

THIS ORDER IS NOT A
PRECEDENT OF THE
TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500
General Email: TTABInfo@uspto.gov

MW

October 9, 2018

Cancellation No. 92068213

Charles Bertini

v.

Apple Inc.

By the Board:

On March 19, 2018, Charles Bertini (“Petitioner”) filed a petition to cancel the registration for the standard character mark APPLE for a variety of education and training services in International Class 41.¹ In his amended pleading (filed May 24, 2018),² Petitioner alleges likelihood of confusion based on prior common law use of the mark APPLE JAZZ, and that Respondent has abandoned the involved mark. In addition, Petitioner asserts seven separate grounds for fraud. In lieu of an answer, Apple Inc. (“Respondent”) filed a motion to dismiss the amended petition for failure to state a claim upon which relief may be granted.

¹ Registration No. 4088195 registered on January 17, 2012 with a claim of March 1, 1981 as the date of first use anywhere and the date of first use in commerce. The underlying application for registration includes a claim of priority based on the September 28, 2007 filing date of a foreign application under Trademark Action Section 44(b), 15 U.S.C. § 1126(b).

² Petitioner filed the amended pleading in response to Respondent’s first motion (filed May 4, 2018) to dismiss the petition for cancellation.

The Board presumes the parties' familiarity with the pleadings, the history of the proceeding, and the arguments submitted in connection with the subject motion. The Board has considered the arguments submitted in connection with the motion, but does not repeat or discuss all of the arguments and submissions, and does not address irrelevant arguments. *Guess? IP Holder L.P. v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

A motion to dismiss under Rule 12(b)(6) is solely a test of the sufficiency of a complaint. *Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *NSM Research Corp. v. Microsoft Corp.*, 113 USPQ2d 1029, 1032 (TTAB 2014). To withstand a motion to dismiss for failure to state a claim upon which relief can be granted, a plaintiff need only allege sufficient factual content that, if proved, would allow the Board to conclude, or draw a reasonable inference, that the plaintiff has standing to maintain the proceeding, and a valid ground exists for opposing or cancelling the registration. *Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780 (TTAB 2012) (citing *Young v. AGB Corp.*, 152 F.2d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); TBMP § 503.02 (2016). Specifically, a complaint must allege sufficient facts which, accepted as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007)).

Accordingly, in the petition for cancellation, Petitioner must establish that (1) he has standing to maintain the proceeding, and (2) a valid ground exists for opposing the mark. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F. 2d 1024, 213 USPQ 185,

187 (CCPA 1982); *Id.* At the motion to dismiss stage, the Board does not consider the merits of Petitioner's standing or its claims but only considers whether the pleading is sufficient to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v Twombly*, 550 U.S. 544, 570 (2007); *Libertyville Saddle Shop Inc. v. E. Jeffries & Sons, Ltd.*, 22 USPQ2d 1594, 1597 (TTAB 1992).

A. Standing

The parties do not dispute Petitioner's standing to bring the proceeding. All that is required for a petitioner to plead standing to file the complaint is that it allege facts sufficient to show a "real interest" in the proceeding. *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 220 USPQ 1017, 1020 (Fed. Cir. 1984). Under the Lanham Act, standing requires only that a plaintiff believe that it is likely to be damaged by the registration. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). In this case, Petitioner alleges that his pending application has been refused registration based on a likelihood of confusion with the subject registration. Thus, Petitioner has sufficiently alleged his standing to bring the proceeding. *See Empresa Cubana del Tabaco v. Gen. Cigar Co.*, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (plaintiff's application refused based on defendant's registrations).

B. Grounds

1. First Count of Fraud

Turning to Petitioner's seven fraud claims, Petitioner's "First Set of Facts" in the amended petition alleges that Respondent committed fraud in signing the declaration

of the underlying application for the involved registration. Petitioner appears to allege that Respondent committed fraud because it “knew or could have known about Petitioner’s use of the mark APPLE JAZZ in commerce”³ and because Respondent knew about a third-party mark APPLEJAXX “because [Respondent] had filed an extension of time to oppose it at the TTAB.”⁴

In an application declaration, the declarant states that to the best of his or her “knowledge and belief” no other firm “has the right to use” the mark or a confusingly similar mark in commerce. Thus, the verification is phrased in terms of the declarant’s subjective belief and is very difficult to prove. *See* 6 Thomas J. McCarthy, McCarthy on Trademarks & Unfair Competition § 31:76 (5th ed. 2018). A claim of fraud based on a declaration in the application must include particular facts which, if proven, would establish that: (1) there was in fact another use of the same or a confusingly similar mark at the time the oath was signed; (2) the other user had legal rights superior to applicant’s; (3) applicant knew that the other user had rights in the mark superior to applicant’s, and either *believed* that a likelihood of confusion would result from applicant’s use of its mark or had no reasonable basis for believing otherwise; and that (4) applicant, in failing to disclose these facts to the Patent and Trademark Office, intended to procure a registration to which it was not entitled. *Qualcomm Inc. v. FLO Corp.*, 93 USPQ2d 1768, 1770 (TTAB 2010); *Intellimedia Sports v. Intellimedia Corp.*, 43 USPQ2d 1203, 1205-06 (TTAB 1997).

³ Amended Petition at ¶ 53, 6 TTABVUE 12.

⁴ *Id.* at ¶ 55, 6 TTABVUE 12.

Here, Petitioner's allegations in the "First Set of Facts" fail to state a legally sufficient fraud claim for several reasons. First, to the extent that Petitioner intends to plead a fraud claim based on Respondent's knowledge of Petitioner's use, the claim cannot be based on an allegation that Respondent "knew or could have known about Petitioner's use." *See In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1941 (Fed. Cir. 2009) (fraud may not be based on finding that party "knew or should have known").

With respect to Respondent's knowledge of the third-party application, Petitioner merely alleges the existence of an application and does not allege that the third party was using the APPLEJAXX mark and that Respondent knew of such confusing use. There is no duty to disclose a prior registration or application for a confusingly similar mark because these marks are available to the examining attorney; thus, there cannot be an intent to mislead. *See Maids to Order of Ohio, Inc. v. Maid-to-Order, Inc.*, 78 USPQ2d 1899, 1908 (TTAB 2006) (failure to disclose a prior registration is not fraud; no intent to mislead PTO). Further, there are no factual allegations in the petition to support the second and third elements of a claim based on the declaration, namely, that the other users had clearly established legal rights in marks *superior* to Respondent's rights and that Respondent *believed* that the other users had superior rights and *believed* that consumers would be confused by the respective uses of the marks. *See Daniel J. Quirk, Inc. v. Village Car Co.*, 120 USPQ2d 1146, 1149 (TTAB 2016) ("Fraud will not lie against an applicant who holds an honest, good faith belief

in its right to register a mark and signs an application with the statutorily prescribed ownership statement which is phrased in terms of subjective belief.”)

In view of the foregoing, Respondent’s motion to dismiss Petitioner’s first count of fraud based on the signing of the application declaration is **GRANTED**. Because it appears the Petitioner is unable to plead sufficient factual allegations to support a plausible claim of fraud based on the signing of the declaration, the claim is dismissed with prejudice.

2. Second, Third, and Fourth Counts of Fraud

Petitioner’s “Second Set of Facts,” alleges that Respondent committed fraud in the filing of the Statement of Use, specifically, that Respondent did not use the involved mark “before and on the date of SOU” on or in connection with “entertainment services, namely, production of live musical performances; entertainment services, namely, providing live musical performances online via a global computer network.”⁵ Petitioner’s “Third Set of Facts” alleges that Respondent falsely averred that “[b]efore and on the date of the SOU Registrant didn’t use the standard character mark APPLE in commerce *on or in connection with* entertainment services listed in the SOU.”⁶ And Petitioner’s “Fourth Set of Facts” alleges that the subject mark “was not in use in commerce on or in connection with all goods or services as explained [] in ¶¶ 70-72, 87-94 and [] in ¶¶ 128-131, 135.”⁷

⁵ Amended Petition at ¶ 72, 6 TTABVUE 14.

⁶ *Id.* at ¶ 89, 6 TTABVUE 15 (emphasis in original).

⁷ *Id.* at ¶ 112, 6 TTABVUE 17 (underlining in original).

Fraud in procuring or maintaining a registration may occur when an applicant for registration or a registrant in a declaration of use or renewal application knowingly makes specific false, material representations of fact in connection with an application to register or in a post-registration filing with the intent of obtaining or maintaining a registration to which it is otherwise not entitled. *See In re Bose Corp.*, 91 USPQ2d at 1942. Thus, to assert a viable claim of fraud, the plaintiff must allege with particularity, rather than by implied expression, *see* Fed. R. Civ. P. 9(b), that the defending party knowingly made a false, material representation in the procurement of, maintenance of, or renewal of a registration with the intent to deceive the U.S. Patent and Trademark Office. *Id.*

Petitioner's pleading of fraud under the second, third, and fourth set of facts fails because, in this case, Respondent's alleged failure to use the mark prior to the filing date of the statement of use is not material to the registration of the mark. A plaintiff alleging nonuse (or fraud based on nonuse) pursuant to Section 1 of the Trademark Act, 15 U.S.C. § 1051, must plead and prove that there was no use in commerce prior to the filing of the use based application *or* prior to the deadline for filing the statement of use (as extended). *See Embarcadero Tech., Inc. v. Delphix Corp.*, 117 USPQ2d 1518, 1526 (TTAB 2016) (petitioner must plead that respondent did not use its mark with the goods in the registration within the time for filing its statement of use as extended).⁸ As noted by Petitioner in paragraph 17 of the petition, Respondent

⁸ Under Trademark Rule 2.88(e), 37 C.F.R. § 2.88(e), an applicant may amend its statement of use to state dates of use which fall after the statement of use filing date but before the expiration of the deadline for filing the statement of use. *See* Trademark Rule 2.71(c)(2), 37 C.F.R. § 2.71(c)(2).

filed a request for extension of time to file the SOU in conjunction with the SOU. Thus, despite filing the SOU the same day as the extension request, the “insurance” extension allowed Respondent an additional six months (until May 11, 2012) to use the mark in commerce and file an additional statement of use. *See* TMEP § 1108.03 (Oct. 2017). Where a claim of nonuse is asserted in an *inter partes* proceeding, “the Board also will consider evidence of use which occurred after the filing of the statement of use but within the original or extended period for filing the statement of use.” *Embarcadero Tech., Inc.*, 117 USPQ2d at 1524. Consequently, Petitioner’s allegation that Respondent failed to use the mark by the filing date of the SOU is insufficient to support the fraud claims.

In addition, while knowledge and intent, as conditions of mind, may be alleged generally under Fed. R. Civ. P. 9(b), the pleading must “allege sufficient underlying facts from which [the Board] may reasonably infer that a party acted with the requisite state of mind.” *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 91 USPQ2d 1656, 1668 (Fed. Cir. 2009). Here, Petitioner’s allegations in the second, third, and fourth sets of facts that the alleged false statements were made with the declarant’s knowledge and intent to obtain a registration are conclusory and not supported by sufficient facts to infer the Mr. La Perle acted with the intent to deceive the USPTO.⁹

⁹ 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.” (Paragraph 95). 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.

Further, the allegations in the third and fourth sets of facts regarding Respondent's failure to use the mark in connection with "entertainment services" or "all goods and services" are unspecific allegations and do not specify which services were not in use. Thus, the allegations are insufficient under Fed. R. Civ. P. 9(b) to support the fraud claims.

In view of the foregoing, Respondent's motion to dismiss is **GRANTED** with respect to the second, third, and fourth counts of fraud.

3. Fifth and Sixth Counts of Fraud

Petitioner's fifth and sixth "set[s] of facts" asserting fraud consist of allegations that Respondent's specimens of use submitted in connection with the statement of use (paragraphs 127-131) and the Combined Declaration of Use and Incontestability (paragraphs 153-165) are insufficient, do not show use of the mark functioning as a service mark for the services, and were fraudulently submitted. The Board finds that these allegations fail to state a claim upon which relief may be granted because fraud based on the specimens submitted with application (or maintenance documents) is simply not an available claim. It is well-settled that the adequacy of specimens submitted during the prosecution of an application is solely a matter of *ex parte* examination and, therefore, does not constitute grounds for opposing the registration of a mark. *See Granny's Submarine Sandwiches, Inc. v. Granny's Kitchen, Inc.*, 199 USPQ 564, 567 (TTAB 1978); *see also, Century 21 Real Estate Corp. v. Century Life of America*, 10 USPQ2d 2034, 2035 (TTAB 1989) (unlike a cancellation (or opposition) proceeding, during *ex parte* examination of the application the applicant would have

had an opportunity to submit acceptable substitute specimens). Thus, the adequacy of the specimens is not at issue in a cancellation proceeding. The proper ground for cancellation is the underlying question of whether the mark was in use in commerce. *Marshall Field & Co. v. Mrs. Fields Cookies*, 11 USPQ2d 1355, 1358 (TTAB 1989) (the insufficiency of the specimens, per se, does not constitute grounds for cancellation; the proper ground for cancellation is that the term has not been used as a mark); *Century 21 Real Estate Corp.*, 10 USPQ2d at 2035. To the extent that Petitioner, in the “Sixth Set of Facts,” also asserts a claim of fraud based on nonuse of the mark at the time of filing the combined declaration, the Board finds that 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. *See* Fed. R. Civ. P. 9(b).

In view thereof, Respondent’s motion to dismiss Petitioner’s fifth and sixth counts of fraud is **GRANTED**. Because fraud based on the specimens submitted with the application or maintenance documents is not an available claim, the claims are dismissed with prejudice.¹⁰

4. Seventh Count of Fraud

Petitioner’s seventh count of fraud is based on Respondent’s averment in the combined Section 8 and 15 declaration that “[T]here is no proceeding involving said

¹⁰ If Petitioner amends the pleading to include a properly supported fraud claim based on nonuse of the mark, Petitioner is not precluded from alleging facts, in support of its claim, asserting that the specimens submitted in connection with the filings were knowingly altered or not in actual use in commerce. *See, e.g., Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 1 USPQ2d 1483, 1484-85 (Fed. Cir. 1986) (specimen not currently in use; fraud found because registrant was not using the mark in commerce).

rights pending and not finally disposed of either in the United States Patent and Trademark Office or in a court.”¹¹ Petitioner asserts that the statement was made fraudulently because Respondent raised the involved registration in support of its affirmative defense in an opposition proceeding involving Respondent’s application to register the mark APPLE MUSIC. This allegation cannot support a fraud claim because Petitioner’s rights to the registration raised in support of an affirmative defense are not involved in (subject to) the proceeding. *See* Trademark Act Section 15, 15 U.S.C. § 1065. Merely pleading the registration in support of an affirmative defense does not place the owner’s rights in the registration in issue in the proceeding and Petitioner has provided no support for his contrary position. As noted by Respondent, Petitioner does not allege that there was a counterclaim or petition to cancel the registration pleaded in the defense at the time the combined declaration was filed. *See, e.g.*, TMEP § 1605.04 (“where there is no counterclaim *involving the owner’s rights* in the mark,” the USPTO does not consider the ownership rights under Section 15 to be involved in the proceeding). Thus, there are no factual allegations in the petition for cancellation that support Petitioner’s conclusion that the statement in the combined declaration is false.

Accordingly, Respondent’s motion to dismiss the seventh fraud claim is **GRANTED**. Because Petitioner has not asserted a plausible claim under the “Seventh Set of Facts,” the claim is dismissed with prejudice.

¹¹ Amended Petition at ¶ 191, 6 TTABVUE 25.

5. Abandonment Claim

Turning to Petitioner's abandonment claim, in order to set forth a *prima facie* case of abandonment, a plaintiff must plead at least three consecutive years of non-use or must set forth facts that show a period of non-use less than three years with an intent not to resume use. Trademark Act Section 45, 15 U.S.C. 1127; *See Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 14 USPQ2d 1390, 1393 (Fed. Cir. 1990); *Otto Int'l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861, 1863 (TTAB 2007). Here, Petitioner alleges that Respondent has not used the mark "in connection with all services."¹² While Petitioner alleges facts supporting nonuse for "at least some services," 9 TTABVUE 22, the vague allegation that the mark has not been used with all of the services does not provide Respondent with fair notice of the basis of the claim because it does not specifically identify which services are allegedly not in use.¹³ *See Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007) (elements of each claim should be stated concisely and directly, and include enough detail to give the defendant fair notice). Accordingly, Respondent's motion to dismiss the abandonment claim is **GRANTED**.

6. Likelihood of Confusion Claim

Under Trademark Act Section 14, 15 U.S.C. § 1064, a petition to cancel a registration on the Principal Register must be filed within five years of the date of registration of the mark unless cancellation is sought on one or more of the grounds specified in Section 14(3) or Section 14(5). Accordingly, a petitioner may not seek to

¹² *Id.* at ¶ 207.

¹³ This is similar to Petitioner's allegations of fraud in the third and fourth sets of facts.

cancel a registration on the Principal Register over five years old on the ground of likelihood of confusion. *See Otto International Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861, 1862-63 (TTAB 2007). However, if a plaintiff in an opposition or cancellation proceeding relies on a registration and that registration has not been registered for five years, the filing of the opposition or cancellation proceeding tolls the running of the five-year period for purposes of determining the grounds on which a counterclaim to cancel the pleaded registration may be based. *See* TBMP § 307.02(c)(1); *see, e.g., Williamson-Dickie Mfg. Co. v. Mann Overall Co.*, 359 F.2d 450, 149 USPQ 518, 522 (CCPA 1966); *UMC Indus., Inc. v. UMC Electronics Co.*, 207 USPQ 861, 862 n.3 (TTAB 1980) (grounds not limited where petition to cancel registration pleaded in opposition was not filed until after fifth anniversary date of registration, because opposition wherein opposer relied on registration was filed before anniversary date).

In support of his argument that the time limit in Section 14 is tolled by a defense raised by Respondent in another proceeding, Petitioner relies on the *Williamson-Dickie* case, *supra*, in which the Court of Customs and Patent Appeals, the predecessor to our primary reviewing court, followed the decision of the Commissioner in *Sunbeam Corp. v. Duro Metal Prods. Co.*, 106 USPQ 385 (Com'r Pat. & Trademarks 1955).¹⁴ In *Sunbeam*, the Commissioner stated that “if a right of affirmative action relied upon is alive at the time of commencement of suit against the party in position of defendant, Section 14[1] does not bar the right to assert it in

¹⁴ In fact, part of the quotation cited by Petitioner at 9 TTABVUE 23 in support of his position is actually the Court in *Williamson-Dickie* quoting from the *Sunbeam* case. *See Sunbeam Corp.*, at 386 (final sentence).

that action even though the statutory period expires during the pendency of the action and before the claim or affirmative pleading is filed.” *Id.* at 386. The Commissioner further stated that the decision applies only “on the narrow question of whether or not the five-year period prescribed by Section 14 of the statute is a bar to the filing of an affirmative action seeking cancelation of a registration relied upon in a pleading filed before the expiration of the five-year period.” *Id.* Here, Petitioner’s Section 2(d) claim is not a right of affirmative action (e.g., affirmative defense) available to Petitioner at the time a proceeding was brought against him as the defendant. On the contrary, Petitioner asserted the Section 2(d) claim to allegedly prevent an affirmative defense raised by a defendant in the separate action. The specific and narrowly identified rule in *Sunbeam* and *Williamson-Dickie* does not toll the statute of limitations in Section 14 to allow the filing of such a non-affirmative claim by a plaintiff in response to a defense raised in another proceeding.¹⁵

In view thereof and because the subject registration issued more than five years prior to the filing of the petition to cancel, Petitioner’s likelihood of confusion claim is

¹⁵ Moreover, the issue of whether Respondent has asserted the subject registration in connection with an actual affirmative defense remains unsettled and will not be determined in this proceeding. *See Morehouse Mfg. Corp. v. J. Strickland and Co.*, 407 F.2d 881, 160 USPQ 715, 717 (CCPA 1969) (that defendant already owns a substantially similar registered mark for substantially similar goods and/or services such that the second registration (or second registration sought) causes no added injury to the plaintiff); *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1884 n.6 (TTAB 2006) (*Morehouse* defense does not apply where marks in the two registrations being compared are not the same). The Board notes that the pleadings in the related proceeding are not in the record for this motion and the proceeding number was not provided in either the amended petition or Petitioner’s response brief.

untimely under Section 14. Accordingly, Respondent's motion to dismiss the claim is **GRANTED**.

C. Decision

Respondent's motion to dismiss the amended petition to cancel for failure to state a claim is **GRANTED**. The amended petition is dismissed in its entirety. It is the Board's practice, however, when finding a pleading deficient, to grant leave to amend the pleading, if leave to replead would not be futile. *See Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1929 n.10 (TTAB 2014); *see also, Intellimedia Sports Inc.*, 43 USPQ2d 1208. Accordingly, Petitioner is allowed until October 30, 2018 in which to file an amended petition to cancel with a legally sufficient claim of abandonment containing specific allegations regarding the services in the involved registration that are alleged to be abandoned.

Petitioner is also allowed until October 31, 2018 to file an amended fraud claim based on the filing of the statement of use and Respondent's failure to use the mark in connection with particular services¹⁶ if Petitioner is able to allege sufficient facts to support a conclusion that Respondent intended to deceive the USPTO.¹⁷ As noted above, the pleading must also specifically identify the services that Petitioner alleges were not in use. Because the Board has found that Petitioner's first, fifth, sixth, and seventh counts of fraud are either implausible or would be futile based on the alleged facts and relevant law, the Board, in its discretion, dismisses the claims with

¹⁶ *See* Petitioner's second, third, and fourth sets of facts.

¹⁷ If Petitioner is unable to allege sufficient facts to support the claim, Petitioner is not precluded from later moving to amend the pleading under Fed. R. Civ. P. 15(a) if facts supporting the claim are uncovered during the discovery process.

prejudice. See *Embarcadero Tech., Inc. v. Delphix Corp.*, 117 USPQ2d 1518, 1523 (TTAB 2016) (“In deciding whether to grant leave to amend, the Board may consider undue delay, prejudice to the opposing party, bad faith or dilatory motive, futility of the amendment, and whether the party has previously amended its pleadings.”). The Board notes that because Petitioner has accused Respondent of committing fraud under *seven* separate sets of facts, including several claims that are not warranted by existing law, the allegations appear to be, at a minimum, based on an insufficient inquiry under the circumstances. Thus, Petitioner is advised to review Rule 11 of the Federal Rules of Civil Procedure and ensure that he has a sound factual basis for alleging any grounds to refuse registration other than abandonment.¹⁸

Petitioner’s likelihood of confusion claim is also dismissed. Because the likelihood of confusion claim is untimely under Trademark Act Section 14, amendment of the claim would be futile.

Respondent is allowed until November 29, 2018 to file its answer to the second amended petition to cancel.

Proceedings are resumed. Dates are reset as follows:

Time to Answer	11/29/2018
Deadline for Discovery Conference	12/29/2018
Discovery Opens	12/29/2018
Initial Disclosures Due	1/28/2019
Expert Disclosures Due	5/28/2019

¹⁸ See generally 6 Thomas J. McCarthy, McCarthy on Trademarks & Unfair Competition § 31:77 (5th ed. 2018) (“[A]n allegation of fraud based in the application verification is a serious charge which is not easily proven ... Applicants and registrants should not be subjected to harassment by loosely framed and ill-considered charges of fraud. It is apparent that the courts and the Trademark Board have little patience with ill-founded fraud charges.”).

Discovery Closes	6/27/2019
Plaintiff's Pretrial Disclosures Due	8/11/2019
Plaintiff's 30-day Trial Period Ends	9/25/2019
Defendant's Pretrial Disclosures Due	10/10/2019
Defendant's 30-day Trial Period Ends	11/24/2019
Plaintiff's Rebuttal Disclosures Due	12/9/2019
Plaintiff's 15-day Rebuttal Period Ends	1/8/2020
Plaintiff's Opening Brief Due	3/8/2020
Defendant's Brief Due	4/7/2020
Plaintiff's Reply Brief Due	4/22/2020
Request for Oral Hearing (optional) Due	5/2/2020

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.