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

Proceeding	91255820
Party	Plaintiff Hy-Tape International, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

HY-TAPE INTERNATIONAL, INC. Opposer, v. THE BOOTS COMPANY PLC Applicant.	Opposition No. 91255820 App. Ser. No. 88361479 Mark: ORIGINAL PINK

OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS AND/OR STRIKE MATTER FROM AMENDED NOTICE OF OPPOSITION

I. INTRODUCTION

Opposer hereby responds to Applicant's motion to dismiss and strike Opposer's Third (deceptive) and Fourth (deceptive misdescriptiveness) Grounds for opposition to Applicant's ORIGINAL PINK application pursuant to Rules 12(b)(6) and 12(f) of the Federal Rules of Civil Procedure ("Motion"). The Motion should be denied in all respects.

The Plausibility Standard

Opposer alleges sufficient and plausible allegations to support its claims of deception and deceptive misdescriptiveness. Opposer's pleading meets the FRCP Rule 8 and plausibility requirements.

Applicant does not argue that Opposer's Amended Third and Fourth Grounds do not plead all required elements of these Grounds. Rather, the Motion is centered on the argument that Grounds III and IV of the Amended Opposition do not meet the "plausibility" requirement of *Ashcroft v.*

Iqbal, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)(A "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.").

Thus, the threshold issue is what is meant by "plausible."

A claim "is plausible on its face when the petitioner pleads factual content that if proved, would allow the Board to conclude or draw a reasonable inference that" a valid ground exists. *Corporacion Habanos, S.A. v. Rodriguez*, 99 U.S.P.Q.2d 1873 (TTAB 2011)(emphasis added), citing *Twombly*, 550 U.S. at 556. "In particular, a petitioner need only allege enough factual matter to suggest its claim is plausible and raise *a right to relief above the speculative level*." *Id.* (Emphasis added).

In *Zoba International Corp. dba CD Digital Card v. DVD Format/Logo Licensing Corporation*, 2011 TTAB LEXIS 69 (TTAB March 10, 2011), the Board expressed the plausibility standard as follows:

> 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. *Twombly*, 550 U.S. at 556, 127 S.Ct. at 1955. 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 (Fed. Cir. 2010). Consequently, petitioner need not allege, as argued by respondent (motion, pp. 13-15), specific instances where DVD FLLC has permitted unlicensed use of the DVD logo to support its claim of uncontrolled use and licensing. Similarly, it is well established that whether a plaintiff can actually prove its allegations is not a matter to be determined upon motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence. *See Libertyville Saddle Shop Inc. v. E. Jeffries & Sons, Ltd.*, 22 USPQ2d 1594, 1597 (TTAB 1992)(Emphasis added).

In a nutshell, a claim has facial plausibility so long as plaintiff pleads factual content that allows the court to draw "a reasonable inference" that the defendant is liable for the misconduct alleged.

Under the definition and standards for "plausibility," Opposer clearly alleges in the Amended Opposition sufficient and plausible allegations to support Ground III (deception) and Ground IV (deceptive misdescriptiveness) because those grounds set forth "*enough factual matter ... to suggest that [a claim is plausible]" and "raise a right to relief above the speculative level.*" *Zoba International Corp., supra.* (Emphasis added).

The Motion to dismiss and strike should be denied. In the alternative, leave to amend should be given.

II. THE LAW AND BOARD RULES CONCERNING MOTIONS TO DISMISS AND STRIKE UNDER RULE 12 OF THE RULES OF CIVIL PROCEDURE

Applicant does not argue that Opposer's Amended Third and Fourth Grounds do not plead all of the required elements of these causes of action when the Amended Opposition's allegations are read as a whole. "Whenever the sufficiency of any complaint has been challenged by a motion to dismiss, it is the duty of the Board to examine the complaint ***in its entirety***, construing the allegations therein so as to do justice, as required by Fed. R. Civ. P. 8(e), to determine whether it contains any allegations, which, if proved, would entitle the plaintiff to the relief sought." TBMP §503.02. (Emphasis added). Opposer's Grounds III and IV plead sufficient factual and legal content that allow the Board and Applicant to not only "draw an inference," but to readily and easily recognize and understand Opposer's grounds. The Motion does not sustain its burden to show that when the Amended Opposition is read in its entirety, the Board cannot comprehend what is being claimed "above the speculative level."

On this motion, the allegations in the Amended Opposition are to be accepted as true. *Lifetime Industries, Inc. v. Trim-Lok, Inc.*, 869 F.3d 1372, 1376 (Fed. Cir. 2017). This is all that is required. Opposer is not required "to prove its case at the pleading stage." *Lifetime Industries*, 869 F.3d at 1379. The Board should not require the pleader to go beyond its pleadings to prove

facts on the merits. In TTAB proceedings, the Board follows federal notice pleading standard of Fed. R. Civ. P. 8, which includes the requirement that the complaint "state a claim to relief that is plausible on its face." A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of the allegations set forth in a pleading. *Covidien LP v. Masimo Corporation*, 109 U.S.P.Q.2d 1696 (TTAB 2014). Specifically, pursuant to TBMP 309.03(a)(2), a notice of opposition must include (1) *a short and plain statement* of the reason(s) why opposer believes it would be damaged by the registration of the opposed mark, and (2) a *short and plain statement* of one or more grounds for opposition. A pleading need only include enough detail to give the defendant *fair notice* of the basis for each claim. The elements of each claim should be stated simply, concisely and directly, and taken together, "state a claim to relief that is plausible on its face." *Id*. A party need only plead facts sufficient to stave off threshold dismissal for want of an adequate statement of its claim. TBMP 309.03(a)(2), citing *Johnson v. City of Shelby*, 574 U.S. 10 (2014) (per curiam) (plaintiff's "[h]aving informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim.").

A plaintiff served with a motion to dismiss for failure to state a claim upon which relief can be granted *need not submit proofs* in support of its complaint. "Whether a plaintiff can actually prove its allegations is a matter to be determined not upon motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence in support of their respective positions." TBMP §503.02. A plaintiff is not required "to prove its case at the pleading stage." *Lifetime Industries,* 869 F.3d at 1379.

As illustrated below, the Motion relies on factual allegations and theories outside the scope of the pleadings. This is wrong. Substantive arguments outside the scope of the complaint should

be given no consideration. *Covidien LP v. Masimo Corporation*, 109 U.S.P.Q.2d 1696 FN3(TTAB 2014) ("Here, to the extent that respondent argues substantively with respect to whether petitioner can prove its allegations, said arguments have not been considered. As noted above, respondent's motion is a test solely of the legal sufficiency of the allegations in a pleading. Whether petitioner has carried its evidentiary burden of proof with respect to any or all of its allegations is a matter not considered until after trial of the issues. See also TBMP § 503.02 (2013)").

Indeed, the parties should not even argue the merits of the case on a motion to dismiss. *Petrolous Mexicanos vs. Intermix S. A.*, 97 USPQ2d 1403, 1406 (TTAB 2010)("A motion to dismiss for failure to state a claim upon which relief can be granted is a test *solely of the legal sufficiency of a complaint*. In order to withstand such a motion, *a pleading need only allege such facts as would, if proved, establish that petitioner is entitled to the relief sought*. . . [f]or purposes of determining the motion, all of the petitioner's well-pleaded allegations must be accepted as true, and *the complaint must be construed in the light most favorable to petitioner*. The pleading must be construed so as to do justice, as required by Fed. R. Civ. P. 8(e)(emphasis added)(citations omitted))." *See also Otto Int'l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861, 1862 (TTAB 2007).

In order to withstand a motion to dismiss an opposition, the opposition need only allege such facts as would, if proved, establish that the plaintiff is entitled to the relief sought, that is, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought. *Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012). (Opposer's standing is not an issue in this case. The Board's previous decision in this proceeding held that "Opposer . . . has sufficiently alleged its entitlement to a statutory cause of action." *Hy-Tape International, Inc. v. The Boots Company PLC*, Decision dated November 4, 2020, Opposition No. 91255820). In addressing the sufficiency of a pleading, the

Federal Circuit holds that a court "*assume[s] all well-pleaded allegations are true and draw[s] all reasonable inferences in the light most favorable to the plaintiff*." *Lifetime Industries, supra* at 1376 (Fed. Cir. 2017)(emphasis added).

"Whenever the sufficiency of any complaint has been challenged by a motion to dismiss, it is the duty of the Board to examine the complaint *in its entirety*, construing the allegations therein so as to do justice, as required by Fed. R. Civ. P. 8(e), to determine whether it contains *any allegations, which, if proved, would entitle the plaintiff to the relief sought*." TBMP §503.02. (Emphasis added).

The Motion also seeks to strike portions of the pleadings. "Motions to strike are not favored, and matter usually will not be stricken unless it clearly has no bearing upon the issues in the case." TBMP §506.01. "The primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice of the claims or defenses asserted. *Id.*, citing TBMP § 309.03 (Substance of Complaint) and TBMP § 311.02 (Substance of Answer)." *Id.* "Thus, the Board, in its discretion, 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." TBMP §506.01.

Petitioners to proceedings before the Board ordinarily can, and often do, respond to a motion to dismiss by filing, *inter alia*, an amended complaint. "However, if no amended complaint is submitted in response to a motion to dismiss for failure to state a claim upon which relief can be granted, and the Board finds, upon determination of the motion, that the complaint fails to state a claim upon which relief can be granted, the Board generally will allow the plaintiff an opportunity to file an amended pleading." TBMP §503.03. Amendments to the pleadings may be given by "leave of the Board; and leave must be freely given when justice so requires." TBMP §507.02.

The "Board liberally grants leave to amend pleadings at any stage of a proceeding when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party or parties." *Id.* "This is so even when a plaintiff seeks to amend its complaint to plead a claim other than those stated in the original complaint . . ." *Id.* "A proposed amendment need not set forth a new claim or defense; a proposed amendment may serve simply to amplify allegations already included in the moving party's pleading." *Id.* "[W]hether or not the moving party can actually prove the allegation(s) sought to be added to a pleading is a matter to be determined after the introduction of evidence at trial or in connection with a proper motion for summary judgment, and the nonmoving party should not argue against granting the moving party leave to amend merely because the nonmoving party believes the moving party will not be able to prove the additional claim or allegations at trial." *Id*.

III. ARGUMENT

A. Opposer Plausibly Alleges Deceptiveness of the Intended Mark

Ground III of the Amended Opposition alleges that the ORIGINAL PINK mark is deceptive. Pursuant to *In re Budge*, 857 F.2d 773 (Fed. Cir. 1988), there are three elements to plead a deceptive trademark claim: (1) the mark misdescribes the goods; (2) consumers are likely to believe the misdescription and (3) the misdescription is likely to affect consumers' decision to purchase.

The Amended Opposition, in its entirety, amply sets forth the allegations of Opposer's Deceptive claim. In summary, the claim is as follows:

Opposer has developed significant rights in THE ORGINAL PINK TAPE trademark. Opposer has used the mark for 35 years, and a significant amount of recognition of the mark, and its associated goodwill, has built up over those 35 years through the use, marketing and sale of

THE ORGINAL PINK TAPE in connection with skin-related products. As a result of these many years of commercial efforts, Opposer's mark has acquired a highly favorable reputation and has come to be immediately identified by purchasers with Opposer. Amended Opposition, ¶¶ 1-4.

In March 2019, more than 34 years after Opposer's first use of THE ORIGINAL PINK TAPE, Applicant sought to register the mark ORIGINAL PINK, also for skin-related products, amongst a long list of skin care and other related products. Amended Opposition, ¶¶ 1-4. Applicant intends to use ORIGINAL PINK on goods which overlap with Opposer's mark, to create confusion thereby, and to sow in the mind of the consumer the mistaken belief that Applicant's Intended Goods originate with Opposer. Amended Opposition, ¶¶ 10-16 and 24.

In addition to the foregoing foundational facts, Opposer pleads, in summary, that Applicant's Intended Mark, ORIGINAL PINK (1) misdescribes the character, quality, etc., of the goods associated with ORIGINAL PINK as being original and authentic when they are not so; (2) that prospective purchasers are likely to believe what Applicant's ORIGINAL PINK mark says i.e., that Applicant's skin-related goods are the ORIGINAL PINK skin care goods, when in fact they are not original, or authentic, pink skin care goods, and (3) that Applicant's misdescription and false representation is likely to affect purchasers' decision to purchase Applicant's ORIGINAL PINK skin-related products because their product choices are shaped by a desire and preference for "original" or "authentic" products. Amended Opposition, ¶¶ 23-29.

Ground III is direct, concise, and clearly articulates what is claimed against Applicant. It is clear that the Amended Opposition includes (1) "a short and plain statement" of the reasons why Opposer believes it would be damaged by the registration of the opposed mark, and (2) "a short and plain statement" of one or more grounds for opposition. *Covidien LP, supra,* TBMP

309.03(a)(2). The Amended Opposition further includes more than enough detail to give Applicant fair notice of its claims, pled "simply, concisely and directly." *Id*.

It is also clear that Ground III of the Amended Opposition "is plausible on its face" in that it "pleads factual content that if proved, would allow the Board to conclude" that a valid ground exists. *Corporacion Habanos, supra*, *Twombly*, *supra*. Indeed, the Amended Opposition more than "allege[s] enough factual matter to suggest its claim is plausible and raise[s] a right to relief above the speculative level." *Zoba International Corp. supra.*

There is nothing "speculative" about the facts alleged. The Motion should be denied.

B. <u>Opposer Plausibly Alleges Deceptively Misdescriptiveness of the Intended Mark</u>

In order to state a claim for deceptive misdescriptiveness, a party must plead two elements: (1) the mark sought to be registered is misdescriptive of the goods identified in the application, and (2) the misdescription is deceptive, i.e., plausible and likely to be believed by purchasers. *Humanetics Corp. v. Neways, Inc.*, 2004 TTAB LEXIS 215 (TTAB 2004). Those two elements are deemed identical or substantially similar to the first two elements of *In re Budge Mfg. Co., Inc.* 857 F.2d 773 (Fed. Cir. 1988). The Amended Opposition clearly pleads that the Intended Mark is deceptively misdescriptive under Rule 2(e) under the first two prongs of *In re Budge* for the reasons set forth above in Section IIIA.

C. <u>The Motion Is A Premature Motion For Summary Judgment</u>.

Applicant does not seriously dispute that the Amended Opposition on its face has pled all of the elements of the claims. Instead, Applicant argues the merits of the case and goes beyond the pleadings, as if the Motion was one for summary judgment. The Motion should fail for these reasons. For example, Applicant argues that the term "original" is suggestive, which is a fact issue. Motion, page 7. In any event, the adjective "original" describes an attribute of the character of the

goods as used in the Intended Mark. *See, e.g., Gen. Foods Corp. v. Ralston Purina Co.*, 220 USPQ 990 (TTAB 1984). Applicant also raises fact issues whether Opposer's products are the first skin-related products under the THE ORIGINAL PINK TAPE brand. Motion, page 7. Applicant further argues that Opposer does not allege sufficient facts concerning *why* consumers would believe that Applicant's products are original pink cosmetics. Applicant argues that under "objective standards," the Amended Opposition should fail because there are insufficient facts to establish that "original" is a feature of the mark, as opposed to "superior quality, enhanced performance or function, difference in price, health benefit, or religious practice or social policy." Motion, page 10-11, citing precedent. These are issues for trial.

For these reasons, the present Motion should be denied as premature because Applicant has not yet served its initial disclosures in this proceeding. *Noble Communications vs. AFC Network Private Limited*, Canc. No. 92050895 (TTAB June 17, 2009)(motion to dismiss for failure to state a claim treated as a motion for summary judgment because it argued the merits of the claims, and thus denied as premature because it was filed prior to respondent serving its initial disclosures). Further, Applicant's substantive arguments that are outside the scope of the Amended Opposition should be given no consideration. *Covidien LP v. Masimo Corporation*, 109 U.S.P.Q.2d 1696 (TTAB 2014) ("Here, to the extent that respondent argues substantively with respect to whether petitioner can prove its allegations, said arguments have not been considered. As noted above, respondent's motion is a test solely of the legal sufficiency of the allegations in a pleading. Whether petitioner has carried its evidentiary burden of proof with respect to any or all of its allegations is a matter not considered until after trial of the issues. See also TBMP § 503.02 (2013)"). The parties should not argue the merits of the case on a motion to dismiss. *Petrolous*

Mexicanos vs. Intermix S. A., 97 USPQ2d 1403 (TTAB 2010); *Otto Int'l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861 (TTAB 2007).

D. <u>Applicant's Other Arguments Are Unavailing</u>

The Motion, at pages 2-3 and 6, for example, alleges that the allegations simply "parrot," the statutory language, "shoehorns" one set of allegations to another, etc. These "pot shot" arguments have no merit. The Amended Opposition, like any other pleading, when read as a whole, *uses* the statutory language of the causes of action, *along with the facts alleged*. Further, the specific causes of the Amended Opposition at issue, like any other pleading, refer back to the facts pled in previous sections of the Amended Opposition, and "repeats and realleges" them. This is standard and universal pleading practice.

The Motion repeatedly argues that the Amended Opposition dissects the ORIGINAL PINK Intended Mark with a focus on the term "ORIGINAL" at the expense of "PINK". Motion at pages 6,7,8 and 9. This is incorrect. Opposer's allegations are directed to the Intended Mark as a whole. Ground III alleges that: (1) "original" misdescribes the goods associated with the Intended Mark [**ORIGINAL PINK**]; "[a]pplicant's Intended Mark [**ORIGINAL PINK**] makes the claim that Applicant provides the '**Original Pink**' skin care products; "[a]"pplicant's Intended Products are the first, or only authentic, pink skin-related products. Amended Opposition, ¶¶ 23-29. Ground IV alleges "Applicant's Intended Mark [**ORIGINAL PINK**] indicates to consumers in a misdescriptive way that Applicant is providing the first **(original) pink**, skin related products or the only authentic, pink skin-related products; "registration will support and assist Applicant, in a deceptive and misdescriptive manner, to indicate and convey to consumers that Applicant's products offered under Applicant's Intended Mark [**ORIGINAL PINK**] are the first (original) such skin-related products …" Amended Opposition, ¶¶ 30-34. (Emphasis added).

It is fallacious to assert that Opposer need recite the term "ORIGINAL PINK," on every line of its pleadings, or that the use of the terms "Intended Mark" or "original pink" is not synonymous with ORIGINAL PINK, which it clearly is.

The Motion asks the Board to apply a heightened plausibility standard in judging the Amended Opposition. The Motion, at pages 9-11, argues that Opposer alleges only cursory facts and no plausible facts as to *why* ORIGINAL PINK would be more appealing or desirable to a significant portion of consumers. Both points are incorrect. Opposer pleads more than sufficient facts stating, *inter alia*, that (1) the misdescriptiveness of the Intended Mark are likely to affect a significant portion of the relevant consumers decision to purchase Applicant's products, and (2) *because consumer purchasing decisions and product choices are shaped by a desire for original and authentic goods*. Amended Opposition at ¶¶ 26-34. In any event, that is what the mark says, it is the ORIGINAL PINK skin care product. Opposer does not have to disprove Applicant's argument that the Intended Mark is a falsity at the pleading stage. That is for trial.

D. Applicant's Motion To Strike Paragraphs 23-33 Of The Amended Opposition Should Be Denied.

In addition to dismissal, and in summary fashion, Applicant argues that the facts set forth in paragraphs 23-33 should be stricken as immaterial and redundant information. Motion, pages 11-12. Applicant's motion to strike has no merit. "Motions to strike are not favored, and matter usually will not be stricken unless it clearly has no bearing upon the issues in the case." TBMP §506.01. "Rule 12(f) motions are generally viewed with disfavor because striking a portion of a pleading is a *drastic remedy* and because it is often sought by the movant simply as a dilatory tactic." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) (quoting 5A A. Charles Alan Wright Arthur R. Miller, *Federal Practice Procedure* § 1380, 647 (2d ed. 1990)).

As set forth in the discussion in Section III above, it is abundantly clear that the facts and law alleged in the Amended Opposition have a bearing on the issues pled in this proceeding. Applicant's motion does not establish or even seriously contend that the Amended Opposition contains any "scandalous, immaterial, or redundant matter." Moreover, the Opposer would be greatly hampered and prejudiced by the drastic remedy sought here because if the factual allegations set forth in the Amended Opposition were stricken at this early stage of the pleadings, Applicant would be unfairly shielded from Opposer's rightful attempts to move this matter forward and develop evidence to support the facts underpinning its Amended Opposition.

E. In The Alternative, Opposer Requests Leave To Amend.

Opposer submits that this motion to dismiss is baseless, and a mere delay tactic to prevent this opposition from getting off the ground. However, to the extent that the Board concludes that the Amended Opposition still does not adequately plead Ground III and/or Ground IV, Opposer respectfully requests leave to amend so as to set forth even more detail or amplify its claims, if the Board thinks it necessary. If the "Board finds, upon determination of the motion, that the complaint fails to state a claim upon which relief can be granted, the Board generally will allow the plaintiff an opportunity to file an amended pleading." TBMP §503.02. Amendments to the pleadings may be given by "leave of the Board; and leave must be freely given when justice so requires." TBMP §507.02.

IV. CONCLUSION

For the reasons set forth above, Hy-Tape International, Inc. respectfully requests that the Board deny Boots Company's motion to dismiss or strike Ground III and Ground IV from the Amended Opposition. In the alternative, Opposer respectfully requests leave to amend.

DATED: December 30, 2020

Respectfully submitted,

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CERTIFICATE OF FILING

I certify that a true copy of the foregoing OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO DISMISS AND/OR STRIKE MATTER FROM AMENDED NOTICE OF OPPOSITION is being filed electronically with the TTAB via ESTTA on December 30, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing has been served on the date indicated below by emailing said copy to Applicant's counsel at:

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