

ESTTA Tracking number: **ESTTA727053**

Filing date: **02/15/2016**

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

Proceeding	92059685
Party	Defendant FTI Corporation Limited
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Date	02/15/2016
Attachments	Opp'n to MFR.pdf(49623 bytes )

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

**In re Registration of:** FTI Corporation Limited  
**Reg. Nos.:** 3,224,978, 3,476,081, and 3,476,082  
**Reg. Dates:** April 3, 2007, July 29, 2008, and July 29, 2008

**Marks:** REVO, REVO, and 

**SBG REVO HOLDINGS, LLC** )  
 )  
 **Petitioner,** )  
 )  
 v. ) **Cancellation No. 92059685**  
 )  
 **FTI CORPORATION LIMITED** )  
 )  
 **Respondent.** )

**RESPONDENT'S RESPONSE IN OPPOSITION TO  
PETITIONER'S MOTION FOR RECONSIDERATION**

Respondent FTI Corporation Limited (“FTI”), by counsel, states the following as its Response in Opposition to SBG Revo Holdings’ (“SBG”) Motion for Reconsideration:

**I. SBG FAILS TO MEET THE STANDARD FOR A MOTION FOR RECONSIDERATION**

A motion for reconsideration is proper only when, “based on the facts before it and the prevailing authorities, the Board erred in reaching the order or decision it issued.” TBMP § 518; *see also, e.g., Smith v. Entrepreneur Media, Inc.*, Cancellation No. 92053982, 2012 WL 10056747, at \*1 (T.T.A.B. Feb. 23, 2012); *Autozone Parts, Inc. v. Dent Zone Companies, Inc.*, Cancellation Nos. 92044502 and 92050355, 2009 WL 9410587, at \*1 (T.T.A.B. Apr. 14, 2009). “It is not to be a reargument of the points presented in the original motion or response thereto, nor is it to be used to raise new arguments or introduce additional evidence.” *Autozone*, 2009 WL 9410587, at \*1; *see also, e.g., Smith*, 2012 WL 10056757, at \*1; *Emerald Bioagriculture Corp. v. Biosafe Sys., LLC*, Cancellation No. 92042503, 2006 WL 1909825, at \*1 (T.T.A.B. June 28, 2006) (non-precedential); TBMP 518. As a result, the Board should deny a motion for consideration unless the movant demonstrates that, based on the facts before the Board when it decided the motion and the applicable law, “the Board’s ruling is in error and requires appropriate change.” *Autozone*, 2009 WL 9410587, at \*1; *see also, e.g., Smith*, 2012 WL 10056757, at \*1; TBMP 518.

Here, instead of identifying errors in the Board’s opinion, SBG reasserts its arguments from its previous Opposition brief or raises arguments that were not before the Board when it decided the Motion to Dismiss. For example, SBG repeatedly argues that FTI’s Motion to Dismiss should have been denied because it addressed the “merits” rather than the legal sufficiency of the Petition. Mot. for Reconsideration (hereinafter “MFR”) at 3, 5-7 [Dkt. #34]. FTI already made this argument at length in its Opposition to FTI’s Motion to Dismiss, making it improper for a motion for reconsideration. *See* Pet’r’s Br. in Opp’n at 8-9, 16-17 [Dkt. #26]; *Autozone*, 2009 WL 9410587, at \*1 (“Rather than point to any error in our decision . . . granting the motion to dismiss . . . , DentZone is rearguing points previously made. Inasmuch as this is improper, as explained above, Dent Zone’s request for

reconsideration is denied.”). SBG even acknowledges that it is reasserting its previous arguments, complaining without support that FTI’s Motion to Dismiss was not “specific[]...[a]s noted in SBG’s Brief.” MFR at 3; *see Biosafe*, 2006 WL 1909825, at \*1 (noting that, “respondent’s request for reconsideration merely copies its original arguments and for that reason it does not provide a reason to change the result in the original decision”).

SBG also proffers new arguments that fail to identify any errors in the Board’s analysis. For example, SBG argues that the Board erred in finding that SBG’s claimed common law rights in sunglasses, frames and cases were not substantially identical to the goods in FTI’s REVO registrations, due to the fact that SBG also alleged common-law rights in “related goods.” SBG’s failure to raise “related goods” in its original brief means it cannot raise this argument on a motion for reconsideration. *Autozone*, 2009 WL 9410587, at \*1. Further, it was not error for the Board to decline to treat pleading ownership of rights in connection with unspecified “related goods” as a sufficient factual allegation of fraud to withstand a motion to dismiss.

SBG’s argument that the Motion to Dismiss should have been decided by a three judge panel is equally improper for a Motion for Reconsideration. A Motion for Reconsideration should only be granted when the movant demonstrates that “the Board’s *ruling* is in error and *requires appropriate change.*” *Autozone*, 2009 WL 9410587, at \*1 (emphasis added). Whether or not a three judge panel did or should have decided the motion is irrelevant to the correctness of the Board’s ruling, and thus is not grounds to grant SBG’s motion. *See Jones v. Holtzschue*, Cancellation No. 92/040,746, 2003 WL 22222465, at \*2 (T.T.A.B. Sept. 23, 2003) (non-precedential) (construing petitioner’s motion as one for reconsideration and noting that, although the “order should have been issued by a three-judge panel of the Board,” reconsideration was denied because the “petitioner ha[d] not shown that the findings in the March 24, 2003 order were in error”).

Accordingly, SBG's Motion for Reconsideration is improper, and should be denied outright.

## II. NONE OF SBG'S ARGUMENTS HAVE MERIT

Even if the Board were to consider SBG's arguments, none have merit. As discussed above, a motion for reconsideration can only succeed if the movant identifies errors in the Board's ruling. However, SBG fails to find any errors in the Board's central holdings that SBG's non-ownership and nonuse claims are not grounds for a cancellation action under 15 U.S.C. § 1064(3), and that SBG failed to sufficiently plead its fraud claims.

SBG does not dispute the Board's holding that non-ownership is not a statutory ground for cancellation under Section 1064(3). Instead SBG suggests that the Board mischaracterized its invalid assignment claim as one for non-ownership, and argues at length regarding that theory. However, invalid assignment is also not a grounds for cancellation under 1064(3), and thus SBG's argument does not reveal any error in the Board's analysis that would merit reconsideration.

SBG also fails to identify any error in the Board's finding that non-use is not grounds for cancellation under Section 1064(3). Instead SBG argues that *Shutemdown Sports, Inc. v. Carl Dean Lacy*, 102 U.S.P.Q.2d 1036 (P.T.O. Feb. 22, 2012) permits non-use as grounds for cancellation. This is incorrect. In *Shutemdown*, the Board sustained an abandonment claim, which is a different claim than non-use, and one that SBG did not plead. *See Shutemdown*, 102 U.S.P.Q.2d at 1042-44; Petition for Cancellation [Dkt. #1]. Even were one to construe SBG's non-use claim as abandonment, dismissal would still be appropriate because SBG failed to plead the elements of an abandonment claim. SBG did not (because it could not) allege specific goods on which FTI had failed to use the REVO Mark, nor did it claim that FTI had no intention to resume use. Accordingly, the Board did not err in dismissing SBG's non-use claim.

SBG spends much of its brief arguing that the Board did not apply the correct standard in deciding the Motion to Dismiss, an argument SBG already made in its earlier Opposition brief. SBG is entirely wrong on this point. The Board correctly applied the standard set forth in *Ashcroft v. Iqbal*, 555 U.S. 662, 678 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), which requires that a pleading include “sufficient factual matter” and state a claim that is “plausible on its face.” SBG’s argument that it is not required to plead specific goods, either for its allegation of prior rights (MFR at 3-4) or for its non-use claim (MFR at 6) directly contravenes this well-established rule. *See Smith v. Entrepreneur Media, Inc.*, Cancellation No. 92053982, 2012 WL 10056747, at \*2 (T.T.A.B. Feb. 23, 2012) (denying motion for reconsideration) (“Petitioner’s arguments that we erred in applying the standard for the motion to dismiss are without merit. While the Board, for purposes of a motion to dismiss, must accept all well-pleaded allegations as true, and draw reasonable inferences in petitioner’s favor, *the Board is ‘not required to indulge in unwarranted inferences in order to save a complaint from dismissal.’*” (quoting *Juniper Networks Inc. v. Shipley*, 98 U.S.P.Q.2d 1491 (Fed. Cir. 2011))). SBG’s argument (again already addressed in prior briefing) that it sufficiently alleged fraud is equally wrongheaded – the Board was entitled to decide that the “facts” alleged by SBG could not amount to a cognizable claim for fraud.<sup>1</sup>

As SBG failed to identify any errors in the Board’s ruling, its Motion for Reconsideration should be denied.

### **III. SBG SHOULD NOT BE GRANTED LEAVE TO AMEND ITS PETITION**

SBG’s request for leave to amend its Petition should also be denied. The Board already granted SBG leave to amend its Petition, and SBG failed to do so by the deadline set forth in the

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<sup>1</sup> SBG’s suggestion (MFR at 6) that it could use discovery to search for facts on which to base its claims is in clear violation of Fed. R. Civ. P. 11(b).

Board's Order, January 29, 2016. *See* Order Granting Mot. to Dismiss at 16. As discussed in the Board's Order, SBG's non-use and non-ownership claims are barred by statute, and thus amending those claims would be futile. *Midwest Plastic Fabricators Inc. v. Underwriters Laboratories Inc.*, 5 USPQ2d 1067, 1069 (TTAB 1987) (motion to amend to add claim or defense which is legally insufficient will be denied). In addition, the arguments raised by SBG in its Motion for Reconsideration demonstrate that SBG has no facts to support its fraud claims or an abandonment claim, and plans to use discovery as a vehicle to determine such facts. MFR at 6 ¶1. Amendment will not resolve this issue, and would require FTI to file yet another Motion to Dismiss. *Dragon Bleu (SARL) v. VENM, LLC* 112 USPQ2d 1925, 1929 n.10 (TTAB 2014) (Board did not grant leave to replead fraud claim due to futility and lack of plausibility based on recited facts). By waiting until nearly the deadline to amend to file its Motion for Reconsideration, SBG has already delayed the conclusion of this matter significantly. Accordingly, because amendment would serve no purpose and would further burden FTI, SBG's request for leave to amend should be denied, and its Petition to Cancel dismissed with prejudice.

#### IV. CONCLUSION

For the foregoing reasons, FTI Corporation respectfully requests that the Board deny SBG's Motion for Reconsideration, and dismiss with prejudice the Petition for Cancellation.

File via ESTTA: February 15, 2016

Respectfully submitted,

FTI Corporation Limited

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**CERTIFICATE OF SERVICE**

On February 15, 2015, a copy of the foregoing motion was sent via FedEx to counsel for the applicant at the following address:

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