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

Proceeding	91220749
Party	Plaintiff The National Collegiate Athletic Association
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 86/131,804: BRACK ATTACK; 86/242,813: BRACK ATTACK; 86/243,893: DON'T LET ONE TEAM BUST YOUR BRACKET;

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Opposer, v. CLASS ACT SPORTS LLC, Applicant.	)	Opposition No.: 91220749

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

I. INTRODUCTION

Applicant Class Act Sports, LLC's indignation that Opposer, the National Collegiate Athletic Association (the "NCAA"), owns rights that are infringed by Applicant's branding of contests about Opposer's tournaments does not mean that Opposer's claims can be dismissed. To the contrary, accepted as true, the allegations in the Notice of Opposition (the "Notice") adequately plead the NCAA's claims that registrations of BRACK ATTACK, Application Serial No. 86/131,804; BRACK ATTACK, Application Serial No. 86/242,813; and DON'T LET ONE TEAM BUST YOUR BRACKET, Application Serial No. 86/243,893 (together, the "Applications") will cause damage to the NCAA, and that the registrations should be denied.

II. ARGUMENT

To withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), Opposer "need only allege sufficient factual matter that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the plaintiff has standing to maintain the proceeding; and

(2) a valid ground exists for opposing or cancelling the mark." *Nike, Inc. v. Palm Beach Crossfit Inc.*, Opp. No. 91218512, 2015 TTAB LEXIS 314, at *5-6 (TTAB Sept. 11, 2015) (citing *Doyle v. Al Johnson's Swed. Rest. & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012, *Young v. AGB Corp.*, 152 F.3d 1377, 1379 (Fed. Cir. 1998), and TBMP § 503.02 (2015)). Opposer's factual allegations must be accepted as true in deciding the motion. *Id.*

A. The NCAA Adequately Pleaded Standing to Oppose.

Opposer has standing to oppose registration here because it has alleged facts showing it "has a direct and personal stake in the outcome of the opposition and a reasonable basis for its belief that it will be damaged." *Id.* at *7-8 (citing *Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999)). As here, such allegations may consist of (1) Opposer's common law rights in its own marks; (2) that Opposer would be damaged by registration of the subject marks; and (3) that the marks of the parties are similar, are for related goods and services, and that confusion is likely to result. *Id.* An Opposer adequately alleges standing with respect to common law trademarks by pleading ownership of the common law trademark, use prior to the applicant, continuous use, and that the common law marks have become well known in connection with the Opposer such that confusion is likely to result from registration. *Farmamedica, S.A. v. Sukrol Labs., Inc.*, Opp. No. 97,755, 1996 TTAB LEXIS 466, at *6 (TTAB June 27, 1996); *see Nike, Inc.*, 2015 TTAB LEXIS 314 at *7-8 ("Opposer alleges (i) common law rights in . . . the Jumpman marks, (ii) . . . damage[] by registration of Applicant's Handstand marks, and (iii) . . . confusion is the likely result. Opposer therefore has sufficiently alleged its standing."); *Bd. of Dir. of the Am. College of Veterinary Sports Medicine v. Lyons*, Opp. No. 91206077, 2015 TTAB LEXIS 319 at *7 (TTAB Mar. 30, 2015) (alleging common law rights and disputed ownership "is sufficient to establish Opposer's standing").

The NCAA's standing to oppose the Applications is clear based upon pleading that it has continuously used the BRACKET Marks since before the filing dates of the Applications, offered millions of dollars' worth of services in connection with the BRACKET Marks, spent significant sums advertising and promoting the BRACKET Marks. Opp. ¶¶ 2-4. The Opposition further alleges that, as a result of the above, NCAA has built up and owns valuable goodwill in the BRACKET Marks such that registration would damage the NCAA and confusion would likely result. Opp. ¶¶ 5, 7-9. In other words, the NCAA has adequately pleaded that it has "personal interest in the outcome of this case beyond that of the general public." *Farmamedica, S.A.*, 1996 TTAB LEXIS 466 at *6; *see Stoller v. York Int'l Corp.*, Opp. No. 121,420, 2003 TTAB LEXIS at *19-21 (TTAB June 4, 2003) ("He has shown that he has an interest beyond that of the general public and, therefore, we deny applicant's request that we dismiss this proceeding . . .").

Applicant's challenge to the merits of the NCAA's assertion of rights in the BRACKET Marks is inappropriate to consider on a motion to dismiss. *Nike, Inc.*, 2015 TTAB LEXIS 314 at *10 (refusing to consider matter "argu[ing] the merits of Opposer's claims, rather than the sufficiency of those claims" on a motion to dismiss). Rather, Opposer's ownership of these rights must be assumed to be true in deciding this Motion.

B. The NCAA Adequately Pleaded its Section 2(d) Claim.

Opposition to an application based on likelihood of confusion under Section 2(d) requires allegations of "valid proprietary rights that are prior to those of Applicant" and "that Applicant's mark so resembles Opposer's mark as to be likely to cause confusion." *Id.* at *11.

The NCAA alleges each of these elements and has therefore adequately pleaded its Section 2(d) claim. Specifically, the NCAA alleges that it has prior rights to the BRACKET Marks through its continuous use thereof, in commerce, in connection with entertainment

services, and related promotion and sponsorship services. Opp. ¶ 2. The NCAA further alleges that Applicant's use of BRACK ATTACK and DON'T LET ONE TEAM BUST YOUR BRACKET for the goods and services set forth in the Applications is likely to result in consumers' confusion, mistake, and/or deception such that consumers are likely to believe Applicant's goods and services are Opposer's goods and services, or that Applicant's goods and services are of a person or company that is sponsored, authorized, or licensed by, or in some other way legitimately connected with Opposer, in light of the NCAA's use of its BRACKET Marks. Opp. ¶¶ 8-9.

C. The NCAA Adequately Pleaded its Section 2(a) Claim.

Opposition to an application based on suggestion of a false connection under Section 2(a) requires allegations that "(1) [Applicant's] mark is the same as, or a close approximation of, the name or identity previously used by [Opposer]; (2) [Applicant's] 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 the 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." *In re Kent Pedersen*, U.S.P.Q.2d (BNA) 1185, 1188-89 (TTAB 2013).

The NCAA alleges each of these elements and has therefore adequately pleaded its Section 2(a) claim. Specifically, the NCAA alleges that based on its extensive use, advertising, and promotion of the BRACKET Marks and Tournament Bracket, such marks have become well-known and closely identified with Opposer by consumers, and therefore Applicant's applied-for marks will be understood by consumers to be associated with, or authorized by, Opposer. Opp. ¶¶ 11-12. In other words, the NCAA has pleaded that Applicant's applied for marks are at least approximations of the NCAA's identity. Applicant complains that "[b]ecause

of the distinction between NCAA's actual name at the marks upon which it purportedly bases its § 2(a) claim, NCAA's § 2(a) claim is inappropriate" but again (as with the NCAA's Section 2(d) claim), argument regarding the merits of the NCAA's claim is inappropriate on a motion to dismiss. *Nike, Inc.*, 2015 TTAB LEXIS 314 at *10.[1]

The NCAA further alleges that it is not connected with and has not authorized Applicant's goods and services connected with its applied for marks, but in light of the NCAA's good will in the Bracket Marks and Tournament Bracket, Applicant's use of the applied for marks will falsely suggest to consumers a connection with the NCAA. Opp. ¶¶ 13-14.

D. The Opposition Is Not Procedurally Defective.

Finally, Applicant complains that the NCAA requested that its deposit account be debited $1,200, "enough for only (4) international classes" while "the three opposed applications cover five (5) International Classes." Mot. at 4. However, the Opposition states that the "Goods/Services Affected by Opposition" are in International Class 9, 41, 42, and 25, with class 41 being listed for two applications. Thus, the NCAA submitted the appropriate fee for four classes. If the Board determines that an additional $300 is required due to International Class 41 being listed for both Application Nos. 86131804 and 86243893, the NCAA requests that its Deposit Account be debited an additional $300.

[1] Likewise, Applicant's request that, should it prevail on this motion to dismiss, that such dismissal be with prejudice because the NCAA could not properly allege such a claim, (Mot. at 10), also improperly addresses the merits of the NCAA's claim, and should be disregarded.

III. CONCLUSION

For the foregoing reasons, the NCAA requests that Applicant's motion be denied in its entirety (subject to any additional fee requirements).

Dated: October 6, 2015

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CERTIFICATE OF SERVICE

I, Angela Provencio, hereby certify that a copy of the **OPPOSITION TO APPLICANT'S MOTION TO DISMISS OPPOSER'S CONSOLIDATED NOTICE OF OPPOSITION** has been served upon:

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via first class mail, postage prepaid this 6 day of October, 2015.

/s/ Angela Provencio