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

Proceeding	91216238
Party	Defendant Logical Concepts, Inc.
Correspondence Address	SANDERS N. HILLIS BRINKS HOFER GILSON & LIONE 201 N ILLINOIS ST STE 1100 INDIANAPOLIS, IN 46204-4220 officeactions@brinkshofer.com;indianapo
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Andrew J. Avsec
Filer's e-mail	officeactions@brinksgilson.com, aavsec@brinksgilson.com, cdolan@brinksgilson.com, shillis@brinksgilson.com
Signature	/Andrew J. Avsec/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PIT BOSS PRODUCTS, LLC, Opposer, v. LOGICAL CONCEPTS, INC. Applicant.	Opposition No. 91216238

APPLICANT'S MOTION TO DISMISS

On May 6, 2014, Opposer filed a Notice of Opposition to Applicant Logical Concepts, Inc.'s App. Ser. No. 85/698,271, (herein "the Application") which seeks registration of the following mark in Class 9:

The Notice of Opposition alleges two bases for opposing the application: (1) a likelihood of confusion under 15 U.S.C. § 1052(d) (herein "2(d) Claim"); and (2) falsely suggesting a connection with Opposer's name or identity as set forth in 15 U.S.C. § 1052(a) (herein "2(a) Claim"). The Notice of Opposition fails to state a claim upon which relief can be granted with respect to either ground, and accordingly, Applicant hereby moves to dismiss the Notice of Opposition.

I. STANDARD

The Federal Rules of Civil Procedure permit a defendant to move to dismiss a complaint for the failure to state a claim upon which relief can be granted. Fed. R. Civ. Proc. 12(b)(6). An opposer must allege sufficient factual content that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the opposer has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the mark. *Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780 (TTAB 2012). *See* also TBMP § 503.02 (2013). A Notice of Opposition "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). In particular, the opposer must allege well-pleaded factual matter and more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," to state a claim plausible on its face. *Id.*, 556 U.S. 662, 129 S. Ct. at 1949. Here, Opposer fails to establish standing or plead a valid ground for opposing or cancelling the mark.

II. OPPOSER FAILS TO STATE A CLAIM ON ITS 2(d) CLAIM

Applicant moves to dismiss Opposer's 2(d) Claim because it fails to state a claim upon which relief can be granted. Opposer's entire allegation relating to its 2(d) Claim states:

> 8. Opposer believes that federal registration by Applicant of the trademark PITBOSS & design for alarm monitoring systems; radio transceivers; electronic monitors and monitor modules for monitoring electric current and electric signals in International Class 009 either has or is likely to cause confusion, or to cause mistake, or to deceive, as those terms are used in 15 U.S.C. § 1052(d).

While Opposer states generally that it believes that registration of the PITBOSS and Design mark "has or is likely to cause confusion...," Opposer fails to identify the marks with which Applicant's mark will allegedly cause confusion. For instance, while the Notice of Opposition

identifies a limited liability company name and two federal trademark registrations, it is unclear which of these alleged properties, if any, Opposer relies on to support its 2(d) Claim. Moreover, the Notice of Opposition does not allege any facts relating to any similarities between Applicant's mark and Opposer's marks, and it does not allege any facts relating to the relatedness of the parties' goods. Indeed, Opposer only pleads that it will be damaged by Applicant's registration of the mark in Class 7:

> Opposer believes that it will be damaged by registration of the trademark PITBOSS & design and requests that the application to register the mark PITBOSS & design in Application Serial No. 85/698,271 in International Class 007 be refused, that no registration be issued to Applicant for the trademark PITBOSS & design in International Class 007 and that this Opposition be sustained in favor of Opposer.

See Notice of Opposition at pp. 2-3. However, the Application only recites goods falling in Class 9. Therefore, Opposer has not alleged a valid ground for opposing the Application. Moreover, since Opposer only alleges that it will be damaged by registration of the mark in Class 7, Opposer has not alleged standing to oppose the Application, which only covers goods in Class 9.

Even if all of the pleaded facts are construed in Opposer's favor, Opposer's allegations are not plausible on their face and relief could not be granted in its favor. Accordingly, the 2(d) Claim fails to state a claim upon which relief can be granted, and the Notice of Opposition should be dismissed.

III. OPPOSER FAILS TO STATE A CLAIM ON ITS 2(a) CLAIM

Applicant also moves to dismiss the 2(a) Claim because it fails to state a claim upon which relief can be granted. Fed. R. Civ. Proc. 12(b)(6). The Federal Circuit has explained that Section 2(a) was designed to protect "the name of an individual or institution which was not a technical 'trademark' or 'trade name' upon which an objection could be made under Section

2(d)." *The University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 217 USPQ 505, 508 (Fed. Cir. 1983) (holding that NOTRE DAME did not uniquely and unmistakably point to the university, because of the well-known Notre Dame cathedral). The court observed that Section 2(a) embraces the concepts of the right to privacy and the related right of publicity:

> Although not articulated as such, it appears that the drafters sought by § 2(a) to embrace concepts of the right to privacy, an area of the law then in an embryonic state. Our review of case law discloses that the elements of a claim of invasion of one's privacy have emerged as distinctly different from those of trademark or trade name infringement. There may be no likelihood of such confusion as to the source of goods even under a theory of "sponsorship" or "endorsement," and, nevertheless, one's right of privacy, or the related right of publicity, may be violated. *Id.* at 509.

Accordingly, the TTAB has adopted four elements required to establish a claim under Section 2(a):

1. The mark is the same as, or a close approximation of, the name or identity previously used by another person or institution;

2. The mark would be recognized as pointing uniquely and unmistakably to that person or institution;

3. The person or institution named by the mark or using the mark is not connected with the activities performed by the applicant under the mark; and

4. The fame or reputation of the person or institution is such that when the mark is used to identify the applicant's goods or services, a connection with that person or institution would be presumed.

In re White, 73 USPQ2d 1713 (TTAB 2004). "[T]he initial and critical requirement is that the name (or an equivalent thereof) claimed to be appropriated by another must be unmistakably associated with a particular personality or persona." *Notre Dame*, 217 USPQ at 509. Opposer pleading as it relates to its 2(a) Claim baldly states:

> 1. Opposer registered as a limited liability corporation under the name Pit Boss Products, LLC on March 30, 2010....
>
> 9. Opposer believes that federal registration by Applicant of the trademark PITBOSS & design either has or is likely to falsely suggest a connection with Opposer's name or identity, as set forth in 15 U.S.C. § 1052(a).

Opposer's bare bones pleading fails to allege facts sufficient to meet any of the elements, much less the critical element that the name is "uniquely and unmistakably" associated with Opposer. Accordingly, Opposer has not plead sufficient factual matter, which even if accepted as true, would to state a claim to relief that is plausible on its face, and accordingly, its 2(a) Claim must be dismissed.

IV. CONCLUSION

For all of the foregoing reasons, the Notice of Opposition fails to state a claim upon which relief can be granted and therefore should be dismissed.

Dated: June 16, 2014

By: /Andrew J. Avsec/

Christopher M. Dolan
Andrew J. Avsec
BRINKS GILSON & LIONE
NBC TOWER - Suite 3600
455 N. Cityfront Plaza Drive
Chicago, Illinois 60611
Tel. 312/321-4200
Fax. 312/321-4299

Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2014, I served a true and correct copy of the foregoing Motion to Dismiss on Opposer's Counsel by U.S. mail addressed as follows:

Angelo J. Bufalino
Vedder Price P.C.
222 N. LaSalle St.Suite 2400
Chicago, IL 60601

/Andrew J. Avsec/

One of the Attorneys for Applicant