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

Proceeding	91265013
Party	Defendant BIGO TECHNOLOGY PTE. LTD.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GUANGZHOU HUANMAO BUSINESS SERVICE CO., LTD., Opposer, v. BIGO TECHNOLOGY PTE. LTD., Applicant.	)	Opposition No. 91265013

APPLICANT BIGO TECHNOLOGY PTE. LTD.'S MOTION TO DISMISS AMENDED NOTICE OF OPPOSITION

Applicant, Bigo Technology Pte. Ltd., ("Applicant" or "BIGO"), by and through its counsel, Anova Law Group, PLLC, moves to dismiss the Notice of Opposition filed by Opposer, Guangzhou Huanmao Business Service Co., Ltd. ("Huanmao"), under the doctrine of *res judicata*; and for failure to state a claim in trademark opposition proceeding, pursuant to the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §§ 316 and 503, and Federal Rules of Civil Procedure ("FRCP") 12(b)(6).

INTRODUCTION

Opposer's notice of opposition should be dismissed under the doctrine of *res judicata* (or claim preclusion). The default judgment against the Opposer in a previous cancellation proceeding precludes the subsequent application of a substantially same mark and the re-litigation of the same claim based on the subsequent application in this proceeding.

On January 8, 2020, BIGO initiated cancellation proceeding No. 92073149 ("the 149 cancellation") against Trademark Registration No. 5109132, " liKee " ("the 132 trademark"), which is owned by Guangzhou Huaimao Business Services Co., Ltd. ("Huaimao"). Huaimao did not respond to the complaint. The 132 trademark " liKee " was cancelled as a result of the default judgement.

On July 28, 2020, Opposer Huanmao filed trademark application Serial No. 90077134 ("the 134 trademark application"), which is substantially the same as the previously cancelled 132 trademark. Opposer Huanmao is the same company that owned the now cancelled 132 trademark. On September 27, 2020, Opposer Huanmao filed the present opposition based on the newly filed 134 trademark application.

Huanmao should be precluded from relitigate the same claim it surrendered in the early action.

LEGAL STANDARDS

1. **Motion to Dismiss**

***a. Res Judicata* (Claim Preclusion)**

Under the doctrine of *res judicata* (or claim preclusion), the entry of a final judgment on the merits of a claim in a proceeding serves to preclude re-litigation of the same claim in a subsequent proceeding between the parties or their privies, even in those cases where the prior judgment was the result of a default or consent. *See Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Chromalloy Am. Corp. v. Kenneth Gordon, Ltd.*, 736 F.2d 694, 222 USPQ 187 (Fed. Cir. 1984); *Flowers Indus., Inc. v. Interstate Brands Corp.*, 5 USPQ2d 1580 (TTAB 1987).

In general, for claim preclusion to apply, there must be: (1) identity of parties (or their privies); (2) an earlier final judgment on the merits of a claim; and (3) the second claim based on the same set of transactional facts as the first. *Jet Inc. v. Sewage Aerations Sys.*, 223 F.3d 1360, 55 USPQ2d 1854, 1856 (Fed. Cir. 2000). *Jet* test is not the exclusive test for preclusion against a defendant in the first action. *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1324 (Fed. Cir. 2008). Rather, different rules of "defendant preclusion" may apply. *Id.* Under such rules, "[a] defendant is precluded only if (1) the claim or defense asserted in the second action was a compulsory counterclaim that the defendant failed to assert in the first action, or (2) the claim or defense represents what is essentially a collateral attack on the first judgment." *Id.* Either of the first basis and the second basis can justify a preclusion against the defendant in the first action. *Id.*

To apply claim preclusion against defendants, the court should assess whether "[t]he effect of the later action is to collaterally attack the judgment of the first action," and if the answer is positive, "[a] collateral attack on a judgement or order will fail if the party making the attack could have raised the issue in the other action." *Id.* In other words, "preclusion is necessary to protect the effect of the earlier judgment." *Id.* (*See Faust v. United States*, 101 F.3d 675, 678 (Fed.Cir.1996)).

In appropriate circumstances, "[a] default judgment can operate as res judicata." *Id.* (*See Sharp Kabushiki Kaisha v. Thinksharp, Inc.*, 448 F.3d at 1371; *see* also *Morris v. Jones*, 329 U.S. 545, 550-51, 67 S.Ct. 451, 91 L.Ed. 488 (1947); *Riehle v. Margolies*, 279 U.S. 218, 225, 49 S.Ct. 310, 73 L.Ed. 699 (1929); *Int'l Nutrition Co. v. Horphag Research, Ltd.*, 220 F.3d 1325, 1328 (Fed.Cir. 2000)). Further, abandonment of application without consent invokes claim preclusion in a subsequent opposition to bar

applicant's subsequent application for an insignificantly modified mark. *Miller Brewing Co. v. Coy International Corp.*, 230 USPQ 675, 678 (TTAB 1986); TBMP §601.

b. Failure to State a Claim under FRCP 12(b)(6)

Under Rule 12(b)(6) of the FRCP and TBMP §§ 316 and 503, a registrant may move to dismiss a petition for opposition for "failure to state a claim upon which relief can be granted." To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'stated a claim to relief that is plausible on its face.'" *Corporacion Habanos, S.A. v. Rodriguez*, 99 USPQ2d 1873, 1874 (TTAB 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In an opposition proceeding before the Board, the allegations in the opposer's notice of opposition must "include enough detail to give the defendant fair notice of the basis for each claim." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). A party must allege sufficient facts beyond "naked assertion[s]" devoid of "further factual enhancement" to support its claims. *Id.* A 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. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); FRCP 8(a)(2). The Board may consider certain objective, verifiable facts available from Office records under a motion to dismiss, such as the filing date, filing basis, priority date, publication date and Applicant's name in an application that is the subject of an opposition proceeding. *See Compagnie Gervais Danone v. Precision Formulations LLC*, 89 USPQ2d 1251, 1256 & n.8 (TTAB 2009).

ARGUMENTS

1. Opposer Is Precluded from Bringing This Opposition Proceeding

Opposer Huanmao is precluded from bringing this opposition against BIGO's mark because Opposer is barred from applying for the subsequent 134 trademark application for an insignificantly modified mark "likee."[1] The current opposition proceeding should be dismissed because it is based on the barred 134 trademark application.

Claim preclusion applies in the present case because (1) identity of parties (or their privies) is the same; (2) an earlier final judgment on the merits of a claim exists; and (3) the second claim is based on the same set of transactional facts as the first. *Jet Inc.*, 55 USPQ2d at 1856.

In addition, the defendant preclusion rules derived from the principle in F. R. C. P. 13(a) also justifies a preclusion of the Opposer Huanmao's current opposition proceeding.

(1) *Jet* Test

Identity of Parties

Huaimao and Huanmao are the same company. In another trademark application, Serial No. 87520324 ("the 324 application"), Huaimao, the owner of the cancelled 132 trademark, is identified as the applicant and the owner of the 324 application. Ex. A. On November 8, 2017, Applicant Huaimao submitted a use specimen in the 324 application, which is a product sold on Amazon.com by Amazon seller "Likee." Ex. B. In the 134 trademark application, upon which the present opposition is based, Applicant Huanmao

[1] In the Opposer's subsequent application (Serial No. 90077134), the only difference between the descriptions of goods for the Opposer's cancelled mark (Registration No. 5109132) and the description of goods for the subsequent applied-for mark (Serial No. 90077134) is the description of "Smartphone mounts" that has been added to Class 009 in the subsequent application (Serial No. 90077134).

submitted a use specimen on July 28, 2020. The use specimen submitted on July 28, 2020 also identifies that the submitted specimen is sold on Amazon.com by the same Amazon seller "Likee." Ex. C. It is apparent from Huanmao's own submissions that Huaimao and Huanmao are the same Amazon seller "Likee."

Earlier Final Judgment on the Merits of the Claim

Opposer's once registered 132 trademark " liKee " was cancelled on May 25, 2020 as a result of the default judgment entered against Opposer in the 149 cancellation proceeding. Applicant BIGO initiated a cancellation proceeding due to a non-final office action issued by the USPTO on August 07, 2019 ("the Office Action") for BIGO's trademark application serial No. 88432124 ("the 124 trademark application"). The office action cited the registered 132 trademark " liKee " as the basis for refusal based on likelihood of confusion under Trademark Act Section 2(d). In the 149 cancellation proceeding, Applicant BIGO claimed damage caused by the Opposer's mark " liKee " as being cited against the 124 trademark application in the Section 2(d) refusal for likelihood of confusion. BIGO further claimed fraudulent procurement of the 132 trademark based on false use dates and statement of use. Respondent Huaimao failed to respond to the complaint in the cancellation proceeding, and subsequently, the Board entered default judgment against Huaimao and cancelled the 132 trademark on May 25, 2020.

In the present Opposition, Huanmao opposes BIGO's 124 trademark application. The opposition is based on the 134 trademark application by Huanmao which is substantially the same as the cancelled 132 trademark. As discussed above, Respondent Huaimao in the 149 cancellation proceeding and Opposer Huanmao are the same

company. Therefore, the earlier final judgment was entered against Opposer on the merits of the damage claim and fraudulent procurement claim in the 149 cancellation proceeding.

Second Claim Based on the Same Sets of Transactional Facts as the First

On July 28, 2020, Opposer Huanmao filed the 134 trademark application. The table below shows the goods and services of the cancelled 132 mark and the mark in the 134 trademark application. As shown below, the only difference between the goods and services of the 132 trademark and the goods and services for the mark in the 134 trademark application is the description "smartphone mounts." The goods and services identified by the two trademarks are otherwise the same.

	Trademark Registration No. 5109132 (cancelled)	Trademark Application Serial No. 90077134 (newly applied)
Mark	liKee	likee
Goods and Services (Class 009)	Camcorders; Cinematographic cameras; Facsimile machines; Galvanic cells; Headphones; Integrated circuits; Measuring buckets; Notebook computers; Optical lenses; Scales; Sunglasses; Telephone apparatus; Video screens; Videorecorders; Geiger counters	Camcorders; Headphones; Scales; Sunglasses; Videorecorders; Cinematographic cameras; Facsimile machines; Galvanic cells; Geiger counters; Integrated circuits; Measuring buckets; Notebook computers; Optical lenses; **Smartphone mounts**; Telephone apparatus; Video screens

In the current opposition proceeding, Opposer Huanmao relied on the 134 trademark application as the basis for the opposition. Notice of Opposition at pp. 1-2. In addition, the cancelled 132 trademark is a design mark with the literal element, "likee," which is the same as the applied-for word mark of the 134 trademark application.

Accordingly, the doctrine of claim preclusion applies to the current opposition proceeding and precludes Opposer Huanmao from bringing this opposition proceeding against BIGO's 124 trademark application based on the same cause of action. *See also, Miller Brewing Co. v. Coy International Corp.*, 230 USPQ 675, 678 (TTAB 1986).

(2) "Defendant Preclusion" Rule

Opposer's Attempt to Collaterally Attack Judgment of First Action

In addition, Opposer's current opposition proceeding, if succeeded, would be a collateral attack on the judgment of the first action – the 149 cancellation proceeding.

The 149 cancellation proceeding was filed to overcome the Section 2(d) refusal based on the 132 mark registration cited in the Office Action. *See "Petition to Cancel Trademark Registration"* in support of the Petition for Cancellation filed on January 08, 2020, at pp. 3-4, para. 10. The likelihood of confusion rejection was one of the grounds of the 149 cancellation proceeding. *Id.* The 149 cancellation proceeding also alleged fraudulently claimed use date by Huanmao. *Id.* at para. 4. The Applicant BIGO, in the cancellation proceeding, sought to cease suffering damage caused by "likelihood of confusion" to the consumer public who recognize the goods associated with the BIGO's trademark " Likee ," and succeeded.

As the Federal Circuit explained in *Nasalok*, for a defendant, the default judgment still has binding effect in a subsequent action. *Nasalok Coating* at 13330. Here,

if the Opposer Huanmao succeeds in the current opposition proceeding, the effect of the refusal to register the Applicant BIGO's trademark " Likee " would amount to a collateral attack to the judgment entered in the 149 cancellation proceeding, and undoubtedly impair BIGO's right as established by the 149 cancellation. For this additional reason, the effect that would be rendered from the Opposer Huanmao's prevailing in the current opposition proceeding *justifies* the application of claim preclusion against the defendant's current proceeding.

2. Opposer Fails to State a Legally Permissible Ground for Opposition

In addition to raising a claim that it has surrendered, Opposer has further failed to state a claim upon which relief can be granted. Opposer should be precluded from filing the subsequent 134 application for an insignificantly modified mark. Nevertheless, if the Board decides to consider the 134 trademark application with the description of goods "smartphone mounts" in Class 009 in this opposition, Opposer has not properly alleged BIGO's trademark " Likee " would cause any damages to the 134 trademark application that is directed to "smartphone mounts."

BIGO's 124 trademark application for " Likee " is directed to "*Downloadable software in the nature of a mobile application for social networking; Downloadable software in the nature of a mobile application for facilitating communication through audio, video, image and text messaging over a wireless network; Downloadable graphics for mobile phones; Downloadable music files; Downloadable software in the nature of a mobile application for casual social online game; Downloadable video files in the fields of music, movies, digital pictures, mobile games,*

reality show, dancing performance, singing performance; Downloadable applications for mobiles phones to download music and videos; Cinematographic film, exposed; Video disks with recorded animated cartoons; Downloadable electronic publications in the nature of books, magazines, news journals, booklets, manuals, and pamphlets, in the fields of music, entertainment and games" in Class 009. Opposer Huanmao has not properly alleged any confusion, mistake, or deception that can be caused by BIGO's registration of the 124 trademark with its own applied for trademark "likee" being directed to "smartphone mounts."

Consequently, Opposer Huanmao has failed to plead any legitimate grounds for likelihood of confusion, mistake, or deception for trademark opposition with regard to BIGO's 124 trademark application. Accordingly, Opposer's opposition should be dismissed.

CONCLUSION

For the foregoing reasons, Applicant BIGO's motion to dismiss should be granted in its entirety and the opposition should be dismissed, with prejudice.

Date: December 11, 2020

Respectfully Submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document, **Applicant BIGO TECHNOLOGY PTE. LTD.'s Motion to Dismiss Amended Notice of Opposition**, was served upon counsel for Opposer Guangzhou Huanmao Business Service Co., Ltd. via email on December 11, 2020, to:

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