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

Proceeding	91245800
Party	Defendant The Vineyard House LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Constellation Brands U.S. Operations Inc.  v.  The Vineyard House LLC	Opposition No. 91245800  Serial Nos.: 87/945310, 87/944993, 87/944990, 87/944988, 87/945312, 87/945302  Marks: HENRY WALKER CRABB, HENRY WALKER (H.W.) CRABB, HENRY WALKER (H.W.), HENRY WALKER, H.W. CRABB, HENRY W. CRABB
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**APPLICANT’S MOTION TO DISMISS**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (Fed.R.Civ.P) and Section 503 of the *Trademark Trial and Appeal Board Manual of Procedure* (“TBMP”), and in lieu of an Answer, Applicant, The Vineyard House LLC (hereinafter “TVH” or “Applicant”), by and through its undersigned counsel, moves the Trademark Trial and Appeal Board (“Board”) for an Order dismissing the Notice of Opposition for failure to state a claim upon which relief can be granted.

Opposer, Constellation Brands U.S. Operations Inc. (hereinafter “Constellation” or “Opposer”) has failed to allege facts which demonstrate: 1) any proper statutory ground for opposing Applicant’s applications, and 2) that Opposer enjoys the requisite standing necessary to oppose these applications. Simply stated, Opposes alleges no use of HENRY WALKER CRABB, HENRY WALKER (H.W.) CRABB, HENRY WALKER (H.W.), HENRY WALKER, H.W. CRABB, or HENRY W. CRABB, or any other similar marks in the United States. In further support of its Motion, Applicant states as follows:

## **STATEMENT OF THE CASE**

### **A. TVH's Applications**

On June 1, 2018, TVH filed application Serial Nos. 87/945310, 87/944993, 87/944990, 87/944988, 87/945312, 87/945302 for the marks HENRY WALKER CRABB, HENRY WALKER (H.W.) CRABB, HENRY WALKER (H.W.), HENRY WALKER, H.W. CRABB and HENRY W. CRABB (the "Crabb Applications"). On November 13, 2018, the Crabb Applications were all published for opposition in the *Official Gazette*. Applicant has not yet alleged a date of first use or first use in commerce.

### **B. This Proceeding**

On January 12, 2019, Constellation filed a Notice of Opposition against the Crabb Applications. Constellation pleads that it is a corporation organized under the laws of New York. The only basis asserted by Constellation for opposing the Crabb Applications is that it is the owner of trademark registrations and applications which include the wording "TO KALON," including Registration No. 1489619 for TO KALON, Reg. No. 1857851 for TO KALON VINEYARD, Serial No. 87/818643 for TO KALON 1886 and Serial No. 88/010746 for THE MIRACLE OF TO KALON, and that the marks being opposed "suggest a direct connection to TO KALON VINEYARD." Constellation further alleges that it "has an interest in using the Marks Being Opposed to promote TO KALON VINEYARD and Opposer's TO KALON marks." As such, Constellation avers that the registration of the Crabb Applications "will cause the relevant purchasing public to erroneously assume and thus be confused, misled or deceived, that Applicant's goods are made by, licensed by, controlled by, sponsored by, or in some way connected, related or associated with Opposer's TO KALON VINEYARD and Opposer's TO KALON marks..." At no point has Constellation stated that it has used any marks that include the term CRABB or anything similar. Thus, without an interest to use the mark, and without any actual use of the mark, the Board should accept this Motion to Dismiss.

## **ARGUMENTS**

As an initial matter, it is difficult (if not impossible) to determine the exact grounds for cancellation against each of the six applications at issue. Opposer failed to set forth independent counts or claim headings for each application. Even if the Board can determine what grounds are asserted, Opposer has failed to state valid claims for relief, including alleged claims of fraud and likelihood of confusion. Indeed, Opposer has failed to plead intent to deceive and other particular facts required for fraud under Federal Rule of Civil Procedure 9(b) and *Bose*. Similarly, Petitioner has failed to state likelihood of confusion beyond threadbare allegations. Indeed, Opposer failed to allege priority for likelihood of confusion as Opposer is not using any marks similar to the Crabb Applications. For these reasons and the reasons set forth below, the Opposition should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

### **A. Opposer Failed to State Priority and Likelihood of Confusion**

Opposer apparently tries to assert likelihood of confusion against the Crabb Applications. To plead a valid claim for likelihood of confusion, Opposer must allege that it has priority for the challenged goods and services, and that Registrant's mark so resembles Opposer's mark as to be likely to cause confusion. See Lanham Act Section 2(d), 15 U.S.C. §1052(d); *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 n.2 (CCPA 1981). Opposer has failed to plead priority in this case.

As set forth in *Bayer Consumer Care AG v. Belmora LLC*, 90 USPQ2d 1587, 1590 (TTAB 2009), "[i]n order to withstand a motion to dismiss for failure to state a claim, a plaintiff need only allege such facts as would, if proved, establish that (1) the plaintiff has standing to maintain the proceedings, and (2) a valid ground exists for opposing [or cancelling] the mark." See also, *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007) and the cases cited therein.

Constellation's Petition does not identify or cite to any specific statutory provision on which it relies as the basis for its opposition claim. Based on the Notice of Opposition as pleaded, however, there is only one possible statutory basis that is applicable - §2(d)(15 U.S.C. §1052(d)). Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), *infra*, provides that:

[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it...(d) consists of or comprises a mark which so resembles a mark ***registered in the Patent and Trademark Office***, or a mark or trade name ***previously used in the United States*** by another...

[Emphasis added].

The Notice of Opposition does not allege the existence or ownership of any prior United States registrations for a mark that resembles the Crabb Applications. Specifically, Constellation fails to mention any common law or registered trademarks that it uses which are similar to the Crabb Applications. Given that Constellation claims that it has used the TO KALON mark since July, 1994 but has never used anything similar to the Crabb Applications, it is obvious that Constellation has no intention of using any marks similar to the Crabb Applications, and has no standing to bring these proceedings. In fact, it appears that Opposer has filed this Notice of Opposition in retaliation for Applicant's rightful oppositions to Constellation's pending TO KALON applications.

Constellation has failed to allege any facts that would confer on it prior or superior rights in any mark involving the Crabb Applications in the United States. Therefore, it has "no reasonable basis for believing that it is damaged by the registration..." *General Healthcare v. Qashat*, 254 F.Supp.2d 193, 204 (D.Ma.2003), *aff'd on other grounds*, 364 F.3d 332, 70 USPQ2d 1566 (1<sup>st</sup> Cir. 2004). To constitute a valid statutory basis under §2(d), the pleaded mark or trade name must have been "previously used." The Board has granted motions to dismiss likelihood of confusion claims where, as here, priority was not adequately pleaded. *See, e.g. Adv. Mktg. Plus, Corp. v. North*, Opposition No. 9115796, 2005 WL 2747606, at \*1 (TTAB Oct. 19, 2005).

The Opposition filed by Constellation is bereft of any claim of use of any marks similar to the Crabb Applications, and contains not a single allegation of any activities using any marks similar to the Crabb Application. Thus, the Petition fails to plead the requisite elements of a statutory (§2(d)) claim, and therefore, fails to state a claim upon which relief may be granted by the Board in an opposition proceeding.

Further, the foregoing also establishes that Constellation lacks the other requisite element to maintain the opposition – standing. Constellation has failed to allege any facts which would confer on it prior or superior rights in the Crabb Marks. In fact, Constellation is clearly bringing this Notice of Opposition in retaliation for Applicant’s rightful filing of Oppositions against Constellation’s pending TO KALON applications (Opposition Nos. 91244817 and 91244819). By virtue of the absence of Opposer’s prior use of the Crabb Marks, it is precluded from bringing and maintaining the present opposition. Accordingly, Opposer’s likelihood of confusion claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

**B. Opposer Failed to State a Claim of Fraud**

Opposer failed to state a claim of fraud regarding any of Applicant’s six applications at issue. In particular, Opposer failed to set forth any specific allegation that Applicant intended to deceive the U.S. Patent and Trademark Office (“PTO”) (which it did not) when applying to register the Crabb Applications, a required element of fraud. *See In re Bose Corp*, 580 F.3d 1240, 91 USPQ2d 1938, 1939-41 (Fed. Cir. 2009); *Wolverine Outdoors, Inc. v. Marker Vokl (Int’l) GmbH*, Opposition Nos. 91161363, 91177732, 91177736, 2010 WL 9597362, at \*2 (TTAB June 21, 2010) (“intent to deceive the USPTO to obtain or maintain a registration is a required element in pleading a fraud claim...”).

“[A] trademark is obtained fraudulently under the Lanham Act only if the applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO.” *In re Bose Corp.*, 91 USPQ2d at 1941. “[T]he preferred practice for a party alleging fraud in a Board...cancellation proceeding is to specifically allege the adverse party’s intent to deceive the USPTO, so that there is no question that this indispensable element has been pled.” *DaimlerChrysler Corp. v. Am. Motors Corp.*, 94 USPQ2d 1086, 1089 (TTAB 2010). While intent may be averred generally under Federal Rule of Civil Procedure 9(b), “the pleadings must nonetheless allege sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind.” *Asian & W. Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1479 (TTAB 2009).

Here, Opposer’s fraud claims are based on vague allegations. For example, Opposer alleges that:

- 1) “Applicant had no documentary evidence demonstrating objective evidence of its bona fide intent to use Marks Being Opposed.”
- 2) “Applicant knowingly did not have a bona fide intent to use the Marks Being Opposed as Applicant has not taken steps to commence use of the Marks Being Opposed...”

When filing an intent to use application, an Applicant does not have to provide any documentary evidence to show its bona fide intent to use the mark, and does not need to immediately take any steps to commence use of the filed mark. Per TMEP §1101, “...an applicant may file a trademark or service mark application based on a bona fide intention to use a mark in commerce "under circumstances showing the good faith of such person." Opposer is unaware of Applicant’s actions which would demonstrate good faith and Applicant does not have to present such evidence to the PTO in connection with its application. Opposer therefore fails to allege a specific intent by Applicant to deceive the PTO as required under Federal Rule of Civil Procedure 9(b) and *Bose*.

Moreover, Opposer alleges only generally, for example, that Applicant does not have a bona fide intent to use the Crabb Applications. But Opposer alleges no facts to establish that Applicant has no such intent. Therefore, Opposer fails to “allege sufficient underlying facts from which [the Board] may reasonably infer that [Registrant] acted with the requisite state of mind.” *Asian & W. Classics B.V.*, 92 USPQ2d at 1479.

Opposer’s allegations that Applicant filed the declaration “with the intent to deceive the USPTO” and that the USPTO relied on the declaration and “allowed the applications to publish” also fall short. Merely filing declarations to obtain a registration does not establish an intent to deceive, nor does it lead to that inference. *See In re Bose Corp.*, 91 USPQ2d at 1941 (the allegations must be alleged with particularity, rather than by implied expression, and must allege that the applicant knowingly made a false, material representation in the subject application with the intent to deceive the Office); *King Auto, Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 212 USPQ 801, 803 (CCPA 1981) (“[T]he pleadings [must] contain explicit rather than implied expression of the circumstances constituting fraud.”). Without any specific intent to deceive, alleged misrepresentations in a declaration do not constitute fraud. *See King Auto, Inc.*, 212 USPQ at 803 n.4 (holding that absent the requisite intent to mislead the PTO, even a material misrepresentation does not qualify as fraud that would warrant cancellation of the registration).

Opposer's conclusory allegations of Applicant's "false and fraudulent" declaration are likewise legally deficient. A fraud claim based on an alleged false oath regarding the Applicant's intent to use a mark, without any evidence of Applicant's false and fraudulent actions (of which there are none in this case), is insufficient to support a claim of fraud. Opposer has failed to plead the requisite facts, nor can it do so in this case.

**C. Opposer Failed to Plead Fraud with Particularity**

Opposer also failed to plead fraud with particularity under Federal Rule of Civil Procedure 9(b). As shown above, Opposer's fraud allegations are too vague to meet the heightened pleading standard under Rule 9(b). Opposer never states the specific reason why Applicant does not exhibit a good faith bona fide intention to use the Crabb Applications. It is well-settled that a proper pleading of fraud required specific and detailed factual allegations concerning the elements of fraud. *See Asian and W. Classics B.V.*, 92 USPQ2d at 1479 ("[A] petitioner must allege the elements of fraud with particularity in accordance with Fed.R.Civ.P. 9(b) made applicable to Board proceedings by Trademark Rule 2.116(a).").

Opposer has not plead any of the fraud allegations on actual knowledge. "Pleadings of fraud...without allegations of specific facts upon which the belief is reasonably based are insufficient." *NSM Res. Corp. v. Huck Doll, LLC*, 113 USPQ2d 1029, 1034 (TTAB 2014) (citing *Asian and W. Classics B.V.*, 92 USPQ2d at 1479). Allegations such as Opposer's raise only the mere possibility that supporting evidence may be uncovered and do not constitute pleading of fraud with particularity. *See Exergen Corp. v. Wal-Mart Stores, Inc.* 575 F.3d 1312, 91 USPQ2d 1656, 1670 n.7 (Fed. Cir. 2009) (citing *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1279 n.3 (D.C. Cir. 1994) ("[P]leadings on information and belief [under Rule 9(b)] require an allegation that the necessary information lies within the defendant's control, and...such allegations must also be accompanied by a statement of the facts upon which the allegations are based.") (citation omitted).

Accordingly, Opposer's fraud claims should be dismissed for failure to state such claims with particularity under Federal Rule of Civil Procedure 9(b).

**D. Opposer Failed to Allege Detailed Facts for Lack of *Bona Fide* Intent to Use**

For the same reasons that Opposer’s fraud claims are deficient, its vague allegations of lack of *bona fide* intent should be dismissed. The Opposition contains broad allegations and statement of lack of *bona fide* intent to use the Crabb Applications. The Opposition states, without any facts, that:

- 1) “...Applicant had no good faith bona fide intent to use Applicant’s Marks being Opposed for Applicant’s Goods.” (Opposition ¶30)
- 2) “Applicant’s actions in filing intent to use trademark applications are insufficient to establish a bona fide intent to use Applicant’s Marks...” (Opposition ¶ 31)
- 3) “Applicant has taken no steps to begin commercial use of Applicant’s Marks...” (Opposition ¶32)
- 4) “On June 1, 2018, when Applicant filed Applicant’s applications, Applicant had no objective bona-fide intent to use Applicant’s Marks Being Opposed.” (Opposition ¶33).

Opposer has not provided any facts to support the allegations and merely makes vague accusations to surmise that Applicant has no *bona fide* intent to use the Crabb Applications. Petitioner has failed to meet the requisite pleading standard. *See Ashcroft v. Iqbal*, 556 U.S. at 678; TBMP §309.03(a)(2). Neither the Board nor Applicant can parse through Petitioner’s vague allegations to determine if the lack of *bona fide* intent allegations are plausible. Accordingly, the allegations should be dismissed under Federal Rule of Civil Procedure 12(b)(6).

**MOTION TO SUSPEND**

Trademark Rule 2.117 provides that proceedings may be suspended pending disposition of a potentially dispositive motion or upon a showing of good cause. Applicant’s Motion to Dismiss is dispositive of all of Opposer’s claims. Accordingly, Applicant respectfully requests that all proceedings not germane to the Motion to Dismiss be suspended pending disposition of the Motion.

**CONCLUSION**

For the foregoing reasons and authorities, Applicant respectfully requests that its Motion to Dismiss be granted.

Dated: February 13, 2019

Respectfully Submitted

**THE VINEYARD HOUSE LLC**

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**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing APPLICANT’S MOTION TO DISMISS was served by email on this 13<sup>th</sup> day of February 2019, upon Applicant at the following email addresses of record:

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