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

Proceeding	92065543
Party	Plaintiff Quinn Foods LLC
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as to priority and likelihood of confusion, these allegations should be deemed admitted.

4. Because Registrant has admitted Petitioner's priority and the likelihood of confusion between the parties' marks, the Board should find in Petitioner's favor and the QUIN Registrations should be cancelled.
5. Registrant brought the Counterclaim requesting that the Board (i) deny registration of Petitioner's QUINN Application Serial No. 86432331 and QUINN SNACKS Application Serial No. 87295315 (the "Applications"); (ii) cancel Petitioner's Registration No. 5028705 for the mark QUINN (the "QUINN Registration"); and (iii) compel Petitioner "to provide accurate information regarding efforts to obtain registration or cancellation."
6. Registrant brought the Counterclaim to cancel the QUINN Registration on the grounds that (i) the parties' marks are likely to be confused, and (ii) Petitioner fraudulently procured the QUINN Registration by misrepresenting the date of first use in Application Serial No. 86979759, which matured into the Registration.
7. Registrant further alleges that Petitioner's use of the QUINN Marks is (i) likely to cause confusion; (ii) infringes Registrant's registered QUIN trademarks; (iii) constitutes unfair competition; and (iv) has caused and will cause Registrant "substantial economic and reputational harm."
8. Registrant has admitted that Petitioner has priority of use of its QUINN Marks and that there is a likelihood of confusion between Petitioner's QUINN Marks and Registrant's QUIN Marks. Therefore, Petitioner cannot succeed in its claim to cancel the QUINN Registration.

9. Registrant has failed to allege with particularity the elements required to establish fraud on the USPTO sufficient to warrant cancellation of the QUINN Registration.
10. Because Registrant failed to allege the elements of fraud with sufficient particularity, Registrant failed to state a claim upon which the relief sought can be granted.
11. A motion to compel is wholly inappropriate, as the pleadings are not even closed and the parties have not yet entered the discovery period.
12. Registrant cannot move the Board to deny registration of the Applications, as Registrant's Counterclaim is the inappropriate to vehicle through which to do so or otherwise challenge the Applications.
13. Registrant has no recourse for any alleged infringement by Petitioner, as such claims are beyond the Board's jurisdiction.

MEMORANDUM OF LAW

I. INTRODUCTION

The issues for the Board's consideration in this Motion are clear and ripe for judgment on the pleadings. Since at least as early as 2011, Petitioner has continuously used and promoted its QUINN and QUINN POPCORN trademarks (the "QUINN Marks"). Petitioner owns U.S. federal trademark registrations for its QUINN Marks, namely, QUINN Registration No. 5028705 and QUINN POPCORN Registration No. 4141361 (the "QUINN Registrations"). The application that matured into the QUINN POPCORN registration was filed on April 15, 2011, and the registration claims a date of first use in commerce of September 1, 2011. The application that matured into the QUINN registration was filed on October 23, 2014, and the registration claims a date of first use in commerce of September 30, 2011. On March 6, 2017,

Petitioner filed the instant Petition for Cancellation, seeking cancellation of Registrant's registrations for the mark QUIN, subject of U.S. Registration Nos. 4482579 and 4869537. The Petition is grounded in likelihood of confusion, based on Petitioner's priority of use and its belief that consumer confusion will occur as a result of the continued registration of Registrant's QUIN marks.

Registrant responded with an Answer that did not that contain any specific admissions or denials of the allegations set forth in the Petition. As such, Registrant admitted all allegations contained in the Petition, including Petitioner's priority of use and the likelihood of confusion between the parties' marks. Registrant also filed a nearly incomprehensible Counterclaim flush with irrelevant allegations and requesting unavailable relief. Relevant to the Petition, Registrant petitions the Board to cancel Petitioner's QUINN Registration No. 5028705 on the grounds that Petitioner fraudulently procured the Registration by misrepresenting the date of first use in Application Serial No. 86979759, which matured into the QUINN Registration, and that there is a likelihood of confusion between the parties' marks.

As discussed in detail below, Registrant admits Petitioner's priority of use and likelihood of confusion and, therefore, Petitioner is entitled to judgment as a matter of law on these issues. Moreover, Registrant fails to allege any of the requisite elements of fraud sufficiently and, therefore, fails to state any claim upon which relief can be granted. The remaining inscrutable claims are irrelevant, improper, or outside of the Board's jurisdiction. Therefore, Petitioner should prevail in both its Petition and Registrant's Counterclaim.

II. THE LEGAL STANDARD

In a cancellation proceeding, the Federal Rules of Civil Procedure apply. 37 C.F.R. § 2.116(a); *see* TBMP § 101.02. A motion for judgment on the pleadings "is a test solely of the undisputed facts appearing in all the pleadings such that the moving party is entitled to

judgment as a matter of law.” *Kraft Group LLC v. Harpole*, 90 U.S.P.Q.2d 1837, 1840 (T.T.A.B. 2009). As such, to prevail on a motion for judgment on the pleadings, the moving party must establish that no material issue of fact remains to be resolved and that, considering solely the pleadings, it is entitled to judgment as a matter of law. *Media Online Inc. v. El Clasificado Inc.*, 88 U.S.P.Q.2d 1285, 1288 (T.T.A.B. 2008). All well-pleaded factual allegations of the non-moving party are assumed to be true and the inferences drawn therefrom are to be viewed in a light most favorable to the non-moving party. *Kraft Group LLC*, 90 U.S.P.Q.2d at 1840 (citing *Baroid Drilling Fluids Inc. v. Sun Drilling Prods.*, 24 U.S.P.Q.2d 1048, 1049 (T.T.A.B. 1992)). Failure to state a claim upon which relief can be granted may be raised in a motion for judgment on the pleadings. Fed. R. Civ. P. 12(h)(2)(B); TBMP § 503.01.

An allegation in a petition for cancellation is admitted if the registrant does not deny the allegation in its answer. *See* Fed. R. Civ. P. 8(b)(6) (“An allegation . . . is admitted if a responsive pleading is required and the allegation is not denied.”). Where a registrant in its answer does not specifically or generally deny a petitioner’s allegations in the petition for cancellation, those allegations are deemed admitted. *See id.*; *Weyerhaeuser Co. v. SmartBuilt Homes, Inc.*, Opp. No. 91168932, 14 TTABVUE 5 (T.T.A.B. Aug. 9, 2004) (“Because applicant in its answer did not specifically or even generally deny opposer’s averments on these matters, the averments are deemed admitted.”) (not precedential).

Here, even when the facts are viewed in a light most favorable to Registrant, it is clear that there are no genuine issues of material fact that Petitioner has priority and that a likelihood of confusion exists between the parties’ marks. Based on the undisputed facts, Registrant is entitled to judgment as a matter of law. Moreover, Registrant fails to state a claim upon which relief can be granted with respect to each of the remaining claims in its Counterclaim.

III. JUDGMENT ON THE PLEADINGS IS PROPER

A. The Undisputed Facts

Since at least as early as 2011, Petitioner has continuously used and promoted its QUINN and QUINN POPCORN trademarks for popcorn (the “QUINN Marks”). (1 TTABVUE ¶ 2.) Petitioner owns U.S. federal trademark registrations for its QUINN Marks, namely, QUINN Registration No. 5028705 and QUINN POPCORN Registration No. 4141361 for popcorn (the “QUINN Registrations”). (1 TTABVUE ¶ 5; 1 TTABVUE Ex. A.) The QUINN Registrations are valid and subsisting. (1 TTABVUE ¶ 5.) The application that matured into the QUINN Registration was filed on October 23, 2014, and the registration claims a date of first use in commerce of September 30, 2011. (1 TTABVUE ¶ 5; 1 TTABVUE Ex. A; 5 TTABVUE Ex. E.) The application that matured into the QUINN POPCORN Registration was filed on April 15, 2011, and the registration claims a date of first use in commerce of September 1, 2011. (1 TTABVUE ¶ 5; 1 TTABVUE Ex. A; 5 TTABVUE Ex. E.)

Registrant has used the QUIN mark since July 1, 2013. (5 TTABVUE 8 second ¶ 31¹; 6 TTABVUE 4 second ¶ 31.) Registrant owns U.S. federal trademark registrations for the QUIN mark, specifically, QUIN Registration Nos. 4482579 for “retail candy store” and Registration No. 4869537 for “bakery goods and desert items” (the “QUIN Registrations”). (1 TTABVUE ¶ 6; 5 TTABVUE ¶ 1.) The QUIN Registrations claim a date of first use in commerce of July 1, 2013. (1 TTABVUE ¶ 6.)

Registrant’s goods and services offered under its QUIN mark are closely related to the goods and services Petitioner offers under its QUINN Marks. (1 TTABVUE ¶ 11; 5

¹ Petitioner notes that Registrant’s Counterclaim contains several misnumbered paragraphs. Petitioner has formatted its citations to most effectively refer the Board to the appropriate paragraphs cited.

TTABVUE 8 first ¶ 31.) Moreover, the parties offer their respective QUIN and QUINN goods and services to the same class of customers. (1 TTABVUE ¶ 12; 5 TTABVUE ¶ 24.)

Petitioner has priority of use and registration of the QUINN Marks. (1 TTABVUE ¶¶ 7–10; 5 TTABVUE 8 second ¶ 31; 5 TTABVUE Ex. E.) There exists a clear likelihood of confusion between Petitioner’s QUINN Marks and Registrant’s QUIN mark. (1 TTABVUE ¶¶ 13–14; 5 TTABVUE 8 first ¶ 31.)

On March 6, 2017, Petitioner filed the instant Petition for Cancellation, seeking cancellation of the QUIN Registrations based on Petitioner’s priority of use of the QUINN Marks and the likelihood of confusion between the parties’ marks. On April 19, 2017, Registrant — through its legal counsel — filed an answer and counterclaim, captioned “Registrant’s Opposition to Petitioner’s Motion to Cancel, Petition to Reject Pending Registration of ‘Quinn Snacks’, Defenses and Counter Petition for Cancellation of Quinn Mark, and Allegation of Fraud.” (5 TTABVUE.) In the answer, Registrant did not specifically or even generally deny any of the allegations set forth in the Petition. Therefore, Petitioner’s allegations in the Petition should be deemed admitted. Registrant counterclaimed for, among other things, the cancellation of Petitioner’s QUINN Registration No. 5028705. However, Registrant did not allege that it has priority of use. (5 TTABVUE ¶¶ 29–31.) Rather, Registrant concedes Petitioner’s priority. (5 TTABVUE 8 second ¶ 31; 5 TTABVUE Ex. E.)

The undisputed facts outlined above show that Petitioner is entitled to judgment on the pleadings.

B. Petitioner is Entitled to Judgment as a Matter of Law as to Priority and Likelihood of Confusion, and the QUIN Registrations Should Be Cancelled

Here the undisputed facts show that Petitioner has priority of use of its QUINN Marks and that there is a likelihood of confusion between Petitioner’s QUINN Marks and Registrant’s QUIN marks. Petitioner has used its QUINN Marks since at least as early as 2011,

and the QUINN Registrations claim respective dates of first use in commerce of September 2011. Petitioner avers and Registrant admits in its Counterclaim that Petitioner has used its QUINN Marks since 2011. (Moreover, because Registrant does not specifically or even generally deny any of these allegations in its answer, they are deemed admitted.)

Both Petitioner and Registrant state that Registrant commenced use of its QUINN marks on July 1, 2013, well after Petitioner first used its QUINN Marks in 2011 and after the April 15, 2011 filing date of Registrant's QUINN POPCORN Registration No. 4141361. Both Petitioner and Registrant state that the parties' respective marks so closely resemble one another as to be likely to cause confusion. (Moreover, Registrant does not specifically or generally deny Petitioner's allegations of likelihood of confusion in the Petition, rendering these allegations admitted.)

Because the undisputed facts show that Petitioner has priority of use and that there is a likelihood of confusion between the parties' marks, Petitioner can clearly prevail on the issues of priority and likelihood of confusion and is therefore entitled to judgment as a matter of law on these issues. Therefore, the Board should find in Petitioner's favor, cancelling the QUINN Registrations and denying Registrant's counterclaim for cancellation of QUINN Registration No. 5028705.

C. Registrant's Remaining Counterclaims Fail to State a Claim Upon Which Relief Can Be Granted

“[A] complaint ‘must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face. In particular, the claimant must allege well-pleaded factual matter and more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” to state a claim plausible on its face. *Caymus Vineyards v. Caymus Medical, Inc.*, 107 U.S.P.Q.2d 1519, 1522 (I.T.A.B. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009) (internal citations omitted)).

1. Registrant's Fraud Claim Is Not Pled With the Requisite Particularity.

Registrant's counterclaim for cancellation of QUINN Registration No. 5028705 for popcorn based on fraud must be dismissed for failure to state a claim, as Registrant has clearly failed to allege the elements of fraud with the requisite particularity. To bring a colorable fraud claim, a counterclaim-plaintiff must allege that the petitioner "obtained its registration fraudulently by knowingly making a false, material representation of fact with the intent to deceive the United States Patent and Trademark Office." *Caymus Vineyards*, 107 U.S.P.Q.2d at 1522 (citing *In re Bose Corp.*, 580 F.3d 1240, 91 U.S.P.Q.2d 1938, 1941 (Fed. Cir. 2009)). This is not the end of the counterclaim-plaintiff's pleading obligations. He "must allege the elements of fraud with particularity in accordance with Fed. R. Civ. P. 9(b), made applicable to Board proceedings by Trademark Rule 2.116(a). Under Rule 9(b), together with Fed. R. Civ. P. 11 and USPTO Rule 11.18, 'the pleadings [must] contain explicit rather than implied expression of the circumstances constituting fraud.'" *Asian & Western Classics B.V. v. Selkom*, 92 U.S.P.Q.2d 1478, 2009 WL 3678263, *1 (T.T.A.B. 2009) (quoting *King Auto., Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 1010, 212 U.S.P.Q. 801, 803 (C.C.P.A. 1981)). In line with the heightened pleading standard mandated by Rule 9(b), the Board has held that "[p]leadings of fraud made 'on information and belief,' when there is no allegation of 'specific facts upon which the belief is reasonably based' are insufficient." *Id.* (quoting *Exergen Corp. v. Wal-Mart Stores, Inc.*, 91 U.S.P.Q.2d 1656, 1670 (Fed. Cir. 2009)).

Registrant's befuddling allegation of fraud is quoted below:

33. The earliest use we can see of baked good or pretzels appearing to be on sale by Petitioner from the Internet archiving service, www.waybackmachine.com, is March 22, 2016. The archive of March 2, 2016 shows only popcorn. (See Exhibit G).

[intervening irrelevant paragraphs deleted]

35. Based on the above, JSC has reason to believe that Quinn Foods' declaration of its first commercial use of the standalone QUINN mark was false and that the '705 QUINN registration [Registration No. 5028705] was procured by fraud.

This allegation makes no sense. Registrant's fraud claim is based on a fundamental misunderstanding of trademark law and federal trademark registration. QUINN Registration No. 5028705 is for popcorn. The specimen submitted in support of registration shows the QUINN mark in use in connection with and on popcorn. The claimed date of first use of the QUINN mark pertains to popcorn. The information and materials submitted by Petitioner are far from fraudulent.

Registrant alleges that the date of first use alleged in the registration should relate to the use of the QUINN mark in connection with "baked good or pretzels." Registrant is wrong. "Baked good and pretzels" have nothing to do with QUINN Registration No. 5028705. The QUINN registration is for popcorn. The specimen and date of first use are acceptable, and the USPTO properly viewed them as such. Petitioner is confounded as to how any reasonable person could review the record along with Registrant's allegations and believe that Registration No. 5028705 was procured through fraud.

Most important, Registrant's fraud claim is based on Petitioner's allegedly false statement of its date of first use in Petitioner's Statement of Use filed on June 17, 2016. The critical question here is whether Petitioner's QUINN mark was in use in connection with the identified goods as of the June 17, 2016 filing date of the statement of use. *See Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha*, 77 U.S.P.Q.2d 1917 (T.T.A.B. 2006). "If the mark was in current use, then the first use, even if false is not fraud." *Id.*; *see also Bio-One, Inc. v. A.L.E.G.*,

Inc., Cancellation No. 92052195, 13 TTABVUE 6 (T.T.A.B. Mar. 8, 2012) (“[A] false claim in a date of use is not material so long as the mark was in use in commerce . . . at the time the Statement of Use was filed, if the application was based on intent-to-use (Section 1(b) of the Act).”) (not precedential); *see also L. & J.G. Sticky Inc. v. Cosser*, 81 U.S.P.Q.2d 1956, 1970 n. 17 (T.T.A.B. 2007) (holding that inaccurate information regarding claimed dates of first use does not, by itself, constitute fraud); *Western Worldwide Enters. Grp. Inc. v. Qinqdao Brewery*, 17 U.S.P.Q.2d 1137, 1141 (T.T.A.B. 1990) (“The Board repeatedly has held that the fact that a party has set forth an erroneous date of first use does not constitute fraud unless, inter alia, there was no valid use of the mark until after the filing of the [Section 1(a)] application.”). Registrant does not allege, nor has it proven, that Petitioner did not make use of its mark as of the filing date of the Statement of Use on June 17, 2016. Thus, Registrant’s claim of fraud, even if Petitioner’s nearly indecipherable allegations were taken as true, does not state a ground of fraud because it fails to allege that the supposed false statement was material. Further, Registrant has failed to prove that Petitioner did not make use of its QUINN mark at the time of filing the Statement of Use.

Registrant’s misunderstanding of federal trademark prosecution and Board precedent aside, Registrant has simply failed to make a supportable fraud claim. Specifically, Registrant’s pleadings must fail because they lack the requisite particularity under Fed. R. Civ. P. 9(b). Indeed, Registrant has failed to provide any facts that could lead anyone to reasonably believe that Petitioner’s QUINN mark was not in use when it filed the Statement of Use with (or without) the intent to deceive the USPTO. Indeed, Registrant never even gives lip service to the requisite deceptive intent by alleging that Petitioner engaged in any conduct before the USPTO with the intent to deceive the USPTO into granting Registration No. 5028705.

In light of the foregoing, the Board should dismiss Petitioner's fraud claim for failure to state a claim upon which relief can be granted.

2. Opposition of Petitioner's Pending QUINN and QUINN SNACKS Applications Not Available to Registrant.

Registrant displays its ignorance of Board procedure in requesting the Board to "reject registration" of Petitioner's QUINN Application Serial No. 86432331 and QUINN SNACKS Application Serial No. 87295315. Registrant further, and more broadly, requests that the Board deny "registration from any mark confusingly similar to 'QUIN,' including but not limited to 'QUINN'." Neither of these requests is permissible. "The only type of counterclaim that may be entertained by the Board is a counterclaim for cancellation of a registration owned by an adverse party." TBMP § 313.01; *see MG Recordings Inc. v. Mattel Inc.*, 100 U.S.P.Q.2d 1868, 1873 (T.T.A.B. 2011) (finding that the scope of applicant's request, to restrict all of opposer's registrations, pending applications, and future applications, is in the nature of an injunction and not considered); *Pyttronic Indus. Inc. v. Terk Techs. Corp.*, 16 U.S.P.Q.2d 2055, 2056 n.2 (TTAB 1990) (striking as improper a counterclaim to cancel "any registration which might issue in the future from pleaded application"); *Int'l Tel. & Tel. Corp. v. Int'l Mobile Machs. Corp.*, 218 U.S.P.Q. 1024, 1026 (T.T.A.B. 1983) (holding that a counterclaim to "refuse any application filed by petitioner" was improper).

In light of the above, the Board should dismiss Registrant's counterclaim to refuse Petitioner's QUINN Application Serial No. 86432331 and QUINN SNACKS Application Serial No. 87295315, and any application consisting of or including the term QUINN Petitioner might file in the future.

3. Registrant Cannot Move to the Board to Compel Anything.

Registrant further demonstrates its ignorance of Board procedure and the Federal Rules of Civil Procedure in moving the Board to compel petitioner "to provide accurate

information regarding efforts to obtain registration [of the QUINN mark] or cancellation.” A motion to compel concerns only discovery disputes.² *See* TBMP § 523.01. The instant proceeding is not in the discovery phase, as the pleadings are not closed. Registrant’s request does not, and cannot, pertain to discovery requests (No discovery requests have been served by either party.) or a deposition (No depositions have been noticed.). Rather, Registrant is requesting information on Petitioner’s first use of the QUINN mark in connection with “baked good or pretzels.” Registrant’s “petition to compel” is effectively a written discovery request. This request does not belong in a counterclaim, or any pleading for that matter. In light of the foregoing, the Board should dismiss Registrant’s “petition to compel.”

3. Registrant’s Allegations of Infringement, Unfair Competition, and Economic Damage Are Beyond the Scope of the Board’s Jurisdiction.

Registrant claims that Petitioner’s “use of the standalone QUINN mark . . . (b) constitutes infringement of [Registrant’s] registered trademarks; (c) amounts to unfair competition; and (d) has caused and will continue to cause [Registrant] substantial economic and reputational harm.” Registrant further states that “Petitioner should not be allowed to use QUINN or any other similarly confusing mark.” “The Board is empowered to determine only the right to register.” TBMP § 102.01. As such, the Board has no jurisdiction to consider claims for trademark infringement or unfair competition, or to determine the right to use. *See Paramount Pictures Corp. v. White*, 31 U.S.P.Q.2d 1768, 1771 n.5 (T.T.A.B. 1994) (Board has no jurisdiction over claims of trademark infringement and unfair competition); *Andersen Corp. v.*

² Even if the Board reads Registrant’s “petition to compel” as a motion for a more definite statement, the Board must deny the motion. A motion for a more definite statement is appropriate only if the Petition were “so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.” TBMP § 505.01. This is not the case — there are no vague or ambiguous allegations in the Petition. Even if there were, Registrant is too late, as Registrant was required to file any motion for a more definite statement before filing its answer and counterclaim. *See* Fed. R. Civ. P. 12(e). Finally, “[a] motion for a more definite statement may not be used to obtain discovery.” TBMP § 505.01. As noted above, Registrant appears to be seeking discovery on Petitioner’s use of the QUINN mark. For these reasons, the Board should dismiss Registrant’s “petition to compel.”

Therm-O-Shield Int'l, Inc., 226 U.S.P.Q.431, 432 n.5 (T.T.A.B. 1985) (Board may not entertain any claim based on Trademark Act § 43(a)); *Elec. Water Conditioners, Inc. v. Turbomag Corp.*, 221 U.S.P.Q. 162, 163–64 (T.T.A.B. 1984) (unfair competition and Trademark Act § 43(a) claims are outside the Board’s jurisdiction); *Hershey Foods Corp. v. Cerreta*, 195 U.S.P.Q.246, 252 (T.T.A.B. 1977) (determination of whether opposer is guilty of unfair business practices is not within the province of the Board); *see also* TBMP § 102.01 (“The Board is not authorized to determine the right to use, nor may it decide broader questions of infringement or unfair competition.”). Accordingly, as these claims are beyond the scope of the Board’s jurisdiction, they should be dismissed.

WHEREFORE, Registrant requests that the Board enter judgment in Petitioner’s favor and against Registrant with respect to the Petition for Cancellation and Counterclaims based on the pleadings herein.

Respectfully submitted,

Dated: June 1, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Registrant's Motion for Judgment on the Pleadings and Memorandum of Law has been served on Registrant's correspondent of record by forwarding said copy on June 1, 2017, via email to:

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