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

Proceeding	91243873
Party	Defendant Hills Point Industries, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

	)	Opposition No.: **91243873**
RUGNUR, LLC,	)	
	)	Mark: GripMAX
Opposer,	)	Application Serial No: 87/853969
	)	
v.	)	Mark: GripMAX
	)	Application Serial No: 87/872352
HILLS POINT INDUSTRIES, LLC,	)	
	)	
Applicant.	)	

APPLICANT'S TRIAL BRIEF

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I. DESCRIPTION OF RECORD

The record consists of:

1. Notice of Opposition [1 TTABVUE]

2. Answer [6 TTABVUE]

3. Applicant's Application Serial No. 87/853969, as pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b)

4. Applicant's Application Serial No. 87/872352, as pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b)

The record is devoid of any properly submitted evidence authenticated by testimony or by submission of notices of reliance.

II. RECITATION OF FACTS

Hills Point Industries, LLC ("Applicant") applied to register the GripMAX mark in standard characters in two applications, Application Serial Nos. 87/853969 and 87/872352 (collectively, "Applicant's Marks"):

1. In Application Serial No. 87/853969, Applicant applied to register the mark GripMAX on the Principal Register for the following goods and services[1]:

Class 005: Incontinence pads;

Class 016: Drawer liners;

Class 020: Bath pillows; Beds for household pets;

[1] Application Serial No. 87/853969, was filed on March 28, 2018, based on intent-to-use in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application was published for opposition on July 31, 2018. Opposer was granted extension of time to oppose until September 29, 2018. Opposer filed its Notice of Opposition on September 28, 2018.

Class 021: Cutting boards; Scoops for the disposal of pet waste;

Class 024: Mattress pads; Unfitted fabric furniture covers; Bed pads; Unfitted furniture covers not of paper; and

Class 027: Anti-fatigue floor mat; Bath mats; Bathroom rugs; Carpet underlays, namely, rug grippers; Door mats; Floor mats; Pet litter pan floor mats; Rugs; Shower mats; Floor mats in the nature of non-slip pads for use under apparatus to prevent slippage; Underlays for rugs.

2. In Application Serial No. 87/872352, Applicant applied to register the mark GripMAX on the Principal Register for the following goods and services[2]:

Class 020: Fitted furniture covers.

On September 28, 2018, Rugnur, Inc. ("Opposer") filed its Notice of Opposition with the TTAB. On the ESTTA Cover Sheet, Opposer indicates its grounds for opposition as: "Priority and likelihood of confusion".[3]

Neither party submitted any evidence, notices of reliance or any other testimony. Neither party authenticated any evidence for purposes of submission by notice of reliance nor by testimony.

For the reasons set forth, *infra,* Applicant respectfully requests that Opposer's opposition be dismissed in its entirety and that Applicant's applications proceed to a Notice of Allowance and Registration.

III. STATEMENT OF ISSUES

A. Evidentiary Issue

[2] Application Serial No. 87/872352, was filed on April 11, 2018, based on intent-to-use in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The application was published for opposition on July 31, 2018. Opposer was granted extension of time to oppose until September 29, 2018. Opposer filed its Notice of Opposition on September 28, 2018.

[3] Notice of Opposition ESTTA Cover Sheet, Grounds for Opposition, 1 TTABVUE 2.

Are Opposer's factual allegations as set forth in its pleadings and brief without corroborating testimony sufficient to establish standing, ownership, priority, and likelihood of confusion?

B. Substantive Issue

Has Opposer presented evidence of standing, ownership, priority and likelihood of confusion sufficient to support an opposition based upon likelihood of confusion?

IV. LAW AND ARGUMENT

A. Applicant's "General Objection" to Opposer's Factual Allegations Pursuant to 37 C.F.R. § 2.128(b) and TTAB § 801.03

Applicant submits this "General Objection" to Opposer's factual allegations and evidence contained within its Notice of Opposition, pleadings and Brief. Opposer failed to submit any testimony or notice of reliance to support its factual allegations. Yet, Opposer relies on uncorroborated, unauthenticated allegations in making its arguments in support of its opposition in its pleadings and Brief.

TBMP 704.05(a) provides:

Statements made in pleadings cannot be considered as evidence on behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony.

TBMP 704.05(b) provides:

Factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value, except to the extent that they may serve as admissions against interest by the party that made them.

Based on TBMP 704.05(a) and (b), **none** of the factual statements made in Opposer's pleadings and brief can be given any consideration, except to the extent that they may serve as admissions against interest by the party that made them.

Additionally, Opposer has failed to submit a notice of reliance. A notice of reliance **shall be filed during the testimony period** of the party that files the notice. TBMP 704.02 [emphasis added]. Applicant submits that because Opposer did not take any testimony or submit evidence on its claims, they should be considered waived. "But because it did not take testimony or submit evidence on these [affirmative] defenses, they are considered to have been waived." *M/S R.M. Dhariwal (HUF) 100% EOU v. Zarda King Ltd. and Global Technology & Trade Marks Limited*, 2019 USPQ2d 149090, n8 (TTAB 2019) [Precedential], citing, *Research in Motion Ltd. v. Defining Presence Mktg. Grp. Inc.,* 102 USPQ2d 1187, 1190 (TTAB 2012) [Precedential].

Based on the foregoing, Applicant respectfully requests that **none** of Opposer's uncorroborated alleged factual allegations and unauthenticated evidence be considered by the Board in deciding any of the issues presented by Opposer.

Applicant asserts that because Opposer failed to submit any testimony or notice of reliance to support its factual allegations contained in its pleadings and brief, that this Opposition be dismissed with prejudice in its entirety.

B. Evidentiary Issue

Are Opposer's factual allegations as set forth in its pleadings and brief without corroborating testimony sufficient to establish standing, ownership, priority, and likelihood of confusion?

Based on the foregoing Objection argument, Applicant believes that the answer to this question is "no."

Opposer failed to submit statements established by competent evidence and failed to submit factual statements supported by evidence properly introduced at trial in support of its standing,

ownership, priority, and likelihood of confusion. Accordingly, none of Opposer's factual allegations made in its pleadings and Brief should be considered by the Board and this opposition should be dismissed with prejudice.

C. Substantive Issues

Applicant restates and incorporates herein its "General Objection" as to the "Substantive Issues."

Applicant's Substantive Issue:

Has Opposer presented evidence of standing, ownership, priority and likelihood of confusion sufficient to support an opposition based upon likelihood of confusion?

Opposer Frames This Issue As Follows:

Legal Issue A: Whether granting Applicant's Applications is likely to cause confusion or to cause mistake or to deceive pursuant to 15 U.S.C. § 1052(d).[4]

Applicant believes that it's helpful to break this issue into subsections. A. Standing and Ownership; B. Priority; and, C. Likelihood of Confusion.

i. Standing and Ownership: Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015); *Lipton Indus., Inc. v. Ralston Purina Co.,* 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

In its Brief, Opposer does not address the issue of standing. Further, in its Notice of Opposition, Opposer merely alleges that "Opposer has used and continue [sic] to use in interstate commerce the mark GRIPMAX ("Opposer's Mark") in connection with Opposer's Goods."[5]

[4] Plaintiff's Opening Brief, 7 TTABVUE 5. *Also see, Plaintiff*'s related arguments at 7 TTABVUE 5-7.

[5] Notice of Opposition, Grounds for Opposition, ¶2, 1 TTABVUE 5.

Opposer fails to even allege ownership of the GRIPMAX mark. Notwithstanding any allegation of use of a GRIPMAX mark by the Opposer, Opposer has not submitted into the case any evidence by testimony or notice of reliance of its interest in Opposer's mark sufficient to meet the threshold issue of standing. Mere allegations or arguments in support of standing are insufficient proof thereof. A plaintiff cannot rest on mere allegations in its complaint or arguments in its brief to prove standing. *Lipton Indus., Inc. v. Ralston Purina Co.,* 670 F.2d 1024, 1029, 213 USPQ 185, 188 (CCPA 1982). *See also, Ritchie v. Simpson*, 170 F.3d 1902, 50 USPQ2d 1023, 1027 (Fed. Cir. 1999).

The facts regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading]. *Lipton Indus.,* at 1028. Additionally, a plaintiff must demonstrate that it possesses a "real interest" in a proceeding beyond that of a mere intermeddler, and "a reasonable basis for his belief of damage." *Empresa Cubana Del Tabaco,* 111 USPQ2d at 1062 (citing *Ritchie v. Simpson*, 170 F.3d 1902, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999)). To prove a "real interest" in this case, Opposer must show that it has a "direct and personal stake" in the outcome herein and is more than a "mere intermeddler." *See Ritchie v. Simpson*, 50 USPQ2d at 1026; *see also Jewelers Vigilance Committee Inc. v. Ullenberg Corp*., 853 F.2d 888, 7 USPQ2d 1628 (Fed. Cir. 1988).

It is incumbent upon opposer to establish his standing, in the absence of an admission or stipulation from applicant. *Lipton Indus., Inc. v. Ralston Purina Co*., 670 F.2d 1024, 213 USPQ 185, 188 (CCPA 1982). In the instant case, Applicant has not admitted or stipulated to the facts regarding Opposer's standing and ownership of the GripMAX mark. Therefore, it is incumbent upon Opposer to establish its standing, which it failed to prove.

Opposer has failed to affirmatively prove the facts regarding standing and should not be entitled to standing solely because of the allegations in its pleading. *Prakash Melwani v. Allegiance Corp*., 97 USPQ2d 1537 (TTAB 2010)[Precedential].

Opposer has failed to affirmatively prove the facts regarding standing. There is neither an admission of standing by Applicant nor record evidence that otherwise establishes Opposer's standing.

Based on the foregoing, Applicant respectfully request that this matter be dismissed with prejudice for Opposer's lack of standing.

ii. Priority.

In its ESTTA Cover Sheet, Opposer asserts only one ground for opposition: "[P]riority and likelihood of confusion based on common law trademark rights."[6]

In its Brief, Opposer argues that it has priority by stating: "Numerous exhibits annexed to Opposer's Notice of Opposition, see TTABVUE Doc. No.: 1, demonstrate use [sic] Opposer's mark in commerce, including an Amazon user's review dated as early as June 20, 2016."[7] However, Applicant points out that the record is void of any factual affirmation by testimony or notice of reliance that proves that Opposer has established priority. Assertions appearing in Plaintiff's Brief cannot be used to demonstrate its priority without testimony corroborating the truth of this matter. *Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010)[Precedential]; *see also Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1467 n30 (TTAB 2014).

Moreover, assuming user's review for a product even exists, such a user review, dated at some point in time, *without corroborative evidence*, is not substantial evidence that the asserted GripMAX mark has been associated in interstate commerce with a specific product prior to Applicant's filing date or Applicant's first use of the GripMAX mark in interstate commerce in association with its products. No such corroborative evidence has been submitted in association with Plaintiff's case.

[6] Notice of Opposition ESTTA Cover Sheet, Grounds for Opposition, 1 TTABVUE 2.
[7] Plaintiff's Brief, p. 2, 7 TTABVUE 3.

Based on the foregoing, Applicant respectfully requests that this matter be dismissed with prejudice for Opposer's failure to establish priority.

iii. Likelihood of Confusion.

To prevail on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, based on a previously used mark, it is the Opposer's burden to prove by a preponderance of the evidence both priority of use and likelihood of confusion. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000); *Otto Roth & Co. v. Universal Foods Corp*., 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981); *Life Zone Inc. v. Middleman Group Inc*., 87 USPQ2d 1953, 1959 (TTAB 2008). Because Opposer has not pleaded and submitted any registrations, it must rely on its asserted common law rights, and is not entitled to any of the presumptions accorded to a registration by Section 7(b) of the Trademark Act. *See* Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *see also Larami Corp. v. Talk to Me Programs, Inc.*, 36 USPQ2d 1840 (TTAB 1995).

As discussed under the captions, "Standing and Ownership" and "Priority", *supra,* Opposer has not proven it is the owner of the common law trademark, GripMAX, and, even if it did prove ownership, it has not demonstrated it has priority. Accordingly, Opposer cannot prevail on its claim of likelihood of confusion. *WeaponX Performance Products Ltd. v. Weapon X Motorsports, Inc.,* 126 USPQ2d 1034, 2018 WL 1326374 *9 (TTAB 2018) [Precedential].

In *WeaponX Performance Products Ltd.*, the Board ruled in relevant part with respect to the likelihood of confusion and priority issue:

> We add for completeness that a failure of proof also prevents Opposer from showing that there is a likelihood of confusion between Opposer's pleaded WEAPONX mark and Applicant's involved WEAPON X MOTORSPORTS mark. Opposer has not presented any evidence that it has sold any of its pleaded goods or rendered any of the pleaded services in its notice of opposition under its pleaded WEAPONX mark. We therefore cannot weigh the relationship of the parties' respective goods and services as well as other *duPont* factors, i.e., similarities in trade channels and classes of purchasers, in order to determine if there is a likelihood of confusion. *See, In re E. I. du Pont De Nemours and Co.,* 476 F.2d 1357, 177 USPQ 663 (CCPA 1973) (setting forth

> factors relevant to assessing a Section 2(d) claim). In view of the failure of oppose to prove use (which in this case is the factual predicate for demonstrating the similarity of the parties' goods and services, channels of trade, and classes of purchasers), Opposer has failed to prove by a preponderance of the evidence there is a likelihood of confusion between its pleaded WEAPONX mark and Applicant's involved WEAPON X MOTORSPORTS mark.

As in *WeaponX Performance Products Ltd.*, the Opposer in the instant case has failed to prove it is the owner of the common law mark, GripMAX; has not shown it has priority; and, has not presented any evidence that it has sold any of its pleaded goods or rendered any of the pleaded services in its notice of opposition. Opposer's failure of proof prevents Opposer from showing that there is a likelihood of confusion between Opposer's Mark and Applicant's Marks.

Moreover, even assuming arguendo that Opposer somehow met its burden under by proof of ownership, and a showing of priority, Opposer has not entered into the record via testimony any evidence that would permit one to weigh the relationship of the parties' respective goods as well as other *duPont* factors, i.e., similarities in trade channels and classes of purchasers, in order to determine if there is a likelihood of confusion. *See Id*. Such failure of evidence prevents Opposer from showing that there is a likelihood of confusion between Opposer's asserted Mark and Applicant's Marks.

Based on the foregoing, Applicant respectfully requests that Opposer's likelihood of confusion claim should be dismissed with prejudice.

V. SUMMARY

Opposer has failed to present evidence establishing standing to bring this action, that it owns the common law trademark, that it has priority to use the common law trademark, or that there is a likelihood of confusion between Applicant's Marks and Opposer's Mark. As such, Applicant asserts

that the opposition should be dismissed with prejudice to allow Applicant's applications to proceed to allowance and registration.

Dated: February 28, 2020

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of February 2020, a true copy of the foregoing APPLICANT'S TRIAL BRIEF was served via electronic mail addressed to:

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