

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ALPHA KITTY/BOSS PUSSYCAT
INTERNATIONAL,

Plaintiff,

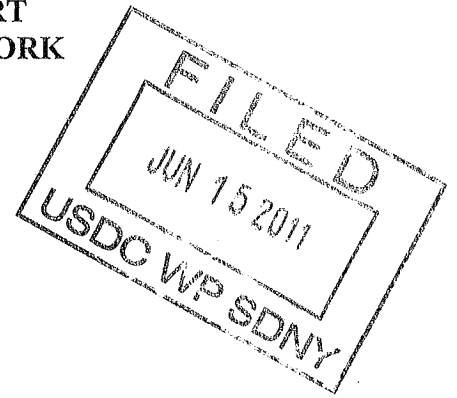
v.

BIG MOMMA HOLDINGS, LLC,

Defendant.

Civil Action No.

ECF Case



11 CIV 4082

COMPLAINT

JUDGE HELLERSTEIN

Plaintiff, by its attorneys, Leason Ellis LLP, allege upon personal knowledge as to their own acts and upon information and belief as to all other acts as follows:

PARTIES

1. Alpha Kitty/Boss Pussycat International ("Alpha Kitty" or "Plaintiff") is a sole proprietorship existing under the laws of the State of Ohio, with its headquarters located 13940 Cedar Road, Cleveland, Ohio 44118. Plaintiff operates in the music, entertainment, art, graphic design, product design, and advertising and marketing industries as a music producer, publisher, performer, artist, graphic designer, product designer, advertising and branding services provider and a website operator.

2. Upon information and belief, Big Momma Holdings, LLC ("Defendant") is a Delaware corporation with its principal place of business located 200 Park Avenue 8th Floor, New York, New York 10003.

NATURE OF THE ACTION

3. Plaintiff brings this action for judicial review of a final Trademark Trial and Appeal Board ("TTAB") decision pursuant to 5 U.S.C. §§ 701 et seq. and 15 U.S.C. §§ 1063, 1071(b).

JURISDICTION AND VENUE

4. Subject matter jurisdiction before this Court is founded upon 5 U.S.C. § 701 (review of final agency action) and 28 U.S.C. § 1331 (federal question).

5. Venue in this Judicial District with respect to the claims set forth herein against Defendant is proper pursuant to 28 U.S.C. § 1391(b).

6. Defendant is subject to personal jurisdiction in this District 28 U.S.C. § 1391 as it resides in and does business in this District.

PLAINTIFF'S USE OF ITS ALPHA KITTY MARK

7. Plaintiff, either by itself or through a successor-in-interest, has *bona fide* use of its ALPHA KITTY mark ("the Mark") on its goods and services distributed and sold in U.S. commerce.

8. Specifically, Plaintiff has had valid and continuous use of the mark ALPHA KITTY in interstate commerce in the United States in connection with: (i) sound recordings since October 1999; and (ii); and entertainment services since July 2000.

9. Plaintiff has developed extremely valuable goodwill in the ALPHA KITTY mark by virtue of its longevity of usage in commerce, expenditure of substantial time and money in promotional activities, as well as the high quality of its products and services.

10. Plaintiff's use in commerce of its ALPHA KITTY mark has included, *inter alia*, the ALPHA KITTY band as well as its live performances, distribution of CDs and art, website, music downloads, songbooks, and newsletters in connection with the Mark.

11. Plaintiff's use of its ALPHA KITTY mark in commerce has been recognized in third-party news articles and other media written about Plaintiff and its products and services.

12. Plaintiff conducts business and advertisement using the ALPHA KITTY mark via electronic media, namely the Internet, which reaches the entire country.

13. Plaintiff has owned and operated a website since November, 17, 2007. The website is located at the top level domain names www.alphakitty.com, which was registered by Plaintiff in 2000, which website prominently displays the Mark.

14. Plaintiff's prior use of the ALPHA KITTY mark would satisfy the requirements for federal registration of the Mark.

DEFENDANT'S APPLICATION TO REGISTER THE MARK ALPHA KITTY

15. On June 22, 2007, Defendant filed Application Serial No. 77/209,654 (the "Application") seeking to register the mark ALPHA KITTY for various goods and services in International Classes 9, 16, 25, 38, and 41.

16. Specifically, Defendant sought to register the word mark ALPHA KITTY on an intent-to-use basis as a trademark for International Class 9 for, in relevant part, "sound recordings audio visual recordings, DVD's, downloadable sound recordings, downloadable video recordings...", as well as International Class 41 for, in relevant part, "entertainment services, mainly providing a web site."

17. The goods and services identified in Defendant's Application are related to the goods and services for which Plaintiff has prior rights under the Mark.

18. The mark sought to be registered by Defendant in the Application is identical to Plaintiff's ALPHA KITTY mark.

19. Upon information and belief, prior to filing the Application, Defendant conducted a search and discovered Plaintiff's prior use of the mark ALPHA KITTY.

20. Upon information and belief, prior to filing the Application, Defendant never received an opinion from any attorney regarding Plaintiff's prior rights to the ALPHA KITTY mark.

21. The Application was published for opposition on April 29, 2008.

PLAINTIFF'S EFFORTS TO PROTECT THE MARK ALPHA KITTY

22. On May 27, 2008, Plaintiff timely opposed the Application pursuant to a properly commenced opposition proceeding before the USPTO's Trademark Trial and Appeal Board (TTAB), namely Opposition No. 91,184,311 (the "Opposition"). A true and correct copy of Plaintiff's Notice of Opposition is attached as **Exhibit A**.

23. Plaintiff's opposed Defendant's registration solely as to the goods in Class 9 and the services in Class 41 under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that Defendant's ALPHA KITTY mark, when used in connection with Defendant's Class 9 goods and Class 41 services, so resembles Plaintiff's previously used mark ALPHA KITTY for (i) sound recordings since September 20, 1999; and (ii) entertainment services since July 7, 2000 as to be likely to cause confusion.

24. On March 15, 2011, the TTAB dismissed the Opposition for lack of evidence (as Plaintiff's counsel allegedly failed to properly submit evidence pursuant to established TTAB rules and procedures, namely TBMP §704.06). A true and correct copy of the dismissal order is attached as **Exhibit B**.

25. On May 12, 2011, Plaintiff, pursuant to 37 C.F.R § 2.145(e), timely sought an extension of time from the USPTO in which to prepare an application for judicial review of the TTAB's final decision. A true and correct copy of the granted extension is attached as **Exhibit C**.

26. Evidence of Plaintiff's priority was not properly submitted to the TTAB and therefore deemed inadmissible by the TTAB.

27. Evidence of Plaintiff's priority can properly be submitted to, and considered by, this Court in this matter.

28. Upon information and believe, if evaluated on the merits, Plaintiff's bases for opposing Defendant's Application represent a valid ground to prevent the registration of the opposed ALPHA KITTY mark.

COUNT I
REQUEST FOR JUDICIAL REVIEW OF TTAB DECISION

29. Plaintiff incorporates by reference into Count I all allegations contained in paragraphs 1 through 28 of this Complaint as though set forth fully herein.

30. As the TTAB has issued a Final Decision denying Plaintiff's opposition to Defendant's Application, Plaintiff respectfully requests *de novo* judicial review of the decision under the Administrative Procedures Act and the Lanham Act.

31. Defendant's ALPHA KITTY mark is identical to Plaintiff's ALPHA KITTY mark and is likely to cause confusion, mistake and/or deception as to the source and/or origin of Defendant's goods and services, thereby irreparably damaging Plaintiff and Plaintiff's goodwill in its ALPHA KITTY mark.

32. Defendant's registration of its mark is further likely to cause the public to assume erroneously that Defendant's goods and services are sponsored by Plaintiff or that they are in some way connected with Plaintiff, thereby irreparably damaging Plaintiff and Plaintiff's goodwill in the ALPHA KITTY mark.

33. Permitting Defendant's Application to register its ALPHA KITTY mark in the USPTO, as ordered by the TTAB, will irreparably damage Plaintiff and Plaintiff's goodwill in the ALPHA KITTY mark.

34. Plaintiff has no other remedy at law.

35. For the reasons stated herein, the Court should order that Defendant's United States Trademark Application Number 77/209,654 be denied registration in the USPTO.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that the Court:

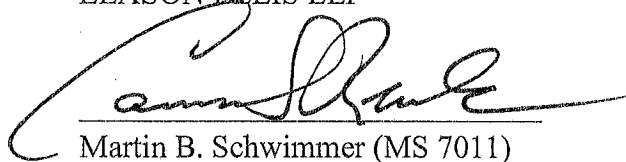
- A. Order the Director of the USPTO to deny registration of Defendant's U.S. Trademark Application Number 77/209,654; and
- B. Grant Plaintiff such additional and further relief as the Court deems proper and just.

JURY DEMAND

Plaintiff hereby demands a trial by jury pursuant to Rule 38 of the Federal Rules of Civil Procedure of all matters pleaded herein so triable by jury.

Respectfully submitted,

LEASON ELLIS LLP



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Dated: June 15, 2011
White Plains, New York