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

Proceeding	91216851
Party	Defendant G Adventures Inc.
Correspondence Address	PASQUALE A RAZZANO FITZPATRICK CELLA HARPER & SCINTO 1290 AVENUE OF THE AMERICAS NEW YORK, NY 10104-3800 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
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Date	07/21/2014
Attachments	Motion to Dismiss.pdf(596031 bytes)

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

ARCTIC EXPLORERS AS,)	
)	
Opposer)	
)	
v.)	Opposition No. 91216857
)	(Serial No 86001138)
G ADVENTURES, INC.,)	
)	
Applicant)	
)	

**MOTION TO DISMISS
THE NOTICE OF OPPOSITION
UNDER 28 U.S.C. §12(b)(i) and (6)**

Applicant G Adventures Inc., through its undersigned counsel moves the Trademark Trial and Appeal Board for an order dismissing the Notice of Opposition in these proceedings.

The grounds and reasons for the motion are set forth in the accompanying MEMORANDUM in support of this motion and include:

1. The Trademark Trial and Appeal Board lacks jurisdiction over the subject matter of this action as the Opposer lacks standing to bring this opposition and fails to allege standing adequate to support such jurisdiction; and
2. The Notice of Opposition fails to state a claim on which relief may be granted.

This motion is based on the Notice of Opposition on file in this action, this Motion and the accompanying MEMORANDUM.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO DISMISS THE NOTICE OF OPPOSITION UNDER 28 U.S.C. §12(b)(1) and(6) was filed electronically. Notice of this filing will be sent by operation of the T.T.A.B's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.



A handwritten signature in blue ink, appearing to read "Suzanne Lynn", is written over a horizontal line.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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ARCTIC EXPLORERS AS,)	
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Opposer)	
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v.)	Opposition No. 91216857
)	(Serial No 86001138)
G ADVENTURES, INC.,)	
)	
Applicant)	
)	

**MEMORANDUM IN SUPPORT OF
APPLICANT'S MOTION TO DISMISS
THE NOTICE OF OPPOSITION
UNDER 28 U.S.C. §12(b)(1) and (6)**

Applicant G Adventures has moved the Trademark Trial and Appeal Board to dismiss the Notice of Opposition in this proceeding under 28 U.S.C. §12(b)(1) for lack of subject matter jurisdiction because Opposer lacks standing. More specifically, Opposer has failed to allege in the Notice that it believes it is or will be damaged by registration of the mark or that there is a reasonable basis in fact that it will be damaged and that it has a real interest in the proceedings.

Applicant also moves for dismissal under 28 U.S.C. §12(b)(6) on the grounds that the Notice of Opposition fails to state facts sufficient to support a claim on which relief may be granted. The Notice fails to allege that the subject mark was used in any way in this country by anyone for any reason (as a mark or otherwise) prior to Applicant's adoption thereof on the services for which the mark is sought to be registered. To the contrary the Notice admits Opposer does not have the ability to allege - or establish - such facts.

Background

The Notice of Opposition in this proceeding contains no factual allegations about who or what Arctic Explorers AS is or what its business is. As best can be surmised from the Notice Opposer operates in Norway and has offered “tours,” for the last two years. There are no allegations that it operates in the United States, or that it offers any services in this country.

The Notice broadly alleges that the term “lifetime deposits” has been used “probably” for decades for “Bingo, Casino, Lottery and other businesses” (without saying where); it also acknowledges that the allegations “cannot be documented with Google results.” Nor does the Notice allege that those allegations could be documented at all. Moreover as to the “tour operator business”, the Notice of Opposition alleges that “lifetime deposits was common wording . . . several years before we started up the company . . .”. Based on that allegation such uses, if any, first occurred long after Applicant’s first use. Moreover, there is no allegation that such alleged uses were in this country. And, even if such uses occurred in this country they would simply be infringing on Applicant’s rights. In sum the Notice alleges uses of Applicant’s trademark by Opposer and others after Applicant introduced its mark -- but without allegations of use in the U.S. at all by anyone. Opposer never alleges that it would be damaged by Applicant’s registration of its mark and instead simply takes the position that since others (somewhere) have used it after Applicant it should be able to as well.

I. The Notice of Opposition Should Be Dismissed Under U.S.C. §12(b)(1) As Opposer Lacks Standing

A party invoking the jurisdiction of the Trademark Trial and Appeal Board (T.T.A.B.) has the burden of establishing the elements of standing. Standing is an indispensable part of any T.T.A.B. proceeding. Generally the party involving jurisdiction must allege injury resulting from the Applicant’s conduct. This requirement is stated plainly in the Lanham Act, 15

U.S.C. §1063, which permits oppositions to be filed only by a “person who believes that he would be damaged by the registration of a mark upon the principal register . . .”. Thus, in its pleading an Opposer must allege facts sufficient to show it has a real interest in the proceeding and a reasonable basis for its belief that it will be damaged by the registration. That “real interest” must be expressed in an allegation of Opposer’s direct and personal stake in the proceeding which allegation must have a reasonable basis in fact. *Ritchie v. Simpson*, 170 F. 3d 1092 (Fed. Cir. 1999).

Here Opposer has not alleged that it will be damaged by Applicant’s registration of its mark or that it suffers any injury resulting from such registration. Indeed, because the registration of Applicant’s mark will have effect only in the U.S., Opposer cannot be harmed where it has not alleged it does business of any kind in the U.S. or that it is engaged in the sale of any of the services identified in Applicant’s pending application in this country. The allegation that Opposer has used the term lifetime deposits for two years or that others, have used it (after Applicant’s first use and without alleging use in the U.S.) in a tour operator business (as opposed to the services identified in the application) does not support a direct interest in this country for the subject mark much less harm caused in this country by the registration.

Accordingly, Opposer has not alleged facts or a reasonable basis for, that would support a finding that Opposer has a legitimate belief of being damaged in the United States.

II. The Notice of Opposition Should Be Dismissed Under 28 U.S.C. §12(b)(6) For Failure To State A Claim On Which Relief May Be Granted

For the same reasons, dismissal under Rule 12(b)(6) also is appropriate in this case because the Notice of Opposition lacks allegations regarding elements necessary to obtain relief. 2 Moore’s Federal Practice § 12.34[4][a] (3d ed. 2012).

In the seminal case of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), the Supreme Court ruled that a complaint cannot survive a motion to dismiss without some factual context sufficient to state a claim to relief that is “plausible on its face.” The Court also found that “a plaintiff’s obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements Factual allegations must be enough to raise a right to relief above the speculative level.” *Id.* at 555 (alteration in original) (internal quotation marks omitted).

Subsequently in *Iqbal*, the Court explained *Twombly*’s “facial plausibility” requirement, stating:

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

Because the Notice of Opposition does not allege damage to Opposer in this country and does not allege that the subject mark was used by Opposer or anyone else in this country before Applicant on the services specified in the application¹, Opposer not only has no standing and has not plead a claim that is plausible on its face.

The Notice of Opposition here simply does not allege facts which, if taken as true, assert a claim for relief.

Following *Twombly* and *Iqbal*, the Court’s inquiry under Rule 12(b)(6) is guided by two principles:

¹ To the contrary the Notice admits Opposer cannot “document” its allegations of use by others even with unrelated products or services.

“First, although ‘a court must accept as true all of the allegations contained in a complaint,’ that ‘tenet’ is inapplicable to legal conclusions,’ and ‘[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.’

Harris v. Mills, 572 F. 3d 66, 72 (2d Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678-79) (alterations in original).

The basis of the claim in the Notice of Opposition is that the subject mark is generic. However, that is a conclusory statement, not a factual allegation. Conspicuous by its absence (and the admission that the claim cannot be documented) is any allegation that:

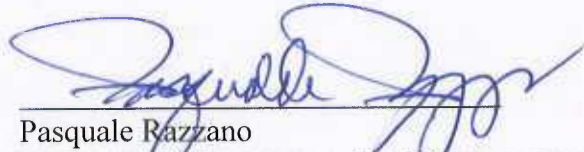
- i) the Opposer does business in this country that would be harmed;
- ii) that the subject mark is generic in this country by reason of long and extensive use for the same services listed in the application;
- iii) that the subject mark was used in this country as a generic term by others (much less Opposer) before its adoption by Applicant for the services listed in the application.

Without such allegations -- and in view of Opposer’s admission about being unable to document the “threadbare” allegations it does make -- the Notice of Opposition does not provide sufficient factual content to state a claim, plausible on its face, that Opposer will be damaged in this country by registration and that the subject mark is generic in this country -- or elsewhere.

Conclusion

Accordingly the Notice of Opposition should be dismissed based on Opposer's lack of standing and for failure to state a claim on which relief may be granted.

Respectfully submitted,



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A handwritten signature in blue ink is written over a horizontal line. The signature is cursive and appears to read "Suzanne J. [unclear]".