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

Proceeding	91210927
Party	Defendant Global Spirits AMG-77 Limited
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Submission	Motion to Dismiss - Rule 12(b)
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Date	06/19/2013
Attachments	Motion to Dismiss.pdf(276386 bytes)

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

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In the Matter of Application :
Mark: GLOBAL SPIRITS :
Serial No.: 79/109,173 :
Filed: December 23, 2011 :
Published: January 29, 2013 :
 : Opposition No. 91210927
LEVON MGRDICHIAN :
 :
 :
 : Opposer,
 :
 : v. :
 :
 :
 : GLOBAL SPIRITS; AMG-77 LIMITED :
 :
 : Applicant. :
-----X

I hereby certify that this correspondence is being filed electronically with the Trademark Trial and Appeal Board using the Electronic System for Trademark Trials and Appeals (ESTTA) on

June 19, 2013

(Date of Filing)

Anna Vishev

Name of Representative

/anna vishev/

Signature

**APPLICANT'S MOTION TO DISMISS THE OPPOSITION
FOR FAILURE TO STATE A CLAIM**

Pursuant to Federal Rule of Civil Procedure (FRCP) 12(b)(6) and TBMP §503, GLOBAL SPIRITS; AMG-77 LIMITED (“Global Spirits” or “Applicant”) moves the Trademark Trial and Appeal Board (the “Board”) to dismiss the above-captioned proceeding for failure to state a claim upon which relief may be granted. In the alternative, Applicant moves to dismiss those purported causes of action and bases which do not meet the applicable standards as set forth below.

BACKGROUND

On or about May 28, 2013, Opposer filed this opposition against the trademark GLOBAL SPIRITS, Application Serial No. 79/109,173, owned by Applicant. The Notice of Opposition lists fraud on the Trademark Office as the sole ground for the opposition. However, Opposer's Notice of Opposition does not provide any facts, let alone sufficient facts, for this grounds that, if proven true, would entitle Opposer to the relief sought.

For the reasons set forth below, Applicant moves to dismiss the proceeding entirely for failure to state a claim upon which relief may be granted. In the alternative, Applicant moves to dismiss those purported causes of action and bases which do not meet the applicable standards as set forth below.

ARGUMENT

“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 a complaint.” Petróleos Mexicanos v. Intermix S.A., 97 USPQ2d 1403 (TTAB 2010); Fair Indigo LLC v. Style Conscience, 85 USPQ2d 1536, 1538 (TTAB 2007); TBMP §503.02. Under the Trademark Rules and precedent, a complaint must include a short and plain statement of a claim, the elements of the claim, and enough factual support to show that the pleader is entitled to relief and to give the defendant fair notice. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007); Fair Indigo LLC, 85 USPQ2d at 1538 (elements of each claim should be stated concisely and directly, and include enough detail to give the defendant fair notice); McDonnell Douglas Corp. v. National Data Corp., 228 USPQ 45, 48 (TTAB 1985) (petitioner's Trademark Act § 2(a), 15 U.S.C. § 1052(a) allegations were merely conclusory and unsupported by factual averments); Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937 (2009), quoting Twombly, 550 U.S. at 570; 37 C.F.R. §2.104(a);

TBMP §309.03(a)(2); Fed. R. Civ. P. 8(a)(2). Therefore, to survive a motion to dismiss, a complaint must state more than bare conclusory allegations, such that the facts in the complaint are sufficient enough to make any claim within it plausible on its face. Twombly, 550 U.S. at 570; TBMP §503.02. Each and every allegation must be supported by at least a modicum of details. Id. Such details are necessary not only to give the defendant fair notice of the basis of each claim, but also to show the Board that a right to relief exists assuming all such facts and allegations are taken to be true. See Fair Indigo LLC, 85 USPQ2d at 1538; TBMP §309.03(a)(2) (“A pleading should include enough detail to give the defendant fair notice of the basis for each claim”).

The “detail” provided by Opposer in the Opposer’s Notice does not meet the minimal pleading standards, but rather constitutes, at best, merely a formulaic recitation of the fraud cause of actions’ elements. As held by the United States Supreme Court:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligations to provide the “grounds” of his “entitle[ment] to relief” require more than labels and conclusion, and a formulaic recitation of a cause of action’s elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the complaint’s allegations are true.

Twombly, 550 U.S. at 545. Here, the Opposer’s Notice provides no details or facts whatsoever upon which to base its claim. Because Opposer has failed to plead a factual basis for the recited claims, the ground listed in the Notice is legally insufficient to raise a right to relief, and the entire Opposition should be dismissed.

A. **Opposer's Ground of Fraud Does Not Meet the Pleading Requirements and Is Thus Legally Insufficient.**

Under the Trademark Rules and precedent, a complaint must include a short and plain statement of a claim, the elements of the claim, and enough factual support to give the

defendant fair notice. Twombly, 550 U.S. at 570; Fair Indigo LLC, 85 USPQ2d at 1538 (elements of each claim should be stated concisely and directly, and include enough detail to give the defendant fair notice); Fed. R. Civ. P. 8(a)(2); TBMP § 309.03(a)(2). Furthermore, under Fed. R. Civ. P. Rule 9(b), when alleging fraud, as is the case here, the pleadings must state the circumstances constituting the alleged fraud with particularity. See DaimlerChrysler Corp., 94 USPQ2d 1086, 1088 (TTAB 2010). The “circumstances” referred to in Fed. R. Civ. P. Rule 9(b) that must be stated specifically are the time, place and contents of the false representations, the facts misrepresented, and identification of what has been obtained for the particular application at issue in the opposition. See e.g. W.R. Grace & Co. v. Arizona Feeds, 195 USPQ 670, 672 (Comm’r Pat. 1977); Saks, Inc. v. Saks & Co., 141 USPQ 307 (TTAB 1964). Therefore, a pleading that simply recites the elements of fraud in a formulaic manner without setting forth the particularized factual basis for the allegation, such as Opposer’s Notice of Opposition, does not satisfy Rule 9(b). See King Automotive, Inc. v. Speedy Muffler King, Inc., 667 F.2d 1008, 212 USPQ 801 (CCPA 1981) (“Rule 9(b) requires that the pleadings contain explicit rather than implied expression of the circumstances constituting fraud”).

Fraud in procuring a trademark registration or renewal occurs when an applicant knowingly makes false, material representations of fact in connection with the application, with the specific intent to deceive the PTO. In re Bose Corp., 580 F.3d 1240, 91 USPQ2d at 1939 (Fed. Cir. 2009); Torres v. Cantine Torresella S.r.l., 808 F.2d 46, 48 (Fed. Cir. 1986). Board precedent requires that the pleadings allege sufficient underlying facts upon which the belief is reasonably based, else the pleading is legally insufficient. See Exergen Corp. v. Wal-Mart Stores Inc., 575 F.3d 1312, 91 USPQ2d 1656, 1670 n.7 (Fed. Cir. 2009). Here, Opposer’s pleading is completely devoid of any such underlying facts.

Opposer contends that Global Spirits committed a fraud by submitting a false declaration to the United States Patent and Trademark Office because, according to Opposer: a) "Applicant had no intention to use" the mark GLOBAL SPIRITS "in commerce within the United States;" and b) Applicant "has not used" the mark GLOBAL SPIRITS "in commerce within the United States". See Notice of Opposition, ¶ 11.

To support the latter basis for its fraud claim, Opposer has provided exhibits allegedly showing that Applicant has not used the mark in the United States. See Notice of Opposition, ¶¶ 18-21. However, it is well-settled that, in trademark applications filed under §66(a) of the Trademark Act, use in commerce prior to registration is not required. 15 U.S.C. §1141h(a)(3); TMEP §1904.01(d). Moreover, under §66(b) of the Trademark Act, "unless extension of protection is refused, the filing of the request for extension of protection constitutes constructive use of the mark." TMEP §1904.01(g). Finally, nowhere in the Notice does Opposer allege that Applicant represented to the USPTO that it actually used the mark in the United States. A true and correct copy of form MM18 filed with Applicant's Madrid Protocol Application and containing Applicant's Declaration is attached hereto as Exhibit A. As can be seen from this Exhibit, Applicant has never stated to the USPTO that the mark was in use in the United States. Thus, Opposer's fraud claim on the basis of non-use of the mark in the United States fails on legal grounds.

Everything else stated in Opposer's Notice are merely conclusory assertions of the elements of fraud without any particularized factual basis for these assertions. Opposer does not present any "factual support" for its allegation that Applicant had no intention of using the mark in the United States, or for the assertion of fraud in the prosecution of Applicant's application. Anything that could even remotely be considered "detail" constitutes, at best,

merely a formulaic recitation of the elements of fraud, and does not meet the minimal pleading standards. What, for example, are the circumstances supporting Opposer's conclusion that Applicant had no intention of using the mark in the United States? Without more, Applicant cannot meaningfully understand the allegations of fraud pleaded against it and adequately respond to them.

Opposer's fraud claim is deficient and utterly devoid of substance, and as such, should be dismissed.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that Opposer's Notice of Opposition be dismissed for failure to state a claim upon which relief may be granted. In the alternative, Applicant moves to dismiss those purported causes of action and based which do not meet the applicable standards as set forth herein.

Dated: Staten Island, New York

June 19, 2013

LAW OFFICE OF ANNA VISHEV P.C.

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Attorneys for Applicant
GLOBAL SPIRITS; AMG-77 LIMITED

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Applicant's Motion to Dismiss was served upon counsel for Opposer this 19th day of June, 2013, by First Class Mail, addressed as follows:

MITESH PATEL
RAJ ABHYANKER P.C.
1580 W. EL CAMINO REAL, SUITE 8
MOUNTAIN VIEW, CA 94040

/anna vishev/

Anna Vishev

EXHIBIT A

MADRID AGREEMENT AND PROTOCOL CONCERNING THE
INTERNATIONAL REGISTRATION OF MARKS

DECLARATION OF INTENTION TO USE THE MARK – UNITED STATES OF AMERICA

(to be annexed to each international application or subsequent designation in which the United States of America is a designated Contracting Party)

IMPORTANT

1. This form contains the exact wording of the declaration of intention to use the mark required by the United States of America. It should not be amended in any respect. Deletions, modifications or inclusions of text will result in the declaration being considered as irregular.
2. The United States of America has required that the declaration of intention to use the mark be made in English, even if the international application or the subsequent designation is in French. Therefore, this form is available in English only.



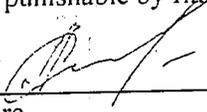
World Intellectual Property Organization
34, chemin des Colombettes, P.O. Box 18,
1211 Geneva 20, Switzerland
Tel.: (41-22) 338 9111
Fax (International Trademark Registry): (41-22) 740 1429
e-mail: intreg.mail@wipo.int – Internet: <http://www.wipo.int>

**DECLARATION OF INTENTION TO USE THE MARK:
UNITED STATES OF AMERICA**

By designating the United States in the international application/subsequent designation, the person signing below declares that:

- (1) the applicant/holder has a *bona fide* intention to use the mark in commerce that the United States Congress can regulate on or in connection with the goods/services identified in the international application/subsequent designation;
- (2) he/she is properly authorized to execute this declaration on behalf of the applicant/holder;
- (3) he/she believes applicant/holder to be entitled to use the mark in commerce that the United States Congress can regulate on or in connection with the goods/services identified in the international application/subsequent designation; and
- (4) to the best of his/her knowledge and belief no other person, firm, corporation, association, or other legal entity has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive.

I declare under penalty of perjury under the laws of the United States of America that all the foregoing statements are true and correct to the best of my knowledge and belief. I understand that willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, and are punishable by fine or imprisonment, or both (18 U.S.C. §1001). 35 U.S.C. §25(b).



Signature

Date of execution (dd/mm/yyyy)

OLENA SHAMRINA
Signatory's Name (Printed)

Power Attorney
Signatory's Title

INSTRUCTION

This declaration must be signed by:

- (1) the applicant/holder or a person with legal authority to bind the applicant/holder; or
- (2) a person with firsthand knowledge of the facts and actual or implied authority to act on behalf of the applicant/holder; or
- (3) an attorney who is authorized to practice before the United States Patent and Trademark Office under 37 C.F.R. §10.1(c), who has an actual written or verbal power of attorney or an implied power of attorney from the applicant/holder.

INFORMATION REQUIRED BY THE INTERNATIONAL BUREAU

- (a) Where the present declaration refers to an international application based on a basic application, indicate:
Basic application number: m 201118788 Date of the basic application: 25.11.2011 (dd/mm/yyyy), or
- (b) Where the present declaration refers to an international application based on a basic registration, indicate:
Basic registration number: _____ Date of the basic registration: _____ (dd/mm/yyyy), or
- (c) Where the present declaration refers to a subsequent designation of an international registration, indicate:
International registration number: _____
- International Bureau's reference (where applicable): _____
- Name of applicant/holder: GLOBAL SPIRITS AMG-77 LIMITED