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

Proceeding	91214782
Party	Defendant Subjekt LLC
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Submission	Motion to Dismiss - Rule 12(b)
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Skullcandy, Inc.,)	Opposition No. 91214782
)	U.S. Serial No. 85/884,443
Opposer,)	
)	Mark: 
)	
v.)	
)	
)	
SUBJEKT LLC,)	
)	
Applicant)	

**APPLICANT'S MOTION TO DISMISS THE NOTICE OF OPPOSITION FOR FAILURE TO
STATE A CLAIM UNDER RULE 12(b)(6)**

INTRODUCTION

Subjekt LLC (the “**Applicant**”), respectfully requests dismissal with prejudice of the Notice of Opposition (the “**Opposition**”) filed by Opposer Skullcandy, Inc. (“**Opposer**”) because the Opposition fails to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Not only does Opposer fail to plead facts to show its standing to bring the Opposition, but it also fails to plead facts sufficient to establish a cause of action for likelihood of confusion pursuant to 15 U.S.C. § 1052(d).

BACKGROUND

Opposer seeks to oppose the registration of U.S. Serial No. 85/884,443 (the “**Opposed Mark**”) on the basis of likelihood of confusion pursuant to 15 U.S.C. § 1052(d)

with its mark U.S. Registration No. 3,168,754 (the "Skull Design Mark"). The only content that Opposer pleads in support of its allegation of likelihood confusion between the Opposed Mark and the Skull Design Mark is comprised of conclusory statements lacking supporting pleaded facts. The Opposition fails to satisfy the pleading standard for stating a claim for relief as set forth by the U.S. Supreme Court and followed by the Trademark Trial and Appeal Board.

ARGUMENT

A. The Legal Standard for a Motion to Dismiss

A complaint is subject to dismissal under Rule 12(b)(6) when it fails to show that either (1) the plaintiff has standing to bring the opposition; or (2) there is a statutory ground for denying registration to the mark that is the subject of the complaint. *Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780 (TTAB 2012), citing *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998). See also TBMP § 503.02 (2013). Moreover, 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, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). This pleading standard applies to proceedings before the Board. See TBMP § 503.02 (citing *Twombly*, 550 U.S. at 554). As demonstrated below, Opposer has not pleaded any factual matter at all, let alone sufficient factual matter to support standing or a

ground of likelihood of confusion under the applicable standard. As such, the Opposition should be dismissed for failure to state a claim upon which relief can be granted.

B. Opposer Has Failed to Plead Facts to Show That it Has Standing to Bring the Opposition

The Opposition should be dismissed for failure to state a claim upon which relief can be granted because Opposer has not plead any facts to show its standing to bring the Opposition. *Doyle*, 101 USPQ2d 1780, citing *Young*, 152 F.3d 1377. See also *TBMP § 503.02 (2013)*. Petitioner has merely plead legal conclusions without any facts to support them. "A petitioner's allegations alone do not establish standing." *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028 (C.C.P.A. 1982).

C. Opposer Has Failed to Plead Facts to Show That there is a Statutory Ground for Denying Registration to the Opposed Mark

Opposer has also failed to plead any facts whatsoever in attempting to demonstrate that a ground of likelihood of confusion exists between the two marks. Instead, Opposer provides mere restatements of the DuPont Factors, which are the factors that must be considered when determining whether there is a likelihood of confusion under 15 U.S.C. § 1052(d). *In re E. I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361, (C.C.P.A. 1973). Opposer's statement that "The Opposed Mark is confusingly similar, in appearance and commercial impression, to Opposer's Skull Design Mark" (Opp. ¶ 6.) is conclusory, and a mere restatement of the first DuPont Factor, which is "[t]he similarity or dissimilarity of the marks in their entireties as to appearance, sound connotation and commercial impression. *DuPont*, 476 F.2d at 1361. Opposer states no

facts as to what visual elements, if any, are similar between the two marks. Moreover, Opposer fails to state any facts as to what its Skull Design Mark looks like, how it is used on Opposer's goods, or facts as to how the placement of Applicant's mark on Applicant's goods is similar to Opposer's placement of its own mark on Opposer's goods. Opposer merely states unsupported conclusions as to the harm it is currently experiencing and will experience in the future due to how the Opposed Mark's appears on Applicant's goods as compared to how Skull Design Mark appears on Opposer's goods. Furthermore, the mere statement that a similarity exists between Opposer's goods and Applicant's goods, without saying *what* the similarity is (Opp. ¶ 7.), is a conclusory restatement of the second DuPont Factor, which is "[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use." *DuPont*, 476 F.2d at 1361. Likewise, Opposer's statement that "...Opposer's Goods and Applicant's applied-for goods are offered to similar or overlapping classes of purchasers", without stating any supporting facts (Opp. ¶ 7.) is also a restatement of the tenth DuPont Factor, which is "[t]he market interface between applicant and the owner of a prior mark." *DuPont*, 476 F.2d at 1361.

These restatements of the DuPont Factors without any supporting facts are not sufficient to establish the grounds for denying registration to the Opposed Mark for likelihood of confusion because "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). Though Opposer concludes that "[t]he registration and use of the Opposed Mark by Applicant in association with the

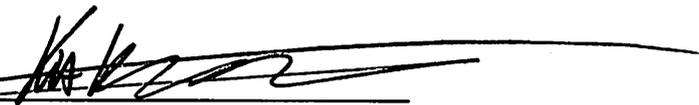
claimed goods is likely to cause confusion as to the source or origin of Applicant's goods, and is likely to mislead consumers, all to Opposer's damage" (Opp. ¶ 6.) because it would "...deceive the trade and public ...[into] believ[ing] that such goods originate with, are approved, sponsored or endorsed by, or have some connection or affiliation with Opposer..." (Opp. ¶8.), these statements and the "[t]hreadbare recitals.." of the DuPont Factors are not sufficient to reach the pleading standard set by the Supreme Court because such "legal conclusions...must be supported by factual allegations." *Iqbal*, 556 U.S. at 662, 663-664. Consequently, the Opposition should be dismissed for failure to state a claim upon which relief can be granted because Opposer has not plead any facts, let alone sufficient facts to establish the statutory ground for denying registration to the Opposed Mark under likelihood of confusion pursuant to 15 U.S.C. § 1052(d). *Doyle*, 101 USPQ2d 1780, citing *Young*, 152 F.3d 1377. See also *TBMP § 503.02 (2013)*.

CONCLUSION

For the reasons stated above, Applicant respectfully requests dismissal of the Opposition with prejudice.

Respectfully Submitted,

Dated: March 17, 2014

By 

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PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **MOTION TO DISMISS THE NOTICE OF OPPOSITION FOR FAILURE TO STATE A CLAIM UNDER RULE 12(b)(6)** has been served on Opposer's counsel via First Class U.S. Mail on March 17, 2014, postage prepaid to:

Andrew J. Avsec
BRINKS GILSON & LIONE
P.O. Box 10395
Chicago, IL 60610

A handwritten signature in black ink, appearing to read 'Kia Kamran', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Kia Kamran, Esq.