

**THIS OPINION IS NOT
A PRECEDENT OF THE TTAB**

Goodman

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

Mailed: February 26, 2014

Cancellation No. 92056574

Frank Clegg Leatherworks LLC

v.

El Group, LLC

Before Zervas, Ritchie and Hightower, Administrative
Trademark Judges.

By the Board:

This case now comes up on petitioner's motion, filed
October 22, 2013, for summary judgment on the Section 2(d)
and Section 2(c) grounds set forth in the petition to
cancel. Respondent has cross-moved on the abandonment
ground.

A decision on summary judgment necessarily requires a
review of the operative pleading in this case. *Asian and
Western Classics B.V. v. Selkow*, 92 USPQ2d 1478 (TTAB
2009). We find all claims insufficiently pleaded.

For the abandonment claim, petitioner simply alleges
that

[o]n information and belief Registrant no longer uses
its mark in commerce in the United States Upon
information and belief, Registrant has "abandoned"
U.S. Registration No. 3,872,561

These allegations are insufficient as petitioner fails to allege any facts to support a prima facie claim of abandonment or to allege abandonment based on less than three years non-use with no intent to resume use. *Otto International Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861, 1863 (TTAB 2007).

The Section 2(d) and Section 2(c) grounds have been alleged together. With regard to these grounds, petitioner alleges

[w]ithout Petitioner's written permission, authorization or consent, Registrant registered the mark LOTUFF & CLEGG, which is confusingly similar to Petitioner's marks F. CLEGG and FRANK CLEGG. Accordingly, Registrant's mark '[c]onsists of or comprises a name . . . identifying a particular living individual' without Petitioner's written consent within the meaning of Section 2(c) of the Trademark Act. . . .¹

To plead likelihood of confusion, petitioner must plead priority of use and either directly or hypothetically that respondent's mark as applied to its goods so resembles the marks previously used by petitioner as to be likely to cause confusion or mistake. *Intersat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154, 156 (TTAB 1985). That was not done here.

¹ We note that petitioner alleges priority in paragraph 1 of the petition to cancel based on the allegation that it "has been selling briefcases and other leather goods under the FRANK CLEGG and F. CLEGG marks since at least as early as 1976."

To plead a Section 2(c) claim, which bars registration of marks comprising a name without the written consent of a living individual, petitioner must plead particular facts that the mark identifies its name and that it either enjoys a reputation of such fame as to be recognizable by the public at large by that name, or that it has been publicly connected with a particular industry by that name.² *Martin v. Carter Hawley Hale Stores, Inc.*, 206 USPQ 931, 933 (TTAB 1979). Petitioner's allegations are conclusory and lack any allegations of fact. See *Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) ("[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice") quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Only properly pleaded claims may be the subject of a grant for summary judgment. See *Intermed Communications, Inc. v. Chaney*, 197 USPQ 501, 503 n. 2 (TTAB 1977) ("If a

² An element of the Section 2(c) ground is that the party asserting that ground must have a cognizable or proprietary right in the name. Thus, a party must plead and prove that it has a linkage or relationship with an individual upon which it could assert this third party's rights. *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.P.A.* 32 U.S.P.Q.2d 1192 (TTAB 1994). In the petition to cancel, petitioner has alleged that Francis A. Clegg is the sole member of petitioner, a limited liability company.

claim has not been properly pleaded, one cannot obtain summary judgment thereon"). Because petitioner's claims are insufficiently pleaded, the cross-motions for summary judgment are denied. See *Consolidated Foods Corporation v. Berkshire Handkerchief Co., Inc.*, 229 USPQ 619, 621 (TTAB 1986) (denying summary judgment due to insufficiently pleaded claim).

We note, in any event, that even if we were to consider the cross-motions for summary judgment on the merits, the motions would have to be denied because genuine disputes of material fact remain. With respect to the Section 2(d) ground, genuine disputes of material fact remain at least as to priority and the similarity of the parties' marks. With respect to the Section 2(c) ground, genuine disputes of material fact remain at least with respect to whether more than an insubstantial number of purchasers or users of respondent's goods would recognize that the mark refers to and identifies Francis A. Clegg. *Ross v. Analytical Technology Inc.*, 51 USPQ2d 1269, 1276 (TTAB 1999). With regard to the abandonment ground, genuine disputes of material fact remain regarding whether respondent has ceased using the mark and intends to resume use.

Proceedings are resumed.

Cancellation No. 92056574

Petitioner is allowed until TWENTY DAYS from the mailing date of this order to file and serve an amended petition to cancel properly alleging grounds for cancellation, failing which, this proceeding will be dismissed. If an amended petition to cancel is filed and served, respondent is allowed until FORTY DAYS from the service date to file an answer thereto.

Dates are reset as follows:³

Expert Disclosures Due	3/29/2014
Discovery Closes	4/28/2014
Plaintiff's Pretrial Disclosures	6/12/2014
Plaintiff's 30-day Trial Period Ends	7/27/2014
Defendant's Pretrial Disclosures	8/11/2014
Defendant's 30-day Trial Period Ends	9/25/2014
Plaintiff's Rebuttal Disclosures	10/10/2014
Plaintiff's 15-day Rebuttal Period Ends	11/9/2014

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

³ The Board granted petitioner's motion to extend on November 29, 2013, extending the discovery period by sixty days.