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

Proceeding	92077648
Party	Defendant Weed Cellars Inc.
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Submission	Motion to Dismiss - Rule 12(b)
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Date	08/31/2021
Attachments	49268-051 M2D Canc No 92077648.pdf(354431 bytes)

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

In the Matter of U.S. Registration No. 6381999
For the Trademark(s): WEED (standard characters)

VBNJ, Inc.,	}) Opposition No.: 92077648
Petitioner,		
v.		
Weed Cellars Inc.,	}	
Respondent.		

Hon. Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451
BOX TTAB NO FEE

**MEMORANDUM OF LAW IN SUPPORT OF
RESPONDENT’S MOTION TO DISMISS PETITIONER’S FRAUD CLAIM**

I. Introduction

Petitioner is petitioning to cancel Respondent’s registration for the WEED standard character mark in class 32 for “Beer, ales and lagers; non-alcoholic beer and other non-alcoholic beverages, namely, soft drinks; soda pops; drinking water and flavored waters; carbonated nonalcoholic drinks; malt drinks, namely, non-alcoholic malt beverages; fruit drinks and fruit juices; syrups for making beverages; preparations for making beverages, namely, powders used in the preparation of fruit-based beverages; beer making kits; none of the foregoing comprised of, derived from or containing oils, extracts or ingredients derived from cannabis sativa L or any cannabis in any form including hemp, hemp seeds and hemp extracts” because of alleged prior rights and a likelihood of confusion with Petitioner’s U.S. Reg. No. 4312889 for the mark WEED WEED GOLDEN ALE MT SHASTA BREWING CO. WEED, CA and Design (shown below) for “Beer making kit; Beer, ale and lager; beer, ale and porter; beer, ale, lager, stout and porter;



beer, ale, lager, stout, porter, shandy; beers; brewed malt-based alcoholic beverage in the nature of a beer; flavored beers; malt beer; malt liquor; pale beer,” along with associated common law rights and an expired earlier registration. As an additional ground of opposition, Petitioner alleges that Respondent committed fraud before the USPTO when it signed the requisite new application declaration that averred that “...no other person has the right to use such mark in commerce...”.

II. Federal Rules of Civil Procedure and Standards for Dismissal

In a cancellation proceeding, the Federal Rules of Civil Procedure apply. See 37 C.F.R. § 2.116(a).

A. *Rule 12(b)(6) Failure to State a Claim*

The Court may dismiss a complaint on the ground that it fails “to state a claim upon which relief can be granted.” FRCP 12(b)(6). For purposes of a motion to dismiss, the court accepts as true all well-pleaded allegations in the complaint but “conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim. *Bradley v. Chiron Corp.*, 45 U.S.P.Q.2d 1819, 1822 (Fed. Cir. 1998).. See, e.g., *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005); *Made in the USA Found. v. Phillips Foods, Inc.*, 365 F.3d 278, 279 (4th Cir. 2004); *Courtenay Communications Corp. v. Hall*, 334 F.3d 210, 213 (2d Cir. 2003). Where the plaintiff has failed to plead sufficient facts “to state a claim to relief that is plausible on its face,” however, the court should grant the motion. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claim stated in the complaint. *Ileto v. Glock Inc.*, 349 F.3d 1191, 1199–1200 (9th Cir.2003); see also Fed.R.Civ.P. 12(b)(6). “Dismissal can be based on the lack of a cognizable legal theory or the absence of

sufficient facts alleged under a cognizable legal theory.” *Hana Financial, Inc. v. Hana Bank*, 500 F. Supp. 2d 1228, 1232 (C.D. Cal. 2007) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.1988)). The primary function of Fed. R. Civ. P. 12(b)(6) “is to allow the court to eliminate actions that are fatally flawed in their legal premise and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity.” *Advanced Cardiovascular Sys.*, 26 U.S.P.Q.2d at 1041. The Board applies these rules to Notices of Opposition and Petitions for Cancellation.

B. Rule 9(b) Requirement to Plead Fraud with Particularity

Rule 9(b) of the Federal Rules of Civil Procedure requires that in all averments of fraud in a complaint, which also applies to a Petition for Cancellation, the circumstances constituting fraud or mistake shall be stated with particularity. *Asian and Western Classics B.V. v. Lynne Selkow*, 92 USPQ2d 1478 (TTAB 2009); *DaimlerChrysler Corp. v. American Motors Corp.*, 94 U.S.P.Q.2d 1086 (T.T.A.B. 2010). More specifically, 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.” *Id.*, citing *King Automotive, Inc. v. Speedy Muffler King, Inc.*, 667 F.2d 1008, 212 USPQ 801, 803 (CCPA 1981). In the case of *Asian and Western Classics*, the Board found that the Petitioner’s allegations based on information and belief were insufficient for pleading fraud, generally indicating that, “Allegations based solely on information and belief raise only the mere possibility that such evidence may be uncovered and do not constitute pleading of fraud with particularity.” *Asian and Western Classics B.V. v. Lynne Selkow*, 92 USPQ2d 1478 (TTAB 2009). Consequently, any allegations made upon “information and belief” must be accompanied by a statement of facts upon which the belief is founded. See *Exergen Corp., v. Wal-Mart Stores, Inc.*, 575 F.3d 1312 (Fed. Cir. 2009). This has been interpreted to mean that a party

alleging fraud in a Board proceeding should specifically allege the other party's intent to deceive the USPTO. *DaimlerChrysler Corp.*, supra.

C. Required Elements of Fraud before the USPTO

The federal Lanham Act at Section 14(3) sets forth as a ground for cancellation that a "registration was obtained fraudulently." In the seminal case of *In re Bose Corp.*, 91 U.S.P.Q.2d 1938 (Fed. Cir. 2009), the Federal Circuit interpreted this to mean that fraud occurs when a registrant "knowingly makes a false, material representation of fact in connection with an application to register with the intent of obtaining a registration to which it is otherwise not entitled." To plead a claim of fraud, Petitioner must allege that Respondent made a specific false statement of material fact in the course of the involved registration and that Registrant made such false statement with the intent of deceiving the USPTO into issuing a registration to which Registrant is not entitled. See *In re Bose Corp.*, supra. Under *In re Bose Corp.*, "a trademark is obtained fraudulently under the Lanham Act only if the Respondent or registrant knowingly makes a false, material representation with the intent to deceive the PTO." *Id.* at 1941; see also *In re Anderson*, 101 USPQ2d 1912, 1915 (TTAB 2012) (Identifying a large number and diverse range of goods and services may bring additional potential claims, including fraud or lack of bona fide intent to use).

The current standard for fraud on the USPTO is not negligence, nor is it even gross negligence. A party challenging another on the basis of fraud thus must be able to "point to evidence to support an inference of deceptive intent;" inadvertence or misunderstanding will not suffice. A party alleging fraud in a Board proceeding should specifically allege the other party's intent to deceive the USPTO in order to meet the requirement of pleading with particularity. Consequently, after *Bose* it is nearly impossible to prove a claim of fraud before the Board. 3

Gilson on Trademarks § 13.04 (2021). In fact, since the aforementioned *Bose* decision issued in 2009, the Board has found fraud before the USPTO in only two subsequent cases. *The TTABlog* <<https://thettablog.blogspot.com/2021/08/precedential-no-21-ttab-upholds-fraud.html>> (Aug. 2, 2021).

III. Petitioner’s Failure to State a Claim for Fraud on the USPTO

While Petitioner devotes twelve paragraphs to its Petition for Cancellation alleging fraud before the USPTO, the paragraphs are extraordinarily repetitious and all of them fail to allege how the Respondent **deliberately intended** to deceive the USPTO into granting its registration. Key facts are omitted because they don’t exist. Some of the paragraphs are outright inaccurate and irrelevant, such as Paragraph 32 which states that Respondent had actual knowledge from Petitioner’s Letter of Protest even though Letters of Protest are never directed to applicants and registrants because they are directed specifically to examiners. Moreover, applicants and registrants cannot act on or respond to a Letter of Protest because only an examiner can do so, and they do so purely within their own discretion and judgment without any input from the applicant.

A. Petitioner’s Claim 2 Allegations are not Plead with Sufficient Particularity

Petitioner alleges in Paragraphs 29 through 33 and 35 that Respondent committed fraud when it signed the new application declaration and Petitioner acknowledges in Paragraph 25 that “Respondent applied to register the Challenged Mark on April 19, 2019.” However, in Paragraphs 26 and 27 Petitioner alleges that Respondent received actual notice of the Petitioner on or about April 5, 2021 and April 27, 2021, more than two years after Respondent had signed the application declaration. In fact, the registration record already automatically of record in this cancellation proceeding, 37 C.F.R. § 2.122; TBMP Sec. 704.03(a), clearly shows that Victoria Toplansky, Director of Marketing for the Respondent, electronically signed the declaration on April 19, 2019.

As such, Petitioner fails to allege with particularity how Respondent maintained fraudulent intent, i.e. a specific intent to defraud the USPTO, on April 19, 2019, when it signed the declaration, if Petitioner only provided actual notice to Respondent two years later in April 2021. None of the other facts alleged in the Claim 2 Allegations discuss specific representations that Respondent made to the examiner that Respondent had to know were false. By April 2021, when Petitioner alleges it gave notice to the Respondent of its asserted rights, the application for the subject registration had already been allowed and the Statement of Use was on the verge of being accepted. The Respondent had not even been notified by the USPTO examiner during examination that Petitioner existed and owned a conflicting or potentially conflicting application or registration.

Petitioner omits from the allegations the fact that the examining attorney assigned to examine the application for Respondent's Registration issued a first Office Action on April 27, 2020 which cited two other registered, identical WEED standard character marks not owned by Petitioner as grounds for refusing registration under Trademark Act Section 2(d). 15 U.S.C. §1052(d); TMEP §704.02." Petitioner's Claim 2 Allegations fail to explain how Respondent's alleged passive misrepresentation in signing a mandatory, boilerplate declaration on the application form either mislead the examiner or was material in influencing the examiner to grant Respondent's Registration, both of which required deliberate intent.

In fact, all of the Claim 2 Allegations in the Petition for Cancellation fail to specify which mark of Petitioner Respondent should have known was confusingly similar or which of Petitioner's marks Respondent's mark had harmed. Was Respondent misrepresenting in its application for WEED that it was not "aware of Petitioner's name and products in the marketplace" because of Petitioner's registration No. 4312889 for the mark WEED WEED GOLDEN ALE MT SHASTA BREWING CO. WEED, CA and Design? Or was Respondent misrepresenting that it was not

aware of Petitioner's U.S. Registration No. 3688702 for the standard character WEED ALES & LAGERS mark which officially expired on June 10, 2020? All of the above-referenced marks were "alleged" in the Petition for Cancellation between Paragraphs 1 and 23, as Paragraph 24 states is incorporated into the Claim 2 Allegations.

Clearly, the above factual omissions represent far too much ambiguity to satisfy the FRCP Sec. 9(b) "particularity" requirement for pleading fraud and this is not an exhaustive list.

B. Petitioner's Claim 2 Allegations Fail to Allege Fraud Before the USPTO

As specified in section II.C above, fraud before the USPTO has been defined as a Respondent or registrant making a "false statement [to the USPTO] with the intent of deceiving the USPTO into issuing a registration to which the Respondent or registrant is not entitled." *Bose*, supra. The TTAB often sees allegations of fraud based upon the mandatory oath a Respondent avers pursuant to Section 1(a)(3)(D) of the Lanham Act which is present in the initial application form and other common documents submitted to the USPTO, usually alleging use of the mark in Commerce. 3 Gilson on Trademarks § 13.04[5][b] (2021). The gist of the fraud claim is the language in the oath that Respondent must represent that "to the best of the verifier's knowledge and belief, no other person has the right to use such mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely ... to cause confusion, or to cause mistake, or to deceive ...". 15 U.S.C. § 1051(a)(3)(D). A cancellation petitioner usually alleges that this statement under oath of the Respondent or registrant was false because the Respondent/registrant averred this statement denying the existence of an allegedly similar mark despite the existence of the allegedly similar mark on similar goods/services that the Petitioner or asserting in the TTAB *inter partes* proceeding. 3 Gilson on Trademarks § 13.04 (2021).

The declaration language that Petitioner alleges was signed by the Respondent in the

opposed application and is displayed in Paragraph 29 of the Petition for Cancellation is accurately portrayed and reads as follows (emphasis added):

To the **best of the signatory's knowledge and belief**, no other persons, except, if applicable, concurrent users, **have the right to use** the mark in commerce, either in the identical form or in such near resemblance as to be likely, when used on or in connection with the goods/services of such other persons, **to cause confusion or mistake, or to deceive**. To the **best of the signatory's knowledge, information, and belief**, formed after an inquiry under the circumstances, the allegations and other factual contentions made above have evidentiary support. The signatory being warned that **willful** false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or submission or any registration resulting therefrom, declares that all statements made of his/**her own knowledge** are true and all statements made on **information and belief** are believed to be true.

As is evident from the portions of the above declaration that are bolded, this language features a lot of moving parts, loaded meanings, legal conclusions, and, most importantly, is phrased in terms of a subjective belief, thereby making proof of deliberate, intentional fraud extraordinarily difficult to prove. Federal and TTAB case law confirms this. *Sovereign Military Hospitaller Order of St. John of Jerusalem v. Florida Priory of the Knights Hospitallers of the Sovereign Order of St. John of Jerusalem*, 702 F.3d 1279, 1290, 105 U.S.P.Q.2d 1001 (11th Cir. 2012) (“The declarant-focused text of the application oath requires the signatory’s good-faith, subjective belief in the truth of its contents.”); See *American Security Bank v. American Security & Trust Co.*, 571 F.2d 564, 568 (C.C.P.A. 1978) (holding that 15 U.S.C. § 1051 and 37 C.F.R. § 2.33 “require the statement of beliefs about exclusive rights, not [the] actual possession” of those rights).” *Woodstock’s Enterprises, Inc. (California) v. Woodstock’s Enterprises, Inc. (Oregon)*, 43 U.S.P.Q.2d 1440 (T.T.A.B. 1997). See also *In re Bose*, 580 F.3d at 1245 (“Subjective intent to deceive ... is an indispensable element in the [fraud] analysis.”); *Ecash v. Guagliardo*, 127 F. Supp.

2d 1069, 1079 (C.D. Cal. 2000) (“In general, an Respondent is only required to have a ‘good faith’ belief that it is the senior user”). As such, if the Respondent “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,” a fraud claim will fail. *Daniel J. Quirk, Inc. v. Village Car Co.*, 120 U.S.P.Q.2d 1146 (TTAB 2016) (denying a petition to cancel QUIRK formative registrations for auto dealerships because of registrant’s alleged fraud in signing application declarations while aware of petitioner’s use of QUIRK formative marks on the same services because registrant honestly believed there would be no consumer confusion based upon petitioner’s use of QUIRK marks in a local market hundreds of miles away).

In view of the above, in *Intellimedia Sports v. Intellimedia Corp.*, 43 U.S.P.Q.2d 1203, 1206 (T.T.A.B. 1997), the Board summarized the specific elements of a fraud claim that a plaintiff must demonstrate in order to adequately show a defendant’s fraudulent intent when signing a new application declaration denying the existence of any similar mark. That plaintiff must demonstrate that ***at the time the declaration was signed:***

- (1) there was in fact another use of the same or a confusingly similar mark;
- (2) the other user had legal rights superior to Respondent’s rights;
- (3) Respondent knew that the other user had rights in the mark superior to Respondent’s, **and** either believed that a likelihood of confusion would result from Respondent’s use of its mark or had no reasonable basis for believing otherwise; and
- (4) Respondent, in failing to disclose these facts to the Patent and Trademark Office, intended to procure a registration to which Respondent was not entitled.

See also *Ohio State University v. Ohio University*, 51 U.S.P.Q.2d 1289 (T.T.A.B. 1999); 3 Gilson on Trademarks § 13.04 (2021). Analyzing these factors in the present case, we find as follows:

(1) There Was in Fact Another Use of the Same or a Confusingly Similar Mark

While Petitioner has not explicitly set forth in its Claim 2 Allegations which marks of Petitioner Respondent should have been aware of and instead refers to a copy of a demand letter sent to Respondent attached to the Petition for Cancellation as an exhibit,¹ Respondent will assume for purposes of this motion only that Petitioner is referring to the following marks:

- Application Ser. No. 90085246 for WEED ALES & LAGERS (standard characters) for “Beer, ale, lager, stout and porter; none of the foregoing containing cannabis or cannabis-derived ingredients” filed on July 31, 2020.
- Reg. No. 4312889 for the mark WEED WEED GOLDEN ALE MT SHASTA BREWING CO. WEED, CA and Design (shown left) for “Beer making kit; Beer, ale and lager; Beer, ale and porter; Beer, ale, lager, stout and porter; Beer, ale, lager, stout, porter, shandy; Beers; Brewed malt-based alcoholic beverage in the nature of a beer; Flavored beers; Malt beer; Malt liquor; Pale beer,” which Petitioner alleges in Paragraph 2 of the Notice of Opposition.
- Expired Reg. No. 3688702 for WEED ALES & LAGERS for clothing items in class 25 and “Ale; ale and porter; ales; beer; beer, ale and lager; beer, ale and porter; beer, ale, lager, stout and porter; lager; lagers; porter” in class 32 which Petitioner alleged in Paragraph 3 and which expired on June 10, 2020.



None of the above marks are exactly identical to the Respondent’s WEED standard character mark, nor do they cover the same goods as Respondent’s class 32 goods, namely “Beer, ales and lagers; non-alcoholic beer and other non-alcoholic beverages, namely, soft drinks; soda pops; drinking water and flavored waters; carbonated nonalcoholic drinks;

¹ And therefore not officially of record in the proceeding.

malt drinks, namely, non-alcoholic malt beverages; fruit drinks and fruit juices; syrups for making beverages; preparations for making beverages, namely, powders used in the preparation of fruit-based beverages; beer making kits; none of the foregoing comprised of, derived from or containing oils, extracts or ingredients derived from cannabis sativa L or any cannabis in any form including hemp, hemp seeds and hemp extracts.” Accordingly, Respondent’s subjective belief that its WEED mark is not confusingly similar to the Petitioner’s above-referenced marks is reasonable and sufficient to show that Petitioner’s claims fail to show that Respondent had the requisite fraudulent intent in submitting its application. This belief is supported by the fact that the examiner of the Respondent’s Registration failed to issue any likelihood of confusion refusal against the Respondent’s Registration citing any of the aforementioned marks of Petitioner and, instead, cited two completely different WEED standard character marks owned by different third parties against other classes of goods in the Respondent’s Registration. The examiner obviously conducted a search of the USPTO database to retrieve the third party WEED registrations that it did cite against Respondent’s Registration and could easily have seen and cited Petitioner’s registration had the examiner thought it was confusingly similar to the Respondent’s Registration. This evidences that the examiner did not think that Petitioner’s registration was sufficiently similar to Respondent’s Registration and therefore Respondent’s belief in its declaration that no confusingly similar marks existed at the time was indeed valid.

In addition, Respondent will produce evidence from the file history of Respondent’s Registration that there are and have been numerous uses of the WEED formative on beer that is both registered, applied-for and in common law use which was

actually submitted to the examiner of that application and other applications of the Respondent to address distinctiveness issues with the WEED mark on beer. This fact alone justifies the Respondent's subjective belief that the marks Petitioner seems to be asserting was not considered confusingly similar to the Respondent's WEED mark.

Moreover, Respondent had no reason to believe, no basis to know and no obligation to find out that Petitioner was still actively using any of the above-referenced marks. It has already been pointed out that Petitioner had allowed its oldest asserted registered mark to expire. Respondent still has good reason to doubt Petitioner's ongoing proper usage of its asserted WEED mark on beer in U.S. Commerce.²

(2) The Other User Had Legal Rights Superior to Respondent's Rights

If Petitioner had ceased use or proper use of, or legally abandoned, any of its alleged WEED marks, or if the WEED formative is sufficiently commercially or inherently weak on beer, then Respondent could reasonably believe that Petitioner does not have superior rights in its mark as opposed to the Respondent's mark.

(3) No. 2 PLUS Respondent Either Believed that a Likelihood of Confusion Would Result From Respondent's Use of its Mark, Or Respondent Had No Reasonable Basis For Believing Otherwise

Since Respondent has reason to believe that Petitioner did not have superior rights in its mark over that of the Respondent, no. 3 is not applicable.

(4) Respondent Failed to Disclose the Facts About Third Party Marks to the USPTO, and Therefore Intended to Procure a Registration to which Respondent Was Not Entitled

Petitioner repeatedly alleges this point in Paragraphs 30, 31, 34 and 35 of the Petition for Cancellation, namely that Respondent "failed to make a reasonable and diligent

² Applicant reserves its right to file a non-use cancellation action against U.S. Reg. No. 4312889.

search for other registered marks” when it signed the declaration and had it done so, Respondent should not have been able to sign a declaration that states that “no other persons... have the right to use the mark in commerce...”. Petitioner’s allegations herein imply that Respondent had a duty to disclose to the USPTO information about third party marks.

A plethora of federal and TTAB case law refutes this point and states that the Respondent does not have a duty to search a mark’s availability. *Money Store v. Harriscorp Finance, Inc.*, 689 F.2d 666, 216 U.S.P.Q. 11 (7th Cir. 1982). See also *Wilson v. Graphol Prods. Co.*, 188 F.2d 498, 89 U.S.P.Q. 382 (C.C.P.A. 1951) (“To hold that a trademark registrant in order to claim good faith must search and find all prior interfering registrations would transfer the burden of examining and searching trademark applications from the Patent Office to the Respondent. Clearly this cannot be the law.”); *Official Airline Guides, Inc. v. Churchfield Publications, Inc.*, 756 F. Supp. 1393, 1399 (D. Ore. 1990) (following *Money Store*); *McGraw-Hill, Inc. v. Comstock Partners, Inc.*, 743 F. Supp. 1029, 17 U.S.P.Q.2d 1599 (S.D.N.Y. 1990) (refusing to find bad faith in defendant’s failure to conduct trademark search where search would have revealed similar mark but in different product area); *V & V Food Prods., Inc. v. Cacique Cheese Co.*, 683 F. Supp. 662, 7 U.S.P.Q.2d 1705 (N.D. Ill. 1988) (“The Lanham Act ... does not require a federal registrant to investigate and report to the USPTO all other possible users of a similar mark,” following *Money Store*).

Moreover, the Respondent is not obligated to disclose the existence of a prior registration to the examiner of its application. *Maids to Order of Ohio, Inc. v. Maid-to-Order, Inc.*, 78 U.S.P.Q.2d 1899 (T.T.A.B. 2006) (“[T]he failure of a party filing an

application to disclose the existence of a prior registration to the USPTO is not fraud.”); *Space Base, Inc. v. Stadis Corp.*, 17 U.S.P.Q.2d 1216 (T.T.A.B. 1990) (“[T]here is no fraud on the Office by reason of a failure to disclose information to the examining attorney of which the examining attorney is aware and, in this case, the examining attorney presumably was aware of the existence of Respondent’s prior pending application and of Petitioner’s opposition thereto at the time the examining attorney approved Petitioner’s application for publication.”); *SCOA Indus., Inc. v. Kennedy & Cohen, Inc.*, 188 U.S.P.Q. 411, 414 (T.T.A.B. 1975) (“The difficulty with respondent’s pleading of fraud is that respondent’s registration was on the register, and thus presumably known to the Examiner of Trademarks, at the time when the Examiner of Trademarks was considering petitioner’s right to registration.”).

IV. Conclusion

For the reasons set forth above, Petitioner’s “Claim 2: Fraud on the USPTO” in the Petition for Cancellation fails to state a cognizable claim against Respondent, both as to how it is insufficiently pleaded pursuant to FRCP Sec. 9(b); and as to the particular facts alleged which fail to satisfy the elements of fraud before the USPTO. *In re Bose Corp.*, 580 F.3d 1240, 1245, 91 U.S.P.Q.2d 1938 (Fed. Cir. 2009). While the TTAB customarily offers an opportunity to re-plead a claim that is dismissed, Respondent respectfully submits that the facts and evidence in this case are not sufficient to support any allegation of fraud before the USPTO and, as such, Petitioner’s fraud claim should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) **with prejudice.**

Favorable consideration is respectfully requested.

Dated this 31st day of August, 2021.

Respectfully submitted,

WEED CELLARS INC.
Respondent,
By counsel,

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

In the Matter of U.S. Registration No. 6381999
For the Trademark(s): WEED (standard characters)

VBNJ, Inc.,)	
)	
Petitioner,)	
v.)	Opposition No.: 92077648
Weed Cellars Inc.,)	Our Docket: 49268-051
)	
Respondent.)	

Hon. Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451
BOX TTAB NO FEE

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that the foregoing RESPONDENT’S MOTION TO DISMISS is being electronically filed using the Electronic System for Trademark Trials and Appeals (ESTTA) on this 31st day of August 2021.

/Alex Butterman/
Alexander Butterman

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT’S MOTION TO DISMISS has been served upon Petitioner via e-mail on this 24th day of August 2021, at the email addresses indicated below:

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