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ESTTA Tracking number: **ESTTA493381**

Filing date: **09/10/2012**

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

Proceeding	92055795
Party	Defendant E.F. Hutton Group, Inc.
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Submission	Motion to Strike
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Date	09/10/2012
Attachments	Motion to Strike 9-10-12.PDF (4 pages)(203596 bytes)

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

TERRENCE HASTINGS Petitioner, v. E.F. HUTTON GROUP INC. Respondent.	Cancellation No. 92/055795 Registration No. 4122970 E.F. HUTTON Registration No. 4126754 EFHutton

COMBINED MOTION TO STRIKE COUNTS II, III, IV AND V
IN PETITION FOR CANCELLATION AND MEMORANDUM AT LAW

Respondent E.F. Hutton Group Inc. ("Respondent") submits this Combined Motion to Strike Counts II, III, IV and V and Memorandum at Law in the above-referenced Petition For Cancellation ("Petition") and states the following: (i) the Trademark Trial and Appeal Board ("Board") is an administrative tribunal of the United States Patent and Trademark Office and is not authorized to determine or decide broader questions of law or unfair competition and (ii) Petitioner has neither asserted all 5 fraud elements nor alleged any heightened facts to support its claim that Respondent has committed fraud on the Trademark Office. As such, Respondent requests the Board STRIKE Counts II, III, IV and V in the Petition.

I. No Authority to Decide Broad Questions of Law.

The Trademark Trial and Appeal Board ("Board") is an administrative tribunal of the United States Patent and Trademark Office ("USPTO"). It is not an Article Three court of law. The Board is empowered to determine only the right to register. *See* Trademark Act §§ 17, 18, 20 and 24; 15 U.S.C. §§ 1067, 1068, 1070 and 1092. The Board is not authorized to determine or decide broader questions of law or unfair competition. *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212,

1216 (TTAB 2006) ("[T]he Board's jurisdiction is limited to determining whether trademark registrations should issue or whether registrations should be maintained; it does not have authority to determine whether a party has engaged in criminal or civil wrongdoings."), *aff'd unpub'd,* 240 Fed. Appx. 865 (Fed. Cir. July 11, 2007), *cert. den'd,* 552 U.S. 1109 (2008); *see also, Enterprise Rent-A-Car Co. v. Advantage Rent-A-Car Inc.*, 62 USPQ2d 1857, 1858 (TTAB 2002), *aff'd*, 300 F.3d 1333, 66 USPQ2d 1811 (Fed. Cir. 2003) (no jurisdiction to decide issues arising under state dilution laws); *Person's Co. v. Christman*, 900 F.2d 1565, 14 USPQ2d 1477, 1481 (Fed. Cir. 1990) (Board cannot adjudicate unfair competition issues); *General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 USPQ2d 1584, 1591 (TTAB 2011) (no authority to determine the right to use, or the broader questions of infringement, unfair competition, damages or injunctive relief); *Hershey Foods Corp. v. Cerreta*, 195 USPQ 246, 252 (TTAB 1977) (determination of whether opposer is guilty of unfair business practices is not within the province of the Board); *Yasutomo & Co. v. Commercial Ball Pen Co.*, 184 USPQ 60, 61 (TTAB 1974) (no jurisdiction to address anti-trust issues); *American-International Travel Service, Inc.* v. AITS, Inc., 174 USPQ 175, 179 (TTAB 1972) (no jurisdiction to determine whether opposer violated criminal statute).

Count II asserts that Respondent's use violates the Federal Wire Act. The Board has no authority to determine whether Respondent's use violates the Federal Wire Act. *McDermott, supra.*

Count III asserts that Respondent's use violates the Maryland Criminal Law Code Ann. §12-101. The Board has no authority to determine whether Respondent's use violates Maryland Criminal Law Code Ann. §12-101. *Enterprise Rent-A-Car Co., supra.*

Count IV asserts that Respondent's use violates the Internet Gambling Enforcement Act. The Board has no authority to determine whether Respondent's use violates the Internet Gambling Enforcement Act. *McDermott, supra.*

II. APPLICANT'S AMENDED COUNTERCLAIM AGAIN FAILS TO MEET THE IQBAL/TWOMBLY PLEADING STANDARDS.

According to the now seminal Supreme Court decisions of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ____, 129 S. Ct. 1937 (2009), in order to withstand a

motion to dismiss (or in this case a Motion to Strike), a claim must be supported by well-pled factual allegations sufficient to establish its facial plausibility. As recently summarized by the Fourth Circuit, the import of these decisions is that "[u]ltimately, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (internal quotation marks omitted). "Facial plausibility is established once the factual content of a complaint allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 256 (internal quotation marks omitted). While detailed factual allegations are not required to satisfy this "context-specific" test, the "complaint must, however, plead sufficient facts to allow a court, drawing on judicial experience and common sense, to infer more than the mere possibility of misconduct." *Id.* (internal quotation marks omitted). Significantly, the *Nemet Chevrolet* court "also conclude[d] from the analysis in *Iqbal* that legal conclusions, elements of a cause of action, and bare assertions <u>devoid of further factual enhancement</u> fail to constitute well-pled facts for Rule 12(b)(6) purposes." *Id.* at 255 (emphasis added). The Board follows the *Iqbal/Twombly* test to determine sufficiency of pleadings. See e.g., Doyle v. Al Johnson's Swedish Restaurant & Butik Inc., 101 USPQ2d 1780 (TTAB 2012).

Count V of the Petition makes two broad assertions that are not supported by any facts. First, Petitioner asserts that: (1) Respondent made false statements to the U.S. Patent and Trademark Office ("USPTO") and (2) that such statements were material in that the USPTO would not have allowed the Application to proceed toward registration. In order for the Petitioner to assert fraud on the USPTO, it must assert five elements. They are: (1) a false representation regarding a material fact; (2) knowledge or belief that the representation is false; (3) an intention to induce the listener to act or refrain from acting in reliance upon the misrepresentation; (4) reasonable reliance upon the misrepresentation; and (5) damage proximately resulting from such reliance. *Federal Treasury Enter. Sojuzplodoimport v. Spirits Int'l N.V.*, 425 F. Supp2d 458, 467-68 (S.D.N.Y. 2006). Count V in the Petition at most asserts 2 of the 5 elements of fraud on the USPTO and does not recite facts sufficient to meet the *Iqbal/Twombly* requirements of well-pled factual allegations. Given that Petitioner has neither asserted all 5 fraud elements of fraud nor

alleged any heightened facts to support its claim that Respondent has committed fraud on the USPTO, Count V should be struck.

For the above reasons, Respondent requests the Board STRIKE Counts II, III, IV and V in the Petition for Cancellation.

Dated: September 10, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of September, 2012, a copy of the foregoing Answer was sent via first class mail, to:

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