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

Proceeding	92044880
Party	Defendant Jarrow Formulas, Inc. Jarrow Formulas, Inc. 1824 South Robertson Blvd Los Angeles, CA 90035
Correspondence Address	Jarrow Formulas, Inc. 1824 South Robertson Blvd Los Angeles, CA 90035
Submission	Registrant's Motion and Memorandum in Support to Dismiss Pursuant to F.R.C.P. 9(b)
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Date	10/11/2005
Attachments	JointMotionMemo.pdf (9 pages)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SPECIALTY NUTRITION PRODUCTS, LLC,	)	
	)	
Petitioner,	)	
	)	CANCELLATION NO. 92/044,880
v.	)	
	)	Registration No. 2,735,038
JARROW FORMULAS, INC.	)	
	)	
Registrant.	)	OCTOBER 11, 2005

REGISTRANT'S MOTION TO DISMISS PURSUANT TO F.R.C.P. 9(b)

Pursuant to Federal Rule of Civil Procedure 9(b), Registrant Jarrow Formulas, Inc. ("JFI") respectfully moves the Board to dismiss the claim of fraud brought by Petitioner Specialty Nutrition Produces, LLC ("Specialty Nutrition") in the above-captioned Petition for Cancellation. As explained fully in the attached memorandum of law, Specialty Nutrition's claim that Registration No. 2,735,038 should be canceled because JFI committed fraud on the Patent and Trademark Office fails to adequately plead the elements of fraud with particularity and should therefore be dismissed for at least this reason.

WHEREFORE, Registrant Jarrow Formulas, Inc. respectfully requests that that the Board dismiss ground number four in Specialty Nutrition Products, LLC's Petition to Cancel Registration No. 2,735,038 filed on August 30, 2005 [Dkt. #1].

Respectfully submitted,

Date: October 11, 2005

By: /abs/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REGISTRANT'S MOTION TO DISMISS PURSUANT TO F.R.C.P. 9(b) was sent via first-class mail, postage prepaid, on this 11th day of October, 2005, to:

Matthew H. Swyers, Esq.
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/abs/
ALEXANDRA B. STEVENS

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SPECIALTY NUTRITION PRODUCTS, LLC,	)	
	)	
Petitioner,	)	
	)	CANCELLATION NO. 92/044,880
v.	)	
	)	Registration No. 2,735,038
JARROW FORMULAS, INC.	)	
	)	
Registrant.	)	OCTOBER 11, 2005

REGISTRANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

Pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, Registrant Jarrow Formulas, Inc. ("JFI") hereby submits this Memorandum of Law in support of its Motion to Dismiss ("Motion") the fourth grounds for cancellation brought by Petitioner Specialty Nutrition Products, LLC ("Specialty Nutrition") in its Petition to Cancel, filed on August 30, 2005 [Dkt. # 1]. JFI brings this Motion as a result of Specialty Nutrition's failure to plead fraud with particularity as required by Rule 9(b).

I. Facts.

JFI filed an intent to use application for the trademark JOINT SUSTAIN ("Mark") on July 2, 1999 and the Mark registered on July 8, 2003 (Reg. No. 2,735,038). On August 30, 2005, Specialty Nutrition filed a Petition to Cancel Registration No. 2,735,038 and

alleged four grounds in support of its Petition: (1) the mark JOINT SUSTAIN is allegedly merely descriptive and has not acquired secondary meaning; (2) the mark JOINT SUSTAIN fails to function as a trademark or source identifier of JFI's goods; (3) the mark JOINT SUSTAIN was abandoned; and (4) JFI utilized fraud in the procurement of the registration of the mark JOINT SUSTAIN.[1] See, Petition to Cancel, pgs. 1-2, ¶ ¶1 - 4. As JFI has filed an Answer herewith in response to the first three grounds of Specialty Nutrition's Petition to Cancel, this Motion is concerned only with Specialty Nutrition's fourth ground of fraud. As set forth below, the fraud count should be dismissed for failure to meet the requirements set forth in Rule 9(b) of the Federal Rules of Civil Procedure.

II. Argument.

> Federal Rule of Civil Procedure 9(b) states as follows:
>
> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

As with Federal Court proceedings, the party alleging fraud in an administrative proceeding must allege fraud with particularity pursuant to Rule 9(b). "[A]llegations of fraud phrased in legal conclusions are insufficient since under F.R.C.P. 9(b), the pleader must state the time, place and content of the false representation, the fact misrepresented and what was obtained as a

[1] Specialty Nutrition's Petition to Cancel alleges four grounds of relief, and 17 factual allegations. None of the factual allegations tie with a specific ground of relief so JFI has no choice but to guess as to which factual allegations support which ground of relief. Further, Specialty Nutrition does not plead separate claims or counts in its Petition, so JFI will refer to the grounds of relief set forth therein interchangeably as grounds of relief and claims of relief.

consequence." J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition, § 31.84 (4th ed. 2005) (citing W.R. Grace & Co. v. Arizona Feeds, 195 U.S.P.Q. 670 (Comm'r Pat. 1977))(emphasis added). McCarthy further notes that the Court of Customs and Patent Appeals stated that Rule 9 "requires that the pleading contain an explicit rather than a mere implied expression of the factual circumstances alleged to constitute fraud." Id. (citing King Automotive, Inc. v. Speedy Muffler King, Inc., 212 U.S.P.Q. 801 (C.C.P.A. 1981)). These holdings mirror the pleading requirements for fraud set out by the Federal Courts. See, Posner v. Coopers & Lybrand, 92 F.R.D. 765, 769 (S.D.N.Y. 1981), *aff'd,* 697 F.2d 296 (2d Cir. 1982), and Beverly Hills Design Studio Inc. v. Morris, 13 U.S.P.Q.2d 1889, 1892 (S.D.N.Y. 1989).

In its Petition to Cancel, Specialty Nutrition makes the following fraud claim: "Registrant utilized fraud in the procurement of registration for the terms JOINT SUSTAIN by informing the USPTO that the mark was in use as early as September 5, 2001 when the Registrant knew that such use had yet to occur." See, Petition to Cancel, pg. 2, ¶ 4. As facts backing up its fraud claim, Specialty Nutrition alleges "Based upon information and belief, the Registrant had not commenced use of the terms JOINT SUSTAIN as of September 5, 2001" See, Petition to Cancel, pg. 3, ¶ 12.

Specialty Nutrition's blanket allegation that JFI committed fraud on the Patent and Trademark Office ("PTO") by alleging that JFI did not commence use of the mark on the date stated does not satisfy the stringent requirements of Rule 9(b). Specialty Nutrition provides no specific facts supporting its claim that JFI committed fraud, other than its accusation that

based on "information and belief," JFI allegedly did not commence use of the JOINT SUSTAIN mark on the date stated. See, Beverly Hills Design Studio, 13 U.S.P.Q.2d at 1892 (noting Second Circuit precedent that as a general rule, "pleadings alleging fraud cannot be based upon information and belief").

In fact, Specialty Nutrition's Petition to Cancel does not include any allegations that demonstrate that JFI made a misrepresentation to the PTO, nor does it allege what it was that was obtained as a consequence of JFI's alleged fraud as required when pleading a claim for fraud. Even if JFI was mistaken in the date of first use of the JOINT SUSTAIN mark (which it was not), such mistake would not be material to JFI obtaining the JOINT SUSTAIN registration because the specific date of first use did not have any bearing on the issuance of the registration. Rather, JFI only needed to allege and demonstrate use of the mark, which it did by submitting a specimen of use of the mark, which was specifically reviewed, approved and accepted by the PTO.

Specialty Products further alleges in its Petition to Cancel that "[b]ased upon information and belief, any use of the terms JOINT SUSTAIN by the Registrant have been descriptive in nature without having acquired secondary meaning, and as such, fail to function as a trademark or source identifier of the Registrant's goods" and "[b]ased upon information and belief, Registrant has also abandoned use of the terms JOINT SUSTAIN to describe its goods." See, Petition to Cancel, pg. 3, ¶¶ 13, 14. As discussed in footnote 1 on page 2 herein, it is not clear whether or not Specialty Products intended that these factual allegations support its fraud

claim, but assuming that was Specialty Products' intent, neither of these allegations properly support a fraud claim pursuant to Rule 9(b) in that they do not identify any specific facts misrepresented to the PTO, nor the consequences obtained as a result of any such misidentified factual misrepresentations.

III. Conclusion.

For the reasons set forth above, Registrant Jarrow Formulas, Inc. respectfully requests that that the Board dismiss the fraud claim, ground number four, in the Petition to Cancel Registration No. 2,735,038 filed by Specialty Nutrition Products on August 30, 2005.

Respectfully submitted,

Date: October 11, 2005

By: /abs/

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