

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: November 26, 2015

Opposition No. 91224272

AFAB Industrial Services, Inc.

v.

Pac-West Distributing NV LLC

By the Trademark Trial and Appeal Board:

Pac-West Distributing NV LLC (“Applicant”) seeks to register the mark Super Rush, in standard characters, for “all-purpose cleaners; cleaning preparations” in International Class 3.¹

On October 18, 2015, AFAB Industrial Services, Inc. (“Opposer”) filed a notice of opposition opposing the registration of Applicant’s involved mark on the following two grounds: (1) unlawful use of the mark in commerce, and (2) fraud.

In lieu of filing an answer to the notice of opposition, Applicant, on November 16, 2015, filed a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

A motion to dismiss for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6) is a test solely of the legal sufficiency of the complaint.

¹ Application Serial No. 86599421, filed on April 16, 2015, based on an allegation of use in commerce under Section 1(a) of the Trademark Act, claiming June 2012 as both the date of first use and the date of first use in commerce. The term “SUPER” is disclaimed.

Advanced Cardiovascular Systems Inc. v. SciMed Life Systems, Inc., 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *Bayer Consumer Care Ag v. Belmora LLC*, 90 USPQ2d 1587, 1590 (TTAB 2009). However, whether a plaintiff can actually prove its allegations is a matter to be determined not upon motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence in support of their respective positions. *Advanced Cardiovascular Systems, supra*, 26 USPQ2d at 1041.

After a careful review of Applicant's motion, the Board finds that the motion is not based on the ground that Opposer has failed to plead properly its asserted claims; rather, the motion argues the merits of Opposer's asserted claims and/or that Opposer has failed to satisfy its burden of proving such claims. As such, the Board construes Applicant's motion as one for summary judgment. *See* TBMP § 503.04 (2015).

A motion for summary judgment, however, may not be filed until the moving party has provided its initial disclosures to the opposing party, except if the motion is based upon claim or issue preclusion or that the Board lacks jurisdiction to entertain the case. *See* Trademark Rule 2.127(e)(1). Inasmuch as Applicant's motion is not based upon claim or issue preclusion or that the Board lacks jurisdiction to entertain Opposer's claims and because the record does not demonstrate that Applicant served its initial disclosures upon Opposer prior to or concurrently with the filing its November 16, 2015, motion to dismiss, Applicant's motion is deemed premature and will be given no further consideration.

Notwithstanding the foregoing, the Board has, *sua sponte*, reviewed Opposer's pleading and finds that Opposer's allegations regarding its standing, as well as its asserted claims of unlawful use in commerce and fraud, are sufficiently pleaded and, therefore, provide Applicant with sufficient notice pleading of said claims.

In view thereof, Applicant is allowed until **December 11, 2015** in which to file and serve an answer to the notice of opposition.

Trial Schedule

Trial dates are reset as follows:

Deadline for Discovery Conference	1/10/2016
Discovery Opens	1/10/2016
Initial Disclosures Due	2/9/2016
Expert Disclosures Due	6/8/2016
Discovery Closes	7/8/2016
Plaintiff's Pretrial Disclosures Due	8/22/2016
Plaintiff's 30-day Trial Period Ends	10/6/2016
Defendant's Pretrial Disclosures Due	10/21/2016
Defendant's 30-day Trial Period Ends	12/5/2016
Plaintiff's Rebuttal Disclosures Due	12/20/2016
Plaintiff's 15-day Rebuttal Period Ends	1/19/2017

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 Trademarks Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.