

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

MBA

Mailed: March 23, 2011

Cancellation No. 92052967

Episode Audio

v.

Wirepath Home Systems, LLC

**Before Bucher, Taylor and Mermelstein, Administrative  
Trademark Judges**

**By the Board:**

This case now comes up for consideration of respondent's motion to dismiss the amended fraud claim under Fed. R. Civ. P. 12(b)(6), filed December 23, 2010. Petitioner opposes the motion.

Background

Respondent owns two registrations of the mark EPISODE, in standard characters, for audio speakers. Petitioner challenges only respondent's more recent Registration No. 3343180, which issued November 27, 2007, from an application filed March 8, 2007, based on dates of first use of January 1, 2006, for "audio speakers, loud speakers, loud speakers [sic] systems, speakers with built-in amplifiers, speaker

enclosures" (the "Registration").<sup>1</sup> After petitioner filed its original petition to cancel the Registration, respondent filed a motion for a more definite statement, which the Board granted as conceded in its order of November 10, 2010. Petitioner then filed its currently-operative amended petition for cancellation, alleging prior use of EPISODE AUDIO and that use of respondent's mark is likely to cause confusion with petitioner's mark, and fraud. In support of its fraud claim, petitioner alleges:

- prior to the filing date of respondent's involved application, petitioner's sole proprietor was introduced to respondent's president in the Philippines; Amended Petition for Cancellation ¶ 3;
- "up on [sic] information and fact" respondent "had full knowledge of the petitioner's mark" at the time it filed its involved application; Id. ¶ 1; and
- Respondent sent a cease and desist letter to petitioner on April 19, 2007, in response to which petitioner claimed that respondent's involved application "appeared to be fraudulent." Id. ¶ 4-5.

#### The Parties' Contentions

Respondent points out that it filed its original, uninvolved application prior to the meeting in the

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<sup>1</sup> Respondent's earlier, uninvolved Registration No. 3320350 issued October 23, 2007, from an application filed August 12, 2005, based on dates of first use of January 1, 2006, for "Loudspeakers; Loudspeaker Systems; Loudspeakers with Built-In Amplifiers; Loudspeaker Cabinets."

Philippines between the parties' principals. Respondent then argues that petitioner's amended fraud claim "fails to state with particularity the knowingly false, material representation" respondent allegedly made in connection with its involved application. Respondent further argues that the amended petition for cancellation "does not contain any allegations concerning [respondent's] intent." According to respondent, "the pleading could at most lead the Board to infer that [respondent's president] knew or should have known to investigate Petitioner's alleged use of EPISODE AUDIO before filing" respondent's involved application.

In response, petitioner primarily restates the allegations in the amended petition for cancellation. Petitioner also argues that respondent "undeniably knew" that it made a false statement in connection with the involved application, but does not specify any particular allegedly false statement(s).

#### Decision

In considering respondent's motion to dismiss under Fed. R. Civ. P. 12(b)(6), the applicable standard is as follows:

In order to withstand a motion to dismiss for failure to state a claim, a plaintiff need only allege such facts as would, if proved, establish that (1) the plaintiff has standing to maintain the proceedings, and (2) a valid ground exists for opposing the mark. The pleading must be examined in its

entirety, construing the allegations therein liberally, as required by Fed. R. Civ. P. 8(f), to determine whether it contains any allegations which, if proved, would entitle plaintiff to the relief, sought. See Lipton Industries, Inc. v. Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); Kelly Services Inc. v. Greene's Temporaries Inc., 25 USPQ2d 1460 (TTAB 1992); and TBMP §503.02 (2d. ed. rev. 2004). For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, all of plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to plaintiff. See Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc., 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993); see also 5A Wright & Miller, Federal Practice And Procedure: Civil 2d §1357 (1990). ... The purpose of a Rule 12(b)(6) motion is to challenge "the legal theory of the complaint, not the sufficiency of any evidence that might be adduced" and "to eliminate actions that are fatally flawed in their legal premises and destined to fail ..." Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc., supra at 26 USPQ2d 1041.

Fair Indigo LLC v. Style Conscience, 85 USPQ2d 1536, 1538 (TTAB 2007); see also, Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998). However,

[i]n order to avoid dismissal for failure to state a claim, a complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief. See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Cambridge v. United States, 558 F.3d 1331, 1335 (Fed. Cir. 2009). At the same time, a court is "not bound to

accept as true a legal conclusion couched as a factual allegation." Twombly, 550 U.S. at 555 (quoting Papasan v. Allain, 478 U.S. 265, 286(1986)).

Acceptance Insurance Companies, Inc. v. United States, 583 F.3d 849, 854 (Fed. Cir. 2009). Furthermore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 555).

Under this standard, we find that petitioner has not sufficiently alleged fraud. First, while it appears that petitioner may intend to suggest that during the parties' meeting in the Philippines, respondent became aware of petitioner's alleged use of EPISODE AUDIO, petitioner does not specifically allege this in the amended petition for cancellation. In fact, petitioner merely claims that its sole proprietor met respondent's president, without also alleging that petitioner discussed any particular trademark with respondent's president, or that petitioner informed respondent's president when any such trademark was first used. As the Board informed petitioner in its order of November 15, 2010, under Fed. R. Civ. P. 9(b), as well as Fed. R. Civ. P. 11 and USPTO Rule 11.18, "the pleadings [must] contain explicit rather than implied expression of the circumstances constituting fraud." King Automotive,

Inc. v. Speedy Muffler King, Inc., 667 F.2d 1008, 212 USPQ 801, 803 (CCPA 1981). Second, and perhaps more importantly, petitioner's amended fraud claim does not allege that respondent intended to deceive the USPTO and thereby obtain a registration to which it knew it was not entitled. As the Board also informed petitioner in its order of November 15, 2010, under In re Bose Corp., 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009), "intent is a specific element of a fraud claim." Asian and Western Classics B.V. v. Selkow, 92 USPQ2d 1478, 1479 (TTAB 2009).<sup>2</sup> For these reasons, respondent's motion to dismiss is hereby **GRANTED**, and petitioner's amended fraud claim is hereby **DISMISSED, WITHOUT PREJUDICE**.

Because petitioner has now filed two petitions attempting but failing to sufficiently allege fraud, petitioner will only be given one more opportunity before the fraud claim is dismissed with prejudice. Specifically, petitioner is allowed until **THIRTY DAYS** from the mailing date of this order to, if warranted, file a further amended fraud claim, and if any further amended fraud claim is found to be insufficient, it will be dismissed with prejudice.

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<sup>2</sup> We note that respondent filed its original application to register EPISODE on August 12, 2005, well before the alleged meeting in the Philippines. Although this is a topic that is beyond the scope of the motion before us, petitioner should carefully consider whether, under these circumstances, respondent could have had the requisite intention to deceive when it filed its involved application on March 8, 2007.

In considering whether to attempt to replead a fraud claim, petitioner should be aware that it appears that a fraud claim may be superfluous in this case and have no substantive impact on this proceeding. In fact,

[a] plaintiff claiming that the declaration or oath in a defendant's application for registration was executed fraudulently, in that there was another use of the same or a confusingly similar mark at the time the oath was signed, must allege particular facts which, if proven, would establish that: (1) there was in fact another use of the same or a confusingly similar mark at the time the oath was signed; (2) the other user had legal rights superior to applicant's; (3) applicant knew that the other user had rights in the mark superior to applicant's, and either believed that a likelihood of confusion would result from applicant's use of its mark or had no reasonable basis for believing otherwise; and that (4) applicant, in failing to disclose these facts to the U.S. Patent and Trademark Office, intended to procure a registration to which it was not entitled. Intellimedia Sports Inc. v. Intellimedia Corp., 43 USPQ2d 1203, 1205 (TTAB 1997).

Qualcomm Inc. v. FLO Corp., 93 USPQ2d 1768, 1770 (TTAB 2010). In other words, even if petitioner sufficiently alleges all four of the above-cited elements of a fraud claim, it will only prevail on the claim if it establishes, at trial or in a motion for summary judgment, the second element, i.e. that petitioner "had rights in the mark superior to" respondent's. But if petitioner is able to establish this second element, then it will have also

established priority of use and likelihood of confusion, and would prevail on that claim, resulting in cancellation of respondent's mark and making the fraud claim unnecessary.

Conclusion

Respondent's motion to dismiss the amended fraud claim is granted. Petitioner is allowed until thirty days from the mailing date of this order to, if warranted, file an amended fraud claim. Proceedings herein are resumed, and answer, disclosure, discovery, trial and other dates are reset as follows:

Time to Answer	<b>May 18, 2011</b>
Deadline for Discovery Conference	<b>June 17, 2011</b>
Discovery Opens	<b>June 17, 2011</b>
Initial Disclosures Due	<b>July 17, 2011</b>
Expert Disclosures Due	<b>November 14, 2011</b>
Discovery Closes	<b>December 14, 2011</b>
Plaintiff's Pretrial Disclosures	<b>January 28, 2012</b>
Plaintiff's 30-day Trial Period Ends	<b>March 13, 2012</b>
Defendant's Pretrial Disclosures	<b>March 28, 2012</b>
Defendant's 30-day Trial Period Ends	<b>May 12, 2012</b>
Plaintiff's Rebuttal Disclosures	<b>May 27, 2012</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>June 26, 2012</b>

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

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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 Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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