

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

al

Mailed: January 25, 2011

Cancellation No. 92052897

Thomas Sköld

v.

Galderma Laboratories, Inc.

Before Bucher, Zervas, and Bergsman,
Administrative Law Judges

By the Board:

Petitioner has filed a petition to cancel two registrations for the mark RESTORADERM for "therapeutic skin care preparations and treatment for skin" in International Class 5¹ and for "non-medicated skin care preparations" in International Class 3.² As grounds for cancellation, petitioner pleads priority of use and likelihood of confusion with its previously used mark RESTORADERM.³

This case now comes up for consideration of respondent's motion (filed September 24, 2010) to dismiss

¹ Registration No. 2985751, issued August 16, 2005, alleging May 27, 2005, as a date of first use and first use in commerce.

² Registration No. 3394514, issued March 3, 2008, alleging June 21, 2007, as a date of first use and first use in commerce.

³ Petitioner also pleads ownership of application Serial No. 85037342 for the mark BASED ON RESTORADERM LIPOGRID TECHNOLOGY and Serial No. 85037362 for the mark RESTORADERM LIPIDGRID.

Cancellation No. 92052897

for failure to state a claim under upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).

As a preliminary matter, we note that the petition to cancel and the parties' briefs refer to contracts between respondent's predecessor-in-interest and petitioner which have not been filed with the Board because the parties have not agreed upon or negotiated the scope of any provisions for protecting confidential information. We remind the parties that the Board's standard protective order is in effect.⁴ Nevertheless, these extraneous materials are not necessary to decide the motion to dismiss and we have determined the sufficiency of petitioner's pleading by looking solely to the pleading itself.

In support of its motion, respondent argues that petitioner alleges in his petition to cancel that respondent no longer owns the subject mark and that such an allegation is based on two alternative contract theories but that this is not a valid ground for cancellation because "it does not go to whether Registrant owned and had the right to register the Mark when the applications were filed and registered";

⁴ The parties are reminded that by one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. Parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:
<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>

Cancellation No. 92052897

that "nowhere in the Petition for Cancellation does Petitioner allege that the registrations were improperly filed or registered"; that petitioner's alleged ground that Registrant "no longer owns" the subject mark must fail because "the lack of ownership of a trademark following registration is not a valid cancellation ground"; that even if petitioner's allegation that respondent "no longer owns" the mark is a valid ground for cancellation, petitioner's factual allegations do not support the alleged ground and petitioner's alternate second contract theory is nothing more than a breach of contract claim which is also not a ground for cancellation and which the Board does not have the authority to consider.

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. In order to withstand such a motion, a pleading need only allege plausible facts as would, if proved, establish that petitioner is entitled to the relief sought, that is, that 1) petitioner has standing to maintain the proceeding, and 2) a valid ground exists for cancelling the registration. See *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998). See also TBMP § 503.02 (2d ed. rev. 2004).

The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to

Cancellation No. 92052897

legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Only a complaint that states a plausible claim for relief survives a motion to dismiss. See *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937, 1949-50, 173 L.Ed.2d 868 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555-556, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 570. The pleading must be examined in its entirety, construing the allegations therein so as to do justice. Fed. R. Civ. P. 8(e); see also *Otto Int'l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861, 1862 (TTAB 2007).

After carefully reviewing the petition to cancel, we find that petitioner has sufficiently alleged facts for priority of use and likelihood of confusion in paragraphs 1 and 21 of the petition to cancel that, if proved, would entitle petitioner to relief. We note that respondent is correct that breach of contract is not a proper grounds for cancellation. We further note that if petitioner wants to plead abandonment or nonuse as grounds for cancellation of the subject registrations he must do so with specificity.⁵

⁵ Because it is easy enough to plead competently the grounds of abandonment or nonuse, we will not again interpret the grounds for cancellation on behalf of petitioner.

Cancellation No. 92052897

Accordingly, respondent's motion to dismiss for failure to state a claim is hereby denied.

Proceedings are hereby resumed. The answer is due on February 25, 2011. All dates are reset as follows:

Answer Due	2/25/2011
Deadline for Discovery Conference	3/25/2011
Discovery Opens	3/25/2011
Initial Disclosures Due	4/24/2011
Expert Disclosures Due	8/22/2011
Discovery Closes	9/21/2011
Plaintiff's Pretrial Disclosures	11/5/2011
Plaintiff's 30-day Trial Period Ends	12/20/2011
Defendant's Pretrial Disclosures	1/4/2012
Defendant's 30-day Trial Period Ends	2/18/2012
Plaintiff's Rebuttal Disclosures	3/4/2012
Plaintiff's 15-day Rebuttal Period Ends	4/3/2012

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.