

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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Mailed: July 11, 2016

Cancellation No. 92063588

*Kimberly Simmons*

*v.*

*Go Daddy Operating Company, LLC*

**By the Trademark Trial and Appeal Board:**

Go Daddy Operating Company, LLC (“Respondent”) is the record owner of a registration for the mark GO DADDY in standard characters for goods in International Class 9 and services in International Class 42.<sup>1</sup>

On April 8, 2016, nearly fourteen years after the issuance of such registration, Kimberly Simmons (“Petitioner”), appearing *pro se*,<sup>2</sup> filed a petition to cancel that

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<sup>1</sup> Registration No. 2558989, issued April 9, 2002, renewed.

<sup>2</sup> Petitioner’s four changes of correspondence address filed between June 26, 2016 and July 5, 2016 are noted and have been entered.

Petitioner intends to represent herself herein. While Patent and Trademark Rule 11.14 permits any person to represent himself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition proceeding to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney.

In this proceeding, the parties should review the Trademark Board Manual of Procedure (TBMP), and the Trademark Rules of Practice, online at <http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>. The Board expects all parties appearing before it, whether or not they are represented by counsel, to comply with the Trademark Rules of Practice and where applicable, the Federal Rules of Civil Procedure, online at <http://www.law.cornell.edu/rules/frcp>.

Trademark Rules 2.119(a) and (b) state that every paper filed in this proceeding must be served upon the attorney for the other party, or on the party if there is no attorney, and

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registration in International Class 9 only. The ESTTA cover form for the petition to cancel indicates that Petitioner seeks cancellation on the ground of fraud. The text of the petition to cancel is the following: “Statement of Grounds: I believe an employee working for the United States Patent and Trademark Office stole my idea. When I called in for advice on how to protect my idea instead the individual working for the United States Patent and Trademark Office stole my idea over 5 years ago.”

In lieu of an answer, Respondent filed a motion to dismiss the petition to cancel under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. On July 7, 2016, Petitioner filed an untimely response thereto. That response does not include proof of service upon Respondent, as required by Trademark Rule 2.119(a), and therefore will receive no consideration.<sup>3</sup> However, inasmuch as the filing of the response indicates that Petitioner does not concede the motion to dismiss, the Board will decide that motion on the merits. *See* Trademark Rule 2.127(a); TBMP § 502.04.

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proof of such service must be made before the paper will be considered by the Board. Consequently, copies of all papers which Petitioner may subsequently file in this proceeding must be accompanied by a signed statement indicating the date and manner in which such service was made, e.g., by mail. The statement, whether attached to or appearing on the paper when filed, will be accepted as prima facie proof of service.

<sup>3</sup> A cursory review of Petitioner’s response indicates that therein Petitioner seeks an investigation within the USPTO to determine whether Respondent’s founder worked for the USPTO between 1996 and 1998. However, the Board is empowered only to determine registrability and does not conduct any such investigations. *See* TBMP § 102.01 (2016).

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A motion to dismiss under Rule 12(b)(6) is solely a test of the sufficiency of a complaint, in this case the petition to cancel.<sup>4</sup> *See Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1222 (TTAB 1995); TBMP § 503.01 (2015). To state a claim upon which relief can be granted, Petitioner need only allege such facts which, if proved, would establish that Petitioner is entitled to the relief sought; that is, (1) Petitioner has standing to bring the proceeding, and (2) a valid statutory ground exists for cancelling the pleaded registration at issue. *See Fair Indigo LLC*, 85 USPQ2d at 1538.

Regarding Petitioner's pleading of standing, the starting point for a standing determination in a cancellation proceeding is Trademark Act Section 14, 15 U.S.C. § 1064, which provides that a petition to cancel may be filed by "any person who believes that he is or will be damaged ... by the registration of a mark upon the [P]rincipal [R]egister...." Section 14 of establishes a broad class of persons who are proper petitioners; by its terms the statute only requires that a person have a belief that he would suffer some kind of damage if the mark is registered. That is, that person must have a real interest in the proceedings, i.e., a personal interest in the outcome of the proceeding, and a reasonable basis for a belief of damage. *See, e.g., Universal Oil Prod. Co. v. Rexall Drug & Chem. Co.*, 463 F.2d 1122, 1123, 174 USPQ 458, 459 (CCPA 1972). There is no requirement that actual damage be pleaded and proved to establish standing or to prevail in a cancellation proceeding. *See Ritchie v. Simpson*, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

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<sup>4</sup> Accordingly, whether Petitioner's failure to timely respond to the motion to dismiss was the result of excusable neglect is essentially a moot point. *See Fed. R. Civ. P. 6(b)(1)(B)*; TBMP § 509.01(b).

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Petitioner's statement that she believes that a USPTO employee stole her idea is insufficient to allege a real interest in this proceeding, i.e., a personal interest in the outcome of the proceeding, and a reasonable basis for a belief of damage, because the statement fails to identify her idea and then makes no connection between the alleged theft of that idea and the filing an application to register the involved mark GO DADDY for the identified goods in International Class 9. In any event, trademark rights are acquired through adoption and use of a mark; merely having a idea for a mark is insufficient. *See Hydro-Dynamics Inc. v. George Putnam & Co. Inc.*, 811 F.2d 1470, 1 USPQ2d 1772, 1774 (Fed. Cir. 1987). Accordingly, the Board finds that Petitioner has failed to adequately plead her standing.

Regarding whether Petitioner has pleaded a valid ground for cancelling the pleaded registration at issue, the primary purpose of a complaint is to provide fair notice of the basis of the claims asserted. *See* TBMP § 506.01. Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2) announces does not require detailed factual allegations, but requires more than labels, conclusions, formulaic recitations of the elements of a cause of action, and naked assertions. *See Ashcroft v. Iqbal*, 555 U.S. 662, 678 (2009). Indeed, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.*, quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged. *Ashcroft*, 555 U.S. at 678. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility of the allegations asserted. *Id.* Indeed, a plaintiff need not allege specific facts that would establish a *prima facie* case for the claim(s) asserted. *See Bell Atlantic Corp.*, 550 U.S. at 547, *citing Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 (2002).

In the context of Board *inter partes* proceedings, a claim is plausible on its face when the plaintiff pleads factual content that if proved, would allow the Board to conclude, or draw a reasonable inference that, the petitioner has standing and that a valid ground for cancellation exists. *Cf. Bell Atlantic Corp.*, 550 U.S. at 556. In particular, a plaintiff need only allege enough factual matter to suggest its claim is plausible and “raise a right to relief above the speculative level.” *Id.* at 555-56. Although the Board, in deciding a Rule 12(b)(6) motion, must accept as true all factual allegations in the complaint, it is not bound to accept as true a legal conclusion couched as a factual allegation. *Id.* at 555.

A fraud claim requires an allegation of a specific, knowingly made, false, material representations of fact in connection with an application to register or in a post-registration filing with the intent of obtaining or maintaining a registration to which it is otherwise not entitled.<sup>5</sup> *See In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009). In determining the sufficiency of fraud allegations, Federal Rule of Civil Procedure 9(b) requires identification of the specific who, what, when,

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<sup>5</sup> “Materiality” of any false application statement is determined in the context of whether the false statement is critical to the Trademark Examining Attorney's decision to approve a mark for publication. *See Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 77 USPQ2d 1917, 1926 (TTAB 2006).

where, and how of the material misrepresentation or omission committed before the USPTO. *Cf. Exergen Corp. v. Wal-Mart Stores Inc.*, 575 F.3d 1312, 91 USPQ2d 1656, 1667 (Fed. Cir. 2009) (allegations of inequitable conduct in patent cases require pleadings of specific conduct upon which allegation is based). A pleading that simply alleges the substantive elements of fraud, without setting forth the particularized factual bases for the allegation, does not satisfy Rule 9(b). *See id.* (citing *King Auto., Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 212 USPQ 801, 802-03 (CCPA 1981).

Knowledge and intent, as conditions of mind of a person, may be averred generally in support of an allegation of fraud. *See Fed. R. Civ. P. 9(b); DaimlerChrysler Corp. v. American Motors Corp.*, 94 USPQ2d 1086, 1088 (TTAB 2010). However, pleadings must allege sufficient underlying facts from which the Board may reasonably infer that a party acted with the requisite state of mind. *Asian and Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1479 (TTAB 2009).

In addition,

a plaintiff claiming that the declaration or oath in defendant's application for registration was executed fraudulently, in that there was another use of the same or a confusingly similar mark at the time the oath was signed, must allege particular facts which, if proven, would establish that: (1) there was in fact another use of the same or a confusingly similar mark at the time the oath was signed; (2) the other user had legal rights superior to applicant's; (3) applicant knew that the other user had rights in the mark superior to applicant's, and either believed that a likelihood of confusion would result from applicant's use of its mark or had no reasonable basis for believing otherwise; and that (4) applicant, in failing to disclose these facts to the Patent and Trademark Office, intended to procure a registration to which it was not entitled.

*Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1205 (TTAB 1997).

An applicant's failure to disclose to the USPTO the asserted rights of another party is not fraudulent unless the applicant knew that the other party was possessed a superior or clearly established right to use the same or a substantially identical mark for the same or substantially identical goods or services as those in connection with which registration is sought.<sup>6</sup> Thus, if the parties' respective marks and goods or services are not substantially identical, then the applicant has a reasonable basis for believing that contemporaneous use of such marks by the parties, on or in connection with their respective goods or services, is not likely to cause confusion. *Id.*, 43 USPQ2d at 1207.

Petitioner has failed to identify any specific statement that Respondent or its predecessors-in-interest made in connection with the application or post-registration filings for the involved registrations upon which she bases her fraud claim and has otherwise failed to set forth a specific factual basis for that claim. Accordingly, Petitioner has failed to plead a legally sufficient ground for cancellation of Respondent's involved registration.

Based on the foregoing, Respondent's motion to dismiss under Rule 12(b)(6) for failure to state a claim is granted. In keeping with Board practice, Petitioner is allowed until **thirty days** from the mailing date set forth in this order to file an amended petition to cancel in which she repleads her standing and a valid ground

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<sup>6</sup> A declaration "is phrased in terms of a subjective *belief*, such that it is difficult, if not impossible, to prove objective falsity and fraud so long as the affiant or declarant has an honestly held, good faith belief." J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 31:76 (4<sup>th</sup> ed. 2016) (emphasis in original).

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for cancellation, failing which the petition to cancel will be dismissed. *See* TBMP § 503.03. Proceedings herein otherwise remain suspended.