

Twombly at the TTAB – Abandonment Allegations Found Sufficient

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by Kaleb McNeely

The U.S. Supreme Court's blockbuster rulings in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* represented a major shift in federal pleading standards. Resolution of motions to dismiss frequently turns on whether a complaint meets *Twombly*'s so-called "plausibility" standard. In the context of a motion to dismiss a petition for cancellation of a trademark registration, however, not much appears to have changed since *Twombly* and *Iqbal*, at least in the context of a claim of abandonment. Late last year, in *Lewis Silkin LLP v. Firebrand LLC*, the Trademark Trial and Appeal Board denied a motion to dismiss, holding that an allegation that a trademark owner is not using a mark with its goods and services, and has no intent to resume use, is legally sufficient to plead an abandonment claim. Notably, the Board reiterated its position that the "the same pleading standard for abandonment claims has been in effect since the 1989 implementation of the [Trademark Law Revision Act of 1988]."

Is the Board simply ignoring *Twombly*? And can it really do that? The answer to the latter is certainly no – indeed, the Board noted that it follows the "federal standard of notice pleading," including the plausibility standard articulated in *Twombly* and *Iqbal*. Whether the Board is properly applying *Twombly* is a closer question, one that probably will not be definitively answered until the Court of Appeals for the Federal Circuit weighs in on the pleading standard for cancellation claims.



In the *Lewis Silkin* proceeding, Respondent Firebrand moved to dismiss a petition for cancellation of its registration for the mark FIREBRAND for a "newsletter dealing with brand and product development" and "business consultation services." The cancellation petition pleads merely that "[o]n information and belief, Respondent is not using Respondent's Mark on or in connection with Respondent's Goods and Services with no intent to resume such use." Under the Lanham Act, a mark is deemed to be "abandoned"

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when its use has been discontinued with intent not to resume such use. Applying that statutory definition, the Board held that “an abandonment claim must plead nonuse, which is use that has been discontinued, plus ‘intent not to resume such use.’”

Firebrand argued that Lewis Silkin’s mere recitation of the statutory elements is insufficient to meet the *Iqbal/Twombly* standard for pleadings. That standard requires that a complaint “state a claim to relief that is plausible on its face,” and cautions that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” While Firebrand seems to have a point, the Board did not agree. Rather, it observed that the “much-quoted reference to ‘threadbare’ recitals does not establish a per se pleading standard” and, quoting *Iqbal*, stated that “[d]etermining 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.” In other words, “while the *Iqbal/Twombly* standard applies to all civil complaints, the Supreme Court makes clear that there is flexibility in application of the standard.”

The Board then noted that, while the Federal Circuit has not applied the *Iqbal/Twombly* standard to abandonment claims, its application of that standard to pleadings of patent infringement is “instructive,” as the Federal Circuit has repeatedly denied motions to dismiss that seek overly-detailed pleading. The Board also referenced three previous cases in which it had occasion to apply the *Iqbal/Twombly* standard to abandonment claims. In each of those cases, the Board held that the *Iqbal/Twombly* standard did not require more than the traditional pleading of nonuse plus intent not to resume. Finally, the Board distinguished its pre-*Iqbal* decision in *Otto Int’l Inc. v. Otto Kern GmbH* because in that case, the petition to cancel, among other things, failed to allege that the respondent had discontinued use of its mark with an intent not to resume use. By contrast, in *Lewis Silkin*, the Petitioner’s “abandonment claim is not merely a formulaic recitation of the elements of the claim, because . . . the allegations of nonuse plus intent serve both to describe the claim and to describe the necessary facts to support the claim.”

The Board did provide some clues as to the policy rationale for its arguably questionable application of the *Iqbal/Twombly* standard to cancellation claims. Specifically, the Board stated that it saw no purpose in requiring detailed pleading requirements for an abandonment claim, particularly in light of the fact that there is no list of activities that always show trademark use, and actual intent not to resume use “also must relate to the use in commerce of the mark.” The Board was also “reluctant to see pleadings devolve into wrangling over whether specific factual allegations offered to demonstrate nonuse and intent not to resume use are sufficient to support the abandonment claim,” as “matters addressing what activities constitute use in commerce under the Trademark Act are best, and traditionally, left to trial.” The Board further remarked that any concerns about an increase in unwarranted abandonment claims could be addressed by participation in discovery conferences, the imposition of sanctions, and the issuance of precedential orders.

Although not explicitly touched on by the Board, a less stringent pleading standard for abandonment claims makes some sense in view of the fact that evidence of lack of *intent* to resume use will generally only be in the possession of the mark owner. As such, it would be unrealistic to expect a petitioner for cancellation to know and plead all the facts necessary to prevail on an abandonment claim. Perhaps this is what the Board was getting at when it noted that *Iqbal* requires “the reviewing court to draw on its judicial experience and common sense” in applying the *Iqbal/Twombly* standard. Whether the Board is ultimately right – and whether its standard for cancellation claims passes muster under *Iqbal* and *Twombly* – will have to await a decision by the Federal Circuit or, better yet, the Supreme Court. Until that happens, however, cancellation petitioners need only plead that a trademark owner is not using a mark with its goods and services, and has no intent to resume use to survive a motion to dismiss.