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

Proceeding no.	92081655
Party	Defendant Alfwear Inc.
Correspondence address	ALFWEAR INC 1635 SOUTH 5070 WEST SUITE C SALT LAKE CITY, UT 84104 UNITED STATES Primary email: mail@trentbaker.com No phone number provided
Submission	Motion to Dismiss - Rule 12(b)
Filer's name	S. Brandon Owen
Filer's email	trent@bakerip.com, admin@bakerip.com, bowen@rqn.com, arichards@rqn.com, kpickering@rqn.com, docket@rqn.com
Signature	/s S. Brandon Owen/
Date	06/26/2023
Attachments	Motion to Dismiss - Cancellation No. 92081655.pdf(151828 bytes)

Trent H. Baker (8799)
BAKER IP PLLC
124 South Main Street, #3147
Cedar City, Utah 84720
Telephone: (801) 618-3359
trent@bakerip.com

S. Brandon Owen (9971)
Adam K. Richards (14487)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
Post Office Box 45385
Salt Lake City, Utah 84111
Telephone: (801) 532-1500
Facsimile: (801) 532-7543
bowen@rqn.com
arichards@rqn.com

Attorneys for Respondent Alfwear, Inc.

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

In the Matter of Trademark Registrations:

KÜHL (Reg. No. 6,637,912) Registered: Feb 8, 2022 (Serial No. 90,582,295) Filed: Mar. 16, 2021;
KÜHL (Reg. No. 6,430,939) Registered: Jul. 27, 2021 (Serial No. 88-709,479) Filed: Nov. 27, 2019;
KÜHL (Reg. No. 6,013,221) Registered: Mar. 17, 2020 (Serial No. 88-585,267) Filed: Aug. 20, 2019;
KÜHL (Reg. No. 5,931,048) Registered: Dec. 10, 2019 (Serial No. 88-432,946) Filed: May 16, 2019;
KÜHL (Reg. No. 5,964,423) Registered: Jan. 21, 2020 (Serial No. 87-672,054) Filed: Nov. 4, 2017;
ÜBERKÜHL (Reg. No. 4,468,589) Registered: Jan. 21, 2014 (Serial No. 85-615,254) Filed: May 3, 2012;
KÜHL (Reg. No. 4,580,723) Registered: Aug. 5, 2014 (Serial No. 85-705,638) Filed: Aug. 16, 2012;
KÜHL (Reg. No. 4,576,447) Registered: Jul. 29, 2014 (Serial No. 85-705,577) Filed: Aug. 16, 2012;
KÜHLDRY (Reg. No. 4,576,372) Registered: Jul. 29, 2014 (Serial No. 85-615,261) Filed: May 3, 2012;
KÜHL (Reg. No. 4,576,371) Registered: Jul. 29, 2014 (Serial No. 85-615,248) Filed: May 3, 2012;
KÜHL (Reg. No. 3,011,867) Registered: Nov. 1, 2005 (Serial No. 76-572,171) Filed: Jan. 23, 2004; and
KUHL (Reg. No. 1,990,375) Registered: Jul. 30, 1996 (Serial No. 74-561,353) Filed: Aug. 15, 1994

Cancellation No. 92081655

KULE, LLC,

Petitioner,

v.

ALFWEAR, INC.,

Respondent.

MOTION TO DISMISS

Respondent Alfwear, Inc. (“Alfwear” or “Respondent”), by and through its undersigned counsel, files this Motion to Dismiss the Petition for Cancellation (TTABVUE 1, “Pet.”) filed by Petitioner Kule, LLC (“Kule” or “Petitioner”).

BACKGROUND

Kule asks the Board to cancel certain trademark registrations owned by Alfwear on two grounds: (1) fraud and (2) abandonment. The registrations that Kule seeks to cancel are Registration Nos. 6,637,912; 6,430,939; 6,013,221; 5,931,048; 5,964,423 (class 41); 4,468,589; 4,580,723 (class 24); 4,576,447 (class 24); 4,576,372; 4,576,371; 3,011,867; and 1,990,375 (class 32) (collectively the “Registrations”).

ARGUMENT

“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 to draw a reasonable inference, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the registration.” *Dragon Bleu (SARL) v. VENM, LLC*, 112 U.S.P.Q.2d 1925 (TTAB 2014). “Specifically, a complaint ‘must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). “In particular, the claimant must allege well-pleaded factual matter and more than ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.’” *Id.* (quoting *Iqbal*, 556 U.S. 662). Here, Kule’s petition should be dismissed because it offers essentially no allegations in support of its fraud and abandonment claims. Furthermore, Kule fails to allege standing to petition to cancel the registrations.

I. The Petition fails to state a plausible claim of fraud.

Kule purports to assert that the Registrations should be cancelled based on fraud. “[A] trademark is obtained fraudulently under the Lanham Act only if the applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO.” *In re Bose Corp.*, 580 F.3d 1240, 1245 (Fed. Cir. 2009). “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.” Fed. R. Civ. P. 9(b). 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 U.S.P.Q.2d 1656, 1668 (Fed. Cir. 2009). Here, Kule fails to allege any facts—let alone particular facts—regarding an allegedly false and material representation made by Alfwear to the USPTO. Furthermore, Kule fails to allege any underlying facts from which the Board could reasonably infer that Alfwear acted with intent to deceive the USPTO. Kule offers only the conclusory and threadbare allegation that “Alfwear obtained those registrations by fraud.” Accordingly, Kule’s claim for fraud should be dismissed.

II. The Petition fails to state a plausible claim of abandonment.

Kule purports to assert that the Registrations should be cancelled as abandoned. “In order to set forth a sufficient claim to cancel the registration of a mark on grounds of abandonment, the plaintiff must plead ultimate facts pertaining to the alleged abandonment, thus providing fair notice to the defendant of plaintiff's theory of abandonment.” *Dragon Bleu (SARL) v. VENM, LLC*, 112 U.S.P.Q.2d 1925 (TTAB 2014). “In this context, a mark is abandoned ‘[w]hen its use has been

discontinued with intent not to resume such use. . . . Nonuse for 3 consecutive years shall be prima facie evidence of abandonment.” *Id.* (quoting 15 U.S.C. § 1127). “Therefore, to adequately plead such a claim, a plaintiff must recite facts which, if proven, would establish at least three consecutive years of nonuse, or alternatively, a period of nonuse less than three years coupled with proof of intent not to resume use.” *Id.* When a petition “provide[s] no facts to support its conclusory allegation of abandonment,” the “pleading of abandonment is legally insufficient.” *Otto Int’l, Inc. v. Otto Kern GmbH*, 83 U.S.P.Q.2d 1861 (TTAB 2007). Here, Kule alleges no specific facts regarding nonuse or intent not to resume use. All Kule alleges is the conclusory allegation that Alfwear “registers multiple trademarks that it does not use and has not used continuously to offer goods or services for sale in interstate commerce.” Such an allegation is legally insufficient to state a claim for abandonment. Accordingly, Kule’s claim should be dismissed.

III. The Petition fails to allege that Kule is entitled to seek cancellation of the Registrations.

To establish an entitlement to seek cancellation of a registration under Section 13 or 14 of the Trademark Act a plaintiff must demonstrate a real interest in the proceeding and a reasonable belief of damage. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373–74 (Fed. Cir. 2020). Kule alleges that “Retention by Alfwear of the fraudulent and abandoned registrations prevents Kule and other legitimate businesses from productive use of the marks.” Such a conclusory statement fails to support a plausible finding that, with respect to each and every one of the Registrations, Kule has a real interest in cancelling the Registrations and has a reasonable belief that it will be damaged without cancellation. Accordingly, the Petition should be dismissed.

CONCLUSION

For the foregoing reasons, Respondent’s motion should be granted.

DATED this 26th day of June, 2023.

RAY QUINNEY & NEBEKER P.C.

/s S. Brandon Owen/

S. Brandon Owen
Adam K. Richards

BAKER IP PLLC

/s Trent H. Baker/

Trent H. Baker

Attorneys for Respondent Alfwear, Inc.

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CERTIFICATE OF SERVICE

I hereby certify a true and complete copy of the foregoing **MOTION TO DISMISS** was served on Petitioner this 26th day of June, 2023, via email on the following:

Vanessa A. Ignacio, Esq.
Matthew P. Hintz, Esq.
LOWENSTEIN SANDLER LLP
One Lowenstein Drive
Roseland, NJ 07068
LStrademark@lowenstein.com

DATED this 26th day of day of June, 2023.

By: /s Kelly D. Pickering /
Kelly D. Pickering

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