

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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WINTER

July 30, 2019

Opposition No. 91245440 (Parent)

Textron Innovations Inc.

v.

*Shenzhen Bell Creative Science and
Education Co., Ltd.,*

Opposition No. 91245441

Bell Helicopter Textron Inc.

v.

*Shenzhen Bell Creative Science and
Education Co., Ltd.,*

Opposition No. 91245619

Textron Innovations Inc.

v.

*Shenzhen Bell Creative Science and
Education Co., Ltd.,*

Opposition No. 91245621

Bell Helicopter Textron Inc.

v.

*Shenzhen Bell Creative Science and
Education Co., Ltd.,*

Opposition Nos. 91245440, 91245441, 91245619, 91245621, 91246719, 91246720, 91246721, 91246722, 91248454, and 91248463

Opposition No. 91246719

Bell Helicopter Textron Inc.

v.

Shenzhen Bell Creative Science and Education Co., Ltd.,

Opposition No. 91246720

Textron Innovations Inc.

v.

Shenzhen Bell Creative Science and Education Co., Ltd.,

Opposition No. 91246721

Bell Helicopter Textron Inc.

v.

Shenzhen Bell Creative Science and Education Co., Ltd.,

Opposition No. 91246722

Textron Innovations Inc.

v.

Shenzhen Bell Creative Science and Education Co., Ltd.,

Opposition No. 91248454

Bell Helicopter Textron Inc.

v.

Shenzhen Bell Creative Science and Education Co., Ltd.,

Opposition No. 91248463

Textron Innovations Inc.

v.

*Shenzhen Bell Creative Science and
Education Co., Ltd.*

BY THE TRADEMARK TRIAL AND APPEAL BOARD:

These cases come up on the following contested motions filed by Bell Helicopter Textron Inc. (“Bell Helicopter”), Textron Innovations Inc. (“Textron”), or Shenzhen Bell Creative Science and Education Co., Ltd. (“Shenzhen”) in seven of the above-referenced cases:

- 1) Opposition Nos. 91245440 and 91245619 (Textron’s cross-motion to strike affirmative defenses filed February 14, 2019; 6 TTABVUE 5);
- 2) Opposition No. 91245441 (Shenzhen’s renewed motion to dismiss filed March 1, 2019; 8 TTABVUE);
- 3) Opposition No. 91245621 (Shenzhen’s renewed motion to dismiss filed March 1, 2019; 7 TTABVUE);
- 4) Opposition No. 91246719 (Shenzhen’s motion to dismiss filed March 15, 2019, 4 TTABVUE);
- 5) Opposition No. 91246721 (Shenzhen’s motion to dismiss filed March 15, 2019, 4 TTABVUE); and
- 6) Opposition No. 91248454 (Shenzhen’s motion to dismiss filed June 7, 2019, 4 TTABVUE).

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I. Preliminary Matter: Additional Proceedings Consolidated

Opposition Nos. 91245440, 91245441, and 91245619 were consolidated on February 13, 2019 (Opp. No. 91245440, 5 TTABVUE); and Opposition No. 91245621 was consolidated with those cases on February 14, 2019 (Opp. No. 91245621, 5 TTABVUE 2). It is noted that Opposer Textron and Opposer Bell Helicopter, respectively, which allegedly are related parties that are represented by the same counsel, filed additional oppositions against pending application Serial No. 87855265 (Opp. Nos. 91246721 and 91246722), application Serial No. 87855291 (Opp. Nos. 91246719 and 91246720), and application Serial No. 87528831 (Opp. Nos. 91248454 and 91248463).

The Board also notes that Opp. Nos. 91246721 and 91246722, Opp. Nos. 91246719 and 91246720, and Opp. Nos. 91248454 and 91248463 also involve the same parties and common questions of law and fact.¹ Specifically, all matters involve Textron's or Bell Helicopter's pleaded BELL marks and Shenzhen's applications for registration of marks that include the term "BELL." It is therefore appropriate to consolidate these six proceedings with the other four proceedings pursuant to Fed. R. Civ. P. 42(a). *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 511 (June 2019).

¹ The Board also notes that issue has been joined only in Opp. Nos. 91245440, 91245619, 91246720, 91246722 and 91248463, in which motions to dismiss are not pending.

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When cases involving common questions of law or fact are pending before the Board, the Board may order consolidation of the cases. *See* Fed. R. Civ. P. 42(a); *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154 (TTAB 1991); *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382 (TTAB 1991). In determining whether to consolidate proceedings, the Board will weigh the savings in time, effort, and expense which may be gained from consolidation, against any prejudice or inconvenience which may be caused thereby.

Consolidation is discretionary with the Board, and may be ordered upon motion granted by the Board, or upon stipulation of the parties approved by the Board, or upon the Board's own initiative. *See, e.g., Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993).

It is noted that the parties to these proceedings are identical, and the issues are similar or related. Accordingly, Opp. Nos. 91246719, 91246720, 91246721, 91246722, 91248454 and 91248463, are hereby **CONSOLIDATED** with Opposition Nos. 91245440, 91245441, 91245619, and 91245621, and all ten cases may be presented on the same record and briefs. *See Hilson Research Inc. v. Society for Human Resource Management, supra*; and *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989).

The Board file will be maintained in **Opposition No. 91245440** as the "parent case." Subject to the Board's other order *infra*, regarding the motions to dismiss, from this point on, only a single copy of all motions and papers should be filed, and each

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such motion or paper should be filed in the parent case only, but caption all consolidated proceeding numbers, listing the “parent case” first.²

Despite being consolidated, each proceeding retains its separate character and requires entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings; a copy of the decision shall be placed in each proceeding file.

II. Motions to Strike and to Dismiss

We have considered the parties’ briefs on the contested motion, but do not repeat or discuss all of the arguments. *Guess? IP Holder LP v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015). For purposes of this order, we presume the parties’ familiarity with the pleadings and the parties’ arguments made in connection with the subject motion.

A. Motion to Strike Affirmative Defenses in Opposition Nos. 91245440 and 91245619

Opposer argues that Applicant has alleged affirmative defenses that “simply do not exist.” 6 TTABVUE 5. In view thereof, in the interest of efficiency, Opposer requests that the Board strike paragraphs 13-45³ from the answer in Opp. No. 91245440 and paragraphs 11-36 from the answer in Opp. No. 91245619.

² The parties should promptly inform the Board of any other Board proceedings or related cases within the meaning of Fed. R. Civ. P. 42, so that the Board can consider whether further consolidation is appropriate.

³ Applicant’s affirmative defenses in Opp. No. 91245440 only number from 1-41.

- **Legal Standard for Motions to Strike**

Pursuant to Fed. R. Civ. P. 12(f), which is applicable to Board proceedings under Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a),⁴ the Board may order stricken from a pleading any insufficient defense, or any redundant, immaterial, impertinent or scandalous matter. *See Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff'd*, 565 F. App'x 900 (Fed. Cir. 2014); *see also* Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a); TBMP § 506. Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case. *See, e.g., Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1293 (TTAB 1999); *Internet Inc. v. Corp. for Nat'l Research Initiatives*, 38 USPQ2d 1435, 1438 (TTAB 1996); *Am. Vitamin Prods., Inc. v. Dow Brands Inc.*, 22 USPQ2d 1313, 1314 (TTAB 1992).

Inasmuch as the primary purpose of pleadings under the Federal Rules of Civil Procedure is to give fair notice of the claims or defenses asserted, the Board may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. *See, e.g., Order of Sons of Italy in America v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1223 (TTAB 1995) (amplification of applicant's denial of opposer's claims not stricken). Further, a defense will not be stricken as insufficient if the

⁴ Trademark Rule 2.116(a) provides that “[e]xcept as otherwise provided, and wherever applicable and appropriate, procedure and practice in *inter partes* proceedings shall be governed by the Federal Rules of Civil Procedure.”

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insufficiency is not clearly apparent, or if it raises factual issues that should be determined on the merits. *See generally*, Wright & Miller, 5C Fed. Prac. & Proc. Civ. § 1381 (3d ed. April 2019 update).

The notice of oppositions in each proceeding plead claims of likelihood of confusion and dilution. Turning first to Opp. No. 91245440, in the paragraphs at issue, Applicant merely asserts various reasons why there is no likelihood of confusion or no dilution. For instance, in paragraph 13, Applicant alleges that Opposer's goods in International Class 12 are unrelated to Applicant's goods and services in International Classes 28 and 41. In paragraphs 14-35, Applicant refers to other goods and/or services as being unrelated. 4 TTABVUE 6-11. As for paragraphs 36-37, Applicant merely denies Opposer's dilution claim by asserting that Opposer's mark is neither distinctive nor famous, 4 TTABVUE 11; and in paragraphs 38-40, Applicant's allegations relate to one or more of the *du Pont* factors, namely, strength or weakness of Opposer's marks and Applicant's asserted lack of bad faith in adopting its mark(s). In view of the foregoing, paragraphs 13-40 are merely amplifications of Applicant's denials of Opposer's allegations in the notice of opposition. In view thereof, Opposer's motion to strike is **denied in part** and those assertions will not be stricken. *See Order of Sons of Italy*, 36 USPQ2d at 1223.

As regards paragraph 41, 4 TTABVUE 12, Applicant reserves the right to plead all affirmative defenses that may exist or may in the future become available. Applicant's reservation of the right to raise additional defenses is improper under the Federal Rules of Civil Procedure. *See FDIC v. Mahajan*, 923 F. Supp. 2d 1133, 1141

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(N.D. Ill. 2013) (reservation of right to add affirmative defenses at a later date is improper under the Federal Rules). Specifically, Applicant cannot reserve unidentified defenses in its answer since it does not provide Opposer fair notice of such defenses. Whether Applicant may, at some future point, amend its answer to include affirmative defenses would be resolved by way of a motion for leave to amend under Fed. R. Civ. P. 15(a). Accordingly, Opposer's motion to strike Applicant's affirmative defenses is **granted in part** to the extent that the purported affirmative defense in paragraph 41 is hereby **stricken**. See Fed. R. Civ. P. 12(f).

With respect to paragraphs 11-36 in the answer filed in Opp. No. 91245619, the Board similarly finds that the majority of the allegations in those paragraphs merely amplify Applicant's denial of likelihood of confusion by informing Opposer that Applicant believes that its goods and services are not related to Opposer's goods and services (¶¶ 11-30); and, similarly, paragraphs 31 and 32, in which Applicant "affirmatively alleges" that Opposer's marks are neither distinctive nor famous, 4 TTABVUE 9-10, are essentially denials of Opposer's dilution claim. Likewise, paragraphs 33-35 of Applicant's affirmative defenses relate to one or more of the *du Pont* factors, namely, strength or weakness of Opposer's marks and Applicant's lack of bad faith in adopting its mark(s). 4 TTABVUE 10. In view thereof, Opposer's motion to strike is **denied in part** and paragraphs 11-35 of Applicant's purported affirmative defenses will not be stricken. See *Order of Sons of Italy*, 36 USPQ2d at 1223.

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Turning to paragraph 36, in which Applicant reserves its “right” to plead all affirmative defenses that may become available, for the reasons discussed *supra*, said “defense” is improper. Accordingly, Opposer’s motion to strike is also **granted in part** to the extent that paragraph 36 of Applicant’s affirmative defenses in Opp. No. 91245619 is also **stricken**. *See* Fed. R. Civ. P. 12(f). The stricken paragraph in each answer will be given no further consideration.⁵

B. Motions to Dismiss in Opposition Nos. 91245441, 91245621, 91246719, 91246721 and 91248454

Because Opposer’s pleadings in the referenced oppositions and the motions to dismiss are virtually identical but for the applied-for mark and identified goods and/or services in the involved application, the Board will address the motions in a single order, with delineation as to issues in any particular proceeding as needed.

Initially, the Board notes that on February 14, 2019, in Opposition Nos. 91245441 and 91245621, Opposer filed an amended notice of opposition in each proceeding in response to the first motion to dismiss (filed January 25, 2019, 4 TTABVUE). 6 TTABVUE. A plaintiff may amend its complaint once as a matter of course within 21 days after service of a motion under Rule 12(b). Fed. R. Civ. P. 15(a)(1)(B). Thus, the party in position of plaintiff in a proceeding before the Board ordinarily can respond to a motion to dismiss by filing an amended complaint. Insofar as Opposer filed its first amended notice of opposition in each case within 21 days of Applicant’s first

⁵ Insofar as Applicant will be allowed, *infra*, to submit answers to Opposer’s amended notices of opposition, said answers should not include a reservation of rights to include additional affirmative defenses.

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motion to dismiss, the Board accepts Opposer's first amended notice of opposition as its operative pleading in each case. Accordingly, the Board will consider Applicant's renewed motions to dismiss solely with respect to Opposer's first amended notices of opposition, and determine whether those pleadings include sufficient allegations for standing and proper claims. *See Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1926 (TTAB 2014) (the first motion to dismiss deemed moot and the second motion to dismiss was considered solely with respect to the amended counterclaim); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1537 (TTAB 2007).

For Opposition Nos. 91246719, 91246721 and 91248454, the Board will consider Applicant's motions to dismiss with respect to Opposer's original (and only) notice of opposition.

- **Legal Standard for Motions to Dismiss**

A motion to dismiss under Rule 12(b)(6) is a test of the sufficiency of the complaint. *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 (TTAB 2014). To survive a motion to dismiss, a plaintiff need only allege sufficient factual content 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 denying the registration sought or for cancelling the involved registration. *See Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) (citing *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998)); *see also Lipton Indus., Inc. v.*

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Ralston Purina Co., 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982). In other words, the Board determines whether Opposer’s belief “is not wholly without merit.” See *Lipton*, 213 USPQ at 189.

Further, 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, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In particular, the plaintiff 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,” to state a claim plausible on its face. *Id.* (citing *Twombly*, 550 U.S. at 555). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. See *Twombly*, 550 U.S. at 556-57. However, the plausibility standard does not require that a plaintiff set forth detailed factual allegations. *Id.* Rather, a plaintiff need only allege “enough factual matter ... to suggest that [a claim is plausible]” and “raise a right to relief above the speculative level.” *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010).

For purposes of determining a motion to dismiss, all of the plaintiff’s well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to the plaintiff. See *Advanced Cardiovascular Systems Inc.*, 26 USPQ2d at 1041; *Petróleos Mexicanos v. Intermix SA*, 97 USPQ2d 1403, 1405 (TTAB 2010). Furthermore, “[u]nder the simplified notice pleading of the Federal Rules of Civil Procedure, the allegations of a complaint should be construed liberally so as to

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do substantial justice.” *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007). Moreover, the purpose of a motion to dismiss is not to address the merits of the case. *See Libertyville Saddle Shop Inc. v. E. Jeffries & Sons Ltd.*, 22 USPQ2d 1594, 1597 (TTAB 1992) (A motion to dismiss is a test solely of the legal sufficiency of the plaintiff’s pleadings ... No matters outside the pleadings are considered. A motion to dismiss does not involve a determination of the merits of the case).

In the original motions to dismiss filed in Opposition Nos. 91245441 and 91245621, Applicant argued that Opposer failed to allege sufficient facts to demonstrate that it has standing to bring the opposition proceeding. In its “renewed” motions to dismiss filed subsequent to the submission of Opposer’s first amended notices of opposition, Applicant argues, *inter alia*, that Opposer has not included sufficient detail in its pleadings to give Applicant fair notice of the basis for each claim. In the interest of completeness, the Board will first address Opposer’s allegations related to standing.

- **Standing**

Standing is a threshold issue that must be pleaded at commencement of a Board proceeding and proven later at trial or at summary judgment. *See, e.g., Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). Specifically, the plaintiff must allege facts sufficient to show that it possesses a “real interest” in the proceeding beyond that of a mere intermeddler, and a “reasonable basis” for its belief of damage. *Empresa Cubana del Tabaco v. General Cigar Co.*, 753

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F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (quoting *ShutEmDown Sports, Inc. v. Lacy*, 102 USPQ2d 1036, 1041 (TTAB 2012) (citing *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999))); *see also Jewellers Vigilance Comm. Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987). A “real interest” is a “direct and personal stake” in the outcome of the proceeding. *Ritchie v. Simpson*, 50 USPQ2d at 1026. Under the “real interest” requirement, a plaintiff must have “a legitimate personal interest in the opposition.” With respect to the second inquiry, the plaintiff’s belief of damage “must have a reasonable basis in fact.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1377, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012) (internal citations omitted); *see generally* 3 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 20:7 (5th ed. & June 2019 update).

In each of the five identified oppositions that are the subject of Applicant’s motions to dismiss, Opposer alleges (i) common law rights in and ownership of various trademarks and service marks containing the term BELL (either in whole or in part) (ii) that it would be damaged by registration of Applicant’s applied-for mark(s), and (iii) that the marks of the parties are similar, the goods and services at issue are related, and confusion is the likely result. Because Opposer’s claim of likelihood of confusion is not wholly without merit, Opposer’s allegations in support of its standing are sufficient. *See Lipton Industries, Inc. v. Ralston Purina Co.*, *supra* 213 UPSQ at 189; *see also Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (petitioner’s production and sale of merchandise bearing its mark is

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sufficient to establish standing); *Nike, Inc. v. Palm Beach Crossfit Inc.*, 116 USPQ2d 1025, 1029 (TTAB 2015) (citing *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) (“Petitioner has established his common-law rights in the mark DESIGNED2SELL, and has thereby established his standing to bring this proceeding.”)); *Hartwell Co. v. Shane*, 17 USPQ2d 1569, 1570 (TTAB 1990) (A belief of likelihood of confusion that is not wholly without merit is sufficient to establish standing if proven at trial.).

As regards Applicant’s arguments asserting that Opposer did not allege sufficient facts as to Opposer’s use of the applied-for marks in its intent-to-use applications and/or how Opposer benefited from the use of a related company, 8 TTABVUE 5-6, the Board disagrees. Opposer clearly alleges in paragraphs 1 and 2 of its pleadings that it has continuously used its “BELL” trademarks and, after assignment from Bell Helicopter Textron Inc. to Textron Innovations Inc., Opposer as licensee uses the BELL trademarks. Opposer also alleges that the BELL trademark and the common law rights in the BELL trademarks are owned or used by either entity. Therefore, whether Opposer Bell Helicopter is using the BELL trademarks at the time of filing, as owner or licensee, it has set forth sufficient allegations for standing. *See, e.g., Chicago Bears Football Club Inc. v. 12th Man/Tennessee LLC*, 83 USPQ2d 1073, 1075 (TTAB 2007) (“Because of opposers’ proof of ownership or licensed use of the registered marks for BEARS and CHICAGO BEARS, we find that opposers each have established their standing to oppose.”); *J.L. Prescott Co. v. Blue Cross Labs. (Inc.)*, 216 USPQ 1127, 1128 (TTAB 1982) (opposer found to have standing where it had

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assigned the mark and obtained an exclusive license from the assignee, and “the record shows that opposer used the mark prior to applicant and the opposer still uses it.”); *Chem. New York Corp. v. Conmar Form Sys., Inc.*, 1 USPQ2d 1139, 1142 (TTAB 1986) (“It is obvious that opposer Chemical New York, as owner of the ‘PRONTO’ marks and registrations, and opposer Chemical Bank, as licensee and user of the marks, have such a ‘real interest’ in this proceeding.”); *cf. Syngenta Crop Prot., Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118, n.8 (TTAB 2007) (evidence of a licensee’s use of a mark sufficient to establish standing “even if that use is purportedly based on a license which has not been clearly established in evidence.”).

Moreover, where a plaintiff has alleged standing as to at least one properly pleaded ground, its allegation of standing satisfies the standing requirement for any other legally sufficient ground. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1727-28 (“[O]nce an opposer meets the requirements for standing, it can rely on any of the statutory grounds for opposition set forth in 15 U.S.C. § 1052.”); *Petróleos Mexicanos*, 97 USPQ2d at 1405.

In view of the foregoing, the Board finds that Opposer has set forth sufficient allegations, if proven at trial or on summary judgment, to establish standing.

- **Likelihood of Confusion Claim**

A claim of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), has two required elements, priority of use and likelihood of confusion. *See Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001). In this case, as regards to priority, because Opposer does

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not plead ownership of a trademark registration, it must allege (and ultimately prove) that it has a proprietary interest in its pleaded mark(s) and that it has priority of use vis-à-vis the adverse party. *See* Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d); *see also Herbko Int'l Inc. v. Kappa Books Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1378 (Fed. Cir. 2002); *Otto Roth & Co., Inc. v. Universal Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981). Thus, contrary to Applicant's arguments, to sufficiently plead priority, Opposer is not required to allege that its trademark applications were filed prior to Applicant's applications for registration, which, in any case, is not true. Rather, Opposer need only allege a proprietary interest in its mark(s) (based on rights accrued through use under common law) and priority of use.

Opposer's priority claim is comprised of the following allegations in paragraph 1 of its notices of opposition or first amended notices of opposition (Board emphasis):

For many years, and *well prior to the filing of the subject application and long prior to any date of first use upon which Applicant can rely*, Opposer, has adopted and continuously used "BELL" in whole or in part as a trademark for a wide range of goods and services including goods and services in Classes 28 and 41 [(or) services in Class 41 (or) goods in Class 28].

For the following reasons, Opposer's allegations regarding priority of use of are not sufficiently pleaded. Although the reference to the mark "BELL" is clear, stating "BELL' in whole or in part" does not provide Applicant sufficient notice as to any particular marks other than "BELL." This problem is compounded by Opposer's allegation at the end of paragraph 4 of Opposer's pleadings, namely, that "[t]ogether, Opposer's common law use of the BELL trademark and Opposer's Marks constitute

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a valuable group and/or family of BELL trademarks (“Opposer’s BELL Marks”).” This statement only mentions “the” BELL trademark. Therefore, it is unclear to the Board and to Applicant what are the other specific marks in which Opposer claims to have accrued prior common law rights. If Opposer intends to claim that it has accrued prior common law rights (through continuous use) in the marks other than “BELL,” such as all the marks identified in its pending trademark applications, then Opposer must say so explicitly to give proper notice thereof to Applicant. Additionally, Opposer’s reference to goods and/or services in International Class 28 and/or 41 is insufficient to provide notice to either the Board or to Applicant in which goods and/or services Opposer’s claims that it accrued rights at common law when sold in connection with the BELL mark or any BELL formative mark.

To plead a sufficient claim of likelihood of confusion, only a general allegation of likelihood of confusion is required. *See The Wet Seal, Inc. v. FD Management, Inc.*, 82 USPQ2d 1629, 1640 n.21 (TTAB 2007) (“Opposer is not required to specifically plead every factual component of a likelihood of confusion claim.”). Opposer has met that requirement by alleging the following in paragraph 5 of its first amended notices of opposition:

Applicant’s Mark so resembles Opposer’s previously applied for and used BELL Marks as to be likely, when applied to the goods or services set forth in Applicant’s application, to cause confusion, mistake, or deception within the meaning of Section 2(d) of the Trademark Act.

Although Opposer did not set forth the variety of detailed information that Applicant argues is required, 7 TTABVUE 5 and 8 TTABVUE 5, it is well-established that such

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particularized allegations are not necessary to set forth a sufficient likelihood of confusion claim. *See id.*

In view of the foregoing, the Board finds that Opposer's claim of likelihood of confusion is insufficiently pleaded.

Notwithstanding the foregoing finding, it is the Board's general practice to allow a party an opportunity to correct a defective pleading. *See Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1208 (TTAB 1997); *Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 USPQ2d 1711, 1714 (TTAB 1993); TBMP § 503.03. Opposer is allowed until **AUGUST 30, 2019**, to submit an amended notice of opposition in each consolidated proceeding, including those in which a motion to dismiss was not filed,⁶ to clarify (i) in which other unregistered marks, *i.e.* "BELL" formatives, Opposer's claims to have priority of use vis-à-vis Applicant; and (ii) with which goods and/or services Opposer has used the mark BELL or any "BELL" formative marks in which it claims priority of use.

- **Dilution by Blurring Claim**

A claim of dilution under Section 43(c) of the Trademark Act, 15 U.S.C. § 1125(c), requires that a plaintiff plead and prove the following in a Board proceeding:

- (1) Plaintiff owns a famous mark that is distinctive;
- (2) Defendant is using a mark in commerce that allegedly dilutes plaintiff's famous mark;
- (3) Defendant's use of its mark began after plaintiff's mark became famous; and

⁶ Opposition Nos. 91245440, 91245619, 91246720, 91246722 and 91248463.

Opposition Nos. 91245440, 91245441, 91245619, 91245621, 91246719, 91246720, 91246721, 91246722, 91248454, and 91248463

(4) Defendant's use of its mark is likely to cause dilution by blurring or tarnishment.

Coach Servs., Inc. v. Triumph Learning, 101 USPQ2d at 1723-24.

In its pleadings, Opposer alleges that its BELL marks are famous and distinctive; that Applicant allegedly began using its applied-for mark(s) after Opposer's BELL marks became famous and that Applicant's use of its marks is likely to diminish the capacity of Opposer's marks to identify and distinguish its goods and services, which is equivalent to alleging dilution by blurring. *See Research in Motion Limited v. Defining Presence Mktg. Group, Inc.*, 102 USPQ2d 1187, 1197 (TTAB 2012) ("Dilution by blurring is an association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. ... Over time, the gradual whittling away of distinctiveness will cause the trademark holder to suffer 'death by a thousand cuts.'") (internal citation omitted). In view of the foregoing, the Board finds Opposer's dilution claim to be sufficiently pleaded.⁷

Accordingly, in view of the foregoing and because Opposer's pleadings of record give fair notice to Applicant of the dilution claim asserted, *see Ohio State Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1292 (TTAB 1999) (primary purpose of pleadings "is to

⁷ Dilution by tarnishment is an "association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark." Trademark Act Section 43(c)(2)(C), 15 U.S.C. § 1125(c)(2)(C). Because Opposer has not alleged in the text of either the original or first amended notices of opposition that Applicant's involved mark would damage its reputation, the Board finds that there is no pleaded claim of dilution by tarnishment in this case. *See Embarcadero Techs. Inc. v. RStudio Inc.*, 105 USPQ2d 1825, 1827 n.2 (TTAB 2013) (mere mention of a ground on the ESTTA cover form of a complaint is insufficient).

Opposition Nos. 91245440, 91245441, 91245619, 91245621, 91246719, 91246720, 91246721, 91246722, 91248454, and 91248463

give fair notice of the claims or defenses asserted”); *McDonnell Douglas Corp. v. Nat’l Data Corp.*, 228 USPQ 45, 47 (TTAB 1985) (“Sufficient detail must be given so that the defendant may obtain a fair idea of the plaintiff’s complaint and of the legal basis for recovery.”) (internal citation omitted),⁸ Applicant’s motions to dismiss are **DENIED IN PART** and **GRANTED IN PART**.

III. Proceedings Resumed; Trial Dates Reset

These proceedings are resumed. As discussed, Opposer is allowed until **AUGUST 30, 2019**, to submit in each proceeding (whether the subject of a motion to dismiss or not) and serve amended notices of opposition which set forth sufficient claims of likelihood of confusion. Applicant is allowed until **SEPTEMBER 29, 2019**, to submit answers to the amended notices of opposition for each proceeding. Trial dates are reset as shown in the following schedule:

Time to Answer	9/29/2019
Deadline for Discovery Conference	10/29/2019
Discovery Opens	10/29/2019
Initial Disclosures Due	11/28/2019
Expert Disclosures Due	3/27/2020
Discovery Closes	4/26/2020
Plaintiff’s Pretrial Disclosures Due	6/10/2020
Plaintiff’s 30-day Trial Period Ends	7/25/2020
Defendant’s Pretrial Disclosures Due	8/9/2020

⁸ See also TBMP § 309.03(a)(2).

Defendant's 30-day Trial Period Ends	9/23/2020
Plaintiff's Rebuttal Disclosures Due	10/8/2020
Plaintiff's 15-day Rebuttal Period Ends	11/7/2020
Plaintiff's Opening Brief Due	1/6/2021
Defendant's Brief Due	2/5/2021
Plaintiff's Reply Brief Due	2/20/2021
Request for Oral Hearing (optional) Due	3/2/2021

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125, 37 C.F.R. §§ 2.121-2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a), 37 C.F.R. § 2.129(a).

