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

Proceeding	91217562
Party	Defendant Jennifer Zvitco
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Submission	Motion to Dismiss - Rule 12(b)
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Date	09/08/2014
Attachments	Motion to Dismiss-FINAL.pdf(158968 bytes)

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

In the Matter of Application Serial No.: 86/061,950
Mark: UNCLE SAM'S MISGUIDED CHILDREN
Published for Opposition in the Official Gazette: January 28, 2014

UNCLE SAM GmbH)	
)	
Opposer,)	Opposition No. 91217562
)	Serial No. 86061950
)	
v.)	
)	
JENNIFER ZVITCO)	
)	
Applicant)	

**MOTION TO DISMISS OPPOSITION
AND INCORPORATED MEMORANDUM OF LAW**

Applicant Jennifer Zvitco (hereinafter referred to as “Uncle Sam’s Misguided Children”), by undersigned counsel, hereby moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Opposer Uncle Sam GmbH’s (hereinafter “Uncle Sam Germany” or “USG”) Notice of Opposition. For the following reasons the Board should dismiss USG’s Notice of Opposition:

- (1) The figure and name of Uncle Sam are historical and widely-used symbols of national piety, which Uncle Sam Germany has no right to exclude others from exploiting;
- (2) Because Uncle Sam’s Misguided Children is a fanciful and unique use of this national character owned by no party, there can be no likelihood of confusion between Uncle Sam’s Misguided Children and the far more generic appropriation made by USG;
- (3) Opposer’s “false suggestion of connection” claim fails as a matter of law, because no person or entity (other than a legendary character) is referred to in the Uncle Sam’s Misguided Children mark, and no connection to USG’s “persona” can be suggested.

BACKGROUND

Back in the midst of World War II, the Second Circuit made clear that no one -- not even an American company, let alone a European or German company -- can have the exclusive right

to use the name and figure of national piety such as Uncle Sam. *See Durable Toy & Novelty Corp. v. J. Chein & Co., Inc.*, 133 F.2d 853 (2d Cir.), *cert. denied*, 320 U.S. 211, 63 S.Ct. 1447, 87 L.Ed. 1849 (1943) (per L. Hand, A. Hand, Frank). The passage of more than 70 years has not diluted this historic figure or given a German company selling T-shirts in Germany the right to prevent a trademark for the clearly distinguishable Uncle Sam’s Misguided Children veteran organization.

FACTUAL ASSERTIONS

Even if taken as true, Uncle Sam Germany’s well-pleaded factual assertions (to the extent plausible) fail to give it a right to relief before this board. A summary of Uncle Sam Germany’s allegations are as follows:

Without reference to any geographic scope, Uncle Sam Germany claims that it has “longstanding” rights in the words “Uncle Sam.” Opp. at ¶ 1. USG claims that it “has protected, used and continues to use” the words “Uncle Sam” in connection with “a wide range of clothing items.” *Id.* USG claims it owns trademark no. 1,189,422 registered originally by Salant Corporation in 1982, and apparently assigned and/or sold several times. *Id.* at ¶ 2. USG also claims that it owns trademark registration no. 3,557,762 for a word and design mark with “Uncle Sam” and a drawing of the traditional “I want you!” Uncle Sam character, *Id.* at ¶ 3, while failing to identify that this drawing, these words, and the name Uncle Sam have been in long-standing use in government advertising and American national mythology. Although USG’s German-language website (the only website USG appears to operate) indicates that the brand was founded in Germany in 1986¹, USG claims that the registration’s first use in commerce in the United States was January 1, 1900. *Id.* at ¶ 5. USG claims that it possesses trademark rights to

the Uncle Sam mark or marks in other jurisdictions world-wide. *Id.* at ¶ 6. USG claims that it has built up “valuable goodwill” by “extensive use” in the U.S. of the words “Uncle Sam” and that the words “Uncle Sam” have become “uniquely identified and associated with” Uncle Sam Germany. *Id.* at ¶ 7.

On the other hand, Uncle Sam’s Misguided Children filed the opposed application on or about September 11, 2013 in Class 25 for t-shirts and apparel featuring the word mark “Uncle Sam’s Misguided Children” and in class 41 for Uncle Sam’s Misguided Children’s veterans-focused “publications . . . news articles and podcasts in the field(s) of politics, popular culture, leadership, current events, social policy, general business topics and news analysis.” *Id.* at ¶ 8. Uncle Sam’s Misguided Children began using “Uncle Sam’s Misguided Children” on or about July 9, 2012. *Id.*

USG claims that the Uncle Sam’s Misguided Children Class 25 goods are “identical and/or closely related” to the goods covered by USG’s registration, and that the words “Uncle Sam’s Misguided Children” so resembles “Uncle Sam” that members of the public would be confused, and are likely to believe USG is the origin Uncle Sam’s Misguided Children apparel. *Id.* at ¶¶ 9-11. USG claims that it would suffer injury because “Uncle Sam’s Misguided Children” somehow closely approximates “Uncle Sam” and suggests to members of the public that Uncle Sam’s Misguided Children goods are actually from the German sportswear company, not the American veteran organization. *Id.*

¹ “Uncle Sam – Über uns [About Us]”, available online at <http://www.unclesam.de/index.php/ueber-uncle-sam/> (last accessed September 3, 2014).

LEGAL ARGUMENT

I. Legal Standards

(a) Motion to Dismiss

Rule 12(b)(6) provides for the dismissal of an action where a complaint fails “to state a claim upon which relief can be granted.” When the sufficiency of a complaint is challenged under Rule 12(b)(6), “the court must accept its factual allegations and construe them in a light most favorable to the non-moving party.” *Chamberlain v. American Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007). However, the “[f]actual allegations must be enough to raise a right to relief **above the speculative level.**” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (emphasis added). “[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*, 129 S. Ct. 1937, 1949 (2009) (internal quotation omitted). Plaintiffs must put forth “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “[D]ismissal under Rule 12(b)(6) is appropriate where the Complaint fails to allege the elements of a legally viable claim.” *Chamberlain*, 931 A.2d at 1023. Under *Bell Atlantic*, the Supreme Court has described Plaintiffs’ burden to plead “plausible entitlement to relief” by setting forth “facts consistent with the allegations.” 127 S. Ct. at 1970. Conclusory allegations or legal conclusions masquerading as factual allegations will *not* suffice to prevent a motion to dismiss.

To avoid dismissal under Rule 12(b)(6) in the TTAB, an opposer must allege “facts as would, if proven, establish both its standing to challenge applicant’s right to registration and a . . . statutory ground for opposition to the application.” *Commodore Electronics Ltd. v. Cbm Kabushiki Kaisha Opposition*, 26 USPQ2d 1503, 1506 (TTAB 1993) (emphasis removed). The

Board may dismiss the case under Fed. R. Civ. P. 12(b)(6) if “it appears to a certainty that [a party] is entitled to no relief under any state of facts which could be proved in support of the claim.” *Flash & Partners S.P.A. v. I. E. Manufacturing LLC*, 95 USPQ2d 1813, 1815 (TTAB 2010) (quoting *Stanspec Co. v. Am. Chain & Cable Co., Inc.*, 189 USPQ 420, 422 (CCPA 1976)).

(b) Likelihood of Confusion under 12(b)(6)

USG alleges that confusion is likely to result. To state a proper claim for confusion, Opposer must allege a valid “priority of use” and that “likelihood of confusion” would result. *Lesley Hornby a/k/a Lesley Lawson a/k/a Twiggy v. TJX Companies, Inc.*, 87 USPQ2d 1411, 1420 (TTAB 2008); *see also* 15 USC § 1052(d). While likelihood of confusion may require factual development, the Board can rule immediately that USG has no superior claim to use the name or character of “Uncle Sam” that would prevent the registration of the unique and fanciful “Uncle Sam’s Misguided Children.”

(c) False Suggestion of Connection under 12(b)(6)

USG’s second claim at ¶ 11 is that Uncle Sam’s Misguided Children’s registration would “falsely suggest a connection between Applicant and Opposer.” Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a) bars registration if the mark falsely suggests a connection with *persons* (living or dead), *institutions*, *national symbols*, or *beliefs*. In *inter partes* proceedings before the Board, an essential element of a Section 2(a) claim of false suggestion of a connection is that the defendant’s mark must point uniquely and unmistakably to the identity or persona of the “person” or “institution” asserting the claim. If the defendant’s mark does not point uniquely and unmistakably to the plaintiff’s identity or persona, then there can be no false suggestion of a connection. *See, e.g., National Aeronautics and Space Administration v. Bully Hill Vineyards*

Inc., 3 USPQ2d 1671, 1676 (TTAB 1987). The false suggestion of a connection to USG as a commercial entity does not bar the Applicant’s registration under 2(a).

II. The term “Uncle Sam” standing alone cannot be protected because it is not distinct, and because its use by USG is merely an adoption of the national legend.

USG cannot adopt for itself a character so rooted in the national psyche and declare itself the only lawful user of the name in a class of goods. Uncle Sam is a character said to have originated in the early 1800s, and is widely known to be a personification of the United States. USG’s use of “Uncle Sam” is no more complicated than the straight appropriation of the name and likeness of this character – a fact acknowledged by USG’s German-language website: “Uncle Sam originated from the popular national figure in the United States and represents . . . the American Way of Life. Therefore, the acronym US stands not only for Uncle Sam, but also for the United States.”²

Regardless of whether USG’s marks have any independent strength or resonance in Germany or other countries, they are as a matter of law not capable of protection in the United States. Courts will not confer the advantage to one business alone of a word or phrase of very common usage, or one imbued with symbolic importance. *Mother’s Restaurants Inc. v. Mother’s Bakery, Inc.*, 498 F. Supp. 847 (W.D.N.Y. 1980) (declining to protect “Mother’s Restaurants” in action against purported infringer “Mother’s Bakery”). The Court explained why one business may not prevent another from using words like “Mother” (or here, Uncle Sam):

In addition to the lack of a likelihood of confusion between marks, an additional factor weighs against granting defendants the injunctive relief they request, a factor closely related to the distinctiveness of the word “Mother’s.” “Mother” or “Mother’s” is not only a word of very common usage. It is a word imbued with much symbolic importance, and it is no doubt exploited so frequently because of the impression it imparts of a connection to the values of motherhood, home and

² “Uncle Sam – About Us” (Google Translate of <http://www.unclesam.de/index.php/ueber-uncle-sam/>) (last accessed September 3, 2014).

family. This is certainly evidenced by the great frequency of uses by non-parties to this case, discussed above. There would seem to be a general advantage to businesses in exploiting the word “Mother’s” which this court should be extremely hesitant to confer upon one business alone. *See Durable Toy & Novelty Corp. v. J. Chein & Co., Inc.*, 133 F.2d 853 (2d Cir.), *cert. denied*, 320 U.S. 211, 63 S.Ct. 1447, 87 L.Ed. 1849 (1943) (per L. Hand, A. Hand, Frank); *Chandon Champagne Corp. v. San Marino Wine Corp.*, 335 F.2d 531 (2d Cir. 1964).”

The *Durable Toy* case cited in *Mother’s Restaurants* is of particular and dispositive relevance here. In that case, the Durable Toy company made a toy bank with the label “Uncle Sam” or “Uncle Sam’s” purported to be of high quality. The defendant J. Chein & Co. began making a cheap tin coin bank, also called “Uncle Sam” and using the “accredited” costume of the Uncle Sam character – which was as well known in 1943 as it is today (and then, as today, used by many unrelated companies in various pursuits). The Second Circuit held that Durable Toy could not prevent J. Chein from using the character, symbols, or name of the “Uncle Sam” character for the simple reason that **no entity could come to exclusively use Uncle Sam’s name or character**, as they could a personal name or a fanciful mark:

Where the name is personal or the mark is coined, it will be hard indeed for the newcomer to find any excuse for invading it, even though his user does no more than vaguely confuse the reputation of the first user with his own; he has no lawful interest in adopting such a mark. But that is not this case; **“Uncle Sam” is part of the national mythology, not entirely unlike the flag, or any other part of our inherited patriotic paraphernalia; all have a measurable interest in its use.** Indeed the very fact that it has been thought necessary to forbid the use of the flag for advertising, is evidence that the use had a value, 4 U. S.C.A. § 3; § 1425 (16) N.Y.Penal Law Consol. Laws N.Y.C. The figure and name of “Uncle Sam” are not indeed the objects of the same national piety, but there is nevertheless apparently some advantage in exploiting them, and, while it remains lawful to do so, the advantage is not negligible. Balanced against any possible damage to the plaintiff’s reputation among buyers for retailers, we think it should prevail. If the plaintiff had wished a truly proprietary sign, it needed only slight ingenuity to contrive one which would have protected it without question. It was not content with that; like the defendants, it wished to throw about its banks a vague implication of solidity, and at the same time to create a trade-mark. We do not say that even so it would be unable to prevent the actual appropriation of its customers; but we do hold that when there is no more at stake than a possible — and not very probable — cheapening of its reputation, it cannot deprive others of

the same commercial advantage which led it originally to adopt a legend so commonly employed.

Durable Toy & Novelty Co. v. J. Chein & Co., 133 F.2d 853 (2d. Cir. 1943) (cert denied).

The *Durable Toy* Court observed that one need “only slight ingenuity to contrive [a mark] which would have protected it without question.” Here, Uncle Sam’s Misguided Children has taken that slight ingenuity to create a fanciful and distinct name, while USG’s purported mark(s) are merely the strict and unchanged adoption of the same legendary character that could not be protected in *Durable Toy*. Under the rationale of *Mother’s* and *Durable Toy*, this board can completely dispose of this opposition.

III. There is no likelihood of confusion because USG’s mark is only used in Germany and/or Europe.

The marks at issue here are extremely different, and there exists no likelihood of confusion in more than one party having trademarks containing the same historical and allegorical symbol, whose name and character have come to symbolize the United States – not a European t-shirt company. USG, at Paragraph 10 of its Opposition, alleges as one of its claims for opposing Applicant’s trademark that it is likely to cause confusion with USG in Class 25 goods. A claim for likelihood of confusion arises under 15 U.S.C. § 1052(d) (also known as § 2(d) of the Trademark Act) when a mark so resembles another registered mark as to cause confusion. The board may dispose of this claim as a matter of law, both (1) based on the *Durable Toy* analysis of the Uncle Sam national symbol above, and (2) the absence of likelihood of confusion in the United States for a clothing company that operates only in Germany and/or Europe.

Weak designations are entitled to a narrower scope of protection than an entirely arbitrary or coined word. *In re Central Soya Company, Inc.*, 220 USPQ 914 (TTAB 1984). When

conflicting marks are owned by different parties, the entity examining the registration must consider the dilution presented by multiple uses of the same mark. Without question, the usage of “Uncle Sam” as a trademark is subject to extreme dilution by the wide variety of parties using the words “Uncle Sam” in registered marks (and unregistered uses). A search of the USPTO’s TESS system reveals at least 30 active registered marks using Uncle Sam in some form or another, with 86 more dead. Just some examples include:

- Uncle Sam’s Safari Outfitters (Reg. No. 1186200) (Retail Store Services Featuring Military Surplus Goods, Outdoor Clothing, and Camping Gear)
- Uncle Sam’s Avengers (Reg. No. 4341699) (Charitable fundraising services [motorcycle club])
- Uncle Sam’s Trojans (Reg. No. 2993492) (Clothing bearing defunct sports team logos, namely t-shirts, sweatshirts, jerseys, hats, and caps)
- Uncle Sam’s Pizza (Reg. No. 1486492) (Food Delivery Services)
- Uncle Sam (Reg. No. 1383607) (Fresh Citrus Fruit)
- Uncle Sam (Reg. No. 1878790) (Breakfast cereal)
- Uncle Sam’s (Reg. No. 2346355) (Dog and cat treats)

These files, the widely-known history of the character of Uncle Sam, and the text of Uncle Sam Germany’s own (German-only) website are facts capable of judicial notice. *See* 37 CFR § 2.122(a); Fed. R. Evid. § 201(b)(1) and (2) (The board may judicially notice a fact that is not subject to reasonable dispute because: “it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned”). The character of Uncle Sam is not exclusively associated with a German sportswear company within the United States (nor would a strong product like a toy bank, as in *Durable Toy*, give it exclusive rights to the character). It is also without question that Uncle Sam GmbH has only a German-language website and uses channels of trade only within Europe (or Germany).

To survive dismissal, a petitioner must articulate a “**plausible**” claim for relief, a standard which the reviewing body should consider in light of its “judicial experience and common

sense.” *Ashcroft v. Iqbal* sets forth a two-pronged approach for courts when deciding a motion to dismiss: 1) identify pleadings that, “because they are no more than conclusions, are not entitled to the assumption of truth” and 2) if a complaint contains well-pleaded factual allegations, a court must “then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 129 S. Ct at 1950. Plaintiffs are required to provide the grounds of their entitlement for relief, and not simply use labels and conclusions, accompanied by formulaic recitations of the elements of a cause of action. If implausible, the Board need not credit the conclusory and unsupported statements made in USG’s Opposition. If this case were allowed to continue, the Board would expend valuable time and resources of the Board and both parties, where there are multiple bases on which to dismiss the Opposition with prejudice, and no likelihood of confusion between “Uncle Sam’s Misguided Children” and Uncle Sam Germany’s unadorned appropriation of a symbol free to use by all Americans.

IV. The claim for a false suggestion of connection fails as a matter of law, because Opposer does not represent a person (an actual Uncle named Sam) or institution (the United States government) for which a suggestion of connection exists.

In Paragraph 11 of its Opposition, Opposer wrongly, and without standing, argues that registration of USMC’s mark would suggest a false connection to Opposer. *See* Opposition at ¶ 11. This argument is without merit because Opposer is not the actual person Uncle Sam, nor are is it the institution associated with Uncle Sam, namely the United States government or its military. As such, Uncle Sam’s Misguided Children’s mark would not suggest a connection to Uncle Sam Germany, as proscribed under 15 U.S.C. §1052(a).

Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a), bars the registration on either the Principal or the Supplemental Register of a designation that consists of or comprises matter which, with regard to persons, institutions, beliefs, or national symbols, that falsely suggests a

connection with them. Section 2(a) is distinctly different from §2(d), 15 U.S.C. §1052(d), for which the relevant test is likelihood of confusion. The purpose of the protection in Section 2(a) is to protect the names of individuals or institutions that were not technically a trademark. This was made clear in *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 703 F.2d 1372, 1375-76, 217 USPQ 505, 508-09 (Fed. Cir. 1983), aff'g 213 USPQ 594 (TTAB 1982), the Court of Appeals for the Federal Circuit stated, “a reading of the legislative history with respect to what became §2(a) shows that the drafters were concerned with protecting the name of an individual or institution which was not a technical “trademark” or “trade name” upon which an objection could be made under §2(d).”

The right to privacy encompassed in Section 2(a) protects a party’s control over the use of its identity or “persona.” A party acquires a protectable interest in a name or equivalent designation under §2(a) where the name or designation is unmistakably associated with, and points uniquely to, that party’s personality or “persona.” *Id.* Section 2(a) protection is intended to prevent the unauthorized use of the persona of a person or institution and not to protect the public. *In re MC MC S.r.l.*, 88 USPQ2d 1378, 1380 (TTAB 2008) (citing *Bridgestone/Firestone Research Inc. v. Auto. Club De L’Quest De La France*, 245 F.3d 1359, 58 USPQ2d 1460 (Fed. Cir. 2001)).

In this instance, Opposer is not the United States government, nor an actual famous Uncle named Sam, as such it is not the individual whose “persona” needs protecting. *Univ. of Notre Dame du Lac*, 703 F.2d 1372 (NOTRE DAME and design, for cheese, held not to falsely suggest a connection with the University of Notre Dame. “As the board noted, ‘Notre Dame’ is not a name **solely associated with the University**. It serves to identify a famous and sacred religious figure and is used in the names of churches dedicated to Notre Dame, such as the Cathedral of

Notre Dame in Paris, France. Thus it cannot be said that the only ‘person’ which the name possibly identifies is the University and that the mere use of NOTRE DAME by another appropriates its identity.”) (emphasis added); *Internet Inc. v. Corporation for National Research Initiatives*, 38 USPQ2d 1435 (TTAB 1996) (cancellation petitioners failed to state claim for relief where they have not alleged, and cannot reasonably allege, that the term INTERNET points uniquely and unmistakably to their own identity or persona). To show an invasion of persona, Opposer must show that the mark submitted for registration points “uniquely” to another person. *See University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 703 F.2d 1372, 1377 (Fed. Cir. 1983). No one seeing the brand Uncle Sam’s Misguided Children would associate it with Opposer, rather observer associating it with anyone other than Uncle Sam’s Misguided Children would likely think first of the national symbol Uncle Sam - a symbol that should never be owned by a German company that does not operate in the United States.

As such, USG does not have a colorable claim for false connection in this instance, and all such claims contained in the Opposition should be dismissed and/or stricken.

CONCLUSION

WHEREFORE, Jennifer Zvitco, by and through undersigned counsel and for the reasons stated above, respectfully requests that this board dismiss Opposer’s opposition with prejudice.

ORAL HEARING REQUESTED

Applicant requests an oral and/or telephonic hearing on all issues herein.

Dated: September 8, 2014

Respectfully submitted,

POSEY LEBOWITZ PLLC

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon counsel for applicant this 8th day of September, 2014, by mailing a copy thereof via first-class mail, postage prepaid, to:

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PROPOSED ORDER GRANTING MOTION TO DISMISS

Upon consideration of Defendant's Motion to Dismiss, and any response thereto, it is hereby ORDERED that:

- (1) The motion is GRANTED; and it is further ORDERED that
- (2) Uncle Sam GmbH's Notice of Opposition is hereby dismissed with prejudice.

Trademark Trial and Appeal Board

Copies To: All Counsel