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

Proceeding	91265013
Party	Plaintiff Guangzhou Huanmao Business Service Co., Ltd.
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Attachments	Opposition to Motion to Dismiss Amended Notice of Opposition.pdf(296630 bytes ) Opposition to Motion to Strike.pdf(130750 bytes ) Certificate of Service_Opposition to Motion to Dismiss Amended Notice of Opposition.pdf(62058 bytes ) Certificate of Service_Opposition to Strike.pdf(63132 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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<b>GUANGZHOU HUANMAO BUSINESS SERVICE CO., LTD.,</b>	:	
	:	<b>Opposition No. 91265013</b>
<b>Opposer,</b>	:	<b>Mark: LIKEE (stylized)</b>
	:	
<b>v.</b>	:	<b>Application Serial No.: 88432124</b>
	:	
<b>BIGO TECHNOLOGY PTE. LTD.,</b>	:	<b>Published: September 1, 2020</b>
	:	
<b>Applicant.</b>	:	

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**OPPOSER’S OPPOSITION TO APPLICANT BIGO TECHNOLOGY PTE. LTD.’S  
MOTION TO DISMISS AMENDED NOTICE OF OPPOSITION**

Opposer, Guangzhou Huanmao Business Service Co., Ltd. (“Opposer” or “Huanmao”), by and through its undersigned counsel, respectfully submit the following Brief in Opposition to BIGO Technology Pte. Ltd. (“Applicant”)’s Motion to Dismiss Amended Notice of Opposition No. 91265013 (“Opposition Proceeding”). For reasons set forth below, Opposer requests that this Board to deny Applicant’s Motion to Dismiss in its entirety:

**INTRODUCTION**

Opposer filed this Opposition Proceeding to oppose the registration of Applicant’s “LIKEE” mark (U.S. Trademark Application No. 88432124) (the “124 Application”). Applicant moved to dismiss under Federal Rules of Civil Procedure (“FRCP”) 12(b)(6), arguing that Opposer’s Opposition Proceeding should be barred pursuant to the doctrine of *res judicata* (or claim preclusion) and Opposer failed to state a claim in its Amended Notice of Opposition. As

discussed in detail below, (1) Opposer's Amended Notice of Opposition should not be dismissed for *res judicata* (claim preclusion) because Applicant failed to demonstrate the elements of *res judicata* (claim preclusion) were met; (2) Opposer's Amended Notice of Opposition should not be dismissed for failure to state a claim because (a) Opposer's claim is legally sufficient and (b) Opposer should be granted leave to amend any claims deemed to currently be legally insufficient;

### **LEGAL STANDARDS**

#### **1. *Res Judicata* (Claim Preclusion)**

The doctrine of *res judicata*, or claim preclusion, protects against relitigation of a previously adjudicated claim between the same parties or their privies based on the same cause of action. *In re Bose Corp.*, 476 F.3d 1331, 81 USPQ2d 1748 (Fed. Cir. 2007). A plaintiff is barred by *res judicata* from bringing a second action if: "(1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first." *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1372, 107 USPQ2d 1167, 1171 (Fed. Cir. 2013) (quoting *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362, 55 USPQ2d 1854, 1856 (Fed. Cir. 2000)).

For claim preclusion against the defendant in the earlier action, a defendant in an earlier action is precluded from bringing a later action 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." *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1324, 86 USPQ2d 1369, 1372 (Fed. Cir.

2008).

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

To withstand a motion to dismiss for failure to state a claim upon which relief can be granted, a plaintiff need only allege sufficient factual matter 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 opposing or cancelling the mark. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1874 (TTAB 2011); TBMP § 503.02 (2020).

A plaintiff may amend its complaint within 21 days after service of a motion under Rule 12(b)(6) of FRCP or with the written consent of every adverse party, or by leave of the Board, which is freely given when justice so requires. FRCP § 15(a); *Caymus Vineyards v. Caymus Medical Inc.*, 107 USPQ2d 1519, 1521 (TTAB 2013).

## **3. Matters Outside the Pleading Submitted on Motion to Dismiss**

Under Federal Rules of Civil Procedure (“FRCP”) 12(d), “[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.”

Where a motion to dismiss is based on issue or claim preclusion or lack of Board jurisdiction, the Board may treat the motion as one for summary judgment, in which case, the parties will be given reasonable opportunity to present all material that is pertinent to the motion.

*Chutter, Inc. v. Great Concepts, LLC*, 119 USPQ2d 1865, 1870 n.9 (TTAB 2016); TBMP § 503.02 (2020).

## ARGUMENT

### **1. Opposer’s Amended Notice of Opposition Should Not Be Dismissed for *Res Judicata* Because the Elements Are Not Met**

In this motion, Applicant argued that Opposer’s Opposition Proceeding is barred based on the doctrine of *res judicata* (claim preclusion) because (1) Opposer and the defendant named in the earlier Petition for Cancellation No. 92073149 (“Cancellation Proceeding”), Guangzhou Huaimao Business Service Co., Ltd. (“Huaimao”), are the same company; (2) the earlier judgment was entered against Opposer on the merits of claims in the earlier Cancellation Proceeding and (3) Opposer’s claims in the present Opposition Proceeding are based on the same sets of transactional facts as the claims in the earlier Cancellation Proceeding.

In the earlier Cancellation Proceeding, Respondent Huaimao’s U.S. Registration 5109132 (the “132 Registration”) was cancelled due to a default judgment entered by the Board against Huaimao. The owner name Huanmao was misspelled as Huaimao in the now cancelled 132 Registration. Therefore, Opposer Huanmao and Huaimao are the same company.

Here, in this motion, Applicant relies on both the three-element test employed in *Jet, Inc. v. Sewage Aeration Sys.*<sup>1</sup> and the defendant preclusion rules derived from the principle in FRCP 13(a) to determine whether the present Opposition Proceeding is precluded. The three-element test

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<sup>1</sup> 223 F.3d 1360, 1362, 55 USPQ2d 1854, 1856 (Fed. Cir. 2000).

employed in *Jet* is applied against a plaintiff who brings a second action related to an earlier action. Since Opposer was a defendant in the earlier Cancellation Proceeding, the test employed in *Nasalok Coating Corp. v. Nylok Corp.*<sup>2</sup> for claim preclusion against the defendant in the earlier action shall apply to this case. Hence, the present Opposition Proceeding is precluded only if: (1) Opposer's claim asserted in the present Opposition Proceeding was a compulsory counterclaim that Opposer failed to assert in the earlier Cancellation Proceeding, or (2) Opposer's claim is essentially a collateral attack on the earlier Cancellation decision made by the Board.

**a. Opposer's Claim Asserted in the Present Opposition Proceeding Was Not A Compulsory Counterclaim That Opposer Failed to Assert in the Earlier Cancellation Proceeding**

In the earlier Cancellation Proceeding, Applicant alleged that Opposer's 132 Registration was procured through fraud and Opposer had abandoned the now cancelled 132 Registration in commerce. A judgment by default was entered against Opposer and the 132 Registration was cancelled because Opposer failed to respond to Applicant's petition.

Under Trademark Rule 2.114(b)(3)(i), "[a] defense attacking the validity of any one or more of the registrations pleaded in the petition shall be a compulsory counterclaim if grounds for such counterclaim exist at the time when the answer is filed." This statute allows a defendant in a cancellation proceeding to assert a counterclaim to cancel the plaintiff's pleaded registration and such counterclaim shall be a compulsory counterclaim. 37 C.F.R. § 2.114(b)(3)(i); *see also* TBMP § 313.04 (2020). The only type of counterclaim that may be entertained by the Board is a

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<sup>2</sup> 522 F.3d 1320, 1324, 86 USPQ2d 1369, 1372 (Fed. Cir. 2008).

counterclaim for cancellation of a registration owned by an adverse party. *UMG Recordings Inc. v. Mattel Inc.*, 100 USPQ2d 1868, 1873 (TTAB 2011) (scope of applicant’s request, to restrict all of opposer’s registrations, pending applications, and future applications, is in the nature of an injunction and not considered); *Pyttronic Industries Inc. v. Terk Technologies Corp.*, 16 USPQ2d 2055, 2056 n.2 (TTAB 1990) (counterclaim to cancel “any registration which might issue in the future from pleaded application” stricken as improper); *International Telephone and Telegraph Corp. v. International Mobile Machines Corp.*, 218 USPQ 1024, 1026 (TTAB 1983) (counterclaim to “refuse any application filed by petitioner” was improper); *see also* TBMP § 313.01 (2020).

Here, in the present Opposition Proceeding, Opposer asserts a claim to oppose Applicant’s registration of the 124 Application on grounds of prior use and likelihood of confusion. In the earlier Cancellation Proceeding, Opposer must assert a compulsory counterclaim to cancel Applicant’s pleaded registration if grounds for such counterclaim exist at the time when the answer is filed. However, there is no registration pleaded by Applicant in the petition so that a compulsory counterclaim was not available for Opposer at that time. Thus, it’s apparent that Opposer’s claim asserted in the present Opposition Proceeding is not a compulsory counterclaim that Opposer failed to assert in the earlier Cancellation Proceeding.

**b. Opposer’s Claim Is Not Essentially a Collateral Attack on the Earlier Cancellation Decision Made by the Board**

In the earlier Cancellation Proceeding, the Board entered a default judgement against Opposer because Opposer failed to respond to Applicant’s petition. As a result of the default

judgement, Opposer's 132 Registration was subsequently cancelled.

In *Nasalok Coating Corp. v. Nylok Corp. supra*, the court determined that, indeed, the effect of the later Cancellation Proceeding would have the effect of attacking the judgment of the first action. The Court determined this because Registrant had been granted an injunction against Petitioner as a result of the judgment in the litigation – if Petitioner was allowed in the Cancellation Proceeding to challenge the validity of Registrant's asserted trademark registration, it would effectively undo the relief granted by the district court in the first action because allowing Petitioner to proceed on its cancellation petition would undoubtedly impair Registrant rights as established in the infringement action, in particular its rights under the injunction, and would constitute a collateral attack on the district court's judgment.

In this case, unlike *Nasalok*, where Registrant was granted a judgment that included injunctive rights against Petitioner, the effect of the default judgement entered by the Board in the earlier Cancellation Proceeding only invalidates the 132 Registration and no rights were granted to either Opposer or Applicant. In other words, if Opposer prevailed in the present Opposition proceeding, it would not effectively revive the now cancelled 132 Registration. Moreover, in the earlier Cancellation Proceeding, Applicant alleged that (1) the date of first use of the "LIKEE" mark in U.S. commerce of January 21, 2014 in connection with the goods identified in the 132 Registration was false and (2) Opposer had not used the "LIKEE" mark in U.S. commerce for the goods identified in 132 Registration for more than three years. Here, Opposer claims its prior use of the "LIKEE" mark for its goods since March 17, 2017, which would not constitute an effective



defense that could have been interposed in the earlier Cancellation Proceeding. The alleged first use date of the “LIKEE” mark in U.S. commerce that Opposer claims in this case will not attack the earlier Board decision. Thus, allowing Opposer to maintain the present Opposition Proceeding will not constitute a collateral attack on the earlier Cancellation decision made by the Board.

**c. The Second Claim is Not Based on the Same Set of Transactional Facts as the First**

Even using the *Jet* test adopted by Applicant, Opposer should not be estopped from bringing this action. Based on the three-prong-test, Applicant must establish that the second claim is based on the same set of transactional facts as the first in order to preclude the current proceeding. However, as demonstrated earlier, the facts alleged in this current case has nothing to do with the earlier Cancellation Proceeding, in which the factual issue is whether trademark had been put into actual commercial use in 2014 and the following three years. Here in the current proceeding, the related facts are whether the trademark has been used in commerce on and since March 2017. Obviously, the transactional facts in the earlier Cancellation Proceeding are different from the present Opposition Proceeding.

In light of the foregoing, Opposer’s Amended Notice of Opposition should not be dismissed for *res judicata* (claim preclusion).

**2. Opposer’s Amended Notice of Opposition Should Not Be Dismissed for Failure to State a Claim**

**a. Opposer’s Claim Is Legally Sufficient**

In this motion, Applicant argued that Opposer had failed to state a claim upon which relief

could be granted because (1) Opposer should be precluded from filing U.S. Application No. 90077134 (the “134 Application”) for an insignificantly modified mark and (2) Opposer had not properly alleged any confusion, mistake, or deception that can be caused by Applicant’s registration of the 124 Application with its own applied for mark “LIKEE” being directed to the goods “smartphone mounts” in Class 009.

Here, to successfully prosecute a notice of opposition, Opposer must plead and prove only two basic elements: (1) that it has standing to maintain this Opposition Proceeding; and (2) that there is a valid ground existing for denying the registration sought. *Bayer Consumer Care Ag v. Belmora LLC*, 90 USPQ2d 1587, 1590 (TTAB 2009); *Cineplex Odeon Corp. v. Fred Wehrenberg Circuit of Theaters*, 56 USPQ2d 1538, 1539 (TTAB 2000).

**i. Opposer Has Standing to Maintain This Opposition Proceeding**

Any person who believes it is or will be damaged by registration of a mark has standing to file a complaint. 15 U.S.C. §1063; *see also* TBMP § 303 (2020). At the pleading stage, all that is required is that a plaintiff allege facts sufficient to show a real interest in the proceeding, and a reasonable basis for its belief that it would suffer some kind of damage if the mark is registered. *Empresa Cubana del Tabaco v. General Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

A real interest in the proceeding and a reasonable belief of damage may be found in a claim of likelihood of confusion that is not wholly without merit, including claims based upon prior use of a confusingly similar mark. *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317,

209 USPQ 40, 44 (CCPA 1981) (plaintiff may show standing based on common law rights in mark that is distinctive, inherently or otherwise); *Grand Canyon West Ranch LLC v. Hualapai Tribe*, 88 USPQ2d 1501, 1502 (TTAB 2008) (standing established by testimony as to prior use); *Wet Seal Inc. v. FD Management Inc.*, 82 USPQ2d 1629, 1634 (TTAB 2007) (standing based on common law use of mark); *L. & J.G. Stickley Inc. v. Cosser*, 81 USPQ2d 1956, 1964 (TTAB 2007) (cancellation petitioner’s standing based on prior common law use of elements contained in defendant’s registered marks).

In this case, Opposer has alleged in its Amended Notice of Opposition that it has used its “LIKEE” mark in commerce through online shopping websites in the United States continuously since at least March 17, 2017 in connection with the sale of its goods. *See* Amended Notice of Opposition at ¶ 2. As a result of its widespread, continuous, and exclusive use of the “LIKEE” mark to identify its goods and Opposer as their source, Opposer owns common law right to the “LIKEE” mark. *Id.* at ¶ 3. Thus, Opposer has alleged facts sufficient to show a real interest in this Opposition Proceeding, and a reasonable basis for its belief that it would suffer some kind of damage if the registration to Applicant’s applied-for “LIKEE” mark is granted.

**ii. A Valid Ground Exists for Denying the Registration Sought by Applicant**

In addition to standing, a plaintiff must also plead (and later prove) a statutory ground or grounds for opposition. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998). A plaintiff may raise any available statutory ground for opposition that negates the

defendant's right to registration. *Id.*; *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Here, in its Amended Notice of Opposition, Opposer has raised a ground for opposition under Trademark Act § 2(d), 15 U.S.C. § 1052(d) that Applicant's applied-for "LIKEE" mark so resembles the "LIKEE" mark previously used in the United States by Opposer since March 17, 2017, as to be likely, when used on or in connection with the goods or services of Applicant, to cause confusion, or to cause mistake, or to deceive. Specifically, the goods covered by the Applicant's 124 Application in Class 009 (at least some of them, such as social networking software, mobile applications for communicating, recorded digital media, and similar goods) are related to the goods of headphones, optical lenses, video screens, smartphone mounts in the same class that Opposer offers under its "LIKEE" mark. It could give rise to the mistaken belief that both Applicant's and Opposer's respective goods emanate from the same source because the same entity commonly provides the relevant goods and markets the goods under the same mark. *See* Amended Notice of Opposition at ¶¶ 7-11. Thus, Opposer has pleaded (and will later prove) a statutory ground for opposition in its Amended Notice of Opposition.

In light of the foregoing, Opposer's Amended Notice of Opposition should not be dismissed for failure to state a claim.

**b. Opposer Should Be Granted Leave to Amend Any Claims Deemed to Currently Be Legally Insufficient**

Even 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 should freely give leave to amend when justice so requires. FRCP 15(a)(2); *Wise F&I, LLC, et al. v. Allstate Insurance Co.*, 120 USPQ2d 1103, 1110 (TTAB 2016) (allowed time to cure defective pleading); *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1208 (TTAB 1997) (allowed time to perfect fraud claim); *Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 USPQ2d 1711, 1714 (TTAB 1993) (“the Board freely grants leave to amend pleadings found, upon challenge under Fed. R. Civ. P. 12(b)(6), to be insufficient, particularly where challenged pleading is the initial pleading”); *Intersat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154, 156 (TTAB 1985) (allowed time to file an amended opposition setting forth a statutory ground).

### **CONCLUSION**

For the foregoing reasons and supportive authority, Applicant’s Motion to Dismiss should be denied in its entirety and the Opposition Proceeding should be sustained.

Dated: December 31, 2020

Respectfully submitted,

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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<b>GUANGZHOU HUANMAO BUSINESS SERVICE CO., LTD.,</b>	:	
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<b>Opposer,</b>	:	<b>Mark: LIKEE (stylized)</b>
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<b>v.</b>	:	<b>Application Serial No.: 88432124</b>
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**OPPOSER’S OPPOSITION TO APPLICANT BIGO TECHNOLOGY PTE. LTD.’S  
MOTION TO STRIKE OPPOSER’S OPPOSITION TO APPLICANT’S MOTION TO  
DISMISS NOTICE OF OPPOSITION**

Opposer, Guangzhou Huanmao Business Service Co., Ltd. (“Opposer”), by and through its undersigned counsel, opposes BIGO Technology Pte. Ltd. (“Applicant”)’s Motion to Strike Opposer’s Opposition to Applicant’s Motion to Dismiss Notice of Opposition. Applicant’s Motion to Dismiss Notice of Opposition was filed and served on November 26, 2020. The deadline for Opposer to file a brief in response to Applicant’s Motion to Dismiss Notice of Opposition should be November 27, 2020 because November 26, 2020 was a federal holiday, i.e., Thanksgiving Day. 37 CFR § 2.196. Therefore, the Opposer’s Opposition to Applicant’s Motion to Dismiss Notice of Opposition filed on November 27, 2020 was timely.

For the foregoing reasons, Applicant’s Motion to Strike Opposer’s Opposition to Applicant’s Motion to Dismiss Notice of Opposition should be denied in its entirety.

Dated: December 31, 2020

Respectfully submitted,

By: /Shiyong Ye/

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## CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2020, I caused a true and correct copy of the foregoing OPPOSER'S OPPOSITION TO APPLICANT BIGO TECHNOLOGY PTE. LTD.'S MOTION TO DISMISS AMENDED NOTICE OF OPPOSITION to be served by email on Applicant's Attorney of Record at the following address:

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By: /Shiyong Ye/  
Shiyong Ye, Esq.

## CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2020, I caused a true and correct copy of the foregoing OPPOSER'S OPPOSITION TO APPLICANT BIGO TECHNOLOGY PTE. LTD.'S MOTION TO STRIKE OPPOSER'S OPPOSITION TO APPLICANT'S MOTION TO DISMISS NOTICE OF OPPOSITION to be served by email on Applicant's Attorney of Record at the following address:

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