

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

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Mailed: May 17, 2010

Opposition No. 91194369

Upward Unlimited

v.

United Football League, LLC

By the Trademark Trial and Appeal Board:

On May 11, 2010, applicant filed papers with the Board entitled "Applicant's Motion to Dismiss." Applicant's motion is filed pursuant to Fed. R. Civ. P. 12(b)(6).

A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint. *See, for example, Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993) (Rule 12(b)(6) challenges the legal theory of the complaint not the sufficiency of the evidence that might be adduced); *Space Base Inc. v. Stadis Corp.*, 17 USPQ2d 1216 (TTAB 1990); and *Consolidated Natural Gas Co. v. CNG Fuel Systems, Ltd.*, 228 USPQ 752 (TTAB 1985). In order to withstand such a motion, a pleading need only allege such facts as would, if proved, establish that the plaintiff is entitled to the relief sought, that is, that (1) the plaintiff has standing to maintain the

proceeding, and (2) a valid ground exists for denying the registration sought (in the case of an opposition), or for canceling the subject registration (in the case of a cancellation proceeding). See *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982);.

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. 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.

Following a careful review of the motion papers filed by applicant on May 11, 2010, the Board notes that applicant's motion does not contest the sufficiency of opposer's pleading but rather argues the merits of opposer's asserted claim of priority and likelihood of confusion. In view thereof, the Board construes applicant's motion as one for summary judgment and not as a motion to dismiss for failure to state a claim upon which relief may be granted.

Under Trademark Rule 2.127(e), a party may not file a motion for summary judgment until the party has made its

initial disclosures, except for a motion asserting claim or issue preclusion or lack of jurisdiction by the Board.

Inasmuch as applicant's motion is not based on claim or issue preclusion nor does it contest the Board's jurisdiction and since there is no indication in the motion papers that applicant has already served its initial disclosures upon opposer, applicant's motion filed on May 11, 2010 is deemed premature and will be given no further consideration.

Trial dates, including the time to answer the notice of opposition, are reset as follows:

Time to Answer	6/7/2010
Deadline for Discovery Conference	7/7/2010
Discovery Opens	7/7/2010
Initial Disclosures Due	8/6/2010
Expert Disclosures Due	12/4/2010
Discovery Closes	1/3/2011
Plaintiff's Pretrial Disclosures	2/17/2011
Plaintiff's 30-day Trial Period Ends	4/3/2011
Defendant's Pretrial Disclosures	4/18/2011
Defendant's 30-day Trial Period Ends	6/2/2011
Plaintiff's Rebuttal Disclosures	6/17/2011
Plaintiff's 15-day Rebuttal Period Ends	7/17/2011

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.

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