ESTTA Tracking number: **ESTTA934150**

Filing date: **11/09/2018**

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

Proceeding	91242558
Party	Defendant TigerRisk Partners LLC
Correspondence Address	EUGENE CHANG WILLKIE FARR & GALLAGHER LLP 787 SEVENTH AVENUE NEW YORK, NY 10019 UNITED STATES ipdept@willkie.com, echang@willkie.com, mgoodman@willkie.com 212 728 8000
Submission	Reply in Support of Motion
Filer's Name	Eugene L. Chang
Filer's email	ipdept@willkie.com, echang@willkie.com, mgoodman@willkie.com, esaunders@willkie.com
Signature	/Eugene L. Chang/
Date	11/09/2018
Attachments	2018.11.09 Reply Brief Re Motion to Dismiss.pdf(19247 bytes)

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

TIGER MANAGEMENT L.L.C. Opposer, v. TIGERRISK PARTNERS LLC, Applicant.	)	OPPOSITION NO. 91242558

REPLY MEMORANDUM OF LAW REGARDING APPLICANT'S MOTION TO DISMISS

Pursuant to the Trademark Rules of Practice, 37 C.F.R. § 2.127(a), TigerRisk Partners LLC, ("Applicant), files this reply memorandum of law regarding Applicant's motion to dismiss the Notice of Opposition filed by Tiger Management L.L.C. ("Opposer").

ARGUMENT

I. OPPOSER MISSTATES THE APPLICABLE LEGAL STANDARD.

Opposer suggests that the plausibility standard mandated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) may not be applicable to allegations of likelihood of confusion. That is simply not true.

Opposer relies heavily on Trademark Trial and Appeal Board Manual of Procedure ("TBMP") Section 503.02 to support its assertion, but ignores that Section 503.02 directly quotes the plausibility standard immediately after the excerpt cited by Opposer. TBMP § 503.02, n. 4, 5. Opposer also points to TBMP Section 309.03(a)(2) as governing likelihood of confusion, but

that rule also quotes the plausibility language of Section 503 as the test for sufficiency of the pleading. TBMP § 309.03(a)(2).

Since the very rules cited by Opposer state that the *Twombly/Iqbal* plausibility standard is the governing test, it is important to understand exactly what that standard requires. "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotation marks and alterations omitted). "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks and alterations omitted). The core of the plausibility standard is that a plaintiff must plead *facts*:

> To survive a motion to dismiss, a complaint must contain sufficient ***factual matter***, accepted as true, to state a claim to relief that is plausible on its face. 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.

Id. (emphasis added) (internal quotation marks and citations omitted). *Iqbal* directed courts to "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and then look at the remaining "factual allegations" to "determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679.

The cases cited by Opposer acknowledge that this is the correct standard. Both *Nike, Inc. v. Palm Beach Crossfit Inc.*, 2015 TTAB LEXIS 314, at *5-*6, 116 U.S.P.Q.2d 1025, 1028-29 (T.T.A.B. 2015), and *Corporacion Habanos, S.A. v. Empresa Cubana del Tabaco*, 2011 TTAB LEXIS 258, at *3-*4, 99 U.S.P.Q.2d 1873, 1874 (T.T.A.B. 2011), state that only well-pleaded factual allegations are entitled to the assumption of truth when assessing a motion to dismiss.

See, e.g., *Nike*, 2015 TTAB LEXIS 258, at *6 ("In particular, the claimant must allege well-pleaded ***factual matter*** and more than '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.'" (emphasis added) (alteration in original)).

II. THE NOTICE OF OPPOSITION DOES NOT SATISFY *TWOMBLY/IQBAL*.

To assess Opposer's Notice of Opposition under these binding precedents, the Board should follow *Iqbal* and consider which sections of the notice contain factual allegations and which ones are mere "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." It is apparent that Opposer's pleading is deficient.

Paragraphs 1-3 and 6-9 contain multiple factual assertions relating to Opposer's ownership of the marks that form the basis of its opposition, as well as the timing of Opposer's use of those marks in commerce. (Notice of Opposition, at ¶¶1-3, 6-9). These may be considered when assessing priority and standing. On the other hand, the assertion that "Opposer Tiger Management and its licensees have enjoyed significant success . . . and have been the subject of substantial favorable publicity" (Notice of Opposition, at ¶4), and the assertion that Opposer's marks are "well-known" (Notice of Opposition, at ¶5), state legal conclusions which are not entitled to the presumption of truth at this stage, *Iqbal*, 556 U.S. at 678.

Continuing this paragraph-by-paragraph analysis, paragraph 10 contains factual assertions regarding Applicant's ownership of the challenged applications, as well as the timing of the filing of those applications. (Notice of Opposition, at ¶10). Paragraph 11, however, merely states a legal conclusion that "Applicant Tiger Risk Partners is unable to establish . . . priority of use or priority of rights." (Notice of Opposition, at ¶11). Thus, it is also not entitled to any presumption of truth.

As stated in more detail in Applicant's motion to dismiss (App. Mot., at 4-6), the entire remainder of the Notice of Opposition contains no factual allegations at all (Notice of

Opposition, at ¶¶12-18). In light of the foregoing it is clear that, regardless of whether or not the factual averments in paragraphs 1-3 and 6-10 are sufficient to plead priority and standing, Opposer has pleaded nothing more than "legal conclusion[s] couched as a factual allegation," *Twombly*, 550 U.S. at 555, regarding its likelihood of confusion grounds for opposition. Since this ground is insufficiently pleaded, and since Opposer has withdrawn its Section 2(a) grounds, (Opp. Br., at 4 n. 2), Applicant respectfully urges the Board to grant its motion to dismiss.

III. APPLICANT'S MOTION TO DISMISS IS NOT AN UNTIMELY MOTION FOR SUMMARY JUDGMENT.

Opposer asserts that Applicant's motion to dismiss references facts outside the pleadings and is thus an "unsupported motion for summary judgment that is procedurally improper. (Opp. Br., At 4). Not true. The facts to which Opposer objects are facts contained in the file for the applications at issue, which the Board has repeatedly held may be considered as being incorporated by reference in a notice of opposition that cites those applications. *See e.g.*, *Compagnie Gervais Danone v. Precision Formulations LLC*, 2009 WL 34747, at *5, 89 U.S.P.Q.2d 1251 (T.T.A.B. 2009). Such matters are facts of which the Board may properly take notice. *Nike*, 2015 TTAB LEXIS 258, at *8-*9. To the extent that some factual matters contained in the motion to dismiss may be determined not to fall into this category, Applicant asks the Board to exercise its discretion to rule on the merits of its motion to dismiss without considering such facts. *See Caymus Vineyards v. Caymus Med. Inc.*, 2013 TTAB LEXIS 343, at *4 n. 2, 107 U.S.P.Q.2d 1519, 1522 n. 2 (T.T.A.B. 2013).

CONCLUSION

For the foregoing reasons, Applicant respectfully asks the Board to grant its motion and dismiss the instant opposition.

Dated: November 9, 2018

WILLKIE FARR & GALLAGHER LLP

By: / Eugene L. Chang /

Eugene L. Chang
Heather M. Schneider
Max S. Goodman
Eric L. Saunders

787 Seventh Ave
New York, New York 10019
Tel: (212) 728-8000
Fax: (212) 728-8111

CERTIFICATE OF TRANSMISSION

I hereby certify that a true and correct copy of APPLICANT'S MOTION TO DISMISS NOTICE OF OPPOSITION AND MEMORANDUM OF LAW (Opposition No. 91242558) is being electronically transmitted to the Trademark Trial and Appeal Board on November 9, 2018.

By:

/ *Max S. Goodman* /

Max S. Goodman

CERTIFICATE OF SERVICE

I hereby certify that I have this November 9, 2018, served on Bruce W. Baber via email, the foregoing APPLICANT'S MOTION TO DISMISS NOTICE OF OPPOSITION AND MEMORANDUM OF LAW (Opposition No. 91242558) to the following:

Bruce W. Baber
King & Spalding LLP
1180 Peachtree Street, NE
Atlanta, GA 30309
Email: bbaber@kslaw.com

By: */ Max S. Goodman /*

Max S. Goodman