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

Proceeding	92051821
Party	Defendant DVD Format/Logo Licensing Corporation
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Date	05/13/2011
Attachments	Registrant's Motion to Dismiss Amended Petition.pdf (12 pages)(629396 bytes) Declaration of Winston Brownlow.pdf (4 pages)(185512 bytes)

**In the United States Patent and Trademark Office
Before the Trademark Trial and Appeal Board**

ZOBA INTERNATIONAL CORP., DBA
CD DIGITAL CARD,

Petitioner,

v.

DVD FORMAT/LOGO LICENSING
CORPORATION,

Registrant.

Cancellation No. 92051821

**REGISTRANT’S MOTION TO DISMISS THE AMENDED PETITION IN PART
OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT, AND
FOR A STATUS CONFERENCE**

Registrant DVD Format/Logo Licensing Corp. (“DVD FLLC”)

respectfully moves pursuant to 37 C.F.R. § 2.116(a) and Federal Rule of Civil Procedure 12(b)(6) to dismiss Petitioner Zoba International Corp. (“Zoba”)’s amended fraud claim or, in the alternative, for partial summary judgment dismissing Zoba’s fraud claim pursuant to Federal Rule of Civil Procedure 56. In addition, DVD FLLC requests that the Board *not* suspend this proceeding, but rather schedule a status conference among counsel for the parties and a Board interlocutory attorney or an Administrative Trademark Judge on or before July 8, 2011, in accordance with the present schedule. *See* 37 C.F.R. § 2.120(a)(2).¹

¹ Separately, Zoba’s amended petition should be dismissed because Zoba no longer exists. *See* Declaration of Winston R. Brownlow, ¶ 3, Ex. 1. Counsel for DVD FLLC has brought this fact to the attention of Zoba’s counsel. Unless Zoba moves to substitute a successor-in-interest as petitioner, then this proceeding should be dismissed in its entirety.

PROCEDURAL HISTORY

Zoba initiated this proceeding by filing petitions to cancel three of DVD FLLC's registered trademarks relating to the familiar DVD Logo. In an order dated March 10, 2011 (the "First Order"), the Board dismissed two of the petitions on the ground that they were barred by the doctrine of *res judicata*. The Board declined to dismiss the instant petition on *res judicata* grounds. The Board held that the registration at issue (No. 2,711,602, the "'602 Mark") was not incorporated into a prior judgment, and cited differences between the '602 Mark and those at issue in the petitions the Board had dismissed. First Order at 19-24.

In an order also issued on March 10, 2011 (the "Second Order"), the Board addressed DVD FLLC's motion to dismiss Zoba's petition in this proceeding on the merits. The Board granted DVD FLLC's motion to dismiss Zoba's fraud claim, with leave to amend its petition. Second Order at 6, 10. The Board denied DVD FLLC's motion to dismiss Zoba's remaining grounds for cancellation, which the Board identified as "a single claim of abandonment by uncontrolled licensing." *Id.* at 9-10.

The fraud claim in Zoba's original petition centered on the allegation that the registration for the '602 Mark was obtained through a fraudulent statement of use. Specifically, Zoba alleged (i) that the applicant for registration of the '602 Mark was Time Warner Entertainment Co., L.P. ("Time Warner"); (ii) that on November 28, 2002, Time Warner submitted a statement of use that included as specimens pictures of products manufactured by Panasonic, Inc.; and (iii) that Panasonic, Inc. was not an agent or licensee of Time Warner on the relevant date. Zoba then alleged that "[t]hese acts or omissions are material regarding the use of the subject Mark, and *Applicant knew or*

should have known that they were false.” Second Order at 5, quoting Petition to Cancel, ¶ 16 (emphasis added).

DVD FLLC moved to dismiss on the ground that the “knew or should have known” allegation was insufficient to support a fraud claim. The Board agreed, construing Zoba’s statement as “an ambiguous allegation of respondent’s intent to deceive.” Second Order at 5. Citing *In re Bose Corp.*, 580 F.3d 1240 (Fed. Cir. 2009), and *Enbridge Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537 (TTAB 2009), the Board held that Zoba had not properly asserted “a *willful intent* to deceive, *which is a requirement for a fraud claim* clearly required by *Bose*.” Second Order at 5-6 (emphasis added).

Zoba filed an Amended Petition on April 8, 2011. In its amended pleading, Zoba refers to the same statement of use and the Panasonic, Inc. specimens. According to Zoba, Time Warner’s November 28, 2002, statement of use referred to products manufactured by Panasonic, Inc., but “[a]t the time of the filing . . . Panasonic, Inc. was not a limited partner, agent, or licensee of [Time Warner], and therefore use alleged by Panasonic, Inc. could not inure to the benefit of the Applicant.” (Am. Petition, ¶ 17.) Zoba now alleges that “[t]hese acts or omissions are material regarding use of the subject Mark, *and Applicant knew that they were false.*” (*Id.* ¶ 19 (emphasis added).)

With regard to Zoba’s abandonment claim, its original petition contains, and its amended petition repeats, a number of allegations regarding DVD FLLC’s licensing program. The Board (as noted above) has construed Zoba’s allegations as a “single claim of abandonment by uncontrolled licensing.” Second Order at 9. To support its claim, Zoba contends that three entities – Koninklijke Philips Electronic, N.V., Sony

Corporation, and Time Warner, Inc. – “are NOT ‘licensees’ of the Registered Mark.”

(Am. Petition ¶ 6.) Zoba then asserts

[u]pon information and belief, numerous DVD replicators and other individuals and entities engaging in the business of mass-producing duplicate pre-recorded DVD products for others (“Replicators”) are producing DVD’s displaying the marks of THE DVD LOGO FAMILY OF MARKS, including the Mark that is the subject of the instant Petition. Upon information and belief, numerous Replicators are producing DVD’s displaying the subject Mark open [sic] and notoriously, and without a license from DVDFLLC nor with “instruction” from a licensee of the subject Mark.

(*Id.* ¶ 14.)

For reasons explained below, the revised fraud allegations in the amended petition suffer from the same defect the Board identified in the Second Order – that is, a failure to allege willful intent. As to the abandonment claim, the Board should *not* suspend proceedings on this case immediately, but rather should set a status conference on or before July 8, 2011 to discuss the course of further proceedings.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the pleading. When ruling on a motion to dismiss, the Board must accept the well-pled factual allegations as true and draw all reasonable inferences in favor of the non-moving party. At the same time, the Board is not required to accept inferences unsupported by the factual allegations, or to accept legal conclusions that are offered as facts. Moreover, although the rules do not require detailed factual allegations, the Supreme Court has held that more than a formulaic recitation of the legal elements of the claim is required. The allegations “must be enough to raise a right to relief above the speculative level,” or “to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550

U.S. 544, 555, 570 (2007). The Supreme Court clarified this standard further in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), explaining that this standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Under this standard, a pleading “must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* (internal quotation marks and citation omitted).²

Under Rule 56, a party is entitled to summary judgment if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party has met its burden, the non-moving party may not rest upon the allegations in its pleadings, but must bring forward more than the “mere existence of a scintilla of evidence” to support its position. *Id.* at 252.

ARGUMENT

I. ZOBA’S FRAUD CLAIM SHOULD BE DISMISSED FOR FAILURE, ONCE AGAIN, TO PLEAD INTENT

As described above, Zoba’s fraud claim rests on its allegation that, on November 28, 2002, Time Warner filed a statement of use for the ‘602 Mark that relied on “photographic examples of a product manufactured by Panasonic, Inc.” (Am. Petition, ¶ 16.) According to Zoba, Panasonic, Inc. was not licensed or authorized to use the mark at the time of Time Warner’s submission, and that the use of products manufactured by

² In ruling on a motion to dismiss, the Board may consider public documents, as well as documents attached to or referenced in the petition. *See Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (“Even where a document is not incorporated by reference [in the pleading], the court may nevertheless consider it [in a motion to dismiss] where the [pleading] ‘relies heavily upon its terms and effect,’ which renders the document ‘integral’ to the [pleading].”) (citation omitted).

Panasonic, Inc. could not “inure to [Registrant’s] benefit.” (Am. Petition, ¶ 17.) Zoba calls this a fraud, asserting that the alleged misrepresentation was “material regarding the use of the subject Mark, and the Applicant knew that [it was] false.” (Am. Petition ¶ 19.)

Zoba’s amended pleading suffers from the same defect the Board found in the initial pleading: Zoba has not properly pled the elements of fraud. Zoba has removed the improper “knew or should have known” language from the original petition, but Zoba still fails to plead the element of willful intent.

As the Federal Circuit has held, “[t]here is no fraud if a false misrepresentation is occasioned by an honest misunderstanding or inadvertence *without a willful intent to deceive.*” *Bose Corp.*, 580 F.3d at 1246 (emphasis added); *see also Money Store v. Harriscorp Fin., Inc.*, 689 F.2d 666, 670 (7th Cir. 1982) (“Fraud will be deemed to exist only when there is a deliberate attempt to mislead the Patent Office into registering the mark.”). Thus, intent to defraud is a key element of a fraud claim; absent an allegation of intent, the fraud claim must fail.

The Board’s ruling on DVD FLLC’s motion to dismiss Zoba’s original petition turned on this point. The Board dismissed the original fraud claim because Zoba’s “knew or should have known” allegation failed to specify a “willful intent to deceive.” Second Order at 5-6. As the Board correctly held, “To assert a viable claim of fraud, the plaintiff must allege with particularity, rather than by implied expression, that the defending party knowingly made a false, material representation in the procurement of or renewal of a registration mark *with the intent to deceive the U.S. Patent and Trademark Office.*” *Id.* at 5 (emphasis added) (citing *Bose Corp.*, *supra*; *Enbridge Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537 (TTAB 2009)). This rule – that a fraud claim is

more than a misrepresentation, and must include a specific allegation of an intent to mislead – finds ample support in other Board decisions as well. In a decision the Board cited in its Second Order (albeit for another proposition), the Board held:

Fraud implies some intentional deceitful practice or act designed to obtain something to which the person practicing such deceit would not otherwise be entitled. Specifically, it involves a willful withholding from the Patent and Trademark Office by an applicant or registrant of material information which, if disclosed to the Office, would have resulted in disallowance of the registration sought or to be maintained. Intent to deceive must be “willful.” . . . There is not room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party.

Woodstock’s Enterprises Inc. (CA) v. Woodstock’s Enterprises Inc. (OR), 43 USPQ2d 1440, 1443-1444 (TTAB 1997), *aff’d* 152 F.3d 942 (Fed. Cir. 1998), *quoting First Int’l Serv. Corp. v. Chuckles Inc.*, 5 USPQ 2d 1628, 1634 (TTAB 1988). More recently, the Board held in *Asian & Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1479 (TTAB 2009), that “[a] pleading of fraud on the USPTO must also include an allegation of intent.”

Despite the Board’s holding in the Second Order and the cases it cited regarding the importance of “willful intent” as an element of fraud, Zoba still does not allege that DVD FLLC (or rather, Time Warner) acted with the requisite intent. Zoba amended the “knew or should have known” allegation that the Board criticized in the Second Order, but it failed to appreciate the central point: that the “should have known” allegation was deficient because it was “an ambiguous allegation of respondent’s intent to deceive.” Second Order at 5-6. The amended pleading still lacks an allegation of intent and, as the Board held, an element of a claim may not be pled by “implied expression.” *Id.* at 5.

Given Zoba's failure to plead the elements of fraud properly, the fraud claim in the Amended Petition should be dismissed. In light of Zoba's failure to comply with the Board's clear instruction that a specific allegation of each element of the fraud claim would be required, the dismissal should be with prejudice.

II. IN THE ALTERNATIVE, THE BOARD SHOULD ENTER SUMMARY JUDGMENT DISMISSING ZOBA'S FRAUD CLAIM

The lynchpin of Petitioner's fraud allegation is that "Panasonic, Inc." was not licensed to use the registered trademark on November 28, 2002, the date Time Warner submitted its statement of use. (*See* Am. Petition ¶¶ 15-18.) That statement is incorrect, and appears to reflect a lack of investigation on Zoba's part regarding the name "Panasonic."

As explained in the attached affidavit of DVD FLLC's president, Makoto Inabayashi, "Panasonic" was a brand name used by Matsushita Electric Industrial Co., Ltd. ("Matsushita") in November 2002. *See* Declaration of Makoto Inabayashi ("Inabayashi Decl.") ¶ 8. In 2008, Matsushita changed its corporate name to Panasonic, Inc. *See id.*³

The question, then, is not whether "Panasonic" was licensed to use the registered trademark, but whether Matsushita was. The answer is yes. Matsushita had a "license from the owner of the trademark rights in and to the DVD Logo to use the DVD Logo on blank DVD-RAM discs." *See* Inabayashi Decl., ¶¶ 3, 7, 8, 10. A copy of Matsushita's DVD Format and Logo License for the period July 26, 1999 through

³ Press reports regarding the change of Matsushita's corporate name, and its prior use of the Panasonic brand name, are readily available. *See, e.g.*, <http://panasonic.co.jp/corp/news/official.data/data.dir/en081001-4/en081001-4.html> (last visited on May 9, 2011).

December 31, 2004, is attached to the Inabayashi declaration as Exhibit J. The agreement demonstrates unambiguously that, contrary to Zoba's allegations, Matsushita (which manufactured Panasonic products in 2002) was licensed to use the worldwide trademarks relating to the DVD Logo, including the registered trademark at issue in this proceeding. Inabayashi Decl., ¶ 10, Ex. J, at Preamble and Arts. 1.7, 1.8 and 3.1.

In these circumstances, there can be no genuine dispute as to the material facts at issue, and there is not a scintilla of doubt that Zoba's allegations regarding the allegedly fraudulent statement of use are simply incorrect. There was no misrepresentation, much less a willful intent to deceive, associated with the application for the registration of the '602 Mark. Accordingly, as the Federal Circuit has held numerous times in similar circumstances, summary judgment dismissing the fraud claim is the proper course. *See, e.g., Zenith Electronics Corp. v. PDI Communication Systems, Inc.*, 522 F.3d 1348, 1357-1358 (Fed. Cir. 2008) (summary judgment properly granted when supported by, *inter alia*, extensive documentary evidence); *STX, LLC v. Brine, Inc.*, 211 F.3d 588, 589 (Fed. Cir. 2000) (summary judgment properly awarded where "[t]he motion was supported by documentary evidence, including a handwritten purchase order completed by an agent for [the plaintiff], showing that [the plaintiff] commercially exploited its invention two days prior to the critical date"); *Vanmoor v. Wal-Mart Stores, Inc.*, 201 F.3d 1363, 1365 (Fed. Cir. 2000) (summary judgment properly awarded where "[t]he motion was supported by affidavits from two [of the defendant's] employees and documentary evidence showing that the manufacturing specifications, component dimensions, and methods of operation of at least three of the accused cartridges were identical to those manufactured, used, and sold prior to the critical date").

III. THE BOARD SHOULD SCHEDULE A STATUS CONFERENCE ON OR BEFORE JULY 8, 2011 IN ACCORDANCE WITH THE CURRENT SCHEDULE

DVD FLLC further requests that the Board *not* suspend this proceeding during consideration of this motion, but rather proceed to schedule a conference pursuant to the present schedule. Pursuant to 37 C.F.R. § 2.120(a)(2), DVD FLLC requests that a Board Interlocutory Attorney or an Administrative Trademark Judge participate in the conference. The agenda for the conference would include the further course of the proceedings with respect to Zoba's abandonment claim, whether by re-pleading, answer,⁴ amendment, further motion practice, or otherwise.

This issue is particularly noteworthy given the fact that the few allegations Zoba offers to support its abandonment claims are demonstrably false. As noted above, the only factual allegation Zoba offers is that Koninklijke Philips Electronics, N.V. ("Philips"), Sony Corporation ("Sony"), and Time Warner, Inc. are not licensed to use the '602 Mark. As set forth in the Inabayashi declaration with supporting documentation, however, Philips, Sony, and Time Warner all have been licensed to use the trademarks for the DVD logo. Sony and Philips have held licenses for more than 10 years; Time

⁴ The issue of whether a respondent is required to answer claims not addressed in a motion to dismiss is an open question under TTAB precedent and the Federal Rules of Civil Procedure. *Compare, e.g., Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 434 F. Supp. 2d 598, 637-640 (N.D. Iowa 2006); *Finnegan v. Univ. of Rochester Med. Ctr.*, 180 F.R.D. 247, 249-250 (W.D.N.Y. 1998); *Brocksopp Engineering, Inc. v. Bach-Simpson Ltd.*, 136 F.R.D. 485, 486-487 (E.D. Wis. 1991) (taking the view that a partial motion to dismiss automatically extends the time to answer the entire complaint); and *Perkins v. Univ. of Illinois at Chicago*, 1995 WL 680758, *1 (N.D. Ill. 1995); *Rawson v. Royal Maccabees Life Ins. Co.*, 1994 WL 9638, *1-2 (N.D. Ill. 1994) (going so far as to strike answers to a portion of a complaint while a partial motion to dismiss is pending); *with Bull HN Info. Systems, Inc. v. American Exp. Bank Ltd.*, 1990 WL 48098, *5 (S.D.N.Y. 1990); *Gerlach v. Michigan Bell Tel. Co.*, 448 F. Supp. 1168, 1174 (E.D. Mich. 1978) (motion to dismiss in part does not extend the deadline to answer the remaining counts of the complaint).

Warner sold its DVD disc manufacturing business to Cinram International, Inc. in 2004, and Cinram has been a licensee since that date. Current licensees, including Sony, Philips, and Cinram, are identified on DVD FLLC's website, which is available for public inspection. *See* www.dvdfllc.co.jp.⁵

Given that the central allegations supporting Zoba's abandonment claim are incorrect, a conference regarding the further course of this proceeding – including whether the claim should proceed at all or, alternatively, a proper procedure to determine whether Zoba has any factual basis for its abandonment claims – should be considered before this matter goes forward.⁶

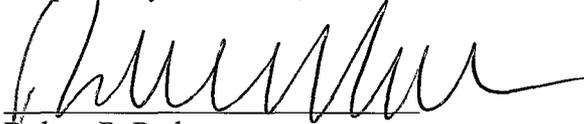
⁵ The amended petition does not include any other specific allegations to support the abandonment claim. Although the Board's second order cited *Clubman's Club Corp. v. Martin*, 188 USPQ 455 (TTAB 1975), for the proposition that, in order to state a cause of action for abandonment, "the plaintiff must allege the ultimate facts pertaining to the alleged abandonment," Second Order at 8, *Clubman's Club* concerned a claim of abandonment through registrant's non-use – circumstances not alleged in this case. Moreover, *Clubman's Club* must be read in light of the more recent decisions in *Twombly* and *Iqbal*, discussed above, in which the Supreme Court rejected "ultimate fact pleading" as sufficient under Rule 8 of the Federal Rules of Civil Procedure.

⁶ The conferees also could address other outstanding issues, such as Zoba's continued corporate existence and whether it intends to designate another party as its successor-in-interest. *See* fn. 1, *supra*.

CONCLUSION

For the foregoing reasons, Registrant DVD Format/Logo Licensing Corporation respectfully requests that the fraud claim in the amended petition be dismissed with prejudice, and that the Board schedule a conference, with the participation of a Board Interlocutory Attorney or an Administrative Trademark Judge, on or before July 8, 2011 in accordance with the present schedule.

Respectfully submitted,



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Dated: May 13, 2011

**In the United States Patent and Trademark Office
Before the Trademark Trial and Appeal Board**

ZOBA INTERNATIONAL CORP., DBA
CD DIGITAL CARD,

Petitioner,

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DVD FORMAT/LOGO LICENSING
CORPORATION,

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Cancellation No. 92051821

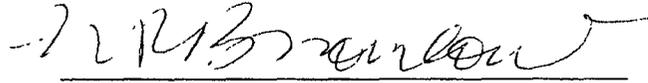
DECLARATION OF WINSTON R. BROWNLOW

I, Winston R. Brownlow, declare and state as follows:

1. I am an attorney with the law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP. I am one of the attorneys for DVD Format/Logo Licensing Corp., respondent in this proceeding.
2. Petitioner Zoba International Corp. alleges in its amended petition in this proceeding that it is a California corporation having its principal place of business at 11150 White Birch Dr., Rancho Cucamonga, California 91730.
3. Attached hereto as Exhibit 1 is a report I obtained from the website of the California Secretary of State. The report lists the status, as of Friday, May 6, 2011, of Zoba International Corp., with an address at 11150 White Birch Dr., Rancho Cucamonga, California 91730, as "DISSOLVED."

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed at New York, New York on May 13, 2011.

A handwritten signature in cursive script, appearing to read "Winston R. Brownlow", written in black ink.

Winston R. Brownlow

EXHIBIT 1

**Business Entities (BE)**

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- [Disclosure Search](#)
- [E-File Statements](#)
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Business Entity Detail

Data is updated weekly and is current as of Friday, May 06, 2011. It is not a complete or certified record of th

Entity Name:	ZOBA INTERNATIONAL CORP
Entity Number:	C2107358
Date Filed:	05/01/1998
Status:	DISSOLVED
Jurisdiction:	CALIFORNIA
Entity Address:	11150 WHITE BIRCH DR
Entity City, State, Zip:	RANCHO CUCAMONGA CA 91730
Agent for Service of Process:	MOHAB SABRY
Agent Address:	11150 WHITE BIRCH DR
Agent City, State, Zip:	RANCHO CUCAMONGA CA 91730

* Indicates the information is not contained in the California Secretary of State's database.

- If the status of the corporation is "Surrender," the agent for service of process is automatically revoked. Corporations Code **section 2114** for information relating to service upon corporations that have surrendered.
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