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

Proceeding	92061330
Party	Defendant Basic Sports Apparel, Inc.
Correspondence Address	BASIC SPORTS APPAREL INC 301 WILLIAMS STREET EL PASO, TX 79901 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
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Date	07/01/2015
Attachments	Respondent, Basic Sports Apparel, Inc. Motion to Dismiss.pdf(23120 bytes)

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

SPIRAL DIRECT, INC. and
SPIRAL DIRECT, LTD.,

Petitioners,

v. **Proceeding No.: 92061330**

BASIC SPORTS APPAREL, INC.

Respondent.
_____/

MOTION TO DISMISS

BASIC SPORTS APPAREL, INC., through its undersigned attorney, moves to dismiss each and every claim set forth in the Petition in the above captioned proceeding pursuant to TBMP §503 and Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(6) for failure to state a claim.

BRIEF SUMMARY

Plaintiff's Petition for Cancellation seeks the cancellation of Respondent's registration of the Mark "Spiral", Registration No. 2218515 as "invalid" on the ground of abandonment and on the grounds of fraud on this office.

A. Motion to Dismiss Standard:

When reviewing a motion to dismiss, a court must accept all factual allegations as true, and view the facts in a light most favorable to the Plaintiff. Erickson v. Pardus, 551 U.S. 89, 93-94, 128 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). Unlike factual allegations, conclusions in a pleading "are not entitled to the assumption of truth" and "must be supported by factual

allegations." Ashcroft v. Iqbal. 556 U.S. 662, 679 (2009). "[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." Davila v. Delta Air Lines, Inc., 326 F.3d 1183, 1185 (11th Cir. 2003). The prior standard that a complaint should not be dismissed for failure to state a claim unless it appeared beyond doubt that plaintiff could prove no set of facts that would entitle him to relief has been "retired" in favor of a somewhat heightened pleading standard requiring factual allegations that make the plaintiff's claim "plausible". Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553 (2007); Lewis v. Seneff, 654 F.Supp.2d 1349 (M.D.Fla. 2009) (Plaintiff's pleading obligation requires more than labels and conclusions or a formulaic recitation of the elements of the cause of action).

A. Petitioners Fail To Show Fraud With Sufficient Particularity:

Petitioners allege "[o]n information and belief" that Respondent only sells a "very limited quantity of a very limited number of items listed in the BSA Goods under the BSA Mark." See Petition, ¶12. Petitioners thereafter follow that with additional "on information and belief" allegations as follows:

a. That Respondent was not using the "Spiral" mark on all of the Goods listed on its September 17, 1997 Application as of its filing date (Petition, ¶14);
b. That Respondent was not using the "Spiral" mark on all of the Goods listed on its January 19, 2005 Section 8 Declaration as of its filing date (Petition, ¶18);
c. That Respondent had not made "continuous use" of the "Spiral" mark on all of the Goods listed on its June 27, 2005 Section 15 Declaration as of its filing date (Petition, ¶22;

d. That Respondent had not made "continuous use" of the "Spiral" mark on all of the Goods listed on its December 18, 2008 Combined Declaration of Use and Application for Renewal under Sections 8 and 9 as of its filing date (Petition ¶26).

Petitioners fail to allege any facts, or any factual basis for their "information and belief" allegations, nor did Petitioners specify which Goods, if any, its information indicated were not being used with the Marks at any time during the eighteen (18) period from the filing of the application to the filing of the Combined Declaration to today's date. Petitioners fail to allege any facts to support their belief that even to the extent that Respondent did use the "Spiral" mark, that such use was merely a "token" use.

Petitioners then go on to argue that Respondent's various filings were therefore made "fraudulently" because the representations of use and continuous use made in those filings were knowingly false.

Federal Rule of Civil Procedure ("FRCP") Rule 9(b) requires that the circumstances of fraud must be alleged with particularity, which applies to claims of fraud against the Patent and Trademark Office. San Juan Products, Inc. v. San Juan Pools of Kansas, Inc., 849 F.2d 468 (10th Cir. 1988). Petitioners simply fail to put Defendant upon notice as to what the alleged fraud consists of, or why they have such wide-ranging beliefs. In any case, even if Petitioners were able to allege facts showing that Respondent did not use the mark in commerce with respect to one or more of the Goods listed in the application, this would not be a sufficient basis for cancellation of the registration without also an affirmative showing of the "fraud" beyond mere non-use on some goods. See, Grand Canyon West Ranch, LLC v. Hualapai Tribe, 78 USPQ2d 1696 (TTAB 2006) (as long as a mark was used on some of the identified goods/services as of

the filing in a use-based application, in the absence of fraud, the application is not void in its entirety).

B. Petitioners Fail To Allege Any Facts In Support Of Its Abandonment Theory:

Petitioners further allege that Respondent has "abandoned" the "Spiral" mark, both because of "non-use" and because of a "loss of significance". Petition ¶¶ 31 and 32. Again, Petitioners do not allege any facts to support these beliefs, nor do Petitioners allege when this alleged abandonment occurred, or whether it was with respect to one, many, or all of the listed Goods in Respondent's trademark registration.

Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do", and only complaints that plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-556 (2007). In Twombly, the Supreme Court attacked the oft-used rubric that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. at 563 (noting that this famous phrase has "earned its retirement").

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations …, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do …. Factual allegations must be enough to raise a right to relief above the speculative level …, on the assumption that all the allegations in the complaint are true (even if doubtful in fact) …

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (U.S., 2007) (finding that the factual allegations must make Plaintiff's belief "plausible" not merely possible. "The Twombly

plausibility standard … does not prevent a plaintiff from pleading facts alleged upon information and belief where the belief is based on factual information that makes an inference of culpability plausible." Associated Indus. Co., Inc. v. Advanced Mgmt. Services, Inc. 2013 WL 1176252 (S.D.Fla. 2013) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

Here, Plaintiffs have not pled any facts to show the grounds for their belief that Defendant abandoned the use of its "Spiral" trademark or that the mark has lost significance, and fails to allege when during the 18 year period from the date of first use to today's date such "abandonment" occurred, or that such abandonment was with the intent not to resume use.

CONCLUSION

By reason of the above, it is respectfully requested that this Court grant dismissal of the Petition, and such other and further relief as this Board deems just and proper.

Dated this 1st day of July, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on **July 1, 2015**, a true and correct copy of the above and foregoing was filed via CM/EMF which will provide service to counsel for Plaintiff.

/s/ Edmund J. Gegan
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