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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

GCP

Mailed: March 31, 2014

Opposition No. 91210863

Chris Economides III

v.

Thanco Products & Imports, Inc.

By the Trademark Trial and Appeal Board:

This case now comes before the Board for consideration of applicant's motion (filed December 12, 2013) to dismiss opposer's amended notice of opposition (filed on November 12, 2013) for failure to state a claim upon which relief may be granted. Opposer filed a timely response to applicant's motion on December 26, 2013.

Background

Applicant has filed two applications seeking to register the mark GOT OUZO? in standard characters; one for "T-shirts, sweatshirts, and caps" in International Class 25[1] and the other for "coffee cups, tea cups and mugs" in International Class 21.[2]

[1] Application Serial No. 77369646, filed on January 11, 2008, based on an allegation of use in commerce under Section 1(a) of the Trademark Act, claiming October 11, 1999 as both the date of first use and the date of first use in commerce.
[2] Application Serial No. 77378572, filed on January 23, 2008, based on an allegation of use under Section 1(a) of the Trademark, claiming August 28, 2007 as both the date of first use and the date of first use in commerce.

05-08-2014

On May 29, 2013, opposer filed a notice of opposition opposing the registration of applicant's GOT OUZO? marks on the following grounds: (1) deceptiveness under Section 2(a) of the Trademark Act; (2) false suggestion of a connection of a national symbol under Section 2(a) of the Trademark Act; (3) mere descriptiveness under Section 2(e)(1) of the Trademark Act; (4) geographic descriptiveness under Section 2(e)(2) of the Trademark Act; (5) fraud; (6) improper prosecution of applicant's involved applications; (7) violation of a geographic indication under Section 2(a) of the Trademark Act; and (8) interference with a foreign owner's mark.

On June 28, 2013, applicant filed a motion to dismiss opposer's notice of opposition for failure to state a claim upon which relief may be granted. By order dated November 3, 2013, the Board granted applicant's motion to dismiss in its entirety but allowed opposer leave to file an amended notice of opposition. As noted above, opposer filed his amended notice of opposition on November 22, 2013.

Applicant's Motion to Dismiss

We now turn to applicant's motion to dismiss opposer's amended pleading for failure to state a claim upon which relief may be granted.

To survive a motion to dismiss, a plaintiff need only allege sufficient factual matter as would, if proved, establish that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the mark. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (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, 129 S.Ct. 1937, 1949-50 (2009), *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In the context of *inter partes* proceedings before the Board, a claim has facial plausibility when the plaintiff pleads factual content that allows the Board to draw a reasonable inference that the plaintiff has standing and that a valid ground for opposition exists. *Cf. Twombly*, 550 U.S. at 556, 127 S.Ct. at 1955. In particular, 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 (Fed. Cir. 2010).

For purposes of determining such motion, all of the plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to the plaintiff. *See Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993). Dismissal for insufficiency is appropriate only if it appears certain that the plaintiff is entitled to no relief under any set of facts which could be proved in support of its claim. *See Stanspec Co. v. American Chain & Cable Company, Inc.*, 531 F.2d 563, 189 USPQ 420 (CCPA 1976).

A. **Standing**

A party has standing to oppose a particular application when it demonstrates that it has a real interest in the proceeding, and a reasonable basis for the belief that it will be damaged by the issuance of a registration. *Herbko Int'l v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375 (Fed. Cir. 2002); Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); *Ritchie v. Simpson*, 170 F.3d 1092, 1098, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999).

The Board may quickly dispose of applicant's assertion that opposer has not pleaded facts which, if proved, would establish his standing. The Board finds that opposer has sufficiently alleged a "real interest" and a "direct and personal interest" in the outcome of this proceeding by pleading that (1) he is a competitor of applicant, (2) he has sold items which bear the mark GOT OUZO?, and (3) has received a threatening letter from applicant regarding use of his GOT OUZO? mark. *See* page 1 of opposer's amended notice of opposition. Clearly, these facts, if proved, would be sufficient to establish opposer's real interest in this proceeding, that is, an interest beyond that of the general public, and that is all the law requires. *See International Order of Job's Daughters v. Lindeburg and Company*, 952 F.2d 1317, 21 USPQ2d 1145 (Fed. Cir. 1991).

Accordingly, applicant's motion to dismiss is **DENIED** to the extent that applicant contends that opposer has not sufficiently pleaded his standing to pursue this action.

We next turn to the opposer's claims for opposition set forth in his amended pleading.

Failure to Prove Acquired Distinctiveness

As a ground for opposition, opposer alleges that applicant failed to prove that its subject marks had acquired distinctiveness during the prosecution of the applicant's two subject registrations. Specifically, opposer seeks to challenge the sufficiency of the evidence submitted by applicant during the prosecution of applicant's involved applications to support applicant's claim that its GOT OUZO? mark has acquired distinctiveness. The Board finds that this is not a ground for opposition under the Trademark Act. As previously stated in its November 3, 2013, order, the Board noted that the foregoing issues solely concern the *ex parte* prosecution of applicant's involved applications, and any alleged error on the part of the Office in correctly prosecuting applicant's involved applications, including the examining attorney's determination regarding the sufficiency of the evidence submitted by applicant to demonstrate that its GOT OUZO? mark has acquired distinctiveness, does not constitute a ground for opposition. *See* p. 12 of the Board's November 3, 2013, order; see also *Saint-Grobain Abrasives, Inc. v. Unova Indus. Automation Sys.*, Inc. 66 USPQ2d 1355 (TTAB 2009).

In view thereof, applicant's motion to dismiss opposer's claim of failure to prove acquired distinctiveness is **GRANTED**.

False Suggestion Of A Connection Of A National Symbol

As another ground for opposition, opposer alleges that the term OUZO is a national symbol of Greece and that applicant's GOT OUZO? mark constitutes a false suggestion of a connection with this Greek national symbol of Greece. In support of this claim, opposer further alleges that applicant is not an official or unofficial agency or division of the Republic of Greece; that its actions and business enterprise are not sanctioned by the Republic of Greece; there is no connection between applicant and the Republic of Greece; and that there is no connection between the Republic of Greece and any item sold under applicant's GOT OUZO? mark. Opposer further alleges that the use of applicant's involved GOT OUZO? mark would automatically associate that item with Greece.

Under Section 2(a) of the Trademark Act, a trademark may be refused registration if, *inter alia*, it consists of matter which falsely suggests a connection with a national symbol. 15 U.S.C. § 1052(a). A "national symbol" is subject matter of unique and special significance that, because of its meaning, appearance, and/or sound, immediately suggests or refers to the country for which it stands. *In re Consol. Foods Corp.*, 187 USPQ 63 (TTAB 1975).

In order to assert properly a ground of false suggestion of a connection with a national symbol under Section 2(a) of the Trademark Act, opposer must plead that (1) applicant's mark is the same or a close approximation of a national symbol; (2) that the mark would be recognized as such, in that it points uniquely and unmistakably to a particular national symbol or nation; (3) that the particular nation is not connected with the goods sold by applicant under the

mark; and (4) that the national symbol is of sufficient fame or reputation that when applicant's mark is used on its goods, a connection with a particular nation would be presumed. Furthermore, a party alleging a ground of false suggestion of a connection with a national symbol must allege that the contested mark must point uniquely and unmistakably to the identity of the person or institution asserting the claim. *Internet, Inc. v. Corporation for National Research Initiatives*, 38 USPQ2d 1435, 1437 (TTAB 1996). Further, "if the challenged marks does not point uniquely and unmistakably to the [challenger's] identity or persona, then there can be no false suggestion of a connection. *Id.*; *accord Ritz Hotel Ltd. v. Ritz Closet Seat Corp.*, 17 SPQ2d 1466, 1477 (TTAB 1990).

In his amended notice of opposition, opposer has not affirmatively alleged that applicant's mark points uniquely to opposer or that opposer is an official or unofficial agency or division of the government of Greece or an official representative of the Greek government to assert a claim that applicant's mark falsely suggests a national symbol of Greece. Since opposer has not alleged that he is any way affiliated with the government of Greece in any official or unofficial capacity, he is not entitled to raise a claim that applicant's mark falsely suggests a connection with a national symbol of Greece.

Accordingly, applicant's motion to dismiss opposer's claim of false suggestion of a national symbol is **GRANTED**.

Fraud

To assert a viable claim of fraud, the plaintiff must allege with particularity, rather than by implied expression, that the defending party knowingly made a false, material representation in the procurement of or maintenance of or renewal of a registration with the intent to deceive the U.S. Patent and Trademark Office. *See In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1942 (Fed. Cir. 2009).

Further, fraud in procuring or maintaining a trademark registration may occur when an applicant for registration or a registrant in a declaration of use or a 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 otherwise is not entitled. *Id.*

In his amended notice of opposition, opposer alleges that applicant made material, false representations during the prosecution of applicant's two involved applications. Specifically, opposer alleges that the following submissions made by applicant during the prosecution of its involved applications were material representations and false:

1. The declaration of Thanos Dimalas who declares that applicant's sale catalogue is sent to "every single Greek Orthodox Church in the United States, and to the sponsors of every single Greek festival across the country," and that this catalogue "reaches approximately 250-300 recipients." See pp. 13-14 of opposer's amended notice of opposition;
2. Sales invoices which do not specifically show sales of any items that contain the mark GOT OUZO?. See pp. 14-15 of opposer's amended notice of opposition; and
3. Certain declarations made by third parties attesting that they associate the mark GOT OUZO? with applicant and they are not aware

> of any other individual or entity offering merchandise under the GOT OUZO? trademark. See pp. 15-17 of opposer's amended notice of opposition.

In his amended notice of opposition, opposer also alleges that applicant submitted the above-identified filings during the course of the prosecution of applicant's involved applications with an intent to deceive the USPTO in procuring registrations for applicant's GOT OUZO? marks.

Notwithstanding the foregoing, the Board notes that opposer does not affirmatively plead that applicant made the above-identified submissions with the knowledge of their falsity.

Accordingly, the Board finds that opposer's fraud claim is deficiently pleaded. In view thereof, applicant's motion to dismiss opposer's fraud claim is **GRANTED** to the extent noted below.

Notwithstanding, the Board generally grants leave to amend pleadings that have been found insufficient, upon challenge under Fed. R. Civ. P. 12(b)(6) and/or Fed. R. Civ. P. 12(e).

In view thereof, opposer is allowed until **twenty (20) days** from the mailing date of this order in which to file and serve a revised amended notice of opposition which properly sets forth allegations regarding his standing to bring this opposition proceeding, as well as allegations which support a claim of fraud, or any other claim, if any, that may be properly asserted based on the circumstances of the case, failing which the notice of opposition will be dismissed with prejudice.

By this order, however, opposer is precluded from re-asserting the following claims: 1) any ground for opposition based on the sufficiency of the evidence submitted by applicant during the prosecution of its involved applications to support its contention, in response to the examining attorney's office action, that its GOT OUZO? marks have acquired distinctiveness, and 2) a claim of false suggestion of a connection of a national symbol.

Further, opposer should not embed any evidence in support of his claims within the body of his revised amended pleading. Indeed, evidentiary matters should not be pleaded in a complaint. They are matters for proof, not for pleading. *See McCormick & Co. v. Hygrade Food Products Corp.*, 124 USPQ 16, 17 (TTAB 1959). Additionally, opposer should not cite to any case law to support its allegations nor should opposer argue the merits of his asserted claims in his revised amended pleading.

Moreover, the revised amended pleading must include (1) a short and plain statement of the reason(s) why opposer believes he would be damaged by the registration of the opposed marks and (2) a short and plain statement of one of more grounds for opposition. *See* Trademark Rule 2.104(a). All averments should be made in numbered paragraphs, the contents of each of which should be limited as far as practicable to a statement of a single set of circumstances. *See* Fed. R. Civ. P. 10(b). Each claim founded upon a separate transaction or occurrence should be stated in a separate count

whenever a separation would facilitate the clear presentation of the matters pleaded. *Id.* A paragraph may be referred to by number in all succeeding paragraphs, and statements in the complaint may be adopted by reference in a different part of the complaint. *See* Fed. R. Civ. P. 10(b) and (c). Finally, opposer's amended pleading must be in compliance with Trademark Rule 2.126, i.e., a paper submission must be printed in at least 11-point type and double spaced, a paper submission must include page numbers, etc.

In turn, applicant is allowed until **twenty (20) days** from the date indicated on the certificate of service of opposer's revised amended notice of opposition to file an answer or otherwise plead to the revised amended pleading, if filed.

As a final matter, the Board recognizes that opposer is representing himself in this matter. However, this does not excuse opposer from complying with Board orders, the U.S. federal rules of civil procedure, or Board rules and procedure. In view thereof, the Board will be extremely reluctant to afford opposer another opportunity to file a revised amended pleading if opposer fails to do so in compliance with this order.

Further, the Board notes that applicant, in its motion papers, contends that opposer violated the Board's November 3, 2013, order by failing to serve a courtesy copy of its amended notice of opposition upon applicant's counsel by email. Opposer maintains, however, that he did in fact serve a courtesy copy of his amended notice of opposition by email upon applicant's counsel.

In order to avoid any further confusion as to whether opposer has properly served a courtesy email copy of any future filings with the Board upon applicant's counsel, opposer henceforth will be required to submit concurrently with any future filings with the Board, and in addition to a certificate of service, a copy of the courtesy email transmission demonstrating service of any paper upon applicant's counsel by electronic transmission.

Trial Schedule

Proceedings herein are resumed and trial dates, beginning with the deadline for the parties' required discovery conference, are reset as follows:

Deadline for Discovery Conference	**5/30/2014**
Discovery Opens	**5/30/2014**
Initial Disclosures Due	**6/29/2014**
Expert Disclosures Due	**10/27/2014**
Discovery Closes	**11/26/2014**
Plaintiff's Pretrial Disclosures Due	**1/10/2015**
Plaintiff's 30-day Trial Period Ends	**2/24/2015**
Defendant's Pretrial Disclosures Due	**3/11/2015**
Defendant's 30-day Trial Period Ends	**4/25/2015**
Plaintiff's Rebuttal Disclosures Due	**5/10/2015**
Plaintiff's 15-day Rebuttal Period Ends	**6/9/2015**

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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