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

Proceeding	91218320
Party	Defendant Working Girls Design, Inc.
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Submission	Motion to Dismiss - Rule 12(b)
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Attachments	Motion to Dismiss Opposition WGD Inc and Design.pdf(256865 bytes)

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

EVERGREEN ENTERPRISES, INC.,	:	
	:	
Opposer,	:	**Opposition No. 91218320**
	:	**Application No. 86/177,716**
v.	:	**Trademark: WORKING GIRLS DESIGN, INC. and Design**
	:	**Filing Date: January 28, 2014**
WORKING GIRLS DESIGN, INC.,	:	
	:	
Applicant.	:	

APPLICANT'S MOTION TO DISMISS OPPOSER'S NOTICE OF OPPOSITION

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and TMBP § 303.03(b), Applicant Working Girls Design, Inc. ("Working Girls" or "Applicant") hereby moves to dismiss the Notice of Opposition filed by Evergreen Enterprises, Inc. ("Evergreen" or "Opposer") on the grounds that Evergreen lacks standing to oppose registration of U.S. Trademark Application Serial No. 86/177,716 ("Application").

STATEMENT OF FACTS

On March 11, 2014, Working Girls filed a lawsuit in United States District Court for the Eastern District of Virginia against Evergreen Enterprises, Inc. for willful copyright infringement, trademark infringement and unfair competition. On August 21, 2014, Working Girls amended its Complaint against Evergreen to withdraw its claims for trademark infringement. Evergreen consented to the filing of the amended Complaint ("Amended Complaint") and indeed acknowledges in its Notice of Opposition that WGD's trademark infringement claims were withdrawn. *See* Notice of Opp. ¶ 7.

On September 12, 2014, Evergreen filed the immediate Notice of Opposition, opposing registration of the Application, apparently and inexplicably on the grounds that Evergreen will be harmed by Working Girls' alleged fraud on the United States Patent and Trademark Office.

STANDARD OF REVIEW

The Board reviews a notice of opposition by assuming all well-pleaded allegations in the pleading are true, and construing these allegations in a light most favorable to the opposer. *Consolidated Foods Corp. v. Big Red, Inc*., 226 U.S.P.Q. 829, 831 (T.T.A.B. 1985).

To withstand a motion to dismiss for failure to state a claim under Rule 12(b) of the Federal Rules of Civil Procedure and TMBP § 503.02, an opposer, as the plaintiff in an opposition proceeding, has the burden of proof to establish, by a preponderance of the evidence, that it has standing and a ground upon which relief may be granted. *Cunningham v. Laser Golf Corp*., 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *See* TBMP § 503.02 citing *Lipton Industries, Inc. v. Ralston Purina Co*., 670 F.2d 1024, 1028 (CCPA 1982); *See also, Young v. AGB Corp*., 152 F.3d 1377, 47 USPQ2d 1752, 1855 (Fed. Cir. 1998).

REQUIREMENTS FOR STANDING

Standing is a threshold issue that must be properly plead by the opposer in any *inter partes* proceeding. In order to prove that an opposer has standing, it must establish that it has a real interest in the proceeding. A party's pleading lays the foundation for standing and therefore, if the opposer does not plead facts sufficient to show a personal interest in the outcome beyond that of the general public, the case may be dismissed for failure to state a claim. *Lipton Industries, Inc.* at 1028 (CCPA 1982). The Trademark Trial and Appeal requires sufficient pleading of standing for the important purpose of

"preclud[ing] meddlesome parties from instituting proceedings as self-appointed guardians of the purity of the Register." *Lipton Industries, Inc*. at 1027 (CCPA 1982). The *Lipton* Court accordingly held that,

> The question of standing is to be determined upon the well-pleaded allegations of the complaint, made in good faith, and is not contingent upon re-examination based on the evidentiary record, unless such record establishes clearly and convincingly that the allegation was a sham pleading.

The Trademark Trial and Appeal Board specifically described the elements of standing in the well-known "Goats-on-the-Roof" case, *Doyle v. Al Johnson's Swedish Restaurant & Butik, Inc.* (TTAB July 12, 2012):

> With respect to standing, petitioner must allege facts which, if ultimately proven, would establish that petitioner has a "real interest," i.e., a "personal stake," in the proceeding. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999); *Lipton Industries, Inc. v. Ralston Purina Co.*, 213 USPQ 185, 189 (TTAB 1982).
>
> While the requirements to establish standing set forth in *Ritchie* set a low threshold, they are still requirements which must be met. In *Ritchie*, the Federal Circuit reaffirmed that standing before the Board requires a "real interest," noting that a plaintiff "must show a direct injury to himself." *Ritchie*, 50 USPQ2d at 1025-26 (emphasis added) (citing *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp*., 823 F.2d 490, 2 USPQ2d 2021, 2023-24 (Fed. Cir.1987)).

Accordingly, a party seeking to oppose registration of a trademark with the United States Patent and Trademark Office must show that they have a real interest in the proceeding and that they will be damaged by registration of the mark.

ARGUMENT

Applicant submits that Opposer simply has no standing to bring this opposition proceeding, nor has Opposer even alleged standing in its Notice of Opposition.

Evergreen acknowledges in its Notice of Opposition that Applicant's previously asserted trademark infringement claims were withdrawn. Indeed, Evergreen includes as its Exhibit A the Consent Order establishing that the claims were withdrawn with Opposer's consent, and as its Exhibit D Working Girls' amended complaint wherein the trademark infringement claims have been withdrawn.

In its Notice of Opposition, Evergreen has failed to allege standing; it has not claimed that it has any trademark rights relevant to the Application, it has not claimed that any trademark rights it may have would be adversely affected by the registration of Applicant's marks, nor has not explained how it would suffer any "direct injury" by the registration of Applicant's marks or what its "real interest" is in this proceeding. Rather, it is clear from the face of the Notice of Opposition that Evergreen is trying to act as a USPTO "gatekeeper" in this Opposition; Evergreen is no more than an intermeddler in this Trademark Office proceeding whose only "real interest" is to harass Working Girls for pursuing copyright infringement claims against Evergreen and to delay registration of Working Girls' legitimate trademarks. In short, Evergreen is impermissibly using the Trademark Trial and Appeal Board and this sham Notice of Opposition as a bad faith litigation strategy.

In the Notice of Opposition, Evergreen's only vague allegation of damage relates to alleged damage to the USPTO. Evergreen alleges:

> "In claiming [first use dates in 2008], Applicant made a false representation to the United States Patent and Trademark Office." (Notice of Opp. ¶ 14).
>
> "Falsely representing a date of first use in commerce is material to the registrability of the mark, because the incorrect date of first use will prevent rightful senior users from asserting rights through prior use." (Notice of Opp. ¶ 15).

"Applicant intends to deceive the USPTO…" (Notice of Opp. ¶ 16).

> "…Applicant seeks to obtain a trademark registration fraudulently with an intent to deceive the USPTO…Applicant intends to induce the [US]PTO to issue it a registration, and in doing so has committed fraud upon the USPTO…" (Notice of Opp. ¶ 18).

Then, in an incredible summation, Opposer states, "[f]or the foregoing reasons, Opposer is and will be damaged by the registration for the WGD Design Mark…" without putting forth any explanation as to how any alleged fraud on the USPTO would cause Opposer harm, damage or injury in any way. See ¶ 19. Simply put, Evergreen has failed to allege any basis for standing to oppose the Application. Applicant submits that Opposer's complete lack of "personal interest" is clear evidence of Evergreen's bad faith in filing its Notice of Opposition and causing delay in registration of Evergreen's marks.

CONCLUSION

In light of the foregoing, and without consideration of the merits of Evergreen's Notice of Opposition, Applicant submits that Opposer has neither alleged nor established any standing to bring this Notice of Opposition and accordingly that this Notice of Opposition must be dismissed pursuant to the Federal Rules of Civil Procedure and TMBP § 303.03(b).

Respectfully submitted,

Dated: 9/19/2014

WORKING GIRLS DESIGN, INC.

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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing APPLICANT'S MOTION TO DISMISS OPPOSER'S NOTICE OF OPPOSITION was served by electronic mail and via First Class U.S. Mail, postage paid, on this 19th day of September, 2014 upon:

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