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

Proceeding	92060780
Party	Defendant Fuel Aspen Snowmass, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

JONES SODA CO., Petitioner, v. FUEL ASPEN SNOWMASS, INC., Respondent.	Cancellation No.: 92060780 Mark: STRIPPED Reg. No.: 4,251,324

MOTION FOR JUDGMENT ON THE PLEADINGS

Fuel Aspen Snowmass, Inc. ("Respondent"), by and through its attorneys, hereby moves, pursuant to Federal Rule of Civil Procedure 12(c) and 37 C.F.R. § 2.127, for entry of judgment on the pleadings against Jones Soda Inc. ("Petitioner"). The basis of Petitioner's Motion for Judgment on the Pleadings (the "Motion") is that the Petition for Cancellation (the "Petition") fails to state a claim on which relief can be granted because Petitioner failed to plead with particularity facts sufficient to support its fraud claims.

I. Introduction and Factual Background

Petitioner seeks cancellation of Respondent's registration of the trademark STRIPPED, Reg. No. 4,251,324 (the "Registered Mark") on the assertion that Respondent has committed fraud on the U.S. Patent & Trademark Office ("USPTO") in the procurement of the registration.[1] Petitioner's fraud claim is based on the following factual allegations asserted in the Petition:

> Numbered Paragraph 1: "Petitioner has good reason to believe that Respondent made various false representations in its Statement of

[1] The electronically generated cover sheet to the Petition confirms that the ground for cancellation is identified as "Other" and described as "Respondent made false representations in its Statement of Use relating to bona fide use in commerce."

> Use, specifically relating to bona fide use in commerce and that, contrary to the Respondent's representations, at the time that the Respondent filed its Statement of Use the Registered Mark was not being used in interstate commerce."
>
> Numbered Paragraph 9: "On information and belief, Petitioner alleges that Respondent is not and has never used the Registered Mark in bona fide interstate commerce. On information and belief, Petitioner further alleges that Respondent was not using the mark STRIPPED in interstate commerce at the time of the application or registration of the mark."

At the outset, it is important to note that Petitioner only filed the Petition after Petitioner received an office action to Petitioner's application to register JONES STRIPPED, Application Serial No. 86/073,696, in which an examining attorney determined that there is a likelihood of confusion between Petitioner's JONES STRIPPED mark and Respondent's prior-registered STRIPPED mark. It thus appears that Petitioner is merely attempting to rid the USPTO register of an obstacle (the Registered Mark) in order to obtain registration for JONES STRIPPED.

Because the Petition fails to plead the elements of fraud with the requisite particularity sufficient to cancel the Registered Mark, the Petition should be dismissed in its entirety and judgment should be entered in favor of Respondent.

II. Argument

A. Legal Standard

"A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board will take judicial notice." Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 504.02. Similar to a Federal Rule of Civil Procedure 12(b)(6) motion, a motion for judgment on the pleadings should be granted when a petitioner "has failed to allege any facts which would support a cause of action under the statute." *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 U.S.P.Q. 2d 1203,

1205 (T.T.A.B. 1997). As the Supreme Court held in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 – 50 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." A claim has facial plausibility when a plaintiff (or petitioner) pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *See Twombly*, 550 U.S. at 556, 127 S.Ct. at 1955. A plaintiff must allege "enough factual matter . . . to suggest that [a claim is plausible]" and "raise a right to relief above the speculative level." *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346 (Fed. Cir. 2010).

Fraud in procuring a trademark registration occurs when an applicant in a declaration of use makes false, material representations of fact in connection with an application to register. *See Torres v. Cantine Torresella S.r.l.*, 1 U.S.P.Q.2d 1483 (Fed. Cir. 1986); *Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 77 U.S.P.Q. 2d 1917 (T.T.A.B. 2006); *Medinol Ltd. v. Neuro Vasx Inc.*, 67 U.S.P.Q. 2d 1205 (T.T.A.B. 2003). In addition, under Trademark Rule 2.116(a), the sufficiency of a fraud claim is governed by Fed. R. Civ. P. 9(b) ("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."). Thus, a well-pleaded fraud claim must (1) set forth the factual allegations supporting such fraud claim with particularity, and (2) include an allegation that Respondent knowingly made inaccurate or misleading statements to the USPTO in the procurement of the registration of the Registered Mark. *See generally, King Automotive, Inc. v. Speedy Muffler King, Inc.*, 68 F.2d 108, 212 U.S.P.Q. 801, 803 (C.C.P.A. 1981); *In re Bose Corp.*, 580 F.3d 1240, 91 U.S.P.Q. 2d 1938 (Fed. Cir. 2009).

B. Petitioner's Fraud Claim is Deficient

1. Petitioner Fails to Allege Facts With Particularity

The Petition fails to set forth with particularity Petitioner's fraud claim. Instead, Petitioner merely asserts that it has "good reason to believe that Respondent made various false representations in its Statement of Use" (Paragraph 1 of the Petition) and that "[o]n information and belief, Petitioner alleges that Respondent is not and has never used the Registered Mark in bona fide interstate commerce" (Paragraph 9 of the Petition), and finally, that "[o]n information and belief, ... Respondent was not using the mark STRIPPED in interstate commerce at the time of the application or registration of the mark" (Paragraph 9 of the Petition).

To be entitled to plead fraud on information and belief, the allegations must be "'regarding matters peculiarly within the opposing party's knowledge,'" and "'accompanied by a statement of the facts on which the belief was founded.'" *Iowa Health Sys.*, 177 F. Supp. 2d at 916 (internal citations omitted). Moreover, "Rule 9(b) requires that the pleadings contain explicit rather than implied expression of the circumstances constituting fraud." *King Auto., Inc.*, 212 U.S.P.Q. at 803 ("Rule 9(b) requires that the pleadings contain explicit rather than implied expressions of the circumstances constituting fraud"). A party pleading fraud "cannot simply make conclusory allegations" that a party's conduct was fraudulent or deceptive. *Iowa Health Sys. v. Trinity Health Corp.*, 177 F. Supp. 2d 897, 914 (N.D. Iowa 2001).

Here, Petitioner has not alleged any facts upon which it bases its conclusory "on information and belief" allegations that Respondent made false representations or that it was not using the mark STRIPPED in interstate commerce at the time of the application or registration of the mark. The Board has explained that allegations of false statements based solely upon information and belief fail to meet the pleading with particularity requirements under Fed. R.

Civ. P. 9(b) if they are unsupported by any statement of facts providing the information upon which a petitioner relies or the belief upon which the allegation is founded. *See Media Online Inc. v. el Clasificado Inc.*, 88 U.S.P.Q. 2d 1285, 1287 (T.T.A.B. 2008) (finding a proposed amended pleading insufficient under Fed. R. Civ. P. 9(b) because the false statements that purportedly induced the Trademark Office to allow registration were not set forth with particularity); *Exergen Corp. v. Wal-Mart Stores Inc.*, 91 U.S.P.Q. 2d 1656, 1670 (Fed. Cir. 2009) (pleadings of fraud made "on information and belief" when there is no allegation of "specific facts upon which the belief is reasonably based" are insufficient). Federal Rule 9 requires pleading in detail, meaning "the who, what, when, where and how of the alleged fraud." *Id.* at 1667 (internal quotations and citations omitted).

Because Petitioner's fraud claims are merely based upon information and belief with no supporting statement of facts to support such belief, judgment should be entered in favor of Respondent.

2. Petitioner Fails to Allege Registrant's Intent to Commit Fraud

Petitioner's allegations also fail to allege any facts regarding Respondent's scienter. Under *In re Bose Corp.*, 580 F.3d 1240, 91 U.S.P.Q. 2d 1938 (Fed. Cir. 2009), a pleading of fraud on the USPTO must include an allegation of intent to deceive the USPTO. *See also, Asian and Western Classics B.V. v. Selkow*, 92 U.S.P.Q. 2d 1478, 1479 (T.T.A.B. 2009) ("under *Bose*, intent is a specific element of a fraud claim . . .").

Fraud in procuring a trademark registration "occurs when an applicant *knowingly* makes false, material representations of fact in connection with an application." *L.D. Kichler Co. v. Davoil, Inc.*, 192 F.3d 1349, 1351, 52 U.S.P.Q. 2d 1307, 1309 (Fed. Cir. 1999). Thus, "[a] pleading of fraud on the USPTO must also include an allegation of intent." *Id.* Under Fed. R.

Civ. P. 9(b), "the pleadings must allege sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind." *Asian and Western Classics B.V.*, 92 U.S.P.Q. at 1479 (internal citation omitted). "Pleadings of fraud which rest solely on allegations that the trademark applicant or registrant made material representations of fact in connection with its application or registration which it 'knew or should have known' to be false or misleading are an insufficient pleading of fraud because it implies mere negligence and negligence is not sufficient to infer fraud or dishonesty." *Id.* (citing *In re Bose*, 91 U.S.P.Q.2d at 1940, additional citation omitted).

Petitioner has not asserted any facts regarding Respondent's state of mind. "[I]n order to state a claim upon which relief can be granted on the ground of fraud, it must be asserted that the false statements complained of were made willfully in bad faith with the intent to obtain that to which the party making the statements would not otherwise have been entitled." *Crown Wallcovering Corp. v. The Wall Paper Mfrs. Ltd.*, 188 U.S.P.Q. 141, 144 (T.T.A.B. 1975). The Petition is simply silent as to what specific false and material statements that Respondent made to the USPTO that Respondent knew were false and that they were made to "induce the [USPTO] to issue a registration." *DaimlerChrysler Corp. and Chrysler, LLC v. American Motors Corp.*, 94 U.S.P.Q. 2d 1086 (T.T.A.B. 2010). For this reason, judgment should also be entered in favor of Respondent.[2]

[2] It is worth noting that the Board has opined that fraud must be proven "to the hilt." *M.C.I. Foods, Inc. v. Bunte*, 96 U.S.P.Q. 2d 1544 (T.T.A.B. 2010).

III. <u>Conclusion</u>

As a result of the deficiencies in the claim of fraud asserted in the Petition for Cancellation, Respondent respectfully requests that the Board enter judgment in favor of Respondent.

August 3, 2015

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT, FUEL ASPEN SNOWMASS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Judgment on the Pleadings has been served on August 3, 2015 to the following counsel for the Petitioner by U.S. First Class Certified Mail, postage prepaid:

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