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

Proceeding	92061955
Party	Plaintiff DFASS Brands Holdings, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

DFASS Brand Holdings, LLC, a Florida
limited liability company,

Petitioner,

and

Reginald Williams, an individual,

Registrant.

In the matter of Registration No.
4313253

For the mark TIME TRAVEL ACADEMY

Registered on April 2, 2013

Cancellation No. 92061955

**MEMORANDUM OF PETITIONER DFASS BRAND HOLDINGS, LLC
IN OPPOSITION TO REGISTRANT'S MOTION TO
DISMISS THE PETITION TO CANCEL FOR LACK OF STANDING**

Petitioner, DFASS Brand Holdings, LLC by and through undersigned counsel, hereby submits this Memorandum in Opposition to Registrant's Motion to Dismiss the Petition to Cancel for Lack of Standing. Petitioner's Petition to Cancel sufficiently alleges standing to challenge Registration of the Mark and states a claim upon which relief may be granted. Accordingly, Registrant's motion should be denied.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Reginald Williams ("Registrant") maintains a website to sell books, videos, and promotional items with a time travel theme. Pet. Cancel at ¶ 3. Registrant applied for trademark protection on April 5, 2008 to protect the mark TIME TRAVEL ACADEMY (the "Mark"). *Id.* at ¶ 1. On April 2, 2013, the United States Patent and Trademark

Office ("USPTO") issued registration number 4313253 to Registrant for trademark protection of the Mark in class 035 (the "Registration"). *Id.* at Introduction.

DFASS Brand Holdings, LLC, a Florida limited liability company ("Petitioner"), is in the business of duty-free retail sales at international ports throughout the Americas. *Id.* at ¶ 1. Petitioner created a subsidiary company called "Time Travel," at significant expense, for retail store facilities that would sell, *inter alia*, watches, clocks, and jewelry. *Id.* at ¶¶ 2, 33. Petitioner attempted to register the "Time Travel" mark, but this application was denied due to Registrant's registration of the Mark. *Id.* at ¶ 8. Inability to protect the "Time Travel" mark has damaged, and continues to damage, Petitioner. *Id.* at ¶ 9.

Petitioner filed a Petition to Cancel the Registration on July 31, 2015 (the "Petition") with the USPTO. *See generally id.* In the Petition, Petitioner alleges that the Mark is not registrable because it is comprised of two parts; a descriptive term (TIME TRAVEL) and a generic term (ACADEMY), neither of which are registrable, making the Mark entirely unregistrable. *See id.* at ¶¶ 10-22. Petitioner also argues that the Mark is not inherently distinctive, and has not acquired a secondary meaning in the marketplace. *Id.* at ¶¶ 34-43.

On September 14, 2015, Registrant filed a Motion to Dismiss the Petition to Cancel for Lack of Standing. *See generally* Reg's Mot. Dismiss. In his motion, Registrant asserts that Petitioner failed to sufficiently allege standing, and therefore failed to state a claim upon which relief can be granted. *Id.* at 2. Registrant also peppered the motion with various random legal theories on which to dismiss the petition such as alleged failure to provide proper notice of the claim, alleged failure to plead

essential elements of the claim, and alleged failure to provide “even a modicum of details.” *Id.* at 3. In the interest of clarity and completeness, Petitioner will address each assertion independently, supporting its contention that the motion to dismiss should be denied.

LEGAL DISCUSSION

Registrant's Motion to Dismiss Should be Denied.

“Motions to dismiss are rarely granted and generally viewed with disfavor.” *Alpha Kappa Alpha Sorority, Inc. v. Converse, Inc.*, 175 Fed. Appx. 672, 676 (5th Cir. 2006) (citing *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005)). Courts may dismiss a complaint “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Powell v. U.S.*, 945 F.2d 374, 375 (11th Cir. 1991) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). When reviewing a motion to dismiss, courts must “accept well pleaded facts as true and draw all reasonable inferences in [Petitioner's] favor.” *Johnson v. Wal-Mart Stores, Inc.*, 588 F.3d 439, 441 (7th Cir. 2007).

Petitioner has demonstrated standing to bring this cancellation action.

Petitioner agrees that it is required to possess standing to maintain this cancellation action. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1026 (C.C.P.A. 1982). “A petition to cancel a registration of a mark . . . may . . . be filed . . . by any person who believes that he is or will be damaged . . . by the registration of a mark . . .” Lanham Act, 15 U.S.C. § 1064 (2006). The “‘case’ and ‘controversy’ restrictions for standing [required in an Article III court] do not apply to matters before administrative agencies and boards, such as the PTO.” *Ritchie v. Simpson*, 170 F.3d

1092, 1094 (Fed. Cir. 1999). To establish standing, a plaintiff must “show that it has a ‘real interest’ in the proceeding, *by alleging, and thereafter proving at trial*, that it has a real commercial interest in [the Mark], plus a reasonable basis for its belief that it would be damaged by the registration in question.” *Chemical New York Co. v. Conmar Forms Systems, Inc.*, 1 U.S.P.Q.2d 1139, *3 (T.T.A.B. 1986) (emphasis added).

A complaint should be considered in its entirety. “It is elementary that, on a motion to dismiss, a complaint must be read as a whole, drawing all inferences favorable to the pleader.” *Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 562 (2nd Cir. 1985) (citing *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957)). A complaint should not be judged by “dismembering it and viewing its separate parts, but only by looking at it as a whole.” *Ostrofe v. H. S. Crocker, Co., Inc.*, 670 F.2d 1378, 1381 (9th Cir. 1982).

Registrant fails to consider the complaint as a whole when concluding that Petitioner has made only two vague assertions that relate to standing. In his analysis, Registrant looks solely to paragraphs eight and nine of the Petition to support this conclusion. However, factors supporting standing can be found elsewhere in the complaint. *See, e.g.*, Pet. Cancel at ¶ 2 (explaining that Petitioner has already expended significant resources to create a business); *and id.* at ¶ 33 (explaining that Registrant's registration of the Mark is a source of injury for Petitioner). Petitioner expressly alleged this interest in Paragraph 7 of the Petition, wholly ignored by Registrant.

1. Establishing Real Interest

The USPTO defined *real interest* as an interest in the outcome of a proceeding “beyond that of the general public.” *Ritchie v. Simpson*, 41 U.S.P.Q.2d 1859, 1861 (T.T.A.B. 1996) (citing *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 493 (Fed. Cir. 1987)). On appeal, the Federal Circuit relaxed the standard, holding that to satisfy the real interest standard, a plaintiff need merely have a stake in the outcome of the proceeding, and be more than a “mere intermeddler.” *Ritchie v. Simpson*, 170 F.3d 1092, 1097 (Fed. Cir. 1999). In *Ritchie*, the plaintiff's *alleged* belief that his belief was disparaged was sufficient to satisfy *real interest* for standing purposes.

Petitioner's interest meets the more restrictive USPTO requirement for *real interest*. Petitioner's interest in the outcome of the instant proceeding is beyond that of the general public because Petition alleges that it is, and will continue to be, damaged by Registration of the Mark. Pet. Cancel at ¶ 9. Facts supporting this allegation include the significant resources expended to create the business, and inability to protect the Time Travel mark due to the Registration. *Id.* at ¶¶ 2, 33. Petitioner is more than a mere intermeddler because, as alleged in the Petition, its application to register the Time Travel mark was denied due to Registrant's existing Registration. *Id.* at ¶ 8.

2. Establishing Reasonable Belief of Potential Damages

To establish a reasonable belief of potential damages, Petitioner needs only to show a belief that it will be damaged, so long as the belief has a basis in fact. *Ritchie v. Simpson*, 170 F.3d 1092, 1098 (Fed Cir. 1999). This reasonable belief can be shown in many ways. *Id.* Facts alleged in the pleadings need not be sufficient to prevail on the merits, but need only show that the belief is not a subjective one. *Id.*

Petitioner believes that it will be damaged, as alleged in the Petition. Pet. Cancel at ¶ 9. This belief is not subjective because it is based on two material facts: (i) that Petitioner has “expended significant resources to create a subsidiary” and (ii) that Petitioner is unable to register its mark to protect the brand it has invested said resources in. See Pet. Cancel at ¶¶ 2, 7, and 8. Petitioner need only allege these facts in the pleadings, but bears the burden of proving that the resources were expended, and that it was unable to register the mark, during the trial. *Chemical New York Co. v. Conmar Forms Systems, Inc.*, 1 U.S.P.Q.2d 1139, *3 (T.T.A.B. 1986).

Finally, Registrant claims that Petitioner failed to identify its application for registration, and asserts that Petitioner failed to identify the trademark protection sought. Reg's Mot. Dismiss at 3. This assertion ignores the facts provided in the Petition. Petitioner alleges that the trademark sought is Time Travel. Pet. Cancel at ¶ 33. Further, Petitioner alleges that it applied for and was denied registration based on the Registration. *Id.* at ¶ 8. Petitioner's *allegation* of application and denial is sufficient to establish standing. See *Chemical New York Co.*, 1 U.S.P.Q.2d at *3. Petitioner need not prove in the Petition that it applied for, and was rejected, registration of the “Time Travel” mark. See *id.* Petitioner will bear the burden of proving that application was made and rejected when the case is heard on the merits during a trial. See *id.*

Petitioner has Provided Notice of the Nature and Basis for the Petition to Cancel.

A complaint need only give Respondent “fair notice of what [Petitioner's] claim is and the grounds upon which it rests.” *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 507 (2002). To provide fair notice, a complaint should identify the circumstances underlying the claim and basis of the litigation. *Aktieselskabet AF 21. November 2001 v. Fame*

Jeans, Inc., 525 F.3d 8, 16 (DC Cir. 2008). The complaint should contain direct allegations; in the absence of direct allegations, “a complaint must contain . . . inferential allegations.” *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562 (2007)). To illustrate, in a complaint for patent infringement, the complaint should include the patent number allegedly infringed, and describe the defendant's product that infringes the patent. *Id.* at 17.

A complaint must provide enough facts to state a plausible claim, such that a court can reasonably separate facts from legal conclusions, and reasonably infer that the Petitioner can prevail. *A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 80 (1st Cir. 2013). To withstand a motion to dismiss, a plaintiff need not demonstrate that it is likely to succeed on the merits, but instead need only show ‘more than a sheer possibility’ of success. *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Petitioner has notified Registrant of its claim and the grounds supporting it. In the introduction of the Petition, Petitioner includes the registration number of the trademark that it is petitioning to cancel, and asserts that “it will be damaged by the continued registration of the mark . . .” Pet. Cancel at Introduction. Throughout the Petition, Petitioner makes direct allegations, explaining the grounds upon which its argument rests, in separate sections, labeled with bold headings. *See, e.g., id.* at ¶¶ 10-15 (arguing that the term ACADEMY in the Mark is generic); *and id.* at ¶¶ 16-23 (arguing that the term TIME TRAVEL in the Mark is descriptive); *and id.* at ¶¶ 24-32 (arguing that because all terms in the Mark are unregistrable, that the Mark as a whole is unregistrable); *and id.* at ¶¶ 34-38 (arguing in the alternative that the Mark is not

inherently distinctive; *and id.* at ¶¶ 39-42 (arguing in the alternative that the Mark has not acquired a secondary meaning).

A plausibility analysis will conclude that sufficient facts were pleaded to support Petitioner's claim. Separating conclusory legal allegations from fact, Petitioner has alleged facts relating to the nature of Registrant and Petitioner's businesses. *Id.* at ¶¶ 2-3. Petitioner has described the terms contained in the Mark. *Id.* at Introduction. Petitioner has described Registrant's services as disclosed in the registration application for the Mark. *Id.* at ¶ 5. Petitioner has included the instructions provided to Registrant by the USPTO relating to registering the Mark. *Id.* at ¶ 21. Finally, Petitioner described its failed efforts to register its mark, leading to the filing of the cancellation action. *Id.* at ¶ 8. These facts, coupled with the relevant underlying law, demonstrate more than a "mere possibility" for Petitioner to prevail, and the Petition should survive a motion to dismiss for failure to provide notice.

Petitioner has Provided Sufficient Facts to Support a Petition to Cancel.

"Unless [Petitioner] cannot prove any set of facts entitling them to relief, the complaint should not be dismissed." *Alpha Kappa Alpha Sorority, Inc. v. Converse, Inc.*, 175 Fed. Appx. 672, 676 (5th Cir. 2006) (citing *General Elec. Capital Corp. v. Posey*, 415 F.3d 391, 395 (5th Cir. 2005)). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* Further, "the court must construe the complaint in a light most favorable to the plaintiff, *and accept all . . . factual allegations as true.*" *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir. 2002) (emphasis added).

Registrant's motion to dismiss is partially based on the assertion that the Petition "failed to provide even a modicum of details." Reg's Mot. Dismiss at 2. To support this argument, Registrant points to *Twombly*, a case where the court had to decide "what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). Section 1 of the Sherman Act prohibits restraint of trade "effected by . . . conspiracy." *Id.* at 553. The Court held, in terms of a Section 1 claim, that the claim requires enough factual matter, taken as true, to suggest an agreement was made, and that pleadings require "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," even if "actual proof of those facts is improbable, and 'that recovery is very remote and unlikely.'" *Id.* Allegations of conspiracy require "action or inaction alleged with a plausible suggestion of conspiracy." *Id.* at 566. The "common economic experience" and alleged "parallel conduct" in the complaint did not support an allegation of conspiracy. *Id.* at 566-68.

In contrast, a petition to cancel can be filed, by "any person who *believes* that he is or will be damaged . . . by the registration of a mark on the principal register" by stating the grounds relied upon. Lanham Act, 15 U.S.C. § 1064 (2006) (emphasis added). Petitioner need not allege a complex fact pattern such as is required to establish conspiracy. Instead, Petitioner need only *allege* that it believes it is or will be damaged by continued registration of the mark, and the legal grounds relied upon for the cancellation of the mark. Petitioner alleges a belief that it is, and will continue to be, damaged by the Registration. Pet. Cancel at ¶ 9. Petitioner provides multiple legal grounds relied upon for cancellation of the mark. *See, e.g., id.* at ¶¶ 10-15; ¶¶ 16-23; ¶¶

24-32; ¶¶ 34-38; and ¶¶ 39-42. Accordingly, the Petition should survive the motion to dismiss for failure to allege sufficient facts.

Petitioner has pleaded the essential elements of a claim for which relief is sought.

“[A] complaint must 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). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility” of prevailing. *Id.* at 679. Courts must accept Petitioner’s allegations as true but need not accept legal conclusions. *Id.* at 678. This analysis requires the court, not only to accept the facts alleged as true, but to its “judicial experience and common sense” to determine if the facts alleged lead to a plausible claim for relief. *Id.* at 679. “The complaint should be read as a whole, not parsed piece by piece to determine if each allegation, in isolation, is plausible.” *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 103 (1st Cir. 2013).

Registrant’s motion improperly attempts exactly such a piece by piece parsing technique. By isolating paragraphs eight and nine of the Petition, Registrant conveniently hand picks two paragraphs and determines that they are, in their own universe, insufficient legal grounds to establish standing.

More accurately, and read as a whole, Petitioner is

a Florida based company, in the business of duty-free retail sales at airports in North America, Latin America, and the Caribbean, that has expended significant resources to create a subsidiary to sell . . . watches, clocks, jewelry, and travel related goods, and is entitled to use the term ‘Time Travel,’ which is not a descriptive term as it relates to Petitioner. Petitioner’s application to register the term ‘Time Travel’ was denied, and this denial does, and will continue to damage Petitioner.

Pet. Cancel at ¶¶ 1-2, 33, 8-9.

Petitioner alleges that it applied for registration. Pet. Cancel at ¶ 8. The trademark which Petitioner seeks to protect is not *unidentified*; it is "Time Travel." *Id.* at 33. The reason the trademark protection was denied was not *unstated*; Petitioner alleges it is because the USPTO claimed that Registrant's claim to the mark is valid. *Id.* at 8. Registrant correctly points out that Petitioner believes, and alleges, that it is, and will continue to be damaged by Registration of the Mark. Reg's Mot. Dismiss at 3 (citing Pet. Cancel at ¶ 9). Petitioner was required to allege, not prove, these facts to plead the elements of a claim for which relief is sought. *See Chemical New York Co. v. Conmar Forms Systems, Inc.*, 1 U.S.P.Q.2d 1139, *3 (T.T.A.B. 1986). Petitioner is prepared to prove all allegations at trial.

CONCLUSION

Petitioner has established standing to challenge Registration of the Mark. The Petition satisfies all pleading requirements, and alleges sufficient facts to support the petition; discovery and argument will add further detail during trial. The Petition also provides Registrant with fair notice of the nature and basis of the petition. For the foregoing reasons, Petitioner respectfully requests this Court to deny Registrant's Motion to Dismiss the Petition for Cancel for Lack of Standing.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **PETITIONER'S MEMORANDUM IN OPPOSITION TO REGISTRANT'S MOTION TO DISMISS THE PETITION TO CANCEL FOR LACK OF STANDING** is being served on September 25, 2015, by e-mail addressed to counsel for Petitioner, Joseph J. Zito, Esq. at jzito@dnlzito.com.

DATED: September 25, 2015

Respectfully submitted,

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