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

Proceeding	92066765
Party	Defendant Biostar Technology International LLC
Correspondence Address	ERIC MISTEROVICH REVISION LEGAL PLLC 109 E FRONT ST, SUITE 309 TRAVERSE CITY, MI 49684 UNITED STATES Email: eric@revisionlegal.com, john@revisionlegal.com, Anderson@revisionlegal.com
Submission	Other Motions/Papers
Filer's Name	Eric Misterovich
Filer's email	eric@revisionlegal.com
Signature	/EM/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ING. KHACHATUR MKRTCHYAN

Petitioner,

Proceeding No: 92066765

v.

BIOSTAR TECHNOLOGY
INTERNATIONAL, LLC,

Registrant.

REGISTRANT'S REPLY IN SUPPORT OF IT MOTION TO DISMISS / MOTION FOR SUMMARY JUDGMENT

Registrant Biostar Technology International, LLC, by and through its attorneys Revision Legal, PLLC, submits its reply brief in support of its Motion to Dismiss / Motion for Summary Judgment pursuant to Fed. R. Civ. P. 12(b)(6) and 56 and TBMP § 503, and states the following:

SUMMARY OF ARGUMENT

Petitioner's response brief pleads ignorance for not knowing that he needed to file a response to Registrant's Motion to Dismiss in Proceeding Number 92066217, which was dismissed with prejudice. At the same time, Petitioner continues to make fatal mistakes in his instant response. Petitioner must accept the consequences of his decision to forego hiring an attorney licensed and authorized to practice before the Board. Petitioner has not raised a single defense that is accurate under the law, yet alone in line with the relevant pleading and argument standards. Petitioner's petition must be dismissed.

I. RES JUDICATA APPLIES

"For claim preclusion based on a judgment in which the claim was not litigated, there must be (1) an identity of the parties or their privies, (2) a final judgment on the merits of the prior claim,

and (3) the second claim must be based on the same transactional facts as the first and should have been litigated in the prior case." *Sharp Kabushiki Kaisha v. ThinkSharp, Inc.*, 448 F.3d 1368, 79 USPQ2d 1376, 1378 (Fed. Cir. 2006). Petitioner only raises an argument as to the second element: whether there was a final judgment on the merits. As a result, there is no question of fact as to whether the parties are identical (they are) or whether the instant claim is based on the same facts as Proceeding No. 92066217 (they are).[1]

The final judgment in Proceeding No. 92066217 was reached after Petitioner failed to respond to Registrant's motion to dismiss. Petitioner admits receiving the motion to dismiss[2] and admits it was a mistake not to respond.[3]

But Petitioner claims that "prejudice can't be applied in this case" because Proceeding No. 92066217 was not "considered on the merits." Response at p. 5. Petitioner then refers to Registrant's arguments regarding res judicata and collateral estoppel as "insignificant procedural details" and alleges this argument was presented in "bad faith." *Id*. Petitioner is completely wrong.

The fact that Proceeding No. 92066217 ended because Petitioner failed to respond to Registrant's Motion to Dismiss is more than sufficient for res judicata to apply. *International Nutrition Co. v. Horphag Research Ltd*., 220 F.3d 1325, 55 USPQ2d 1492, 1494 (Fed. Cir. 2000) ("default judgments can give rise to res judicata"); *see also, Bass Anglers Sportsman Society of America, Inc. v. Bass Pro Lures, Inc.*, 200 USPQ 819, 822 (TTAB 1978) ("the application of a legal doctrine which would be appropriate to a judgment after trial is equally appropriate to a

[1] Petitioner admits the petition filed in Proceeding No. 92066217 is identical to the instant petition. Response at 3 ("I applied the same Petition for Cancellation once again in order to correct my procedural failure and give response to Motion to dismiss this time.").

[2] "I didn't notice straight arguments and evidence against my claims and decided that USPTO doesn't require claiming again with the same arguments." Response at p. 3.

[3] "Nevertheless, though I admit my procedural failures, it is still obvious that Registrant violated my rights with his trademark registration…." Response at 3.

judgment by default"); *Wells Cargo, Inc. v. Wells Cargo, Inc.*, 197 USPQ 569, 571 (TTAB 1977), aff'd, 606 F.2d 961, 203 USPQ 564 (CCPA 1979) ("The conservation of the Board's time and resources and the need for finality to litigation require that the party which failed to contest the matter at its first opportunity should not, at its option, be permitted to reopen questions that have been concluded. An applicant's default … is all that is necessary to support the judgment.").

The Board has considered –and rejected–Petitioner's argument about whether res judicata should apply when the first decision was not "on the merits." In *Orouba Agrifoods Processing Company v United Food Import*, 97 U.S.P.Q.2d 1310 (TTAB 2010), the petitioner failed to timely file a brief or submit any evidence of its claims. After petitioner failed to respond to an order to show cause, the Board entered judgment against petitioner and dismissed the proceeding with prejudice. *Id*. at 2. In a subsequent proceeding that brought additional claims, Petitioner argued that res judicata did not apply because the Board did not reach the "substantive merits" of the prior proceeding. *Id*. at 3. In a precedential opinion, the Board rejected that argument and found that res judicata applied. *Id*. at 4.

And the same is true here. Petitioner had his chance and decided not to hire an attorney that was knowledgeable of the process, and failed to properly understand the process himself. Proceeding No. 92066217 was dismissed with prejudice. Petitioner then filed the exact same petition to cancel. As a matter of law, this subsequent proceeding is barred. *International Nutrition Co. v. Horphag Research Ltd*., 220 F.3d 1325, 55 USPQ2d 1492, 1494 (Fed. Cir. 2000); *Orouba Agrifoods Processing Company v United Food Import*, 97 U.S.P.Q.2d 1310 (TTAB 2010). This is true despite Petitioner's attempt to raise new issues as to Registrant's actions, which were never raised in the instant petition to begin with. *Orouba Agrifoods Processing Co*, USPQ2d, 97, (T.T.A.B. December 28, 2010) (Petitioner cannot avoid the application of claim preclusion by

merely bringing additional claims in this proceeding based on the same transactional facts as the prior opposition) (citations omitted).

Res judicata applies and Petitioner's petition must be dismissed.

II. PETITIONER FAILED TO STATE A CLAIM FOR CANCELLATION

Petitioner does not understand the standard of review for a motion to dismiss. Again, this error is directly attributable to Petitioner's own decisions. Petitioner attempts to argue, in confusing fashion, that Registrant has failed to provide evidence of its defenses. Response at p. 5. However, that is not the question. The question is whether the Petitioner has alleged sufficient facts to support its claim for cancellation.

As a result, Petitioner has not substantively responded to Registrant's arguments that the petition failed to state a claim based on priority or likelihood of confusion. As Registrant has argued, Petitioner incorrectly concludes that May 25, 2015 is the priority date. As a result, the petition fails to state a claim that Petitioner's use predates Registrant's use in the United States. While Petitioner argues about Registrant's first use, Petitioner fails to address the validity of its own trademark rights. And as plead, Petitioner simply fails to state a claim to possess any trademark rights within the United States superior to Registrant's rights.

Petitioner's arguments regarding misrepresentation of source simply do not state a claim for trademark cancellation. The petition fails to establish a claim, consistent with Fed. R. Civ. P. 9(b), that Registrant "blatantly represented" its goods or services as coming from Petitioner. *American Cruise Lines, Inc. HMS American Queen Steamboat Company, LLC*, 223 F.Supp, 3d 207, 213 (D. DE. 2016).

Petitioner failed to respond in total regarding Registrant's argument that the petition failed to allege any facts showing Registrant made a false representation material to the registration of

the mark or that any representation was made with the intent to deceive the USPTO.

Finally, the "supplement" that the Petitioner provides is of no consequence. These facts were not stated in the petition to cancel, and even if they were, they have nothing to do with the trademark rights at issue before the Board.

III. PETITIONER'S "TRANSLATIONIST"

Petitioner claims his Russian attorneys are merely providing translation services and are not acting as attorneys. Petitioner has provided no evidence in support of this position, other than its unsworn statements. Registrant maintains its position that Petitioner is using the services of unlicensed attorneys and dismissal is proper.

CONCLUSION

Petitioner's Petition should be dismissed based on res judicata. In the alternative, Petitioner's Petition should be dismissed for using an attorney not licensed to practice before the Board and for failure to state a claim, in the same manner an identical petition was already denied.

For the reasons stated above, Registrant respectfully requests this Board **GRANT** its Motion to Dismiss or Motion for Summary Judgment and dismiss this Petition in whole and with prejudice. Again.

Date: October 31, 2017

/s/ Eric Misterovich
Eric Misterovich
John Di Giacomo
Anderson Duff
Revision Legal, PLLC
109 E. Front St. Suite 309
Traverse City, MI 49684
Phone: (231) 714-0100
Fax: (231) 714-0200
eric@revisionlegal.com
john@revisionlegal.com
anderson@revisionlegal.com

Attorneys for Registrant

PROOF OF SERVICE

I, Eric Misterovich, hereby certify that a true and complete copy of the foregoing Registrant's Reply In Support of its Motion to Dismiss/Motion for Summary Judgment has been served on ING. KHACHATUR MKRTCHYAN by forwarding said copy on October 31, 2017, via email to: diacomtechnology@gmail.com.

Date: October 31, 2017

/s/ Eric Misterovich
Eric Misterovich
John Di Giacomo
Anderson Duff
Revision Legal, PLLC
109 E. Front St.
Suite 309
Traverse City, MI 49684
Phone: (231) 714-0100
Fax: (231) 714-0200
eric@revisionlegal.com
john@revisionlegal.com
Anderson@revisionlegal.com

Attorneys for Registrant