

ESTTA Tracking number: **ESTTA1109982**

Filing date: **01/25/2021**

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

Proceeding	92075086
Party	Defendant Giancarlo Fantappie
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Date	01/25/2021
Attachments	Reply Brief in Support of Motion to Dismiss.pdf(43010 bytes )

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

**In the Matter of Trademark Registration No. 5,101,888**

Black Rifle Coffee Company LLC,

Petitioner,

v.

Giancarlo Fantappié,

Registrant.

Cancellation No.: 92075086

**REPLY IN SUPPORT OF REGISTRANT’S MOTION UNDER FED. R. CIV. P.  
12(b)(6) TO DISMISS PETITIONER’S CLAIMS WITH PREJUDICE**

Registrant, Giancarlo Fantappié, hereby submits its response in support of its Motion under Fed. R. Civ. P. 12(b)(6) to Dismiss Petitioner’s Claims with Prejudice.

**INTRODUCTION**

In its Opposition Brief, Petitioner makes the following arguments:

- I. To the extent that Registrant is pleading that Petitioner lacks standing in this matter, Petitioner contends that standing exists;
- II. Petitioner argues that it has stated a valid claim for fraud; and
- III. Petitioner argues that it has stated a valid claim for abandonment.

Petitioner’s arguments are either irrelevant to the motion at hand, or unavailing. None of Petitioner’s arguments justify the denial of Respondent’s Motion.

**I. REGISTRANT’S MOTION IS UNRELATED TO THE ISSUE OF  
PETITIONER’S STANDING (OR LACK THEREOF)**

Registrant has not sought dismissal at this time based upon an allegation of a lack of standing, which is properly brought under Fed. R. Civ. P. Rule 12(b)(1) and not Rule

12(b)(6). Registrant is further unsure why the issue of standing has been raised at all by Petitioner's Opposition brief – it has not and is entirely irrelevant to the motion at hand. Registrant is not obliged to address arguments entirely unrelated to the motion at hand. Without conceding the issue, to the extent that Petitioner seeks the Board's determination on the issue of standing at this time, such a determination would be premature. Without conceding the issue of standing, however, Registrant reserves the right to address this issue of standing in the future, should Registrant bring a motion to address the issue of standing.

## **II. PETITIONER HAS NOT STATED A VALID CLAIM FOR FRAUD**

In its Motion to Dismiss, Registrant presented the following arguments in favor of dismissal of the claim for fraud:

- a. Petitioner has not established that its damages proximately result from the Trademark Office's reliance on the purportedly false statements of Registrant.
- b. Petitioner has not included any specific facts or evidence that the purported misrepresentation is false.

With regard to Registrant's first argument, Petitioner has not addressed or refuted this issue. It may be that Petitioner believes that Registrant here is arguing that Petitioner lacks standing to bring this action entirely (thus the inclusion of the section on "standing") but this is mistaken. Petitioner is rather arguing that Registrant has not adequately pleaded an essential element of fraud: the requirement that Petitioner's "damage proximately resulting from such reliance" by the Trademark Office on the purportedly false statement. Petitioner's purported damages here are alleged to be the denial of its applied-for ATOMIC ORCA mark for "coffee and coffee based beverage" in Class 30 under Section 2(d). This denial, however, simply does not flow from the purported false representation by Registrant that "the Registered mark was not in use in the United States in connection with at least "tea pods" and "tea pods containing milk." *Petitioner makes no argument to the contrary, conceding the issue.* The Petition makes no contention whatsoever that Registrant's statements to the Trademark Office regarding use of its ORCA mark in connection with coffee pods are fraudulent, and rather implicitly acknowledges that

Registrant was in fact using the ORCA mark in connection with coffee pods at the time at which the purportedly false statements were made. Thus, Petitioner's damages do not proximately result from the purportedly false statement, and Petitioner has not argued otherwise. Consequently, the claim of fraud cannot be sustained due to a lack of an essential element for proving fraud.

Turning to Registrant's second argument, Petitioner again sidesteps Registrant's points, and simply disagrees with Registrant's points of law without actually addressing the issue. Petitioner rather contends that the act of appending the statement "based upon a reasonable investigation" or "upon information and belief" to its barebones contentions, which include absolutely no statements of fact or evidence whatsoever, is sufficient to transform a "threadbare recital of the elements of a cause of action, supported by mere conclusory statements" into a fraud claim which meets the twin pleading requirements of *Iqbal* **and** Rule 9(b). Furthermore, Petitioner acknowledges that its contentions do not meet the heightened pleading requirements of Rule 9(b), stating in its Opposition only that "has supported its fraud-based claim with sufficient factual matter to suggest that it is at least plausible the Registered Mark was fraudulently obtained." Petitioner acknowledges the existence of the special heightened pleading requirements of Rule 9(b) in its Opposition that go above and beyond the *Iqbal* plausibility requirement, but does not actually contend that its pleadings arise to the "who, what, when, where, and how" standard of Rule 9(b). Rather, Petitioner's Opposition glosses over this point entirely, and seemingly concedes by omissions that the pleadings do not comply with the standards of Rule 9(b).

### **III. PETITIONER HAS NOT STATED A VALID CLAIM FOR ABANDONMENT**

In its Motion to Dismiss, Registrant presented the following arguments in favor of dismissal of the claim for abandonment:

- a. Petitioner fails to plead abandonment under a *prima-facie* non-use theory because the Petition does not allege of non-use of the mark as a whole for three consecutive years, but rather only insufficiently alleges of non-use of the mark in relation to a subset of goods and services to which the mark pertains.

- b. Petitioner fails to plead abandonment of the mark under a discontinuation plus intent not to resume theory because it only alleges as such in relation to use of the mark in relation to a certain subsets of goods and services, and not in relation to all goods and services of the mark, which is insufficient for abandonment.

In relation to Registrant's arguments, Petitioner in its Opposition simply ignores the points raised by the Motion to Dismiss altogether, instead reiterating the basic positions raised in its Petition. The Board is invited to treat Petitioner's evasion on these points raised by Registrant as a concession of the issues. A claim for abandonment requires complete non-use of the mark in relation to any goods and services, not merely some goods and services. Petitioner's refusal in its Opposition to address and justify this defect in its pleadings makes it clear that Petitioner in fact has no response. Consequently, the claim of abandonment cannot be sustained due to a failure to pleading an essential element for proving abandonment – i.e., non-use of the mark in relation to any goods and services to which it pertains.

#### **IV. CONCLUSION**

Based on all the foregoing, Registrant requests that the Petition be dismissed with prejudice.

Respectfully submitted,

STETINA BRUNDA GARRED & BRUCKER

Dated: January 25, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that on **January 25, 2021**, a true and complete copy of the foregoing **REPLY IN SUPPORT OF REGISTRANT'S MOTION PURSUANT TO FED. R. CIV. P. 12(b)(6) TO DISMISS PETITIONER'S CLAIMS WITH PREJUDICE** was served via email on counsel of record for Petitioner at the following address:

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