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

Proceeding	91224287
Party	Defendant Kabushiki Kaisha Nibariki
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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<p>HANDLE ONLY WITH LOVE, LLC</p> <p style="text-align: center;">Opposer,</p> <p style="text-align: center;">v.</p> <p>KABUSHIKI KAISHA NIBARIKI</p> <p style="text-align: center;">Applicant.</p>	<p>Opposition No.: 91224287</p> <p>Mark: HOWL'S MOVING CASTLE Application No.: 86314157 Filing Date: June 19, 2014</p>
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**APPLICANT'S MOTION TO PARTIALLY DISMISS
OPPOSITION FOR FAILURE TO STATE A CLAIM**

Pursuant to TBMP § 503 and Rules 8 and 12 of the Federal Rules of Civil Procedure, Kabushiki Kaisha Nibariki ("Applicant") moves to partially dismiss Handle Only With Love, LLC's ("Opposer") Notice of Opposition for its failure to allege facts sufficient to plead likelihood of confusion under 15 U.S.C. § 1052(d) and dilution under 15 U.S.C. § 1125(c).

I. INTRODUCTION

Opposer sets out three grounds in its Notice of Opposition: likelihood of confusion, dilution, and lack of bona fide intent to use. Notice of Opposition, TTABVUE1. Two of these claims are entirely unsupported. Specifically, Opposer fails to allege: (1) that Applicant's mark, as applied to its goods or services, so resembles Opposer's mark as to be likely to cause confusion, mistake, or deception; (2) that Opposer's mark is famous as defined in 15 U.S.C. § 1125(c)(2); (3) that Opposer's mark was famous prior to Applicant's filing date; and (4) that Applicant's mark is likely to cause dilution by blurring or

tarnishment. Without these pivotal allegations, Opposer's notice is fatally deficient and falls far short of an adequate pleading to support either a likelihood of confusion or a dilution claim. As such, these claims should be dismissed.

II. ARGUMENT

A pleading must include enough detail to give a defendant fair notice of the basis of each claim. Fed. R. Civ. P. 8(a); TBMP § 309.03(a)(2); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007). Rule 12 "allow[s] the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity." *Advanced Cardiovascular Sys. v. SciMed Life Sys.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993) (citing *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989)). Dismissal is appropriate "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Thus, the Board should dismiss a claim where the non-movant has not presented "enough facts to state a claim to relief that is plausible on its face." *See Twombly*, U.S. 550 at 570; *Caymus Vineyards v. Caymus Med. Inc.*, 107 USPQ2d 1519, 1522 (TTAB 2013) (quoting *Iqbal*, 556 U.S. at 678).

1. The Board Should Dismiss Opposer's Likelihood of Confusion Claim

A claim of likelihood of confusion under 15 U.S.C. § 1052(d) requires pleading (1) priority of use and (2) that Applicant's mark, as applied to its goods or services, so resembles Opposer's mark as to be likely to cause confusion, mistake, or deception. 15

U.S.C. § 1052(d); TBMP §309.03(c). Opposer's claim does not satisfy these elements. A mere allegation of priority, without an allegation of likelihood of confusion, is insufficient to survive a motion to dismiss. *Intersat Corp. v. Int'l Telecomms. Satellite Org.*, 226 USPQ 154, 156 (TTAB 1985) (dismissing pleading that did not allege that "[applicant's mark] as applied to its services so resembles [opposer's mark] previously used by [opposer] so as to be likely to cause confusion or mistake.").

The Board should dismiss Opposer's likelihood of confusion claim because, like the pleading in *Intersat Corp.*, Opposer's Notice of Opposition only alleges priority. Notice of Opposition, TTABVUE1, ¶ 6. It is entirely devoid of any allegations that Applicant's mark, as applied to its goods and services, is likely to cause confusion, mistake, or deception. *See generally, id.* Without such pivotal allegations, Opposer cannot prove any set of facts entitling it to relief under 15 U.S.C. § 1052(d). It is therefore "clear that no relief could be granted . . . consistent with" Opposer's existing allegations. *Hishon*, 467 U.S. at 73. Because Opposer has failed to adequately plead its likelihood of confusion claim, the Board should grant Applicant's motion to dismiss it.

2. The Board Should Dismiss Opposer's Dilution Claim

Opposer's dilution claim is similarly deficient. To adequately plead dilution, Opposer must plead that (1) its mark is distinctive, (2) its mark is famous, (3) its mark achieved this fame prior to Applicant's efforts to use and/or register its mark, and (4) Applicant's mark is likely to cause dilution by blurring or tarnishment. 15 U.S.C. § 1125(c); *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1726-27 (TTAB 2007); *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 94 USPQ2d 1645, 1665 (TTAB 2010), *aff'd*, 637 F.3d 1344 (Fed. Cir. 2011). Famous marks are "widely recognized by the general

consuming public of the United States as a designation of source of the goods or services of the mark's owner." 15 U.S.C. § 1125(c)(2). Courts have generally limited famous marks to those that are "almost universally recognized by the general public." *Heller Inc. v. Design Within Reach, Inc.*, Civ. No. 09-CV-1909, 2009 WL 2486054, at *3 (S.D.N.Y. Aug. 14, 2009). Because Applicant's mark is an intent-to-use application, Opposer must also allege that its mark became famous prior to Applicant's filing date. *Toro Co. v. ToroHead, Inc.*, 61 USPQ2d 1164, 1174 (TTAB 2001); *Polaris Indus., Inc. v. D.C. Comics*, 59 USPQ2d 1798, 1800 (TTAB 2000) (dilution claim "legally insufficient" without an allegation as to when opposer's mark became famous).

Applicant's dilution claim fails to satisfy three of the four required elements. First, Opposer has not adequately alleged that its mark is famous. Opposer alleges in Paragraphs 4-5 of its Notice of Opposition that its marks "serve to identify and indicate the source of Opposer's goods and services to the consuming public" and "have become distinctive and are recognized by consumers." Notice of Opposition, TTABVUE1, ¶¶ 4-5. Nowhere does Opposer allege that its mark is widely recognized by the general public. Nor does it allege *when* its mark may have become famous. Finally, Opposer has failed to allege that Applicant's mark is likely to cause dilution by blurring or tarnishment. Without these allegations, Opposer's dilution claim must be dismissed.

III. CONCLUSION

In light of the above, the facts alleged in Opposer's Notice of Opposition, even if proven true, cannot give rise to a likelihood of confusion or a dilution claim. Applicant

therefore respectfully requests that the Board dismiss Opposer's likelihood of confusion and dilution claims.

Dated: November 18, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2015, a true and correct copy of the foregoing
MOTION TO PARTIALLY DISMISS OPPOSITION FOR FAILURE TO STATE A CLAIM
was served by United States first class mail, postage prepaid, on counsel for Opposer at the
following address of record:

Christopher A. DiSchino, Esq.
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A handwritten signature in blue ink, appearing to read "J. Valusek", is written over a horizontal line.