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

Proceeding	91220749
Party	Defendant Class Act Sports, LLC
Correspondence Address	MARK I KOFFSKY KOFFSKY SCHWALB LLC 349 FIFTH AVENUE, SUITE 733 NEW YORK, NY 10016 UNITED STATES trademark@koffskyschwalb.com, mkoffsky@koffskyschwalb.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Robert B. Golden
Filer's e-mail	RGolden@LSLLP.com, JRollings@LSLLP.com, EMenist@LSLLP.com, TMEFS@LSLLP.com
Signature	/Robert B. Golden/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Application Ser. No.: 86/131,804
Mark: BRACK ATTACK
International Classes: 9,41, and 42
Applicant: Class Act Sports, LLC
Published in *OG*: August 26, 2014

Application Ser. No.: 86/242,813
Mark: BRACK ATTACK
International Classes: 25
Applicant: Class Act Sports, LLC
Published in *OG*: August 26, 2014

Application Ser. No.: 86/243,893
**Mark: DON'T LET ONE TEAM BUST
YOUR BRACKET**
International Classes: 41
Applicant: Class Act Sports, LLC
Published in *OG*: August 26, 2014

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NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,	:
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Opposer,	:
	:
v.	:
	Opposition No. 91220749
	:
CLASS ACT SPORTS, LLC,	:
	:
Applicant.	:
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**CLASS ACT SPORTS, LLC'S MOTION TO DISMISS NATIONAL COLLEGIATE
ATHLETIC ASSOCIATION'S NOTICE OF OPPOSITION**

Applicant, Class Act Sports, LLC ("Class Act"), by and through its undersigned counsel, brings this Motion to Dismiss National Collegiate Athletic Association's ("NCAA") Notice of Opposition (the "Opposition") pursuant to Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 503 and Fed. R. Civ. Proc. 12(b)(6).

INTRODUCTION

This proceeding presents a classic case of trademark bullying. Without pleading a single relevant trademark registration, NCAA attempts to assert exclusive rights to the word “bracket” and all composite marks containing the word “bracket.” In fact, NCAA goes even further. Though its allegations appear intentionally vague (and as explained in more detail below, are defectively vague), NCAA claims rights not merely to “bracket” word marks, but more broadly to “images of brackets.” See Consolidated Notice of Opposition (“Notice”) at ¶ 2. And starting at paragraph 5 of the Notice, and in numerous instances thereafter, NCAA claims rights to an alleged “Tournament Bracket” mark as if it is a specific, known mark. But nowhere in the Notice does NCAA define the term.

As used by NCAA, “bracket” refers to a common tree-diagram, illustrating games or matches to be played in an elimination-style sports tournament. Though NCAA does not so allege in the underlying facts or in connection with its § 2(d) claim, its alleged rights relate to the NCAA Men’s Division I basketball tournament. In the context of the use of brackets to illustrate the basketball tournament format, NCAA’s alleged marks are generic or merely descriptive and thus, not entitled to protection. Not surprisingly, in its Notice NCAA only vaguely (and defectively) describes the services it allegedly offers under the asserted marks.

NCAA did not invent brackets. NCAA was not the first entity to use brackets in connection with sporting events. NCAA is not the only entity to currently use brackets. Brackets are commonly used in tournaments or “championships,” many of which (such as Wimbledon and the French Open tennis tournaments) have been in existence since prior to the first NCAA basketball tournament. And professional sports leagues typically use brackets for their play-offs. For example, the National Hockey League uses a bracket format for its play-offs

and has been in existence since prior to the first NCAA basketball tournament. In fact, NCAA is not even the first entity to operate basketball tournaments using a bracket format. *See generally, March Madness Athletic Association, LLC v. Netfire, Inc.*, 310 F. Supp. 786 (ND TX, 2003)(discussing, *inter alia*, the Illinois High School Association's prior conduct of basketball tournaments).

NCAA's odd pleading, in which it fails to clearly identify either its asserted trademark rights or the services offered under such rights, appears to be a deliberate strategy aimed at hiding from the Board the true, generic/descriptive nature of NCAA's asserted rights. Though not pled in the Notice, NCAA, in fact, does own relevant "BRACKET" trademark registrations. The registrations, however, have long and tortured histories, including repeated rejections based on mere descriptiveness. It was only after NCAA divided its original application and amended its identification of goods and services so as to remove references to "tournaments" that it was finally able to obtain the registrations. But in the context of an *inter partes* proceeding, the clever lawyering that succeeded in the context of the *ex parte* application process will not succeed. If and when Class Act must answer the Notice (or any subsequently amended notice), it intends to include a counterclaim for cancellation of NCAA's relevant registrations.

In light of the generic/descriptive nature of "bracket" in this context, numerous third parties have been permitted to register and use "bracket" composite marks. Many of these marks are used in connection with sporting events. And some, which appear to relate directly to the NCAA's Men's Division I basketball tournament, are owned by third parties. In light of all these issues, it is imperative for NCAA to clearly state exactly what marks it is basing its opposition upon and exactly what goods or services the asserted marks have been used upon. Failing such clear statements, it is impossible for Class Act to defend itself and it will be impossible for the

Board to make determinations as to the protectability of the asserted marks and the likelihood of confusion. For these reasons, and as explained in more detail below, NCAA's Notice is defective and must be dismissed pursuant to Rule 12(b)(6).

The Notice also appears to be procedurally defective. Together, the three opposed applications cover five (5) International Classes. NCAA purports to be opposing each of the applications in its entirety, yet counsel specified in the Notice that its deposit account should be debited \$1,200, enough for only (4) international classes.

ARGUMENT

I. MOTION TO DISMISS STANDARDS

A motion pursuant to Fed. R. Civ. P. 12(b)(6) is a test solely of the legal sufficiency of a complaint. *See* TBMP § 503.02. To survive a motion to dismiss, a plaintiff must allege sufficient factual matters that, if proved, establish that the plaintiff has standing to maintain the proceeding and a valid ground exists for opposing the mark. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982). *See also* TBMP § 503.02. Specifically, “a complaint 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), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

As explained by the Supreme Court in *Iqbal*:

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require “detailed factual allegations,” but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” Nor does a complaint

suffice if it tenders “naked assertion[s]” devoid of “further factual enhancement.”

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we “are not bound to accept as true a legal conclusion couched as a factual allegation”). . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . .

Iqbal at 1949 (internal citations omitted). Applying this test, the NCAA’s Notice is clearly deficient.

II. NCAA’S NOTICE FAILS TO STATE PLAUSIBLE CLAIMS FOR RELIEF

NCAA’s Notice asserts two bases for opposing Class Act’s applications: (1) likelihood of confusion under § 2(d); and (2) suggestion of a false connection under § 2(a). Both of these causes of action rely upon and incorporate the general factual allegations of the Notice. The entirety of these factual allegations is contained in the first seven paragraphs of the Notice. Of these seven paragraphs, one merely describes NCAA (§ 1), one alleges that Class Act’s use of its marks has been without NCAA’s consent (§ 6), and one contains the legal conclusion couched as a factual allegation that NCAA would be harmed by registration of the applied-for marks (§ 7). Thus, the “facts” upon which NCAA bases its opposition are confined to just four paragraphs – paragraphs 2-5 – of the Notice.

A. NCAA’S NOTICE FAILS TO ADEQUATELY PLEAD ITS LIKELIHOOD OF CONFUSION CLAIM

A claim under Section 2(d) requires standing, proof of ownership of a mark or marks, priority of use, and a likelihood of confusion between the mark(s) and the mark(s) of the applications. NCAA’s Notice does not adequately plead any of these elements.

Standing is a threshold issue that must be alleged and proven in every *inter partes* case. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028, 213 USPQ 185, 189 (CCPA 1982). A plaintiff must plead (and ultimately prove) that it has a “real interest,” or “personal stake,” in this proceeding beyond that of a mere intermeddler. *Ritchie v. Simpson*, 170 F.3d 092, 50 USPQ 2d 1023, 1025-26 (Fed. Cir. 1999); *Lipton Industries*, 213 USPQ at 189.

Because NCAA is not currently asserting any registrations or applications, but is instead relying on alleged common law rights, it must plead (and ultimately prove) that its asserted marks are distinctive of its goods or services, either inherently or through the acquisition of secondary meaning. *Towers v. Advent Software, Inc.*, 913 F.2d 942, 945, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990); *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43-45 (CCPA 1981). In addition to ownership of valid marks, NCAA must additionally plead (and ultimately prove) that it used its alleged marks prior to any date available to Class Act.

Assuming NCAA adequately pled standing, ownership of valid rights, and priority, it must additionally plead (and ultimately prove) a likelihood of confusion. Among the relevant factors are the similarity of the marks and the similarities of the goods/services. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973).

Critical to each of these inquiries is the identification by NCAA of the trademark rights it is asserting. Stated otherwise, if NCAA does not clearly plead what its alleged trademark rights are, it has not adequately pled standing, ownership of a valid mark, priority, or a likelihood of

confusion. By way of example only, if NCAA does not plead with sufficient detail and clarity what its rights are, it has not adequately pled standing because the Notice does not indicate if NCAA has a real interest or is a mere intermeddler. Similarly, absent a clear identification of the asserted rights and the goods/services, NCAA has not adequately pled a likelihood of confusion.

Thus, it is imperative to review NCAA's Notice to determine how it pled its alleged rights. The totality of NCAA's pleading in this regard is found at paragraph 2 of the Notice, which reads in its entirety:

NCAA has continuously used images of brackets, and marks consisting of or referring to the term BRACKET, in commerce in connection with entertainment services, and related promotional and sponsorship services ('BRACKET Marks').

This description is logically and legally insufficient. NCAA apparently (though it is not clear) asserts rights in two categories of marks. The first category is "images of brackets." NCAA however, has not in any way described the images or provided any examples of images. Is NCAA really claiming exclusive trademark rights in and to every conceivable image of brackets? As noted above, NCAA did not invent or conceive brackets, it was not the first to use brackets for sporting events, it was not the first to use brackets for basketball tournaments, and it is not the only current user of brackets. But based on the vague allegations, it appears that NCAA is claiming such exclusive rights to all images of brackets.

The second category of asserted rights is described as "marks consisting of or referring to the term BRACKET." This description presumes that there are multiple such marks, but again, NCAA does not further describe such marks or itemize the marks. Rather, Class Act and the Board are left to guess what these marks may be.

Federal Rules 8 and 12, the Supreme Court's *Twombly* and *Iqbal* decisions, and fundamental notions of due process and fairness require more of NCAA's pleading. Class Act is

entitled to know exactly what rights NCAA is asserting so that Class Act can assess the merits of NCAA's claims and formulate its defenses and litigation strategy. And as pled, without a clear identification of its alleged rights, NCAA's pleading is deficient with respect to standing, ownership, its validity, priority and the likelihood of confusion. Each of these elements requires a clear identification of NCAA's alleged rights. Absent such an identification, NCAA's subsequent allegations as to the elements of its § 2(d) claim are merely insufficient "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." For example, absent a clear identification of the asserted marks and the goods/services, the allegation of a likelihood of confusion is a legal conclusion couched as a factual allegation, which the Board need not accept as true.¹

B. NCAA'S NOTICE FAILS TO ADEQUATELY PLEAD ITS SUGGESTION OF A FALSE CONNECTION CLAIM

Section 2(a) prohibits the registration of a mark that consists of or comprises matter that may falsely suggest a connection with persons, institutions, beliefs or national symbols. As the Trademark Manual of Examination Procedure ("TMEP") explains:

To establish that a proposed mark falsely suggest a connection with a person or an institution, it must be shown that: (1) the mark is the same as, or a close approximation of, the name or identity of a person or institution; (2) the mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution; (3) the person or institution named by the mark is not connected with the activities performed by applicant under the mark; and (4) the fame or reputation of the person or institution is such that, when the mark is used with the applicant's goods or services, a connection with the person or institution would be presumed.

TMEP § 1203.03(e) (citing cases).

¹ NCAA additionally fails to plead that its alleged marks are distinctive, either inherently or through the acquisition of secondary meaning. Because NCAA did not assert a registered mark, such an allegation is part of its *prima facie* case and absent such an allegation, its pleading is deficient. *Towers v. Advent Software, Inc.*, 913 F.2d 942, 945, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990); *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43-45 (CCPA 1981)

NCAA has failed to plead sufficient facts with respect to the necessary elements of its § 2(a) claim. The leading case on § 2(a), *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 703 F.2d 1372, 217 USPQ 505, (Fed. Cir. 1983), from which TMEP § 1203.03(e) derives in large part, explains in further detail:

A reading of the legislative history with respect to what became Sec. 2(a) shows that the drafters were concerned with protecting the name of an individual or institution which was not a technical “trademark” or “trade name” upon which an objection could be made under Sec. 2(d). . . . Under concepts of the protection of one’s “identity,” in any of the forms which have so far been recognized, the 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.” . . . Thus, to show an invasion of one’s “persona,” it is not sufficient to show merely prior identification with the name adopted by another. Nor is it sufficient, as urged by the University, that the fame of the name of an institution provides the basis for protection in itself. The mark NOTRE DAME, as used by [Defendant], must point uniquely to the University.

University of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co., 703 F.2d 1372, 1375 -77 (Fed. Cir. 1983).

Using the TMEP and *Notre Dame* as a guide, it is clear that NCAA has not adequately pled a cause of action under § 2(a). First, NCAA has not and cannot allege that Class Act has attempted to appropriate NCAA’s name; none of the marks applied for by Class Act incorporate or imitate the National Collegiate Athletic Association name or persona. Rather, Class Act is attempting to register marks which incorporate the word BRACKET (or an abbreviation thereof). Bracket, however, is not NCAA’s name. NCAA has not pled, and under the facts cannot plead that Class Act’s applied for marks are “the same as, or a close approximation of, the name or

identity of a person or institution.” Because of the distinction between NCAA’s actual name and the marks upon which it purportedly bases its §2(a) claim, NCAA’s § 2(a) claim is inappropriate.

To the extent a § 2(a) claim may be appropriate, NCAA must plead (and ultimately prove) that the word BRACKET is “unmistakably” associated with NCAA. It is not sufficient to plead merely that there was a prior identification between BRACKET and NCAA, or that NCAA and/or BRACKET are famous. *Id.* Rather, NCAA must plead (and ultimately prove) that Class Act’s BRACKET and BRACK marks “point uniquely” to NCAA. *Id.* NCAA, however, has not so pled. At best, NCAA pled that its ill-defined marks and its wholly undefined Tournament Bracket mark “became well-known and closely identified with Opposer by consumers.” Notice at ¶ 11. Under TMEP § 1203.03(e) and *Notre Dame*, even assuming that NCAA’s asserted marks are “well-known and closely identified with” NCAA, NCAA has not sufficiently pled a §2(a) cause of action.

More specifically, NCAA has not pled that the word BRACKET is “unmistakably associated” with and “points uniquely” to NCAA. Thus, NCAA’s § 2(a) claim must be dismissed for failure to state a claim. And the § 2(a) claim should be dismissed without leave to re-plead, as such an amended pleading would be futile. *Tavory v. NTP, Inc.*, 297 Fed. Appx. 976, 984 (Fed. Cir. 2008)(“Leave to amend may properly be denied where the amendment would be futile.”), *citing Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986). As explained, NCAA must plead (and ultimately prove) that Class Act’s applied for marks point “uniquely” to NCAA. But NCAA cannot, without violating Rule 11, make this allegation, as numerous BRACKET composite marks are registered and owned by third parties for services the same as or related to the services alleged by NCAA in the Notice. A partial list of the third-party registrations includes:

NATIONAL BRACKET DAY, Registration Nos. 4,444,143 and 4,335,265;
PERFECT BRACKET, Registration No. 4,182,481;
BRACKET LAB, Registration Nos. 4,293,368 and 4,247,466;
INSTABRACKET, Registration No. 4,593,025;
BILLION DOLLAR BRACKET, Registration No. 4,693,652;
BILLION \$ BRACKET, Registration No. 4,683,048;
RACKET BRACKET, Registration No. 3,906,789;
BREW BRACKET, Registration No. 4,095,549 (registered after NCAA had obtained an extension of time to oppose); and
BEYOND THE BRACKET, Registration No. 4,381,296.²

As the *Notre Dame* Court explained under similar circumstances:

‘Notre Dame’ is not a name solely associated with the University. It serves to identify a famous and sacred religious figure and is used in the names of churches dedicated to Notre Dame, such as the Cathedral of Notre Dame in Paris, France. Thus, it cannot be said that the only ‘person’ which the name possibly identifies is the University and that the mere use of NOTRE DAME by another appropriates its identity.

University of Notre Dame Du Lac v. J.C. Gourmet Food Imports Co., 703 F.2d 1372, 1377 (Fed. Cir. 1983)

“Bracket,” whether as part of a composite word mark or as an “image” is not a name (or mark or symbol, to the extent relevant under § 2(a)) associated “solely” with NCAA. *Id.* The word “bracket” and images of brackets, are and have been used by others for more than 100 years, *e.g.*, Wimbledon, and long prior to NCAA’s use. As set out, numerous third-parties own BRACKET composite mark registrations. At least some of these, such as NATIONAL

² While a court may not normally consider matters outside the pleadings on a motion to dismiss, consideration may be given to matters of public record. *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999).

BRACKET DAY and BRACKET LAB relate directly to the NCAA Division I basketball tournament. There are undoubtedly many more unregistered uses of BRACKET marks. Thus, it cannot be said that the only person which BRACKET possibly identifies is NCAA and that the mere use of BRACKET by Class Act appropriates NCAA's identity. *Id.* Accordingly, not only has NCAA failed to plead a claim under § 2(a), it should additionally be precluded from filing an amended pleading reasserting §2(a) because any such pleading would either fail in the same way, or impermissibly and falsely claim that BRACKET uniquely and unmistakably identifies NCAA.

CONCLUSION

For all of the foregoing reasons, Class Act's motion should be granted in its entirety.

Dated: Scarsdale, New York
September 8, 2015

Respectfully submitted,

LACKENBACH SIEGEL, LLP

By: /s/ Robert B. Golden

Robert B. Golden
Jeffrey M. Rollings
Lackebach Siegel Building
One Chase Road
Scarsdale, New York 10583
(914) 723-4300
(914) 723-4301 fax
Attorneys for Opposers

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the enclosed CLASS ACT SPORTS, LLC'S MOTION TO DISMISS THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION'S NOTICE OF OPPOSITION was served on Opposer on September 8, 2015, via U.S. 1st Class Mail, addressed to counsel for Opposer as follows:

Douglas N Masters
LOEB & LOEB LLP
321 North Clark Street, Suite 2300
Chicago, Il 60654

/s/ Eric A. Menist
Eric A. Menist