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

Proceeding no.	92079337
Party	Plaintiff Mija Clean, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Mija Clean, LLC)	
)	
Petitioner,)	Cancellation No.: 92079337
)	
v.)	
)	
Mija, LLC)	
)	
Respondent.)	
)	
)	

PETITIONER’S RESPONSE TO RESPONDENT’S MOTION TO DISMISS

Petitioner Mija Clean, LLC through its undersigned counsel, hereby responds to Respondent Mija, LLC’s Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) and TBMP § 503, *et seq.* for failure to state a claim upon which relief may be granted.

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 (2022)). 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) it 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). 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).

In the case at hand, Petitioner alleges that its Application No. 90452598 has been refused registration based on a potential likelihood of confusion with Registration No. 6532271 (the “Registration”). Based on the foregoing claim, Petitioner has sufficiently established its 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). The issue of standing is not contested by Respondent.

Furthermore, Petitioner asserts that a valid ground exists for cancelling the Registration based on its claim of fraud. 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 1938, 1942. Thus, to assert a viable claim of fraud, the petitioner must allege with particularity, rather than by implied expression, that the respondent 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 (the “USPTO”). *Id.*; see Fed. R. Civ. P. 9(b).

Here, Petitioner did not fail to state a fraud claim for which relief may be granted. In the Trademark Trial and Appeal Board's ruling issued on May 8, 2023, this Board allowed Petitioner to file an amended pleading to properly allege fraud. In its Amended Petition for Cancellation filed on April 7, 2023, Petitioner submitted additional statements of facts providing information upon which it relies or the belief upon which the allegation is founded. In particular, Petitioner further asserted that its claims are based upon facts which are clearly reflected and made publicly available to the public in the USPTO database. For example, as alleged in the amended pleading, Petitioner's investigation of Respondent's fraudulent attestation of use primarily involved publicly available resources, including Respondent's website. 12 TTABVUE 3.

Additionally, Petitioner's claims are based on Respondent's false declaration filed with the USPTO with its Statement of Use in which it declared under oath that it had used the MIJA mark on all the goods identified in the Notice of Allowance. More specifically, Respondent's Statement of Use, filed on July 28, 2021, included the following statement: "The mark is in use in commerce on or in connection with all of the goods/services, or to indicate membership in the collective organization listed in the application or Notice of Allowance or as subsequently modified for this specific class." 12 TTABVUE 4. In fact, in the Answer to the Amended Petition, Respondent admits that the mark was not in use on the Goods in the Notice of Allowance at the time the Statement of Use was filed. Answer to Amended Petition No. 9. Elsewhere in the Answer, Respondent identifies this as a mistake or inadvertent error without any knowledge of the Respondent's intent. Respondent should not be allowed to escape its own knowledge.

Moreover, Petitioner has alleged with further particularity that Respondent's registration was obtained fraudulently based upon the Respondent's responses to Petitioner's discovery requests. In particular, as claimed in Petitioner's amended pleading, "[i]n its Response

to Request No. 6 of Petitioner's First Set of Requests for Admissions, Respondent admitted that its mark was not in use in connection with 'perfumery; hair care products, namely, shampoos, conditioners, hair cleaning preparations, hair styling spray, hair styling gels and sprays, hair coloring and dyeing preparations; beauty care preparations, namely, non-medicated balms for use on skin, lips, hair, body lotions; face toner; face gels, face creams, face mist, skin lotions; makeup, lip balms, lip sticks, body washes, body scrubs, skin toners, beauty creams; body creams' at the time that its Statement of Use was filed on July 28, 2021." 12 TTABVUE 4.

Respondent also incorrectly asserts that Petitioner alleges no facts that would show that Respondent "had any intent to deceive and no facts from which the Board could infer such intent to deceive." 13 TTABVUE 4. Contrary to Respondent's claim that its Section 7 amendment to the Registration "goes only to the claim that the attestation was false, not to any claim that the attestation was made with intent to deceive," Petitioner maintains that Petitioner was only motivated to amend its identification to correctly reflect its goods well after it received notice of its fraud from Petitioner. In particular, as reflected in the USPTO record for the Registration, Respondent amended its identification of goods as it had never used the mark in connection with the following goods: "perfumery; hair care products, namely, shampoos, conditioners, hair cleaning preparations, hair styling spray, hair styling gels and sprays, hair coloring and dyeing preparations; beauty care preparations, namely, non-medicated balms for use on skin, lips, hair, body lotions; face toner; face gels, face creams, face mist, skin lotions; make-up, lip balms, lip sticks, body washes, body scrubs, skin toners, beauty creams; body creams" at the time of filing its Statement of Use. Such an amendment clearly demonstrates Respondent's intent to deceive the USPTO as it was made aware of its fraudulent use of the mark in connection with its goods and willfully continued such use for an extended period of

time.

Based on Petitioner's additional statements of facts, as well as Petitioner's arguments of record, Respondent incorrectly asserts that Petitioner's claims "are nothing more than 'threadbare' recitals which lack any factual particularity as to knowledge or intent." 13 TTABVue 4. Petitioner has alleged in a sufficient manner in its amended pleading that (1) the false representations were material to the determination of registrability; (2) Respondent had knowledge of the falsity of the representations; and (3) Respondent made the representations to the USPTO with the intent to deceive the USPTO with respect to the registrability of the mark.

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). As stated above, Petitioner alleged sufficient factual content that, if proved, would allow the Board to conclude, or draw a reasonable inference, that the Petitioner has standing to maintain the proceeding, and a valid ground exists for canceling the Registration. Petitioner's fraud claim is stated so that it is plausible on its face as pleaded in the Petition.

Interestingly, Respondent appears to base its Motion on the claim that Petitioner does not adequately allege first-hand knowledge of the Respondent's intent on its filing a false Statement of Use. Such a fact is not required and in fact, Petitioner has alleged sufficient facts to support this claim. Yet, it is Respondent that even at this stage claims to not have sufficient knowledge. The following are taken directly from the Amended Petition and Respondent's Answer to the Amended Petition which is attached to its very Motion.

Petitioner's Amended Petition, Paragraph 16:

16. Although Respondent's then-attorney of record filed the Statement of Use, Respondent knew or should have known it was not using the MIJA mark in connection with the goods specified therein.

Respondent's Answer to Petitioner's Paragraph 16:

16. Registrant denies the allegations of Paragraph 16 of the Amended Petition.

Petitioner's Amended Petition, Paragraph 17:

17. In *Hachette Filipacchi Presse v. Elle Belle LLC*, the Board held that when an applicant is represented by counsel, both the applicant and its counsel share the same duty to ensure the accuracy of the trademark application and the truth of the statements contained therein. 85 U.S.P.Q.2d 1090, 1094 (T.T.A.B. 2007). Thus, Respondent must be held accountable for any false or misleading statements made to the U.S. Patent and Trademark Office.

Respondent's Answer to Petitioner's Paragraph 17:

17. Registrant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 17 of the Amended Petition, which are therefore denied.

Petitioner's Amended Petition, Paragraph 18:

18. Mr. Vaidya was authorized by Respondent to execute and file the Statement of Use.

Respondent's Answer to Petitioner's Paragraph 18:

18. Registrant admits that it authorized its then attorney of record to file a Statement of Use with its Application No. 90263714. However, Registrant denies having authorized its then attorney that to file the Statement of Use covering all of the goods listed in the application.

Petitioner's Amended Petition, Paragraph 23:

23. By filing the Statement of Use in which Respondent declared under oath that it had used the mark on all the goods identified in the Notice of Allowance, Respondent made a material misrepresentation of fact to the U.S. Patent and Trademark Office with regard to its use of the MIJA mark on the specified goods.

Respondent's Answer to Petitioner's Paragraph 23:

23. Registrant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 23 of the Amended Petition, which are therefore denied.

Petitioner's Amended Petition, Paragraph 26:

26. By filing its Statement of Use claiming use in connection with "perfumery; hair care products, namely, shampoos, conditioners, hair cleaning preparations, hair styling spray, hair styling gels and sprays, hair coloring and dyeing preparations; beauty care preparations, namely, non-medicated balms for use on skin, lips, hair, body lotions; face toner; face gels, face creams, face mist, skin lotions; makeup, lip balms, lip sticks, body washes, body scrubs, skin toners, beauty creams; body creams," Respondent intended for the U.S. Patent and Trademark Office to issue a registration that included "perfumery; hair care products, namely, shampoos, conditioners, hair cleaning preparations, hair styling spray, hair styling gels and sprays, hair coloring and dyeing preparations; beauty care preparations, namely, non-medicated balms for use on skin, lips, hair, body lotions; face toner; face gels, face creams, face mist, skin lotions; makeup, lip balms, lip sticks, body washes, body scrubs, skin toners, beauty creams; body creams."

Respondent's Answer to Petitioner's Paragraph 26:

26. Registrant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 26 of the Amended Petition, which are therefore denied.

In deciding the motion, “the Board ... must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987). The amended pleading specifically identifies the goods that Petitioner alleges were not in use. Petitioner alleged sufficient factual content that, if proved, would allow the Board to conclude, or draw a reasonable inference, that the Petitioner has standing to maintain the proceeding, and a valid ground exists for canceling the registration.

For the foregoing reasons, Petitioner respectfully requests that the Board deny Registrant’s Motion to Dismiss the Petition and resume the proceeding.

Respectfully submitted,

May 30, 2023

/Joseph T. Nabor/

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CERTIFICATE OF SERVICE

I, Joseph T. Nabor, Attorney for the Petitioner, hereby certify that a copy of the foregoing Amended Petition for Cancellation has been served via email upon:

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Dated: May 30, 2023

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