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

Proceeding no.	91271308
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SNAP, INC.,

Opposer,

v.

WHIZSOLVE PTE. LTD.,

Applicant

Opposition No. 91271308

Serial No.: 88880340

Mark: SNAPSOLVE

Classes: 9, 16, 41, 42

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**OPPOSITION TO OPPOSER’S MOTION TO DISMISS APPLICANT’S
AMENDED COUNTERCLAIMS FOR CANCELLATION AND
TO STRIKE APPLICANT’S AMENDED AFFIRMATIVE DEFENSE**

Applicant Whizsolve Pte. Ltd. (“Applicant” or “Whizsolve”) submits this brief in opposition to Opposer Snap Inc.’s (“Opposer” or “Snap”) motion to dismiss Applicant’s amended counterclaims for cancellation of particular registrations claimed by Opposer, and to strike Applicant’s affirmative defense of estoppel. For the reasons set forth below, Opposer’s motion should be denied. The amended counterclaims amply satisfy the applicable pleading standards, and Applicant’s affirmative defense of estoppel should likewise be maintained.

I. PROCEDURAL HISTORY

A. The Original Answer, Counterclaims, and Affirmative Defense

Opposer filed an Opposition to registration of Whizsolve’s SNAPSOLVE mark on August 25, 2021. (1 TTABVUE). Upon receipt of Whizsolve’s original motion to dismiss, seeking dismissal of a claim for “dilution by blurring” and clarification of Opposer’s likelihood of confusion theories (4 TTABVUE), Opposer filed an amended pleading on October 25, 2021 (7 TTABVUE). In addition to its answer, Whizsolve filed counterclaims to cancel the

registrations that formed the basis of the Opposition. As of right, on November 29, 2021, Whizsolve filed its Answer, Affirmative Defenses, and Counterclaims (9 TTABVUE), seeking cancellation of Snap's Registration No. 4111564 ("the '564 Registration") on grounds of non-use abandonment and seeking cancellation of Opposer's Registration No. 6420265 ("the '265 Registration") on grounds of non-use and fraud on the USPTO.

In lieu of answering, on January 6, 2022, Snap moved under Rules 12(b)(6), 12(f), and 12(f)(2) to strike the affirmative defenses and dismiss the cancellation counterclaims. On January 26, 2022, in lieu of responding to Opposer's motion to dismiss (11 TTABVUE), Whizsolve re-filed its Answer, Amended Affirmative Defenses, and Amended Counterclaims. (13 TTABVUE). Snap has again moved to dismiss the remaining affirmative defense and the amended counterclaims. (15 TTABVUE).

B. The Answer, Amended Affirmative Defense, and Amended Counterclaims

Whizsolve's Answer, Amended Affirmative Defense, and Amended Counterclaims (the "Amended Counterclaims") contains an affirmative defense of estoppel (13 TTABVUE 3), and counterclaims for cancellation of Opposer's two SNAP registrations based on non-use and fraud. (13 TTABVUE 5-8). Snap has filed a second motion to dismiss without clarifying the basis for its arguments that Whizsolve's cancellation petition is lacking. Although Opposer harps on what it perceives to be deficiencies in prior allegations, these are no longer of record and have not been ruled upon. *See e.g.*, 15 TTABVUE 4. Opposer mixes the legal standards required for pleadings in its effort to seek dismissal of Whizsolve's cancellation claims.

II. LEGAL STANDARD

Pursuant to Fed. R. Civ. P. 12(b)(6) and TBMP § 503.02, motions to dismiss are designed to test *solely* the legal sufficiency of a complaint or claim. *See Advanced Cardiovascular Sys.*

Inc. v. SciMed Life Sys. Inc., 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993) (emphasis added). The counterclaim pleading, “taken as a whole, must be liberally construed in the light most favorable to petitioner and may not be dismissed absent a finding, not subject to doubt, that petitioner could prove no set of facts based on the petition that would yield the relief sought.” *Kelly Servs. Inc. v. Greene’s Temporaries Inc.*, 25 USPQ2d 1460, 1462 (TTAB 1992) (citing *Scotch Whisky Ass’n v. United States Distilled Prods. Co.*, 952 F.2d 1317, 21 USPQ2d 1145 (Fed.Cir.1991)).

As a general matter, federal pleading rules call for “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). There is no requirement, for example, that any claim which is not for fraud requires more than notice pleading. To withstand Opposer’s Motion, on claims that do not require a heightened pleading standard under Rule 9, Applicant need only allege enough facts that, if proven, would allow the Board to reasonably infer or conclude that (1) Applicant has standing to bring its counterclaims, and (2) a valid ground exists for cancelling the marks. *See Doyle v. Al Johnson’s Swedish Rest. & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) (citing *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998)); TBMP § 503.02 (2014).

Opposer suggests that all of the counterclaims are read under Rule 9(b). That is not so. Rule 9(b) only imposes a heightened pleading standard for Whizsolve’s fraud claims, Counterclaims II and IV. Whizsolve has satisfied that heightened standard. “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R. Civ. P. 9(b). Whizsolve has more than adequately alleged fraud in procuring or maintaining an existing registration. “A finding of fraud in procuring a registration requires

proof of the following elements: (1) the challenged representation was a false statement of material fact; (2) the person making the representation knew of its falsity; (3) the person making the representation did so with an intent to deceive; (4) the [USPTO] relied on the representation; and (5) damage resulted from such reliance.” *See In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1941 (Fed. Cir. 2009).

This is not a situation where Whizsolve has made “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To the contrary, Applicant has alleged substantial facts that the Opposer deliberately filed statements of use – to maintain an existing registration which was assigned to it – and to obtain a new registration – knowing that it did not use the mark applied-for in connection with the services claimed in the respective registration or application. 13 TTABVUE 3-8. As the Board has noted, when reviewing another argument with what has become boiler plate language from *Iqbal/Twombly*, “this much-quoted reference to ‘threadbare’ recitals does not establish a per se pleading standard [and will] ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Lewis Silkin LLP v. Firebrand LLC*, 129 USPQ2d 1015, 1016 (TTAB 2018). Thus, while *Iqbal/Twombly* applies, there is flexibility in applying the standard. Opposer’s arguments for dismissal of counterclaims “appear to confuse the sufficient pleading of a claim with the obligation of proving that claim.” *See Young*, 47 USPQ2d at 1754. Opposer’s arguments mix the different pleading standards required of the asserted abandonment claim, the asserted fraud claims, and the asserted claim that a registration should be cancelled for nonuse. While fraud must be “proven to the hilt,” it only needs to be plead with sufficient particularity. A

claim of abandonment does not, however, need to be plead with particularity; notice pleading under Rule 8 is sufficient.

III. ARGUMENT

A. Whizsolve has Sufficiently Pled Cancellation of the ‘564 Registration on the Basis of Non-Use Abandonment (Counterclaim I).

Federal Rule 8 applies to allegations of non-use abandonment. The pleading standard is the Board’s notice pleading, i.e. the “pleading should include enough detail to give the defendant fair notice of the basis for each claim.” TBMP 309.03(2); *see also Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007). Here, Snap has been given fair notice. A mark shall be “deemed to be ‘abandoned’ ... [w]hen its use has been discontinued with the intent not to resume such use.” *Bison Prods., LLC v. Red Bull GmbH*, Cancellation No. 9207689, 2022 WL 486659, *6 (TTAB Feb. 2, 2022) (stating that “Ownership of trademarks is established by use, not by registration”); *see also* 15 U.S.C. § 1127.

The Board has applied the *Iqbal/Twombly* standard to consider the legal sufficiency of an abandonment claim, without finding that the standard required more than the traditional notice pleading of nonuse plus intent not to resume. *See, e.g., SaddleSprings Inc. v. Mad Croc Brands Inc.*, 104 USPQ2d 1948, 1950 (TTAB 2012) and *Johnson & Johnson v. Obschestvo s Ogranitchennoy*, 104 USPQ2d 2037 (TTAB 2012). The Board has instructed that:

“[T]here is no list of activities which always show trademark use, and thus there is no list of activities whose cessation would always show trademark nonuse. Actual intent not to resume use (as opposed to the statutory period of nonuse which gives rise to the presumption of intent not to resume use) does not exist in a vacuum, but also must relate to the use in commerce of the mark. The Board is reluctant to see pleadings devolve into wrangling over whether specific factual allegations offered to demonstrate nonuse and intent not to resume use are sufficient to support the abandonment claim. These matters addressing what activities constitute use in commerce under the Trademark Act are best, and traditionally, left to trial.”

Lewis Silkin, 129 USPQ2d at 1020.

Hence, there are no detailed pleading requirements for an abandonment claim requiring recitation of specific *facts*, as alleged by the Opposer. 15 TTABVUE 4. Applicant has sufficiently alleged that, “as a result of Opposer’s non-use of the SNAP trademark in connection with the services identified in the ‘564 Registration, and with no intention to begin and/or resume use, Opposer has abandoned said SNAP trademark within the meaning of 15 U.S.C. § 1127, Section 45 of the Lanham Act.” 13 TTABVUE 5, ¶ 13.

Further, Opposer attempts to misconstrue Applicant’s abandonment claim by making a distracting reference to its previous counterclaim for the ‘564 Registration that included allegations that Snap’s specimen did not show use of the mark, but the USPTO nonetheless accepted it. 15 TTABVUE 4. That is not what is alleged in the Amended Counterclaims. 13 TTABVUE 5.

Moreover, the cases that Opposer cites are to final determinations of whether non-use abandonment of a mark *is proven at trial*, not whether non-use abandonment *is adequately pled*. *See* 15 TTABVUE 7.

Regardless, Applicant’s amended abandonment claim is pled adequately under the prevailing pleading standards for the Board, and Snap has fair notice of this claim.

B. Whizsolve Has Sufficiently Pled that the ‘265 Registration Should be Cancelled for Non-Use Abandonment (Counterclaim III).

For the reasons stated above, Whizsolve also has adequately alleged abandonment of the ‘265 Registration based on non-use, and in fact the complete lack of bona fide use, in Counterclaim III. There is no requirement that this allegation be plead with particularity. Snap creates a red herring by claiming that the abandonment claim is a claim objecting to the ex parte review of a specimen of use. *See* 15 TTABVUE 4. The allegation provides notice that Snap has no use of the mark on the applied for services – for which it secured a registration without use.

A verified statement that “the mark is in use in commerce” is a minimum requirement that must be satisfied before the expiration of the statutory period for filing the statement of use. 15 U.S.C. § 1051(d)(1); 37 C.F.R. § 2.88(c)(3). Snap cannot rely on the mere existence of its federal registration and submission of what it claims to be adequate specimens of use, or that such specimens, submitted in ex parte examination, as grounds for dismissal of Whizsolve’s claim of non-use. “If it could do so, a contested cancellation based on [lack of bona fide use or non-use] could never be successful, despite the fact that such claims are clearly contemplated by statute.” *M/S White Feathers Rest. Private Ltd. v. Moti Mahal Delux Mgmt. Servs. Private Ltd.*, Cancellation No. 9206119, 2019 WL 1875418, *13 (TTAB Apr. 24, 2019) (non-precedential); see also Section 45 of the Trademark Act, 15 U.S.C. § 1127; *Cf. Imperial Tobacco, Ltd. v. Philip Morris, Inc.*, 899 F.2d 1575, 1581 (Fed. Cir. 1990) (“[T]he Lanham Act was not intended to provide a warehouse for unused marks.”).

The term “use” in this context means “the bona fide use of that mark made in the ordinary course of trade, and not made merely to reserve a right in a mark.” 15 U.S.C. § 1127. Under Section 45 of the Trademark Act, a mark is deemed to be used in commerce for services when: [1] it is used or displayed in the sale or advertising of services and [2] the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services. *Id.* See also *Aycock Eng'g, Inc. v. Airflite, Inc.*, 560 F.3d 1350 (Fed. Cir. 2009); *Couture v. Playdom, Inc.*, 778 F.3d 1379 (Fed. Cir. 2015) (quoting 15 U.S.C. § 1127). Whizsolve has the right to raise this counterclaim.

Here again, there are no detailed pleading requirements requiring recitation of *facts*, as alleged by Snap. 15 TTABVUE 6. Whizsolve has sufficiently alleged that Snap has never used,

and does not use, the mark SNAP for the Class 42 services in the ‘265 Registration. 13 TTABVUE 7. Whizsolve has satisfactorily asserted allegations of non-use, and a lack of bona fide use, when its mark was registered.

C. Whizsolve Sufficiently Plead Fraudulent Registration Against the ‘564 and ‘265 Registrations (Counterclaims II and IV).

Contrary to Opposer’s arguments, the Amended Counterclaims meet the heightened pleading standard set forth by Rule 9(b). Opposer in particular argues that the allegations relating to the state of mind elements – knowledge and scienter/intent – are lacking. *See* 15 TTABVUE 5-9. To the contrary, Applicant has adequately plead all of the elements of its fraud claims. Snap is viewing the fraud claims in a vacuum and is misconstruing the allegations by ignoring the additional underlying facts that are specifically alleged.

Whizsolve alleges that Snap acquired the ‘564 Registration for the mark SNAP INTERACTIVE from a third party, in settlement of a litigation brought by the third party against Opposer. 13 TTABVUE 3-4, ¶¶ 1-2. At the time of the assignment, Opposer had no use of the mark SNAP INTERACTIVE, and falsely contended that the original owner of the mark, a company named Snap Interactive, was its licensee. *Id.* at ¶¶ 2-3. A Section 8 and 15 Combined Affidavit was filed based on a specimen of use of the entity Snap Interactive, an entity unrelated to the Opposer. *Id.* at ¶ 2.

Shortly after this filing, with the knowledge that Opposer did not have use of SNAP INTERACTIVE, the registration renewed and the mark became incontestable, and Opposer filed a request to amend the drawing of the existing registration to remove the word “Interactive” from the registration. That request was granted. *Id.* at 4, ¶¶ 4-5. However, even with the amendment of the registration, Opposer still did not have use of the amended mark on the services covered by the registration – namely the use of SNAP as a trademark for “on-line social networking

services.” *Id.* at 6, ¶¶ 15, 17. As alleged, Opposer engaged in these acts to maintain a registration for a mark that it did not use, and that it knew it would not use. The filing of the renewal application to maintain this registration was done with knowledge that the filing was false. *Id.* at 6, ¶ 17. Opposer, from its actions, all of which are alleged, show the requisite intent to maintain a registration for a mark that it does not use.

As alleged with respect to the ‘265 Registration, more boldly, Opposer simply filed a Statement of Use for a mark it did not use, knowing that it did not use the mark at all, much less on the services covered by the registration, namely:

“Hosting digital content on the internet; providing online web facilities for managing and sharing online photographs, videos, text, music and digital content; providing photographic images, videos, music, audio, music, text, graphics, and other information from searchable indexes and databases, by means of the internet and communication networks; computer services, namely, creating virtual communities for registered users to participate in discussions and engage in social, business and community networking; application service provider (ASP) services, namely, hosting computer software applications of others; application service provider (ASP) featuring software to enable or facilitate the uploading, downloading, streaming, editing, modifying, posting, displaying, linking, sharing, transmission or otherwise providing photographs, videos, music and electronic media or information over the internet and communication networks; providing temporary use of on-line non-downloadable software applications for photo and video sharing; providing temporary use of on-line non-downloadable authentication software for controlling access to and communications with computers and computer networks.”

13 TTABVUE 7-8, ¶ 26. The facts alleged show an Opposer/Registrant with a clear intent of registering a broad mark, without use, and without intention of use, to broadly claim rights it simply does not have. Whizsolve has alleged that Opposer has not used the mark SNAP on the services claimed in the ‘265 Registration. *Id.* at 4-5, ¶¶ 6-8; 8, ¶¶ 28, 30. Nonetheless, Opposer claimed that it used the mark on all of the asserted services, with knowledge that it did not use the mark on *any* of the services. *Id.* at 8, ¶¶ 27, 29.

As asserted, Whizsolve has alleged that Opposer knew at the renewal of the ‘564 Registration, and at the time of the filing of the Statement of Use of the ‘265 Registration, that it did not use the subject SNAP mark. As Opposer has stated in the Amended Notice of Opposition, it is the designer and distributor of the extremely popular SNAPCHAT camera and messaging application. 7 TTABVUE 1, ¶ 1. Opposer alleges that it “has adopted and used numerous trademarks incorporating the term ‘SNAP’ in connection with a wide variety of goods and services that includes and extends beyond the SNAPCHAT mobile application.” *Id.* at 1, ¶ 2. But it actually does not – it uses the mark SNAPCHAT for its mobile application, not SNAP, as it falsely claimed in its application for renewal of the ‘564 Registration. These claims clearly articulate not only Opposer’s false statements, but that its false statement was material to its registration, and those statements made in maintenance of the ‘564 Registration and to secure the ‘265 Registration were false statements, made with knowledge of the falsity of those statements. Indeed, Opposer’s own motion to dismiss clearly acknowledges that its social media service is SNAPCHAT – not SNAP. 15 TTABVUE 1. Accordingly, the counterclaim petition allegations of fraud clearly allege enough facts from which the Board can reasonably infer the requisite state of mind. *See Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 91 USPQ2d 1656, 1668 (Fed. Cir. 2009). Opposer misconstrues what is required to substantiate a fraud claim, and what is required to satisfactorily allege fraud.

Finally, Opposer appears to have conceded that Whizsolve adequately alleged all of the elements of the two fraud claims, with the exception of an allegation of “state of mind.” 15 TTABVUE 7. As set forth above, Whizsolve’s allegations adequately plead knowledge and intent. *See also* 13 TTABVUE 6, ¶ 17; 8, ¶ 28. The Board has repeatedly held—consistent with the express language of Fed. R. Civ. P. 9(b)—that while intent is a required element in a fraud

claim, it may be averred generally; thus, a pleading that alleges a known misrepresentation was made on a material matter to procure or maintain a registration sufficiently pleads intent. *See, e.g., DaimlerChrysler Corp. v. Am. Motors Corp.*, 94 USPQ2d 1086, 1088–89 (TTAB 2010) (allegation that “[R]espondent knowingly made material misrepresentations to the PTO to procure [r]egistration ...” sufficiently pled intent). Whizsolve has made such allegations. As stated in McCarthy’s chapter on fraud in post-registration declarations:

The Federal Circuit unequivocally held in the *Torres* case that fraud in obtaining a renewal of a registration does amount to fraud in obtaining a registration within the meaning of § 14(3) and is thus a basis for cancellation of the registration. In that case, in order to renew its registration, registrant falsely stated that its mark of LAS TORRES and design of three towers was still in use on wine, vermouth, and champagne and submitted a specimen showing the mark in the form in which it was registered. In fact, it was using TORRES and a different design of towers and only on wine. Therefore the specimen of use was false.

6 McCarthy on Trademarks and Unfair Competition § 31:80 (5th ed.) (citing *Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 48-49, 1 USPQ2d 1483 (Fed. Cir. 1986)).

D. Estoppel

Motions to strike are not favored, and matter will not be stricken by the Board unless it clearly has no bearing upon the issues in the case. *See, e.g., Ohio State Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1292 (TTAB 1999); and *Harsco Corp. v. Elec. Sci. Inc.*, 9 USPQ2d 1570, 1571 (TTAB 1988). “Inasmuch as the primary purpose of pleadings under the Federal Rules of Civil Procedure is to give fair notice of the claims or defenses asserted, the Board may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense.” *Castro v. Cartwright*, Opposition No. 91188477 (TTAB Sept. 5, 2009) (non-precedential) (citing *Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995)).

Opposer has cited no rule or caselaw for its proposition that an affirmative defense of estoppel is unavailable based on the asserted facts. The affirmative defense of estoppel “may be invoked [] by one who has been prejudiced by the conduct relied upon to create the estoppel.” *Textron, Inc. v. The Gillette Co.*, 180 USPQ 152, 154 (TTAB 1973). In the context of an inter partes proceeding, the defense must be tied to conduct that occurred in context of registration. *See, e.g., Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732, 734, 23 USPQ2d 1701, 1703 (Fed. Cir. 1992) (“As applied in trademark opposition or cancellation proceedings, [the defense of estoppel] must be tied to a party’s registration of a mark, not to a party’s use of the mark.”).

Here, under the facts alleged, estoppel arises in several ways, that are already of notice. First, Snap should be estopped from asserting registrations for SNAP, for which it has no use, as the basis for opposing Whizsolve’s right to register its SNAPSOLVE mark on unrelated goods and services. Second, Snap should be estopped from presenting arguments that its SNAPCHAT mark under Reg. No. 5,633,315 is likely to be confused with Applicant’s SNAPSOLVE mark by virtue of the use of the term “snap” when Opposer has already conceded that its SNAPCHAT mark is dissimilar from prior existing registrations for SNAP formative marks covering goods and services in Classes 9 and 41.

IV. CONCLUSION

For the foregoing reasons, it is respectfully requested that Snap's Motion to Dismiss be denied, and Whizsolve's Amended Counterclaims proceed, or that it be granted leave to further amend its claims.

Dated: March 9, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa Bollinger Gehman, hereby certify that on March 9, 2022, a true and correct copy of the foregoing OPPOSITION TO OPPOSER’S MOTION TO DISMISS APPLICANT’S AMENDED COUNTERCLAIMS FOR CANCELLATION AND TO STRIKE APPLICANT’S AMENDED AFFIRMATIVE DEFENSE has been served via e-mail upon counsel for the Opposer:

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