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

Proceeding	92059685
Party	Plaintiff SBG Revo Holdings, LLC
Correspondence Address	ROBERTA S BREN MUNCY GEISSLER OLDS & LOWE PC 4000 LEGATO ROAD SUITE 310 FAIRFAX, VA 22033 UNITED STATES mailroom@mg-ip.com, rsb@mg-ip.com, bac@mg-ip.com
Submission	Opposition/Response to Motion
Filer's Name	Roberta S. Bren
Filer's e-mail	mailroom@mg-ip.com, rsb@mg-ip.com, bac@mg-ip.com
Signature	/Roberta S. Bren/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SBG REVO HOLDINGS, LLC, Petitioner, v. FTI CORPORATION LIMITED, Respondent.	))))))))))))	Cancellation No. 92/059685 Registration Nos. 3224978, 3476081 and 3476082 Marks: REVO, revo and REVO

PETITIONER'S OPPOSITION TO RESPONDENT'S SECOND MOTION TO DISMISS

Petitioner SBG REVO HOLDINGS, LLC ("SBG" or "Petitioner"), hereby opposes Respondent FTI CORPORATION LIMITED's ("FTI" or "Respondent") motion to dismiss Petitioner's Amended Petition for Cancellation. Trademark Rule 2.127(a). Petitioner respectfully requests the Trademark Trial and Appeal Board ("Board" or "TTAB") deny Respondent's Second Motion to Dismiss in its entirety; or alternatively, Petitioner respectfully requests time to file a second amended pleading. Fed.R.Civ.P. 12(b)(6).

I. Introduction

Petitioner has amended its Petition for Cancellation to include sufficient specificity to provide Respondent with notice of the issues in the case, to set forth sufficient facts and allegations to state claims upon which relief can be granted, and to meet the heightened pleading standard for the fraud claim. The Amended Petition is based upon the "best of [Petitioner's] knowledge, information and belief, formed after an inquiry reasonable under the circumstances," and meets the requirements of Trademark Rule 11.18(b). For example, Petitioner amended its petition to list the goods in connection with which Petitioner alleges FTI was not using its marks during the pertinent times. Contrary to FTI's description of the lists as a "random list[s] of goods" (Second Motion to Dismiss p.11), the lists are based upon the best knowledge and information available to Petitioner after a reasonable inquiry. Petitioner specifically denies that the lists of goods are "random", and notes that Petitioner's inquiries did not return the same results as FTI's "simple Google search" (Second Motion to Dismiss p.9 fn3, p.11) with respect to the goods specified in the Amended Petition and that such a search would not cover the relevant time periods. Furthermore, in reviewing a motion to dismiss, all of Petitioner's statements must be accepted as true and must be construed in Petitioner's favor, and as also noted by FTI, matters outside the pleadings should not be considered by the Board. (Second Motion to Dismiss p.9 fn3.)

II. Legal Standard for Rule 12(b)(6) Motions

In order to withstand a motion to dismiss for failure to state a claim upon which relief can be granted, a plaintiff "need only allege sufficient factual content that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the plaintiff has standing to

maintain the proceeding,[1] and (2) a valid ground exists for opposing or cancelling the registration." *Dragon Bleu (Sarl) v. VENM, LLC*, 112 U.S.P.Q.2d 1925, 2014 WL 7206399 (TTAB 2014); *Young v. AGB Corp.,* 152 F.3d 1377, 47 USPQ2d 1752 (Fed. Cir. 1998); *Caymus Vineyards v. Caymus Medical Inc.,* 107 USPQ2d 1519 (TTAB 2013). All of Petitioner's statements must be accepted as true and must be construed in Petitioner's favor, and the Petition need only contain "sufficient factual matter...to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (discussing a Complaint). *See also, Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993) (a dismissal under Fed.R.Civ.P. 12(b)(6), to be sustained must be correct as a matter of law when the allegations of the complaint are taken as true; and disputed issues are construed favorably to the complainant). Arguments other than regarding the legal sufficiency of the claims are superfluous. *Guess? IP Holder L.P. v. Knowluxe LLC*, 116 U.S.P.Q.2d 2018, 2015 WL 9702438 at *1 (TTAB 2015).

III. Abandonment Claims Are Sufficiently Pled

A. Pleading Requirements

"In order to set forth a sufficient claim to cancel the registration of a mark on grounds of abandonment, the plaintiff must plead ultimate facts pertaining to the alleged abandonment...." *Dragon Bleu (Sarl) v.VENM, LLC*, 112 U.S.P.Q.2d 1925, 2014 WL 7206399 at *6 (TTAB 2014). A mark is abandoned when use of the mark has ceased and there is intent not to resume such use. "Nonuse for 3 consecutive years shall be prima facie evidence of abandonment." 15 U.S.C. § 1127.

[1] FTI does not dispute that Petitioner has standing.

B. Petitioner's Abandonment Claims Are Sufficiently Pled

Fed. R. Civ. P. 9(b) does not apply to the pleading of abandonment claims, and the Amended Petition satisfies the requirement set forth above by pleading ultimate facts pertaining to the alleged abandonment. The factual assertions are succinct as the alleged facts are in the nature of a negative.

Registration No. 3224978

Petitioner alleged that:

- FTI and its predecessor-in-interest never used the mark, and did not use the mark during the three-year period preceding the filing of the Petition for Cancellation, in connection with all purpose sports bags, athletic bags, beach bags, clutch bags, diaper bags, gym bags, and/or school bags. (Amended Petition ¶ 22, 25)
- Upon information and belief, Respondent has abandoned the mark in Registration No. 3224978 with respect to all purpose sports bags, athletic bags, beach bags, clutch bags, diaper bags, gym bags, and/or school bags, and has no intent to resume use. (Amended Petition ¶¶ 26, 27)

Registration No. 3476081

Petitioner alleged that:

- FTI and its predecessor-in-interest never used the mark, and did not use the mark during the three-year period preceding the filing of the Petition for Cancellation, in connection with book bags, coin purses, all purpose sport bags, leather suitcases, garment bags for travel, briefcases, parasols, pocket wallets, textile shopping bags, luggage, namely,

trunks, umbrellas, canes, fur, leather for furniture, imitation leather, leather pouches, school bags, sling bags for carrying infants, umbrella covers, and/or shopping bags with wheels attached. (Amended Petition ¶¶ 31, 34)

- Upon information and belief, Respondent has abandoned the mark in Registration No. 3476081 with respect to book bags, coin purses, all purpose sport bags, leather suitcases, garment bags for travel, briefcases, parasols, pocket wallets, textile shopping bags, luggage, namely, trunks, umbrellas, canes, fur, leather for furniture, imitation leather, leather pouches, school bags, sling bags for carrying infants, umbrella covers, and/or shopping bags with wheels attached, and has no intent to resume use. (Amended Petition ¶¶ 35, 36)

Registration No. 3476082

Petitioner alleged that:

- FTI and its predecessor-in-interest never used the mark, and did not use the mark during the three-year period preceding the filing of the Petition for Cancellation, in connection with book bags, coin purses, all purpose sport bags, leather suitcases, garment bags for travel, briefcases, parasols, pocket wallets, textile shopping bags, luggage, namely, trunks, umbrellas, canes, fur, leather for furniture, imitation leather, leather pouches, school bags, sling bags for carrying infants, umbrella covers, and/or shopping bags with wheels attached. (Amended Petition ¶¶ 40, 43)
- Upon information and belief, Respondent has abandoned the mark in Registration No. 3476082 with respect to book bags, coin purses, all purpose sport bags, leather suitcases, garment bags for travel, briefcases, parasols, pocket wallets, textile shopping bags,

luggage, namely, trunks, umbrellas, canes, fur, leather for furniture, imitation leather, leather pouches, school bags, sling bags for carrying infants, umbrella covers, and/or shopping bags with wheels attached, and has no intent to resume use. (Amended Petition ¶¶ 44, 45)

Accepting Petitioner's statements as true and construing them in Petitioner's favor, the Amended Petition contains sufficient factual matter to state claims to relief that are plausible on their face.

IV. Fraud

A. Pleading Requirements

"Fraud in procuring a trademark registration occurs when an Applicant for registration knowingly makes a false, material representation of fact in connection with an application to register with the intent of obtaining or maintaining a registration to which it is otherwise not entitled." *Dragon Bleu (Sarl) v. VENM, LLC*, 112 U.S.P.Q.2d 1925, 2014 WL 7206399 at *2 (TTAB 2014); *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1939 (Fed. Cir. 2009);

The heightened standard of Fed. R. Civ. P. 9(b) applies to allegations of fraud: "Allegations of fraud must be set forth with particularity, although malice, intent, knowledge, and other conditions of a person's mind may be averred generally." *Caymus Vineyards v. Caymus Medical Inc.,* 107 USPQ2d 1519, 1522 (TTAB 2013); *Dragon Bleu (Sarl) v. VENM, LLC*, 112 U.S.P.Q.2d 1925, 2014 WL 7206399 at *2 (TTAB 2014). The Court of Appeals for the Federal Circuit had explained in *In re Bose Corporation*, 580 F.3d 1240, 91 USPQ2d 1938, 1940 (Fed. Cir. 2009):

> The Board stated in *Medinol v. Neuro Vasx, Inc.* that to determine whether a trademark registration was obtained fraudulently, '[t]he appropriate inquiry is ... not into the registrant's subjective intent, but rather into the objective manifestations of that intent.' 67 USPQ2d 1205, 1209 (T.T.A.B. 2003). We understand the Board's emphasis on the 'objective manifestations' to mean that 'intent must often be inferred from the circumstances and related statement(s) made.' *Id.* (internal quotation marks omitted) (quoting *First Int'l Serv.*, 5 USPQ2d at 1636). We agree.

Furthermore, pleadings of fraud based upon "information and belief" are permitted when essential information lies uniquely within the other party's control, so long as allegations of specific facts upon which the belief if reasonably based are also set forth. *See NSM Res. Corp. v. Microsoft Corp.*, 113 USPQ2d 1029, 1034, 2014 WL 7206403 (TTAB 2014); *Asian and Western Classics B.V. v. Lynne Selkow*, 92 USPQ2d 1478, 1479, 2009 WL 3678263 (TTAB 2009); *see also Exergen Corp. v. Wal-Mart Stores Inc.*, 575 F3d 1312, 1330, 91 USPQ2d 1656, 1670 (Fed. Cir. 2009) (patent infringement case stating "Pleading on 'information and belief' is permitted under Rule 9(b) when essential information lies uniquely within another party's control, but only if the pleading sets forth the specific facts upon which the belief is reasonably based").

B. Petitioner's Fraud Claims Are Sufficiently Pled

In the Amended Petition, Petitioner alleges, with respect to each of the subject registrations, "when and how the fraud allegedly occurred and the content of the false representation, and identifies what was obtained by reason of the asserted fraud." *Caymus Vineyards*, 107 USPQ2d at 1522-1523, 2013 WL 6665451 (TTAB 2013). The facts alleged in the Amended Petition, when construed in the light most favorable to the Petitioner, constitute valid grounds for cancelling the registration. *Id.* Furthermore, the specificity included in the Amended Petition provides sufficient notice of the issues to Respondent, as it includes specifics

as to when and how the fraud is alleged to have occurred, as well as the content of the false representations.

Registration No. 3224978

Petitioner alleged that:

- Fair Trade Enterprise Co., Ltd. filed an application with the USPTO for the mark REVO, based on Section 1(a) of the Trademark Act, 15 USC §1051(a), averring use of the mark in commerce on all the identified goods, and supported by the Declaration signed under oath under notice of Section 1001 of Title 18 of the United States Code on June 2, 2006 by Michael F. Brown as "Attorney." (Amended Petition ¶ 20.)
- The Section 8 Declaration of Use (15 USC §1058) was filed for Registration No. 3224978 averring use of the mark in commerce on all the identified goods, and supported by the Declaration signed under oath under notice of Section 1001 of Title 18 of the United States Code on April 10, 2012 by Michael F. Brown as "Attorney of Record" for Respondent. The Section 8 Declaration was accepted by the USPTO on April 21, 2012. (Amended Petition ¶ 21.)
- Fair Trade Enterprise Co., Ltd.'s and Respondent's averments of use of the mark REVO that is the subject of Registration No. 3224978 on or in connection with all goods recited in the use-based application and in the Section 8 Declaration of Use, respectively, were made with knowledge that said material averments were false as the mark was not in use for all purpose sports bags, athletic bags, beach bags, clutch bags, diaper bags, gym bags, and/or school bags. (Amended Petition ¶ 22.)

- By knowingly including in the application and in the Section 8 Declaration goods on which the mark was not in use in commerce, Applicant Fair Trade Enterprise Co., Ltd., and Respondent intended to deceive the USPTO and to induce employees of the USPTO to allow Fair Trade Enterprise Co., Ltd., and Respondent to obtain and maintain Registration No. 3224978. (Amended Petition ¶ 22.)
- Petitioner alleges that the averments of ownership of the mark made by Fair Trade Enterprise Co., Ltd. in filing its Application Serial No. 78/898885, as well as the averment of ownership made by Respondent in maintaining the resulting Registration No. 3224978, were made with the knowledge that said averred material facts were false. By knowingly making such false material averments, Fair Trade Enterprise Co., Ltd., and Respondent intended to deceive the USPTO into granting and later maintaining the registration. (Amended Petition ¶ 23.)

<u>Registration No. 3476081</u>

Petitioner alleged that:

- Respondent filed an application with the USPTO for the mark REVO, based on Section 1(a) of the Trademark Act, 15 USC §1051(a), averring use of the mark in commerce on all the identified goods, and supported by the Declaration signed under oath under notice of Section 1001 of Title 18 of the United States Code on December 19, 2007 by Michael F. Brown as "Attorney of Record." This application was assigned Serial No. 77/355473, and it issued as Registration No. 3476081 on July 29, 2008. (Amended Petition ¶ 29.)
- The Section 8 Declaration of Use (15 USC §1058) was filed for Registration No. 3476081 averring use of the mark in commerce on all the identified goods, and supported

by the Declaration signed under oath under notice of Section 1001 of Title 18 of the United States Code on August 12, 2013 by Michael F. Brown as "Attorney of Record" for Respondent. The Section 8 Declaration was accepted by the USPTO on August 27, 2013. (Amended Petition ¶ 30.)

- Respondent's averments of use of the mark REVO on or in connection with all goods recited in the use-based application and in the Section 8 Declaration of Use, respectively, were made with knowledge that said material averments were false as the mark was not in use for book bags, coin purses, all purpose sport bags, leather suitcases, garment bags for travel, briefcases, parasols, pocket wallets, textile shopping bags, luggage, namely, trunks, umbrellas, canes, fur, leather for furniture, imitation leather, leather pouches, school bags, sling bags for carrying infants, umbrella covers, and/or shopping bags with wheels attached. (Amended Petition ¶ 31.)
- By knowingly including in the application and in the Section 8 Declaration goods on which FTI was not using the mark in commerce, FTI intended to deceive the USPTO and to induce employees of the USPTO to allow Respondent to obtain and maintain Registration No. 3476081. (Amended Petition ¶ 31.)
- Petitioner alleges that the averments of ownership of the mark made by Respondent in filing its Application Serial No. 77/355473, as well as the averment of ownership made by Respondent in maintaining the resulting Registration No. 3476081, were made with the knowledge that said averred material facts were false. By knowingly making such false material averments, FTI intended to deceive the USPTO into granting and later maintaining the registration. (Amended Petition ¶ 32.)

Registration No. 3476082

Petitioner alleged that:

- Respondent filed an application with the USPTO for the mark , based on Section 1(a) of the Trademark Act, 15 USC §1051(a), averring use of the mark in commerce on all the identified goods, and supported by the Declaration signed under oath under notice of Section 1001 of Title 18 of the United States Code on December 19, 2007 by Michael F. Brown as "Attorney of Record." This application was assigned Serial No. 77/355492, and it issued as Registration No. 3476082 on July 29, 2008. (Amended Petition ¶ 38.)
- The Section 8 Declaration of Use (15 USC §1058) was filed for Registration No. 3476082 averring use of the mark in commerce on all the identified goods, and supported by the Declaration signed under oath under notice of Section 1001 of Title 18 of the United States Code on August 12, 2013 by Michael F. Brown as "Attorney of Record" for Respondent. The Section 8 Declaration was accepted by the USPTO on August 27, 2013. (Amended Petition ¶ 39.)
- Respondent's averments of use of the mark on or in connection with all goods recited in the use-based application and in the Section 8 Declaration of Use, respectively, were made with knowledge that said material averments were false as the mark was not in use on book bags, coin purses, all purpose sport bags, leather suitcases, garment bags for travel, briefcases, parasols, pocket wallets, textile shopping bags, luggage, namely, trunks, umbrellas, canes, fur, leather for furniture, imitation leather, leather pouches,

school bags, sling bags for carrying infants, umbrella covers, and/or shopping bags with wheels attached. (Amended Petition ¶ 40.)

- By knowingly including in the application and in the Section 8 Declaration goods on which FTI was not using the mark in commerce, FTI intended to deceive the USPTO and to induce employees of the USPTO to allow Respondent to obtain and maintain Registration No. 3476082. (Amended Petition ¶ 40.)
- Petitioner alleges that the averments of ownership of the mark made by Respondent in filing its Application Serial No. 77/355492, as well as the averment of ownership made by Respondent in maintaining the resulting Registration No. 3476082, were made with the knowledge that said averred material facts were false. By knowingly making such false material averments, FTI intended to deceive the USPTO into granting and later maintaining the registration. (Amended Petition ¶ 41.)

Taking into consideration that some of the facts are in FTI's control, and in deciding a motion to dismiss, Petitioner's allegations should be accepted as true and construed in Petitioner's favor, the Amended Petition sets forth with sufficient particularity the "when and how" of the alleged fraud, the "content of the false representation", and what was "obtained by reason of the asserted fraud." *Caymus Vineyards*, 107 USPQ2d at 1522-23 (TTAB 2013).

V. Request for Denial of Respondent's Second Motion to Dismiss

For the foregoing reasons, Petitioner respectfully requests that the Board deny Respondent's motion to dismiss Petitioner's Amended Petition for Cancellation. If Respondent's Motion is granted in whole or in part, Petitioner respectfully requests leave to file a further

amended Petition for Cancellation, as provided in Fed. R. Civ. P. 15(a)(2) and Trademark Rule 2.115. TBMP §503.03 (June 2016).

Respectfully submitted,

SBG REVO HOLDINGS, LLC

By: Roberta S. Bren

Roberta S. Bren
Muncy, Geissler, Olds & Lowe, P.C.
4000 Legato Road
Fairfax, VA 22033
(703) 621-7140 ext. 148
fax (703) 621-7155
e-mail: *mailroom@mg-ip.com; rsb@mg-ip.com*
Counsel for Petitioner

Date: September 12 , 2016

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Petitioner's Opposition to Respondent's Second Motion to Dismiss** was sent to Respondent's counsel at the address set forth in the Board records this 12th day of September 2016, via First Class mail, postage prepaid, to:

Amanda L. DeFord
MCGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, VA 23219-4030

and with a copy also sent this 12th day of September 2016, via First Class mail, postage prepaid, to Respondent's counsel at the address set forth in Respondent's Motion:

Amanda L. DeFord
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219

Soenya Randolph

Soenya Randolph