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

Proceeding	92068803
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

QT Hotels and Resorts Pty Limited, Petitioner, v. HotelsAB, LLC, Registrant.	Cancellation No.: 92068803 Mark: HOTEL QT U.S. Reg. No.: 5,459,279
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**REGISTRANT’S REPLY BRIEF IN SUPPORT OF ITS
MOTION FOR JUDGMENT ON THE PLEADINGS**

I. Introduction

Registrant’s Motion for Judgment on the Pleadings (“Motion”) should be granted. Petitioner’s response does nothing to alter the fact that its Petition lacks sufficient factual matter to state a claim for fraud that is plausible on its face. Instead, the Petition is composed of mere threadbare recitals of the elements of a fraud claim, failing even to identify a specific person who had the alleged intent to commit fraud. Petitioner’s response to Registrant’s Motion (“Petitioner’s Response”) only confirms that the recitals in the Petition consist of unreasonable conclusory statements, speculation and conjecture. Petitioner’s response is heavy on hyperbole and unsupported accusations, but, as discussed in detail below, its lack of substance and multiple admissions demonstrate that Registrant’s Motion should be granted.

Ultimately, a fraud claim involves a very heavy burden of proof, and the claim must be proven “to the hilt” with clear and convincing evidence, leaving no room for “speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party.” *Smith Int’l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981). For this reason, a petition

to cancel a registered mark alleging fraud “must contain explicit rather than implied expression of the circumstances constituting fraud.” *Asian and Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1479 (TTAB 2009). Petitioner’s response leaves no doubt that the Petition is based upon speculation and implication rather than explicit circumstances constituting fraud. The Petition is deficiently based on information and belief, with no specific facts upon which a claim of fraud can be reasonably based. Petitioner has failed to plead fraud with particularity and has failed to come forward with facts supporting its fraud claim or any evidence showing the factual basis of a fraud claim is likely to be obtained.

II. Registrant Proactively Disclosed to the USPTO That Its Hotel Property Had Not Opened At the Time Registrant Filed its Statement of Use

Petitioner’s Response clarifies that Petitioner’s fraud claim rests primarily on inferences Petitioner has drawn from the fact that Registrant’s hotel was not open at the time Registrant filed its Statement of Use in connection with its application to register the HOTEL QT mark (the “HOTEL QT Application”). (TTABVUE 10.) However, Petitioner’s speculative and conclusory accusation, that because Registrant’s hotel was not yet open at the time it filed its Statement of Use, there is fraud, is patently unreasonable in context. Contrary to Petitioner’s accusation, Registrant specifically indicated to the USPTO, in multiple ways, that its hotel was not yet open at the time Registrant filed its Statement of Use. As an initial matter, the web page Registrant submitted as a specimen with its Statement of Use expressly states that Registrant’s hotel was “opening Spring 2018,” making it clear that the hotel was not open as of the date of the Statement of Use. (TTABVUE 1, ¶¶ 12, 22.) Petitioner, undeterred by this obvious contrary evidence, implies that Registrant somehow wished to hide the status of its hotel from the USPTO, in order to perpetrate a fraud when, in fact, Registrant proactively disclosed the status of its hotel in the specimen that Registrant chose to file with the USPTO. Moreover, Registrant

never represented that the hotel was open at the time Registrant filed the Statement of Use in connection with the HOTEL QT Application, and Petitioner does not assert or plead otherwise.

(*Id.*)

Not only did Registrant submit a specimen in good faith that expressly disclosed that its hotel was not yet open, Registrant also proactively deleted every recited service from the HOTEL QT Application that was not yet offered in connection with Registrant's hotel property in upstate New York, including "the provision of hotel accommodation." (TTABVUE 1 ¶ 12.) The services Registrant maintained in the application were those services that Registrant believed in good faith it had used in connection with the HOTEL QT mark as of the date of the Statement of Use. Registrant's deletion of the services from the recitation of services in the HOTEL QT Application strongly indicates that Registrant's Statement of Use was not fraudulent and that Petitioner's speculative claim is groundless and unsupported. For the Board's convenience Registrant's deletions from the recitation of services are set forth in their entirety at Exhibit A hereto.

Indeed, the Board has found that a proactive amendment to an application to delete services that are not in use, before a fraud claim is raised, creates a rebuttable presumption that the applicant did not intend to deceive the USPTO. *See e.g. Zanella Ltd. v. Nordstrom Inc.*, 90 USPQ2d 1758, 1761-62 (TTAB 2008) (denying summary judgment on fraud claim where registrant filed Section 7 amendment to correct false statement in a Section 8 & 15 declaration); *University Games Corp. v. 20Q.net Inc.*, 87 USPQ2d 1465, 1468 (TTAB 2008) (finding a rebuttable presumption of no intent to deceive where applicant amended recitation during prosecution of the application to eliminate unused goods). Petitioner wrongly asserts that Registrant's narrowing of the recited services somehow demonstrates an intent to commit fraud,

when the reverse is true, for obvious policy reasons. (TTABVUE 10 at 11). The Petition fails to meet the heightened pleading standard for fraud and it falls woefully short of rebutting the presumption that Registrant did not intend to deceive the USPTO.

Of course, Petitioner does not plead or point to any evidence that Registrant ever indicated to the USPTO that its hotel was open when it was not. Moreover, there is no dispute that Registrant owns a relevant hotel property, located at 10 Old Route 9, Staatsburg, New York, which is in the Hudson Valley. (TTABVUE 1 ¶¶ 12, 22.) (reproducing web page disclosing the property address) Indeed, Petitioner admits Registrant's hotel property by repeatedly referencing the fact that it was not open at the time of the Statement of Use. (TTABVUE 1 ¶¶ 22, 24.) Petitioner never pleads or otherwise asserts that there is no property that is the subject of Registrant's services under the mark.

Petitioner, surprisingly, ignores these highly relevant circumstances, while repeatedly stating that there was fraud because Registrant's hotel was not yet open when Registrant filed the Statement of Use. The mere fact that Registrant's hotel had not yet opened is not a reasonable basis for a fraud claim, because, among other reasons, it rests upon a fact that Registrant proactively disclosed to the USPTO through Registrant's Statement of Use. On the contrary, the circumstances run directly counter to the elements of fraud. There is no indication that Registrant made a false statement or that Registrant possessed the requisite intent to commit fraud, and the circumstances surrounding Registrant's filing of its Statement of Use create a rebuttable presumption that Registrant in fact did not intend to deceive the USPTO. Petitioner has failed to identify a reasonable basis to conclude Registrant made any false statement in this regard, and has failed to rebut the presumption that Applicant had no intent to commit fraud.

Accordingly, Petitioner's fraud claim has no reasonable basis and it should be dismissed because it is based only on unsupported and conclusory inference, surmise, speculation and conjecture.

III. Additional Circumstances Identified in the Pleadings Demonstrate that Petitioner's Fraud Claim is Deficient, Unreasonable and Unsupported.

Petitioner's Response also fails to account for additional highly relevant material in the pleadings that demonstrate its fraud claim is deficient, unreasonable and unsupported. For example, among other things and without limitation, Registrant has used the HOTEL QT mark in connection with an operating hotel, in one of the most visited and populous areas of the world, Times Square in New York City. (TTABVUE 4 at ¶ 8.) There is no dispute that Registrant's hotel in Times Square operated under the mark HOTEL QT well-prior to Petitioner's purported first use of the QT mark for a hotel located in Australia. (TTABVUE 1 at ¶¶ 1, 8; TTABVUE 4 at ¶ 8.) There is also no dispute that Registrant owned a U.S. Trademark Registration for the HOTEL QT mark and covering many of the same services recited in the present registration with a filing date of November 1, 2004, and a registration date of November 20, 2007, which was valid and subsisting on the Principal Register until the USPTO cancelled the registration because it did not receive a Section 8 affidavit. (TTABVUE 4 at ¶ 9.) Moreover, Registrant pleaded that Registrant's principal coined and was the first to use the mark QT in connection with hotels and Petitioner did not address this point. (TTABVUE 4, Affirmative Defense 5.) Further, there is no dispute that Registrant filed an intent-to-use application on May 19, 2014 that matured into U.S. Registration No. 5,459,279, and that the filing date was well before Petitioner filed its now suspended application on July 21, 2015. (TTABVUE 1 at ¶¶ 6, 10.)

These foregoing circumstances are certainly not those typically associated with a trademark applicant that intends to commit fraud in connection with the filing of a Statement of Use. Indeed, these circumstances indicate that Petitioner's unsupported fraud claim is

unreasonable, bringing into question Petitioner's aggressiveness and accusatory approach to this dispute, especially considering that Petitioner has never operated a hotel, or any other business, under the QT mark within the United States or anywhere outside of far-off Australia and recently New Zealand. And even there, Petitioner's use was well-after Registrant's first use and registration of the HOTEL QT mark in the United States.

IV. Petitioner's Purported Facts Relating to Its Fraud Claim Are Unreasonably Drawn Conclusions and Self-Serving Conjecture, With No Support

Petitioner levies several accusations against Registrant that it treats as facts, but they are not. For example, Petitioner describes the HOTEL QT mark as the name of a "defunct" hotel (TTABVUE 10 at p. 2) to imply that the mark itself is defunct, when the salient issues are that Registrant used the brand on a hotel many years before Applicant opened a hotel in Australia (TTABVUE 1 at ¶¶ 1, 8); Registrant has continuously maintained rights and interest in the brand (TTABVUE 1 at ¶¶ 8-16); and Registrant filed an intent-to-use trademark application that matured into Registration No. 5,459,279 and was pending prior to any trademark application by Petitioner (TTABVUE 1 at ¶¶ 10, 16).

Petitioner also asserts, without any basis, explanation or evidence, that "the only 'information and advice' was providing a web page . . ." (TTABVUE 10 at p. 3.) Registrant has never stated that its web page was the only information or advice provided in connection with the HOTEL QT brand, nor has Registrant ever limited the means by which such information or advice has been or could be communicated. Indeed, the Registration specifically recites other means of providing information and advice, such as "telecommunications or via any other media." (TTABVUE 1 at ¶¶ 12, 16.) It appears that Petitioner mistakenly concluded that, because a web page was submitted as a specimen, it must be the only indicia of use relating to information and advice on hotels, or that Registrant was required to submit specimens with its

Statement of Use to show use of the HOTEL QT mark in connection with each recited service. TMEP ¶ 904.01 (requiring only one specimen for applications covering more than one good or service). Petitioner has put nothing forward to explain its basis for what appears to be a conclusory and completely speculative statement. Petitioner has failed to identify a reasonable basis to conclude that Registrant made any false statement in this regard.

The Petition, again in conclusory and speculative fashion with no reasonable support, states that the specimen Registrant submitted with its Statement of Use relating to reservation services under the HOTEL QT mark is a “fake.” (TTABVUE 1 at ¶ 20.) Petitioner seems to admit that these allegations of a “fake” are inadequately supported in the Petition, as it provides more detailed observations in the Petitioner’s Response that it failed to include in the Petition. (TTABVUE 10 at p. 12.) But none of the observations in the brief indicate a fake specimen, and they certainly do nothing to indicate any fraud perpetrated by Registrant.

For example, Petitioner complains that the name appearing in the specimen is redacted, but this is reasonable to maintain the privacy of the identified person on a publicly filed document. (TTABVUE 10 at p. 3.) Similarly, Petitioner complains that the specimen as filed does not indicate the date on which it was generated. *Id.* But that in no way indicates it is a “fake.” It is not clear why the other issues Petitioner identifies in its Response are considered relevant to Petitioner’s theory that Registrant’s specimen was “fake.” Particularly considering that Registrant’s hotel is a small 20-room boutique location up-state New York in the Hudson Valley, that the specimen does not indicate that payment was taken at the time of the reservation confirmation, and that the reservation link on Registrant’s website generates an email should not be surprising and neither indicates the specimen is a “fake.” *Id.* Importantly, the Registration recites “hotel reservation services,” without limitation, and these services could be provided in

person, by telephone or by any other means. *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 1323, 110 U.S.P.Q.2d 1157, 1161-62 (Fed. Cir. 2014) (finding that the goods and services recited in a registrations with “no limitations” on the channels of trade and classes of purchasers are presumed to “travel through all usual channels of trade and are offered to all normal potential purchasers”). It is not for Petitioner to dictate the manner in which Registrant provides its services or the granular details of a reservation form.

Petitioner also infers that because Registrant submitted the specimen as part of the Statement of Use before Registrant’s hotel was open, it must be a fake. (TTABVUE 10 at p. 7.) This speculation ignores, among other things, that hotel reservations are generally taken in advance of the guest’s anticipated stay and that at the time Registrant filed the Statement of Use, it had an anticipated opening date. (TTABVUE 1 at ¶¶ 12, 22.) A more charitable inference or speculation would be that Registrant intended to open its Hudson Valley area boutique hotel for Memorial Day weekend, May 25-28 (the date indicated on the specimen). (TTABVUE 1 at ¶ 12.) Notably, Petitioner has never indicated or pleaded when the hotel was expected to open and there are no facts or allegations supporting Petitioner’s assertion that the reservation date indicated on the specimen was somehow impermissibly prior to Registrant’s anticipated opening.

Petitioner’s insistence that the specimen is fake seems rooted in a miscomprehension that a fake specimen is somehow conclusive evidence of fraud, when this is contrary to precedent. *Tommie Cooper IP, Inc. v. Gcool-Tech Usa LLC*, Opp. No. 91223768 (TTAB May 9, 2018) (dismissing fraud claim although applicant submitted “mock-ups” that were never used in commerce as a specimen where applicant did not possess intent to deceive); *see also Information Builders, Inc. v. Bristol Techs., Inc.* Opp. No. 91179897 (TTAB January 10, 2011) (finding no fraud where applicant submitted fabricated specimen but did so without deceptive intent).

Further, Petitioner has provided no basis for its conclusory, uninformed and unsupported statements that the brand was defunct or that it had not been “marketed in years.”

V. Petitioner’s Response Appears To Verify That Petitioner’s References to “Investigations” In Its Pleading Are Illusory

Petitioner admitted in its Response that, despite the representation in its Petition that Paragraph Nos. 18, 20, 25, 29 are “Upon information and belief, **and upon Petitioner’s investigation of Registrant and its business**” Petitioner merely reviewed the “splash page” specimen and a web page in June 2018 and clicked on the web page reservation link to view the resulting email message. (TTABVUE 10 at pp. 6, 10.) Accordingly, Petitioner’s brief seems to confirm Registrant’s position that the pleaded “investigation” is actually mere “information and belief” yielding nothing of import that satisfies the heightened pleading standard.

VI. Petitioner Failed to Properly Plead The Intent Element and Its Fraud Claim Should Be Dismissed

There is no serious dispute that the allegations in the Petition relating to the requisite intent to commit fraud are deficient and that the fraud claim should, therefore, be dismissed. As an initial matter, although Petitioner identified the individual who signed Registrant’s Statement of Use, Petitioner failed to even allege the signatory or any other specific individual associated with Registrant possessed an intent to deceive the USPTO. (TTABVUE 1 at ¶14.) Instead of alleging that a specific individual possessed the requisite intent, Petitioner alleges that Registrant, a limited liability company, knew it had not used the mark in commerce and knew that its specimen was “fake.” (TTABVUE 1 at ¶ 29.) This sort of general pleading, failing even to identify an individual alleged to have the requisite intent to deceive, does not provide a sufficient explanation of culpability that is required for pleading the intent to deceive element of a fraud claim. *In re Bose*, 580 F.3d 1240, 91 U.S.P.Q.2d 1938, 1341 (Fed. Cir. 2009) (requiring “clear

and convincing” evidence of deceptive intent in order to infer any such intent from “indirect or circumstantial evidence”).

Petitioner’s response dwells on the whether a pleading may allege intent generally, but ignores that the Petition must still, in any event, “allege sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind.” *Asian & W. Classics B.V. v. Selkow*, 92 U.S.P.Q.2d 1478, 1479 (TTAB 2009). In addition, something more is needed here due to the rebuttable presumption of no intent to deceive the USPTO.

Confusingly, Petitioner cites to *Asian*, and argues that the language “although Rule 9(b) allows that intent may be alleged generally” completely reverses the meaning of the holding. *Id.* Of course, the preceding language does not “wholly reverse” the meaning of this holding and fraud claim must “allege sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind.” *Id.* Petitioner’s pleading is devoid of underlying facts from which a court may reasonably infer fraud, as described above. Petitioner’s allegations relating to intent do not even identify any individual that the Board could infer acted with the requisite state of mind.

Petitioner also bases its fraud claim on the idea that Registrant filed the Statement of Use near the statutory deadline to make the filing, and that Registrant was, therefore, motivated to act fraudulently for fear of losing its filing. (TTABVUE 1 at ¶ 12; TTABVUE 10 at p. 3.) Of course, this inference of an intent to commit fraud due to a fear of losing a filing could be asserted any time an applicant or registrant faces a USPTO deadline. Petitioner has put forth no evidence to support its theory, and it constitutes a misguided idea that cannot reasonably form a factual basis for a fraud claim, which is subject to a heightened pleading standard. It is unreasoned to infer fraudulent intent or a presumption of fraudulent intent when a filing is made

near the end of the time period permitted by statute. A more charitable inference is that Registrant hoped to use the mark in connection with all of the recited services at its 10 Staatsburg location, but ultimately, in good faith, deleted several of them from the Statement of Use.

VII. CONCLUSION

For the foregoing reasons, Registrant respectfully requests that the Board enter an order granting Registrant's Motion for Judgment on the Pleadings, dismissing the Petition with respect to Count 1 (Fraud) of the Petition.

Respectfully submitted,

HOTELSAB, LLC

Date: December 10, 2018

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Exhibit A

Registrant made the following deletions from the recitation of goods in its application

~~Class 41: Entertainment in the nature of live musical performances, artistic performances, artistic displays, cabaret and nightclub entertainment; entertainment services provided by hotels in the nature of live musical performances, artistic performances, artistic displays, cabaret and nightclub entertainment; entertainment services provided in hotels, restaurants and night clubs in the nature of live musical performances, artistic performances, artistic displays, cabaret and nightclub entertainment; nightclub services~~

~~Class 43: Services for providing food and drink; providing temporary accommodation; restaurant services; bar, café, cocktail lounge services; providing banquet and social function facilities for special occasions; catering services; hotels; the provision of hotel accommodation; hotel reservation services; the provision of information relating to the foregoing services online from a computer database, the internet, telecommunications or via any other media, also known as providing information and advice on hotels and restaurants~~

~~Class 44: Personal services, namely, barber shop, beauty care and salon services, and beauty and health spa services, namely, cosmetic body care services~~

(TTABVUE 1 at ¶ 12.)

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2018, I served a true and correct copy of the foregoing REGISTRANT'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR JUDGMENT ON THE PLEADINGS on counsel for Petitioner via email addressed as follows:

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