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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	ROBERT B GOLDEN LACKENBACH SIEGEL LLP ONE CHASE ROAD LACKENBACH SIEGEL BLDG, PENTHOUSE FL SCARSDALE, NY 10583 UNITED STATES RGolden@LSLLP.com, JRollings@LSLLP.com, EMenist@LSLLP.com, TMEFS@LSLLP.com
Submission	Reply in Support of Motion
Filer's Name	Robert B. Golden
Filer's e-mail	RGolden@LSLLP.com, EMenist@LSLLP.com, TMEFS@LSLLP.com
Signature	/Robert B. Golden/
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Attachments	Reply in support of motion to dismiss 10.27.15.pdf(16268 bytes)

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

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

INTRODUCTION

Class Act understands that the Board generally discourages the filing of reply briefs, but in this instance a reply is warranted. NCAA's opposing brief is not remarkable for what it says; rather, NCAA's brief is remarkable for what it does not say. The gravamen of Class Act's motion is that NCAA failed to identify or define the trademark rights upon which it bases its

opposition. Thus, Class Act, and presumably this Board, reasonably expected NCAA's opposition to address this core issue and to identify where in the Notice of Opposition NCAA's asserted trademark rights were adequately identified and defined. NCAA's opposition, however, contains no such identification or definition. In fact, NCAA entirely ignores this issue and merely offers a "canned" response addressing pleading standards generally.

ARGUMENT

The parties agree that under the Federal Rules of Civil Procedure and controlling case law, the purpose of a complaint (or in this case, the Notice of Opposition) is to provide the party in the position of defendant with fair and adequate notice of the nature of the claims asserted against it. In the context of a notice of opposition, fundamental to this fair and adequate notice is an identification of the rights upon which the Opposer is basing its opposition.

To this end, Class Act carefully reviewed NCAA's Notice of Opposition for an identification of its asserted rights. Throughout its Notice of Opposition, NCAA uses the terms "BRACKET Marks" and "Tournament Bracket" as if they are two separate and distinct marks (or groups of marks), and as if they both are well-defined and easily understood. But NCAA nowhere attempts to define "Tournament Bracket." The term is first introduced in Paragraph 5 of the Notice of Opposition, with no preceding (or succeeding) definition. Astoundingly, NCAA's opposing brief is silent on this issue.

With respect to NCAA's alleged "BRACKET Marks," NCAA alleged that it "used images of brackets, and marks consisting of or referring to the term BRACKET . . . ("BRACKET Marks")." But nowhere does NCAA provide an example of the images of brackets it alleges to be protectable or identify any of the alleged marks "consisting of or referring to the term BRACKET." Again, NCAA's opposing brief is silent on this issue.

The most basic requirement of NCAA's likelihood of confusion (§2(d)) and false suggestion claims (§2(a)) is that NCAA owns valid, protectable trademark rights. The ownership of trademark rights is central to each element NCAA must prove, including standing, confusion, and a false suggestion. Absent ownership of valid trademark rights, NCAA's claims fail. And absent adequate pleadings as to these issues, NCAA's pleading is defective.

In opposition to Class Act's motion, NCAA argues that it alleged ownership of the "BRACKET Marks" and the "Tournament Bracket" and that such allegations are sufficient. NCAA's argument is the equivalent of asserting that a notice of opposition that alleges only "ownership of a series of secret images and a series of undisclosed marks (the "SECRET UNDISCLOSED Marks")," with no more information, would be an adequate pleading. Obviously, such a pleading would be defective.

NCAA's argument, that its blanket allegation of ownership of valid marks is sufficient because it must be accepted as true, is contrary to the controlling case law. As the Supreme Court has held:

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").

Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009) (internal citations omitted).

NCAA's allegations of ownership and validity, without providing the most basic information – the identification of the actual marks upon which it bases its opposition – amount to nothing but prohibited "labels and conclusions." Ownership and validity are legal conclusions. The Board is

not bound to, and should not, accept as true such legal conclusions, even when they are couched as factual allegations. NCAA has merely regurgitated the elements of its causes of action, without providing the most basic information. *Twombly* and *Iqbal* render such formulaic recitations defective.

NCAA's approach is understandable – it cannot credibly claim to own all images of brackets and prevent all registration of any mark that contains the word “brackets.” But in an attempt to achieve what it is not legally entitled to, NCAA is hiding the ball, by refusing to identify the mark(s) it alleges is entitled to protection.

With these legal concepts in mind, NCAA's Notice of Opposition is clearly defective and should be dismissed.

CONCLUSION

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

Respectfully submitted,

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October 27, 2015

LACKENBACH SIEGEL LLP

By: /s/ Robert B. Golden
Robert B. Golden
Jeffrey M. Rollings
One Chase Road
Scarsdale, New York 10583
(914) 723-4300
RGolden@LSLLP.com
JRollings@LSLLP.com
Attorneys for Class Act Sports, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was served on Opposers on October 27, 2015 via first class mail, addressed to counsel for Opposer as follows:

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

Dated: Scarsdale, New York
October 27, 2015

/s/ Eric A. Menist
Eric A. Menist