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

Proceeding	91222962
Party	Defendant Angel Quintana
Correspondence Address	ANTHONY M VERNA III W R SAMUELS LAW PLLC 280 MADISON AVE, SUITE 600 NEW YORK, NY 10016 UNITED STATES angel@angelquintana.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Anthony M. Verna III
Filer's e-mail	anthony@vernalaw.com
Signature	/s Anthony M. Verna III s/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Heart of Success, Inc.)	Opposition No.: 91222962
)	
Plaintiff/Opposer,)	
)	
vs.)	
)	
Angel Quintana)	
)	
Defendant/Applicant)	
)	
)	
)	

MOTION TO DISMISS

Defendant Angel Quintana, (“Defendant” or “Applicant”), through its attorney, Anthony M. Verna III, hereby files this Motion to Dismiss based upon Fed.R.Civ.P. 12(b)(6) for a failure to state a claim against the Notice of Opposition that Heart of Success, Inc. (“Plaintiff” or “Opposer”) filed against Defendant’s trademark application, U.S. Serial No. 86512479, SIGNATURE SYSTEM.

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I. Facts

Applicant Angel Quintana is a resident of California who applied for SIGNATURE SYSTEM, U.S. Serial No. 86512479 (“the ‘479 application”) on January 23, 2015. The ‘479 application represents goods/services of “Business consulting and information services” in International Class 35.

Opposer Heart of Success, Inc. is an Arizona corporation who applied for SIGNATURE SYSTEM, .U.S. Serial No. 86681096 (“the ‘096 application”) on July 1, 2015. The ‘096 application represents “Digital materials, namely, articles, checklists, newsletters, transcripts featuring information on personal and professional development; Downloadable electronic newsletters delivered by e-mail in the field of personal and professional development; Downloadable electronic newsletters in the field of personal and professional development; Downloadable fact sheets in the field of personal and professional development; Downloadable multimedia file containing audio relating to personal and professional development,” in International Class 9, “Printed educational materials in the field of personal and professional development; Printed lectures; Printed materials, namely, written articles in the field of personal and professional development; Printed seminar notes; Printed teaching materials in the field of personal and professional development,” in International Class 16, and “Arranging and conducting business seminars in the field of personal and professional development; Education services, namely, providing live and on-line seminars, webcasts, webinars, classes, lectures, conferences in the field of personal and professional development; On-line journals, namely, blogs featuring personal and professional development; Personal coaching services in the field of personal and professional development; Professional coaching services in the field of personal and professional development,” in International Class 41.

II. The Standard of a Motion to Dismiss

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) is a test of the sufficiency of a complaint. See TBMP Section 503.01 (3d ed. 2011). To survive such a motion, 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). Also see *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); TBMP § 503.02 (3d ed. rev. 2012).

Specifically, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” To survive a motion to dismiss, 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). A pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Specifically a complaint, or counterclaim, “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Doyle v. Al Johnson's Swedish Restaurant & Butik, Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) quoting *Ashcroft v. Iqbal* at 678.

Any defendant to a complaint, counterclaim, or crossclaim may move to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. The party moving for dismissal has the burden of showing that no claim has been stated.

During this threshold review, [t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

In the context of *inter partes* proceedings before the Board, a claim has facial plausibility when the opposer or petitioner pleads factual content that allows the Board to draw a reasonable inference that the opposer or petitioner has standing and that a valid ground for the opposition or cancellation 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, 1354 (Fed. Cir. 2010).

Moreover, if the opposer has provided notice pleading of a claim under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), by alleging (1) priority, based on its ownership of pleaded registrations and pending applications filed prior to the filing date of the defendant's involved application; and (2) likelihood of confusion between the marks at issue, then the opposer has done enough. See Trademark Act Section 7(c), 15 U.S.C. § 1057(c); *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974); *Zirco Corp. v. American Telephone and Telegraph Co.*, 21 USPQ2d 1542 (TTAB 1991).

III. Plaintiff/Opposer has not met its burden

The Plaintiff in this particular proceeding has not met its burden in writing a Notice of Opposition.

The Plaintiff appears to have one legal theory: Likelihood of Confusion.

a. Notice of Opposition is not a Short and Plain Statement

The form of the Notice of Opposition does not comply with Fed. R. Civ. P. 8(a) or Fed. R. Civ. P. 10(b).

Fed. R. Civ. P. 8(a) requires that:

A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 10(b) requires that:

All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings.

A proper pleading for a notice of opposition contains a short and plain statement of the claim showing that the filer is entitled to relief.

The Notice of Opposition filed in this case does not do that. The Notice of Opposition contains paragraphs that waver in their positions. The Notice of Opposition is not short. The Notice of Opposition is not plain. The Notice of Opposition is not numbered. In fact, the Notice of Opposition reads as if it is a letter to the Commissioner of Trademarks in the USPTO.

b. Likelihood of Confusion

In order to properly allege superior proprietary rights for a plaintiff relying on common law rights, the plaintiff must also plead priority of use or “use analogous to trademark use” *Wella Corp. v. Clairol, Inc.*, 169 U.S.P.Q. 190 (T.T.A.B. 1971) and either the inherent or acquired distinctiveness of its mark. In the case of acquired distinctiveness, the opposer must allege facts sufficient to show, if proven, that the ordinary consumer associates the mark with a “single, though anonymous source.” See J. T. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 15.8 (2004).

The complaint should then set forth the basic facts supporting plaintiff's claim of likelihood of confusion. These include, as applicable, allegations as to the similarity of the marks in sight, sound, and/or meaning; similarity of the goods and/or services; similarity of trade channels and classes of purchasers of the goods and/or services; the fame of plaintiff's mark; the similarity of the conditions under which buyers encounter plaintiff's and defendant's marks; and the nature and extent of any actual confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973).

The Notice of Opposition, besides not being in a short and plain statement and numbered paragraphs, tries to mention a few key points under the Lanham Act and the theory of a likelihood of confusion under §2(d), 15 U.S.C. §1052(d), but never truly spells out the theory or in the proper format.

This means that the Trademark Trial and Appeal Board must speculate on the legal theory that the Plaintiff believes he will be harmed under. To survive a motion to dismiss, the factual allegations of a complaint "must be enough to raise a right to relief above the speculative level" and the complaining party must offer "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp.* at 555.

In order to state properly a claim of likelihood of confusion, a plaintiff must plead that (1) the defendant's mark, as applied to its goods or services, so resembles the plaintiff's mark or trade name as to be likely to cause confusion, mistake, or deception; and (2) priority of use. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.'"; *Iqbal*, 556 U.S. at 679 (quoting Fed.R.Civ.P. 8(a)(2)). (And in

Iqbal, the Plaintiff had a well-pleaded facts section. The pleading in this proceeding is not adequate to cover any facts or legal theory.)

In this Notice of Opposition, the Plaintiff nonetheless fails to plead affirmatively that Applicant's involved mark, used in association with its identified goods, so resembles Plaintiff's pleaded mark as to likely to cause confusion. Instead, Plaintiff merely pleads that the parties' respective marks are confusingly similar.

In ruling upon a motion based upon Fed.R.Civ.P. 12(b)(6), the Court may also properly consider matters that can be judicially noted under Rule 201 of the Federal Rules of Evidence. *Solid Host v. Namecheap*, 652 F.Supp.2d at 1099 (CD Cal 2009).

The power of the Trademark Trial and Appeal Board comes from 15 U.S.C. § 1067 (Section 17 of the Lanham Act). Specifically, 15 USC § 1067(a) states "In every case of interference, opposition to registration, application to register as a lawful concurrent user, or application to cancel the registration of a mark, the Director shall give notice to all parties and shall direct a Trademark Trial and Appeal Board to determine and decide the respective rights of registration."

A determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, at 567. See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Therefore, an assessment of whether the Plaintiff has made a prima facie case for likelihood of confusion will consider the same factors. In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d)

goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

In this particular instance, the Plaintiff does not make any link between its registrations and the Applicant’s mark or the goods/services the various marks represent.

IV. Conclusion

The Plaintiff has a duty when filing pleadings to follow the Federal Rules of Civil Procedure. This includes all formatting. Allegations must rise beyond mere speculation. The plaintiff must state a claim upon which relief may be granted. Plaintiff’s Notice of Opposition fails to state any claim upon which relief may be granted. The Plaintiff does not link its goods/services to the Applicant’s goods/services. The Plaintiff does not fully plead how consumers would be confused if the Applicant’s mark on Applicant’s goods/services when compared to the Plaintiff’s marks on the Plaintiff’s goods/services, For these reasons, the Board should grant the motion to dismiss; dismiss this opposition; and allow the Applicant’s mark, SIGNATURE SYSTEM, to register.

Respectfully submitted,

Dated: August 28, 2015

/s Anthony M. Verna III
Anthony M. Verna III, Esq.
Verna Law
170 Kings Ferry Road
Montrose, NY 10548
Attorney for Applicant

Anthony M. Verna III, Esq.
Verna Law
170 Kings Ferry Road
Montrose, NY 10548

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of August, 2015, a copy of the foregoing Motion was served via First Class Mail, postage prepaid, on the following:

Francine Ward
Law Ofc. of Francine D. Ward
775 East Blithedale Ste. 325
Mill Valley, CA 94941

Respectfully submitted,

Dated this August 12, 2015

/s/ Anthony M. Verna III
Anthony M. Verna III, Esq.
Verna Law
170 Kings Ferry Road
Montrose, NY 10548