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

Proceeding	91187644
Party	Defendant Stork Store LLC
Correspondence Address	Jonathan Zucker, Esq. 27 N.Moore St.5th Floor New York, NY 10013 UNITED STATES jjzuck@gmail.com
Submission	Motion to Dismiss - Rule 12(b)
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Date	01/22/2009
Attachments	Storkreply.pdf (5 pages)(100252 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD
- -X
MOTHER'S NUTRITIONAL CENTER,

Opposer-Plaintiff,

-AGAINST-

Application Number: 77452966
Opposition Number: 91187644

STORK STORE LLC,

Applicant-Defendant.
- -X

The Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Plaintiff asserts that (A) "it owns trademark rights in its Stork Logo" (Response p.1), (B) its allegation that Applicant's mark will likely cause confusion is both "reasonable" (Response p.3), and (C) should be deemed true because its written in the pleadings (Response p.4). All three are incorrect and provide this Court ample basis to dismiss the Opposition with prejudice.

First, Plaintiff has not succeeded at registering a trademark and consequently has no *trademark* rights at all.[1] Indeed a review of the trademark application files indicates that Plaintiff could not establish that it previously used in commerce the black and white mark it sought to have registered and instead switched its registration theory to protect its future intent to use the black and white image. Yet, Plaintiff's Opposition requires it to have previously used the black and white image, a fact that it did not previously establish before this Board despite being asked to do so by an examining attorney. While Plaintiff's allegation that it previously used the black and white stork logo in commerce must be accepted as true for the purpose of deciding this motion, this

1 See United States Trademark Office Serial Numbers 77/340525 and 77/368478.

Court can certainly review Plaintiff's trademark application and its confusing statement that it has trademark rights in the image when determining whether a dismissal with prejudice would be appropriate.

Next, Plaintiff's assertion that its underlying claim is reasonable (see Response p.3), entirely lacks merit because the proposed black and white mark looks nothing like Applicant's proposed mark. The fourteen differences listed in Applicant's moving papers did not sufficiently emphasize that Plaintiff submitted a blurry, black and white image in its pleading, while the instant application contains a sharp, colored image. Assuming, as this Court must, that Plaintiff actually uses the mark attached to its pleadings (as opposed to the color sample it provided to the trademark board in its registration attempt or the color image on its website), the likely confusion argument loses a great deal of its thrust. But when one simply places Applicant's proposed mark side-by-side with the black and white image in Plaintiff's pleading, the argument completely stalls; even if a W.I.C. grocery store chain in California and Applicant's storefront in Brooklyn were theoretically competitors (which they are not), no confusion could ever exist since the proposed marks look absolutely nothing alike.

Plaintiff essentially contends that its claims are reasonable just because both marks use images of a stork carrying a baby in a blanket, irrespective of what those storks, babies, and blankets look like or whether additional text or colors further distinguish the marks. This static contention is patently unreasonable and can never be modified or supplemented by further factual development. In any event, the undersigned's highly curtailed search revealed no less than fifteen existing trademarks containing images with storks carrying babies inside blankets. Furthermore, countless companies whose goods and services are geared towards new or expecting mothers use a stork and baby image. Plaintiff's implicit assertion that he has exclusive use over any and all stork

carrying baby images is at best unreasonable but borders on the absurd and should not be countenanced by permitting this Opposition to proceed.

Finally, Plaintiff's argument supporting his supposition that this Court must find that confusion could result merely because it's stated in the pleading (Response p.4), is legally incorrect. Even a case cited earlier in Plaintiff's Response disagrees with the "personal belief" legal standard it asks this Court to apply. *See Richie v. Simpson*, 150 F.3d 1092, 1098 (Fed. Cir 1999). Applicant agrees that facts in the pleadings, of which here there are few, must be accepted as true for the purpose of deciding the instant motion. But this Court need not agree with the legal conclusions drawn in Plaintiff's pleadings.

Two of the cases that Plaintiff cites for this concept do not so hold and are inapposite to the instant situation. *See Guessefeldt v. McGrath*, 342 U.S. 308 (1952); *Kossick v. United Fruit Co*., 365 U.S. 731 (1961). The third, addresses "the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct." *Bell Atlantic Corp. v. Twombley*, 450 U.S. 544, 127 S.Ct. 1955, 1963 (2007), which touches on 12(b)(6) motions, albeit in a very specific and different cause of action. In *Twombley*, the Court wrote, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," which quite aptly describes the fundamental problem with Plaintiff's Opposition in the instant matter. *Twombley*, 127 S.Ct. at 1965, *quoting*, *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

"[B]ald allegations in the language of the statute neither give respondent fair notice of the basis for petitioner's claim nor set forth sufficient facts to establish the elements necessary for recovery." *McDonald Douglas Corp. v. Nat. Data Corp.*, 228 USPQ 45, 47 (TTAB 1985). As noted by the majority opinion in *Twombley*,

> Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

Bell Atlantic Corp. v. Trombley, 450 U.S. 544, 127 S.Ct. 1955, 1965 fn.3 (2007). Through 37 C.F.R. § 2.104(a) this tribunal requires such a statement, one that Plaintiff failed to provide.

Where an intermeddler presents an image that looks nothing like a proposed mark as the basis for its opposition, this Court should use its discretion to evaluate whether confusion could ever possibly result given each mark's distinctiveness. That sound discretion and analysis lies with this tribunal via the standing doctrine. *See Simpson*, 150 F.3d at 1098. Here, the result is manifest as further litigation cannot change the appearance or impact of the marks.

WHEREFORE, Stork Store LLC respectfully requests that this Court dismiss the Opposition with prejudice and grant the trademark application.

Dated: New York, New York
January 22, 2009

/s/ Jonathan Zucker
JONATHAN ZUCKER, Esq.

Certificate of Service

I **Una Chae** hereby certify that on January 20, 2009, a copy of the Reply Brief in Support of Motion to Dismiss was served on Plaintiff by United States Postal Service First Class Mail, postage prepaid, at the following address:

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Date: January 22, 2009

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