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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**

In re Application Serial No.: 88/880,340

Mark: SNAPSOLVE

Filing Date: April 21, 2020

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SNAP INC.,

Opposer,

v.

WHIZESOLVE PTE. LTD.,

Applicant.

Opposition No. 91271308

**SNAP INC.’S REPLY IN SUPPORT OF ITS MOTION TO DISMISS
APPLICANT’S AMENDED COUNTERCLAIMS FOR CANCELLATION
AND TO STRIKE APPLICANT’S AMENDED AFFIRMATIVE DEFENSE**

I. INTRODUCTION

Applicant believes the Office was wrong to accept Snap’s specimens evidencing its use of SNAP, which Snap filed in connection with two of the registrations pleaded in this opposition—the ‘564 Registration and the ‘265 Registration.¹ Initially, Applicant sought to cancel Snap’s registrations on that ground. When Snap pointed out that “insufficiency of . . . specimens, per se, does not constitute grounds for cancelling a registration,”² however, Applicant amended its

¹ Defined terms have the same meaning as in Snap’s February 17, 2022, motion to dismiss. *See* Snap Inc.’s Motion to Dismiss Applicant’s Amended Counterclaims for Cancellation and to Strike Applicant’s Amended Affirmative Defense (“Motion”) at 1-3, 15 TTABVUE 2-4.

² *See* Snap Inc.’s Motion to Strike Applicant’s Affirmative Defenses and to Dismiss Applicant’s Counterclaims for Cancellation at 4, 11 TTABVUE 5 (quoting *Marshall Field & Co. v. Mrs. Fields Cookies*, 11 U.S.P.Q.2d 1355, 1358 (T.T.A.B. 1989)).

counterclaims to eliminate any reference to the word “specimen,” leaving nothing but the bare elements of each claim. Despite this makeover, Applicant’s cancellation theory appears unchanged—i.e., that Snap’s specimens of use for the ‘564 Registration and the ‘265 Registration were insufficient to evidence use of the SNAP mark.

Tellingly, Applicant does not allege that Snap’s specimens are not genuine—they were not digitally created or altered, for example—but alleges, in conclusory fashion, that (a) Snap was not using SNAP as a mark (despite the obvious evidence to the contrary, i.e., Snap’s accepted specimens), and (b) Snap concealed that “nonuse” from the Office (despite submitting evidence of the use that Applicant claims did not occur). In other words, Applicant’s own counterclaims demonstrate that Snap provided the Office with the very information Applicant alleges Snap withheld, thus fatally undermining Applicant’s claims of nonuse and fraud. *See Belstone Cap., LLC v. Bellstone Partners, LLC*, No. 2:16-cv-01124-KJM-GGH, 2017 WL 1153111, at *4 (E.D. Cal. Mar. 28, 2017).

In pleading terms, the practical result of Applicant’s amendment is that its allegations are even less supported than they were before. Applicant’s amended counterclaims now consist of:

1. Factual allegations concerning Snap’s lawsuit against Snap Interactive, Inc., Snap’s acquisition of the ‘564 Registration, and Snap’s subsequent amendment of the drawing under Section 7(e) (Answer, Amended Affirmative Defenses [sic], and Amended Counterclaims to Amended Notice of Opposition (“Amended Answer”) at 3-4 ¶¶ 1-5, 13 TTABVUE 4-5);
2. Factual allegations concerning the prosecution histories of the ‘564 Registration and the ‘265 Registration (*id.* at 4-8 ¶¶ 6-7, 16, 26, 27, 13 TTABVUE 5-9);
3. A factual allegation that “Applicant searched online and did not identify any use of SNAP in connection with on-line social networking services” (*id.* at 6 ¶ 15, 13 TTABVUE 7);

4. Formulaic recitations of the elements of its fraud and abandonment causes of action (*id.* at 5-8 ¶¶ 8-9, 11-13, 15-20, 23, 28-33, 13 TTABVUE 6-9); and

5. Boilerplate requests for relief (*id.* at 6-8 ¶¶ 21, 24, 34, 13 TTABVUE 7-9).

Even taking all of the facts alleged in Categories 1, 2, and 3 as true for the purposes of this Motion, Applicant has alleged no facts from which the Board could infer Snap engaged in either fraud or abandonment. As for the allegations in Categories 4 and 5, those “formulaic recitation[s]” of the elements of fraud and abandonment are nothing more than “legal conclusion[s] couched as . . . factual allegation[s],” none of which merit any deference from the Board. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Applicant’s counterclaims should be dismissed with prejudice.

II. ARGUMENT

A. Applicant Argues the Board Should Apply the “No Set of Facts” Test the Supreme Court Rejected in *Twombly* and *Iqbal*.

Applicant begins its argument by asserting that its counterclaims “may not be dismissed absent a finding . . . that petitioner could prove *no set of facts*” supporting relief, citing a Board decision from 1992. Opposition to Opposer’s Motion to Dismiss Applicant’s Amended Counterclaims for Cancellation and to Strike Applicant’s Amended Affirmative Defense (“Opp.”) at 3, 18 TTABVUE 4 (emphasis added) (citation omitted). This “no set of facts” language comes from *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which the Supreme Court held “has been questioned, criticized, and explained away long enough” and is “not the minimum standard of adequate pleading to govern a complaint’s survival.” *Twombly*, 550 U.S. at 562-63. Applicant finally gets around to mentioning *Twombly* and *Iqbal* on page 4 of its opposition, urging “flexibility” in applying that governing standard, presumably because it knows its allegations are

insufficient. Opp. at 4, 18 TTABVUE 5. As shown below, however, mere flexibility cannot save Applicant's conclusory allegations.

B. Applicant Still Has Not Pleaded Any Factual Content from Which the Board Could Infer that Snap Engaged in Fraud.

In its opposition, Applicant repeatedly claims its amended counterclaims contain “substantial facts” relating to the alleged falsity and materiality of Snap’s statements to the Office, “from which the Board can reasonably infer the requisite state of mind.” Opp. at 10, 18 TTABVUE 11. In support of this argument, Applicant cites *Exergen Corp. v. Wal-Mart Stores, Inc.*, 91 U.S.P.Q.2d 1656, 575 F.3d 1312 (Fed. Cir. 2009). In that case, however, the Federal Circuit reached the opposite conclusion, stating the pleading at issue did “not allege facts that would support a reasonable inference that a relevant individual knew of the allegedly material information” and contained “[n]o facts . . . from which one can reasonably infer that, at the time of the allegedly false statement, the individual who made this statement . . . was aware of an allegedly contradictory statement on Exergen’s website.” *Id.* at 1669-70, 575 F.3d at 1330.

The same is true of Applicant’s allegations here. With the exception of its internet search³—which is insufficient to support an inference of nonuse, much less fraud⁴—Applicant does not identify *a single fact* supporting its foundational allegations that (a) Snap did not use

³ See Amended Answer at 6 ¶ 15, 13 TTABVUE 7.

⁴ See *Equinix, Inc. v. OnePacket LLC*, Cancellation No. 92069714, slip op., 13 TTABVUE 18 (T.T.A.B. July 2, 2021) (nonprecedential) (unavailability of “advertising or promotional materials, or press coverage” about respondent’s services “on the Google, Bing and Yahoo internet search engines (on September 11, 2019) . . . does not establish Respondent’s lack of use of its mark for a three-year period”); *Toufigh v. Persona Parfum, Inc.*, 95 U.S.P.Q.2d 1872, 1875 (T.T.A.B. 2010) (no *prima facie* case of abandonment where “Petitioner did testify to having checked respondent’s website ‘on more than one occasion’” over a period “spanning merely a few weeks,” but there was “no evidence that he checked over a period of at least three years”); *cf. Buchan v. Livingood*, No. 92043742, 2005 WL 2747604, at *4 (T.T.A.B. Oct. 19, 2005) (nonprecedential) (on motion for summary judgment, holding that “[t]he mere absence of petitioner’s mark on the Internet in no way satisfies the strict standard necessary to prove abandonment”).

SNAP as a mark (despite the Office’s acceptance of Snap’s specimens), and (b) Snap submitted verified statements to the contrary knowing they were false. Applicant cites *DaimlerChrysler Corp. v. American Motors Corp.*, 94 U.S.P.Q.2d 1086 (T.T.A.B. 2010), in support of its argument, but in that case, the petitioner was able to allege the registrant “explicitly admitted that it has never used its . . . mark in commerce” in connection with the goods at issue. *Id.* at 1088. Applicant has not alleged, nor could it allege, that Snap made a similar admission here.

Settled law requires Applicant to allege “explicit rather than implied expression of the circumstances constituting fraud.” *Asian & W. Classics B.V. v. Selkow*, 92 U.S.P.Q.2d 1478, 1478 (T.T.A.B. 2009) (quoting *King Auto., Inc. v. Speedy Muffler King, Inc.*, 212 U.S.P.Q. 801, 803, 667 F.2d 1008, 1010 (C.C.P.A. 1981)). It has not done so.⁵ See *Bertini v. Apple Inc.*, No. 92068213, 2018 WL 5016953, at *4 n.9, *5 (T.T.A.B. Oct. 9, 2018) (nonprecedential) (“Petitioner has failed to allege sufficient facts regarding Respondent’s failure to use the mark and the declarant’s knowledge and intent regarding the alleged nonuse. . . . For example, Petitioner alleges that the statement of use of the mark in connection with entertainment services was false because the involved mark ‘did not function as a service mark.’ However, there are no allegations from which a court could infer that the signing party knew that the use of the involved mark did not function as a service mark.”).

⁵ Perhaps in an effort to avoid having to plead and prove its fraud claim, Applicant claims Snap “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.’” Opp. at 11, 18 TTABVUE 12. Snap has not “conceded” any such thing. As Applicant is aware, Snap has not answered Applicant’s amended counterclaims. Snap’s recitations of the facts alleged in Applicant’s amended counterclaims are to be taken as true solely for the purposes of this Motion.

C. Applicant Still Has Not Pleaded Any Factual Content from Which the Board Could Infer Abandonment.

Applicant repeatedly asserts “there are no detailed pleading requirements requiring recitation of facts” to support its abandonment claims. Opp. at 8, 18 TTABVUE 9. While Rule 9(b) does not apply to claims of abandonment,⁶ *see* Fed. R. Civ. P. 9(b) (“fraud or mistake”), the pleading standard the Supreme Court announced in *Twombly* and *Iqbal* does apply to Applicant’s abandonment claims, and Applicant has failed to satisfy that standard. As the Board held in *Dragon Bleu (SARL) v. VENM, LLC*, 112 U.S.P.Q.2d 1925 (T.T.A.B. 2014), to plausibly plead abandonment through nonuse, Applicant “must recite *facts* which, if proven, would establish at least three consecutive years of nonuse, or alternatively, a period of nonuse less than three years coupled with proof of intent not to resume use.” *Id.* at 1930 (emphasis added) (citation omitted); *see also id.* at 1932 (“Because Applicant pleaded no facts from which we could conclude that Opposer does not intend to commence use of its registered marks, the counterclaim fails to state a claim upon which relief can be granted.”).

Applicant has not recited any such facts in its counterclaims, instead offering various iterations of the bare legal conclusion that Snap “has never used, and does not use, the mark SNAP” and “has no intention to use [or] resume use.” Amended Answer at 5-8, 13 TTABVUE 6-9 ¶¶ 8, 11, 12, 15, 23, 28, 30. The formulaic nature of these allegations distinguishes this case from *SaddleSprings, Inc. v. Mad Croc Brands, Inc.*, 104 U.S.P.Q.2d 1948 (T.T.A.B. 2012), in which the Board specifically noted that “petitioner alleges additional facts to support [its] claims” in

⁶ Applicant asserts, falsely, that Snap suggested “all of the counterclaims are read under Rule 9(b).” Opp. at 4. In fact, Snap discussed Rule 9(b) only in connection with Applicant’s fraud claims. *See* Motion at 5, 7, 8, 15 TTABVUE 6, 8, 9.

denying the respondent's motion to dismiss. *Id.* at 1949.⁷ Here, by contrast, Applicant has done nothing but offer “naked assertions.” See *Meat-Companion Co., Ltd. v. Lesslie*, No. 92064174, 2017 WL 3718337, at *2 (T.T.A.B. Mar. 27, 2017) (dismissing abandonment claim “based on discontinuation of use for a period of three years or longer, with intent not to resume such use” because “Petitioner has not pleaded any ultimate facts which form the basis for such claim and has instead merely made naked assertions.”).

Applicant also cites *Lewis Silkin LLP v. Firebrand LLC*, No. 92067378, 2018 WL 6923002 (T.T.A.B. Dec. 21, 2018), in which the petitioner cursorily claimed abandonment through nonuse, obviously unaware of any facts supporting its claim⁸ but gambling that Firebrand had ceased use of its mark since filing its second Application for Renewal of a longstanding registration. (Lewis Silkin ultimately withdrew its petition with prejudice,⁹ but in the meantime, Firebrand was forced to defend a baseless abandonment claim.) Given the theory underlying Lewis Silkin's abandonment claim—that Firebrand had simply ceased using its mark since submitting its latest specimen—the Board's refusal to dismiss the claim is arguably defensible on policy grounds (if

⁷ *Johnson & Johnson v. Obschestvo s Ogranitchennoy*, 104 U.S.P.Q.2d 2037 (T.T.A.B. 2012), is also distinguishable, as the Board was asked to determine whether “the counterclaim is legally insufficient because OsO's counterclaim is ‘premised solely on [Section 18] . . . and fails to plead avoidance of likelihood of confusion.’” *Id.* at 2038.

⁸ See Respondent's Motion Pursuant to Fed. R. Civ. P. 12(b)(6) to Dismiss Petitioner's Claim With Prejudice, *Lewis Silkin LLP v. Firebrand LLC*, Cancellation No. 92067378, 6 TTABVUE 7 (T.T.A.B. Mar. 2, 2018) (“Had Petitioner conducted a reasonable investigation into Respondent's use of the FIREBRAND mark, it would have found that Respondent has been using the mark continuously in connection with the identified goods and services, despite its lack of an Internet presence. Respondent can readily provide Petitioner with examples of use of the mark on sales materials, invoices, and marketing collateral including letterhead, business cards, and other uses that are distributed to clients. Neither Respondent, nor the Board, should have to waste resources dealing with claims that are unfounded and unsustainable on their face.”).

⁹ See Withdrawal of Petition for Cancellation with Prejudice, *Lewis Silkin LLP v. Firebrand LLC*, Cancellation No. 92067378, 34 TTABVUE (T.T.A.B. July 7, 2020).

legally problematic in view of the Supreme Court’s plain language in *Twombly* and *Iqbal*) because the evidence needed to prove a cessation of use is often in the possession of the trademark owner.

That rationale does not apply here because Applicant’s abandonment theory is not “nonuse plus intent,” as in *Lewis Silkin*, 2018 WL 6923002 at *6, but that the Office erred in accepting Snap’s specimens showing use of SNAP standing alone. This is not a valid ground for cancellation, so Applicant cannot plausibly allege the only facts supporting its allegations without exposing those allegations’ lack of merit. Thus, far from being a “distraction,” as Applicant argues, Opp. at 6, 18 TTABVUE 7, the specimen allegations Applicant purged from its initial counterclaims are central to the deficiency of its *amended* claims.

The Supreme Court’s analysis in *Twombly* is directly on point. In *Twombly*, as the Court described in *Iqbal*, the plaintiff alleged an “unlawful agreement” under antitrust law, but the Supreme Court found this allegation deficient because it “was a ‘legal conclusion’ and, as such, was not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 680. “Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce.” *Id.* The Court then addressed the plaintiff’s remaining allegation of parallel behavior, which was “well-pleaded” and “nonconclusory,” to determine whether it passed muster under governing law. *Id.* It did not. “Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs’ complaint must be dismissed.” *Id.*

As the Supreme Court instructed in *Iqbal*, “Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” 556 U.S. at 678-79. Applicant is armed with nothing more than conclusions here. The Board should dismiss its abandonment counterclaims with prejudice.

D. Applicant’s Estoppel Defense Is Still Completely Unsupported.

Finally, Applicant has not offered any support for its estoppel defense—which reads, in its entirety, “Opposer’s claims are barred by estoppel”¹⁰—save the inscrutable observation that “estoppel arises in several ways, that are already of notice” (they are not). Opp. at 12, 18 TTABVUE 13. Applicant has “provided no . . . facts upon which [its estoppel defense] might plausibly be based.” *See Lodestar Anstalt v. Bacardi & Co.*, No. 91216163, 2017 WL 513974, at *3 (T.T.A.B. Feb. 2, 2017). That defense should be stricken from the Amended Answer.

III. CONCLUSION

For the foregoing reasons and those stated in its Motion, Snap therefore respectfully asks the Board to dismiss Applicant’s counterclaims with prejudice and strike Applicant’s affirmative defense from Applicant’s Amended Answer.

This 29 day of March, 2022.

Respectfully submitted,

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¹⁰ *See* Amended Answer at 3, 13 TTABVUE 4.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing SNAP INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS APPLICANT'S AMENDED COUNTERCLAIMS FOR CANCELLATION AND TO STRIKE APPLICANT'S AFFIRMATIVE DEFENSE has been served on Respondent's counsel, Jacqueline M. Lesser, Baker & Hostetler LLP, 2929 Arch Street, Cira Centre, 12th Floor, Philadelphia, Pennsylvania 19104-2891, by electronic mail to the following email addresses:

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This 29th day of March, 2022.

/ Louie W. Crumbley /
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