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October 17, 2024

Cancellation No. 92085380

Holy Cow Restaurant Inc.

v.

Harry Caray, Ltd.

By the Trademark Trial and Appeal Board:

This proceeding now comes before the Board for consideration of Respondent's motion, filed July 19, 2024, to dismiss the petition for cancellation for failure to state a claim under Fed. R. Civ. P. 12(b)(6).[1] The motion is fully briefed.

The Board has carefully considered all of the parties' arguments, presumes the parties' familiarity with the bases for their filings, and does not recount the facts or arguments here except as necessary to explain the decision. *See Guess? IP Holder LP v. Knowluxe LLC*, Can. No. 92060707, 2015 WL 9702438, at *1 (TTAB 2015).[2]

[1] 5 TTABVUE. In this order, the Board cites to the proceeding record by the TTABVUE docket entry number and TTABVUE page number, in accordance with the guidance provided in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") §§ 106.03, 702.05 and 801.01 (2024). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any number(s) following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.
Respondent's change of correspondence address filed August 8, 2024 (7 TTABVUE) is noted and has been entered into the record.

[2] As part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases, the citation form in this opinion is in a form provided in TBMP

I. Background

Respondent is the owner of Registration Nos. 2216797 and 3141729, both for the standard character mark HOLY COW! The '797 registration is for use in connection with "bar and restaurant services" in International Class 42.[3] The '729 registration is for use in connection with "Restaurant and bar services" in International Class 43.[4]

Petitioner has pleaded ownership of the following applications:

Serial No.	Mark	Services
98006584	HOLY HALAL COW	Restaurant and catering services, in International Class 43
98069272	HOLY BURGERS COW	Restaurant and café services; Restaurant and catering services, in International Class 43

§ 101.03. This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion employs citation to the Westlaw (WL) database. Practitioners should also adhere to the practice set forth in TBMP § 101.03.

[3] Registered January 12, 1999. Underlying application filed under a Section 1(a) use in commerce filing basis, 15 U.S.C. § 1051(a), with a claimed date of first use anywhere and in commerce of October 21, 1987. The registration includes a concurrent use statement limiting registration to the area consisting of the states of Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin.

[4] Registered September 12, 2006. Underlying application filed under a Section 1(a) use in commerce filing basis, 15 U.S.C. § 1051(a), with a claimed date of first use anywhere and in commerce of October 21, 1987.

Registration of Petitioner's marks has been refused under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based upon a likelihood of confusion with Respondent's registrations.[5]

Petitioner has petitioned to cancel Respondent's registrations, claiming abandonment pursuant to Trademark Act Section 14(3), 15 U.S.C. § 1064(3). In support of its petition Petitioner pleads the following salient allegations:

4. Online research failed to reveal any evidence of the Registered Marks being used in relation to the Registered Services.

5. Respondent's website at https://www.harrycarays.com/ does not identify any use of HOLY COW! for the Registered Services in the United States.

6. On information and belief, Respondent has failed to use the Registrations for the Registered Services in U.S. interstate commerce in connection with the sale of the Registered Services for a period of at least three (3) years, establishing prima facie evidence of abandonment.

7. On information and belief, Respondent does not intend to resume bona fide use in U.S. commerce of the Registered Marks in connection with the Registered Services.

8. Accordingly, the Registrations have been abandoned, within the meaning of 15 U.S.C. § 1127.[6]

II. The Parties' Arguments

Respondent argues that the petition for cancellation is deficient because Petitioner alleges no well-pleaded facts to state a valid claim. In particular, Respondent assert that the allegations in paragraphs 4-8 of the petition are merely threadbare recitals of the elements of a cause of action, supported by nothing more than mere conclusory statements, and thus do not suffice to properly state a cause of

[5] *See* 1 TTABVUE 4, ¶ 2.
[6] *Id*. at ¶¶ 4-8.

action, and need not accepted as true. Petitioner counters that its petition for cancellation contains factual allegations that, if proved true during the course of this proceeding, would provide a valid ground for the cancellation of the registrations at issue, and that this is all that is required at the pleading stage.

III. Analysis

A. Motion to Dismiss Standard

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) is a test solely of the legal sufficiency of the complaint. *Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993); *Covidien LP v. Masimo Corp.*, Can. No. 92057336, 2014 WL 977444, at *1 (TTAB 2014). To survive a motion to dismiss, a plaintiff need only allege sufficient facts that, if proved, would establish that: (1) the plaintiff has an entitlement to a statutory cause of action; and (2) a valid ground exists for challenging the mark. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1026 (CCPA 1982).

Specifically, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To state a claim plausible on its face, 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." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). The plausibility standard does not require that a plaintiff set forth detailed factual allegations. *Twombly*, 550 U.S. at 556-57. Rather, a plaintiff need

only allege "enough factual matter ... to suggest that [a claim is plausible]" and "raise a right to relief above the speculative level." *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010). The elements of each claim should be stated concisely and directly, and include enough detail to give the defendant fair notice. *See* Fed. R. Civ. P. 8(e)(1); *Fair Indigo LLC v. Style Conscience,* Opp. No. 91175571, 2007 WL 4162785, at *3 (TTAB 2007); *see also Harsco Corp. v. Elec. Sci., Inc.,* Can. No. 92016543, 1988 WL 252330, at *1 (TTAB 1988) (since function of pleadings is to give fair notice of claim, a party is allowed reasonable latitude in its statement of its claims). Under the simplified notice pleading of the Federal Rules of Civil Procedure, the allegations of a complaint should be construed liberally so as to do substantial justice. *Scotch Whisky Ass'n v. U. S. Distilled Prods. Co.*, 952 F.2d 1317, 1319 (Fed. Cir. 1991).

For purposes of determining this motion, all of the Petitioner's well-pleaded allegations must be accepted as true, and the claims must be construed in the light most favorable to Petitioner. *See Petróleos Mexicanos v. Intermix SA*, Can. No. 92052292, 2010 WL 5574284, at *1 (TTAB 2010). Matters outside the pleadings will not be considered on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), as to do so would convert the motion to one for summary judgment, *see* Fed. R. Civ. P. 12(d), which the Board will not entertain prior to the moving party's service of initial disclosures. *See* Trademark Rule 2.127(e)(1), 37 C.F.R. § 2.127(e)(1).

Further, it is well established that whether a plaintiff can actually prove its allegations is not a matter to be determined upon a motion to dismiss, but rather at

final hearing or upon consideration of a motion for summary judgment, after the parties have had an opportunity to submit evidence. *See, e.g., Nike, Inc. v. Palm Beach Crossfit Inc.*, Opp. No. 91218512, 2015 WL 5721653, at *4 (TTAB 2015) ("Whether Opposer is able to prove its allegations . . . is not a matter for determination on a motion to dismiss."); *Libertyville Saddle Shop Inc. v. E. Jeffries & Sons, Ltd.*, Can. No. 92019719, 1992 WL 113733, at *3 (TTAB 1992) ("A motion to dismiss does not involve a determination of the merits of the case…"). Accordingly, in deciding Respondent's motion, the Board has not considered arguments that go to the merits of the case or whether Petitioner ultimately will be able to prove its allegations. *See Covidien*, 2014 WL 977444, at *2 n.3.

B. Entitlement to a Statutory Cause of Action

Respondent has not challenged the sufficiency of Petitioner's allegations regarding its entitlement to a statutory cause of action. Nonetheless, entitlement to a statutory cause of action is a threshold issue that must be properly pleaded by the plaintiff in every inter partes proceeding. *See Ritchie v. Simpson,* 170 F.3d 1092, 1095 (Fed. Cir. 1999); *John W. Carson Found. v. Toilets.com, Inc.*, Opp. No. 91181092, 2010 WL 1233881, at *4 (TTAB 2010). Any person who believes he, she, or it is or will be damaged by registration of a mark is entitled to a statutory cause of action to file a petition to cancel. Trademark Act Section 14, 15 U.S.C. § 1064. To establish entitlement to a statutory cause of action under Section 14 of the Trademark Act, a plaintiff must demonstrate a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d

1370, 1373-74 (Fed. Cir. 2020); *DowntownDC Bus. Improvement Dist. v. Clarke*, Opp. No. 91275100, 2024 WL 4449409, at *10 (TTAB 2024).

At the pleading stage, all that is required is that a plaintiff allege facts sufficient to show it has an interest within the zone of interests protected by statute, i.e., a "real interest" and damage proximately caused by registration, i.e., a "reasonable basis" for its belief that it would suffer some kind of damage if the mark is registered. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1303-05 (Fed. Cir. 2020); *Empresa Cubana del Tabaco Empresa v. Gen. Cigar Co.*, 753 F.3d 1270, 1274-75 (Fed. Cir. 2014). An interest falling within the zone of interests protected by statute and damage proximately caused by the registration of a mark may be found, for example, where plaintiff pleads (and later proves) that plaintiff has been refused registration of its mark because of defendant's registration. *See Empresa Cubana del Tabaco*, 753 F.3d at 1274 (entitlement to statutory cause of action found where plaintiff's application refused based on defendant's registrations); *Hole In 1 Drinks, Inc. v. Lajtay*, Can. No. 92065860, 2020 WL 859853, at *4 (TTAB 2020) (evidence of record showing that petitioner's pending application was refused registration based on respondent's registration sufficient to demonstrate standing).

Here, Petitioner alleges that the USPTO has cited Respondent's registrations against each of its applications, thereby interfering with Petitioner's applications, and causing harm to Petitioner.[7] Petitioner therefore has pleaded a real interest in cancelling the registrations and a reasonable belief that the registrations blocking its

[7] 1 TTABVUE 4, ¶ 2.

application are causing it damage, and such allegations are sufficient for Petitioner to plead entitlement to a statutory cause of action. *See, e.g., Empresa Cubana Del Tabaco*, 753 F.3d at 1274.

C. Abandonment

In order to set forth a sufficient claim to cancel the registration of a mark on the ground 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. *Otto Int'l Inc. v. Otto Kern GmbH*, Can. No. 92046167, 2007 WL 1577524, at *2 (TTAB 2007). A mark shall be deemed abandoned "[w]hen its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie evidence of abandonment." Trademark Act Section 45, 15 U.S.C. § 1127. Thus, to adequately plead a claim of abandonment, 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. *Dragon Bleu (SARL) v. VENM, LLC*, Opp. No. 91212231, 2014 WL 7206399, at *6 (TTAB 2014) (citing *Imperial Tobacco Ltd. v. Philip Morris Inc.*, 899 F.2d 1575, 1579 (Fed. Cir. 1990)).

Here, viewing the allegations set forth in the petition to cancel in a light most favorable to Petitioner, we find that Petitioner has sufficiently pleaded its abandonment claim. Specifically, Petitioner pleads that "Respondent has failed to use the Registrations for the Registered Services in U.S. interstate commerce in

connection with the sale of the Registered Services for a period of at least three (3) years, establishing prima facie evidence of abandonment"[8] and that "Respondent does not intend to resume bona fide use in U.S. commerce of the Registered Marks in connection with the Registered Services."[9] This is sufficient for pleading purposes. *See Lewis Silkin LLP v. Firebrand LLC*, Can. No. 92067378, 2018 WL 6923002, at *6 (TTAB 2018) ("The petition to cancel pleads that Respondent is not using the mark with its goods and services, and has no intent to resume use. The Board finds that no more is necessary for a legally sufficient abandonment claim in the context of the Board's narrow jurisdiction limited to trademark registrability.").

Respondent provides evidence purportedly showing use of its mark and asserts that Petitioner's allegations are false. However, for purposes of determining this motion, all of the Petitioner's well-pleaded allegations must be accepted as true, and the claims must be construed in the light most favorable to Petitioner. *See Petróleos Mexicanos*, 2010 WL 5574284, at *1. Furthermore, at this stage the Board does not consider matters outside the pleadings, as the purpose of a Rule 12(b)(6) motion is to challenge "the legal theory of the complaint, not the sufficiency of any evidence that might be adduced." *Advanced Cardiovascular Sys.*, 988 F.2d at 1160. Petitioner's assertions therefore are unavailing.

Petitioner's argument that Respondent's allegations consist merely of "threadbare recitals" is not well-taken. As the Board noted in *Lewis Silkin*, the "much-quoted reference to 'threadbare' recitals does not establish a per se pleading standard.

[8] 1 TTABVUE 4, ¶ 6.
[9] *Id*. at ¶ 7.

'Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Lewis Silkin*, 2018 WL 6923002, at *2 (quoting *Iqbal*, 556 U.S. at 679). Petitioner's allegations satisfy the pleading standard for claims of abandonment previously set forth by the Board.

D. Summary

Petitioner has sufficiently pleaded its entitlement to a statutory cause of action and claim of abandonment. Respondent's motion to dismiss the petition to cancel in its entirety therefore is **denied.**

IV. Proceedings Resumed

Proceedings are resumed. Respondent is allowed until the deadline set forth below in which to file and serve an answer to the petition to cancel. Remaining proceeding dates are reset as follows:

Time to Answer	11/16/2024
Deadline for Discovery Conference	12/16/2024
Discovery Opens	12/16/2024
Initial Disclosures Due	1/15/2025
Expert Disclosures Due	5/15/2025
Discovery Closes	6/14/2025
Plaintiff's Pretrial Disclosures Due	7/29/2025
Plaintiff's 30-day Trial Period Ends	9/12/2025
Defendant's Pretrial Disclosures Due	9/27/2025
Defendant's 30-day Trial Period Ends	11/11/2025
Plaintiff's Rebuttal Disclosures Due	11/26/2025
Plaintiff's 15-day Rebuttal Period Ends	12/26/2025
Plaintiff's Opening Brief Due	2/24/2026
Defendant's Brief Due	3/26/2026
Plaintiff's Reply Brief Due	4/10/2026

Request for Oral Hearing (optional) Due 4/20/2026

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).