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

Proceeding	91223439
Party	Plaintiff Stanley Logistics, LLC
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Date	09/10/2015
Attachments	Opposer Opposition to Applicant Motion to Dismiss 91223439.pdf(206915 bytes)

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

STANLEY LOGISTICS, LLC	:	
	:	
Opposer	:	
	:	
v.	:	Opp. No. <u>91223439</u>
	:	
JS PRODUCTS, INC.	:	
	:	
Applicant	:	

**OPPOSER’S OPPOSITION TO
APPLICANT’S MOTION TO DISMISS**

Opposer Stanley Logistics, LLC (“Opposer”) submits this brief in opposition to JS Products, Inc.’s (“Applicant”) Motion to Dismiss Count II Pursuant to Rule 12(b)(6).

Opposer has met and exceeded the minimum standards required under the liberal pleading rules. Even if the Board grants the motion Opposer should be given an opportunity to file an amended Notice of Opposition to address any alleged deficiencies.

I. CONSOLIDATION

Opposer confirms that the parties have agreed to consolidate Opposition No. 91223439 with the already-consolidated Opposition Nos. 91221141 and 91221566.

II. MOTION TO DISMISS

A. Standard of Review

To withstand a 12(b)(6) motion to dismiss an opposer need only allege facts that would, if ultimately proved, establish that (1) opposer has standing to maintain the proceeding, and (2) a valid ground exists for opposing the mark. The pleading must be examined in its entirety,

construing the allegations liberally, as required by Fed. R. Civ. P. 8(f), to determine whether it contains any allegations, which, if proved, would entitle opposer to the relief sought. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); *Kelly Services Inc. v. Greene's Temporaries Inc.*, 25 USPQ2d 1460 (TTAB 1992); TBMP § 503.02.

The Board must accept all well-pleaded allegations as true, and the complaint must be construed in the light most favorable to the plaintiff. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1027 (Fed. Cir. 1999); *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203 (TTAB 1997). Such motions must be assessed in light of the liberal pleading standards established by the Federal Rules of Civil Procedure, which require only “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Berry v. Gutierrez*, 587 F. Supp. 2d 717, 721-22 (E.D. Va. 2008); Fed. R. Civ. P. 8.

B. Opposer Has Properly Pled Count II

In its motion to dismiss Applicant makes the utterly falsely claim that “Count II of the Amended Notice of Opposition [in Opposition Nos. 91221141 and 91221566] and Count II of the subject Notice of Opposition are identical.” Opposer’s Motion to Dismiss, Para. 5. A simple comparison of the two filings shows that this simply is not true; indeed, the Amended Notice of Opposition includes two additional paragraphs and numerous revisions to the initial notice.

In any event, the amended notices of opposition are not at issue in the present Motion to Dismiss with regard to Opposition No. 91223439. Notably, the Notice of Opposition concerning Opposition No. 91223439 addresses all the issues raised by the Board in its July 16 Order and Count II of the notice properly sets forth the elements of claims for deception and false

suggestion of connection. *See Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581 (TTAB 2008); *In re Spirits Int'l, N.V.*, 563 F.3d 1347, 90 USPQ2d 1589 (Fed. Cir. 2009).

Further, Opposer's Notice of Opposition includes additional factual allegations not provided in the initial notices for Opposition Nos. 91221141 and 91221566. For example, Paragraphs 6 and 7 claim that PROTO serves as a symbol of Stanley's identity, in part due to extensive and longtime marketing and advertising. That is all that is required in a Notice of Opposition under the liberal pleading rules. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) ("detailed factual allegations" not required).

Applicant also improperly attempts to support its motion to dismiss by claiming that "Opposer has not and cannot plausibly allege a false suggestion of a connection claim under Section 2(a) because "PROTO" is a trademark owned by Opposer, not its name or identity." Applicant's Memo. in Support of Motion to Dismiss, p. 4. As already noted, Opposer has properly alleged a false suggestion of a connection, and Opposer's allegations must be accepted as true when considering a 12(b)(6) motion to dismiss. "Therefore, a plaintiff served with a motion to dismiss for failure to state a claim upon which relief can be granted need not respond by submitting proofs in support of its pleading" TBMP § 503.02.

The Notice of Opposition therefore properly sets forth sufficient factual and legal bases for Opposer's claims under Count II, and the Board should deny the motion.

III. OPPOSER SHOULD BE GRANTED LEAVE TO AMEND ANY DEFICIENCIES

If the Board determines there are any deficiencies in the pleading of Count II Opposer should be granted leave to amend to address the deficiencies. TBMP 503.03 (“the Board generally will allow the plaintiff an opportunity to file an amended pleading.”) *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1208 (TTAB 1997).

The standard for granting leave to amend is very liberal. “In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. - the leave sought should, as the rules require, be ‘freely given.’” *Sweetheart Plastics, Inc., v. Detroit Forming, Inc.*, 743 F.2d 1039, 1043 (4th Cir.1984) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Applicant has not alleged that Opposer is acting in bad faith or that Applicant somehow will be prejudiced if the Board grants Opposer leave to amend its Notice of Opposition at this early stage in the case. Accordingly, Opposer should be granted leave to amend Count II if the Board holds it is deficient.

CONCLUSION

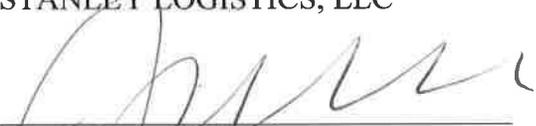
For the foregoing reasons, Opposer respectfully submits that Applicant's Motion to Dismiss under Rule 12(b)(6) should be denied in its entirety.

Respectfully submitted,

STANLEY LOGISTICS, LLC

Dated: September 9, 2015

By:

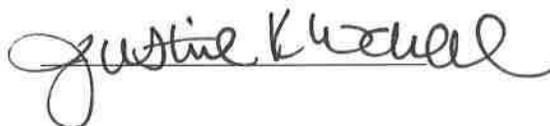

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing Opposer's Opposition to Applicant's Motion to Dismiss Count II regarding Opposition No. 91223439 is being served on Applicant's counsel

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via email as agreed upon, this 10th day of September, 2015.

A handwritten signature in cursive script that reads "Justin K. Kuehl". The signature is written in black ink and is positioned in the lower right quadrant of the page.