitioner misconstrues the issue as one of first use or priority.**

Petitioner misconstrues the dispositive issue as one of first use or priority instead of whether real estate substantially affects interstate commerce. As explained above, use in commerce exists for purely local activities that substantially affect interstate commerce.<sup>17</sup> It is undisputed that Registrant provides real estate services for real property located solely in Florida.<sup>18</sup> It is also undisputed that Registrant renders real estate services to buyers, tenants, and property owners residing in states other than Florida despite the fact that the real property is located solely in Florida.<sup>19</sup> These undisputed facts are sufficient under the legal precedent cited

---

<sup>15</sup> See Registrant’s Motion for Summary Judgment, p. 5, ¶ 1 (March 7, 2016) (citing *Groome Resources Ltd., L.L.C. v. Par. of Jefferson*, 234 F.3d 192, 206 (5th Cir. 2000)).

<sup>16</sup> *Id.*

<sup>17</sup> *Gonzales v. Raich*, 545 U.S. 1, 17 (2005).

<sup>18</sup> Petitioner’s Cross-Motion for Summary Judgment, Exhibit 7, pp. 63 – 67 (attaching Registrant’s Responses to Petitioner’s Requests for Admissions to Registrant, requests 1 – 4, 9 – 12, 19, 21 (March 7, 2016)).

<sup>19</sup> Registrant’s Motion for Summary Judgment, p. 6, ¶ 4 (March 7, 2016).

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.