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

Proceeding	91267481
Party	Plaintiff Arcware Technologies LLC
Correspondence Address	JAMES KLOBUCAR GEARHART LAW LLC 41 RIVER ROAD SUMMIT, NJ 07901 UNITED STATES Primary Email: james@gearhartlaw.com Secondary Email(s): ustmdocket@gearhartlaw.com 908-273-0700
Submission	Opposition/Response to Motion
Filer's Name	James Klobucar
Filer's email	james@gearhartlaw.com, ustmdocket@gearhartlaw.com
Signature	/jk/
Date	05/06/2021
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ARCWARE TECHNOLOGIES LLC,	:	
	:	
	:	
Opposer,	:	
	:	
	:	Opposition No. 914267481
v.	:	Serial No. 88770574
	:	
	:	
AGGRECOST LLC,	:	
	:	
	:	
Applicant.	:	

DECLARATION OF JAMES KLOBUCAR, ESQ.

I, James Klobucar, Esq., declare as follows:

1. I am a senior associate at Gearhart Law LLC and am of at least twenty-one (21) years of age.
2. I obtained and prepared Exhibits A-D for the Notice of Opposition filed by Opposer Arcware Technologies LLC in the present opposition proceeding.
3. Exhibit B of the Notice of Opposition shows the appearance of Opposer Arcware Technologies LLC's website (located at www.mybidbox.com) as of June 30, 2017, via the Wayback Machine (located at archiveweb.org/web). June 30, 2017, predates not only the filing date of the Applicant Aggrecost LLC's trademark application but also both the date of first use and date of first use in commerce asserted in Applicant Aggrecost LLC's trademark application.

4. The contents of Exhibits A-D are true and correct copies of the publicly available information obtained at the time of the preparation of the Exhibits.

I declare further that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements are made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Date: 5/6/21

By: James Klobucar

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

ARCWARE TECHNOLOGIES LLC,	:	
	:	
	:	
Opposer,	:	
	:	
	:	Opposition No. 91267481
v.	:	Serial No. 88770574
	:	
	:	
AGGRECOST LLC,	:	
	:	
	:	
Applicant.	:	

OPPOSER'S MEMORANDUM OF LAW IN OPPOSITION TO APPLICANT'S MOTION TO DISMISS OPPPOSER'S NOTICE OF OPPOSITION

Opposer Arcware Technologies LLC ("Opposer") hereby submits this memorandum of law in opposition to the motion to dismiss, by Applicant Aggrecost LLC ("Applicant"), the Opposer's Notice of Opposition (Opposition No. 91267481; hereinafter "Present Proceeding"). The Applicant appears, as best understood by the Opposer, to argue, that Opposer lacks standing to bring/maintain the Present Proceeding and/or a that valid ground exists for denying the Applicant's application for registration.

Applicant's motion for dismissal of the Present Proceeding should be denied because the Opposer has standing to bring/maintain the Present Proceeding and the Notice of Opposition sufficiently states a claim for denial of Applicant's application for registration on at least the grounds of likelihood of confusion and priority.

STATEMENT OF FACTS

Applicant filed a federal trademark application for BIDBOX (U.S. Serial No. 88770574; hereinafter "Applicant Mark" or "Applicant's Mark") on January 23, 2020, claiming a first date of use in commerce of January 15, 2018. The Applicant's Mark was published for opposition on December 8, 2020.

Opposer filed a federal trademark application for BIDBOX (U.S. Serial No. 90315316; hereinafter "Opposer Mark" or "Opposer's Mark") on November 12, 2020, claiming a first date of use in commerce of November 13, 2013.

On January 5, 2021, Opposer filed a thirty (30) day extension of time to oppose Applicant's Mark which was granted January 6, 2021, providing Opposer until February 6, 2021, to file a Notice of Opposition. Opposer filed its Notice of Opposition on February 5, 2021, based on Opposer's prior use of Opposer's Mark and a likelihood of confusion with the Applicant's Mark. Rather than promptly filing an answer to Opposer's Notice of Opposition, Applicant has

filed an incoherent, rambling, and legally insufficient motion to dismiss, whereby this memorandum in law in opposition to the motion to dismiss is needlessly necessitated and timely as submitted for consideration by the Board.

ARGUMENTS

A. OPPOSER HAS STANDING TO BRING/MAINTAIN THIS PRESENT PROCEEDING

It is well established that any person who believes it is or will be damaged by the registration of a mark has standing to file a complaint. TBMP §§303, 309.03(b). 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. TBMP §303.06. A real interest in the proceeding and a reasonable belief of damage may be found, for example, where plaintiff pleads a claim of likelihood of confusion that is not wholly without merit, including claims based upon current ownership of a valid and subsisting registration or *prior use of a confusingly similar mark*. TBMP §309.03(b) (emphasis added).

First and foremost, Opposer reiterates and relies on for the purposes of this memorandum of law any and all facts alleged in its Notice of Opposition. It is without dispute that Applicant and Opposer have both applied for the same trademark (e.g. BIDBOX) in standard character form. The Applicant's Mark claims the following goods: "[d]ownloadable accounting software for use in the construction industry for contract bidding and job accounting" in International Class 009. Opposer's Mark claims the following goods: "downloadable and non-downloadable software for architectural and construction project bidding" in International Class 009. Thus, in addition to the marks being identical, it is without dispute that both trademarks claim goods

within International Class 009. The goods, while residing in the same International Class, are also highly related, if not identical, as the goods for both Applicant's Mark and Opposer's Mark are claimed to be downloadable software for use within the construction industry. Therefore, a likelihood of confusion is not only likely, but it is inevitable, and such confusion will be injurious to the Opposer who has used the BIDBOX mark now for approx. eight years unimpeded. In addition to the inevitable confusion between the marks, Opposer's Mark has claimed priority (e.g. first date of use in commerce and first date of use anywhere) over Applicant's Mark and Opposer has supplied evidence of the same with its Notice of Opposition.

The Opposer has succinctly pleaded a claim of likelihood of confusion based on prior use of a confusingly similar mark. Further, Opposer has filed for their own trademark application for the identical mark as the Applicant. Because Opposer would inevitably be injured, as outlined above, by the registration of Applicant's Mark, Opposer has standing to oppose this application on grounds of likelihood of confusion and priority, and the Board should deny Applicant's motion to dismiss on this basis.

B. OPPOSER'S ALLEGATIONS IN ITS NOTICE OF OPPOSITION ARE NOT DEFECTIVE

In addition to standing, a plaintiff must also plead a statutory ground or grounds for opposition or cancellation. A plaintiff may raise any available statutory ground for opposition or cancellation that negates the defendant's right to registration. TBMP §309.03(c)(1).

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 complaint 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 (in the case of an opposition), or for canceling the subject registration (in the case of a cancellation proceeding). To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." In particular, the claimant 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." TBMP §503.02.

Here, Opposer has plead the following ground for opposition: 1) priority and a likelihood of confusion; 2) no use of the Applicant's Mark in commerce before Applicant's application or amendment to allege use was filed; and 3) misuse of the federal registration symbol by Applicant. However, Applicant appears, as best understood by the Opposer, to base their motion to dismiss solely on Opposer's alleged failure to properly state a claim for priority and a likelihood of confusion. Thus, that is the only ground which Opposer will address and by virtue, the other grounds in Opposer's Notice of Opposition are not challenged as part of this "partial" motion to dismiss and should be accepted as submitted by the Board.

Opposer has alleged in its Notice of Opposition, that "Opposer is the owner of U.S. Trademark Serial No. 90315316 ('Opposer Mark' or 'Opposer's Mark') on the Principal Register for the mark 'BIDBOX' (in standard characters) for 'downloadable and non-downloadable software for architectural and construction project bidding' in International Class 009, which was filed as a 1A ('in use') trademark application on November 12, 2020, and asserts a date of first use at least as early as October 9, 2013 and a date of first use in interstate commerce at least as early as November 13, 2013. This use in commerce has been continuous since inception and continues through present day." 1 TTABVUE 2, ¶2, Ex. A.

Opposer has further alleged that "Opposer is the owner of the website located at https://mybidbox.com that was made public and went live prior to the filing of Applicant's Mark as well as the date of first use alleged therein. The https://mybidbox.com website has

continuously advertised the Opposer's goods and/or services under Opposer's Mark nationwide since before the filing date and date first use (whether in commerce or not) of Applicant's Mark. Opposer's use in commerce of the "BIDBOX" mark has been continuous since inception and continues through present day." 1 TTABVUE 2, ¶3.

Opposer has yet further alleged that "Opposer has spent significant effort in promoting and advertising its goods and services bearing its 'BIDBOX' mark. Opposer has promoted the 'BIDBOX' mark at various tradeshows dating as far back as at least March 2017. At these tradeshows the Opposer has invested in booth setups and marketing materials bearing the Opposer's Mark (*See* Exhibit E). Opposer has further enjoyed significant sales of products and services bearing the 'BIDBOX' mark and has obtained significant income from sales products and associated business services bearing the 'BIDBOX' mark." 1 TTABVUE 3, ¶8.

Opposer has further introduced evidence that demonstrates its BIDBOX trademark being used in commerce long before Applicant applied for its BIDBOX trademark as Opposer has continuously used the mark in commerce since 2013. 1 TTABVUE 2, Ex. B, Ex. C. Opposer further submits herewith a declaration of Attorney James Klobucar, Esq. attesting to true and accurate nature of the documents/images in those Exhibits.

Thus, it is without dispute that Applicant and Opposer have both filed a trademark application for BIDBOX, an identical trademark. It is further without dispute that both trademark applications claim goods within the same International Class (Class 009). It is yet further without dispute that each of the applied for goods in the trademark applications are directed to software for use with the construction industry. Therefore, a likelihood of confusion is not only likely but also inevitable. The two trademark applications cover essentially the exact same goods for the exact same mark. Opposer has further made an evidentiary showing that is date stamped

demonstrating use before Applicant even filed their trademark application. The Opposer has ticked off every box in making a sufficient pleading of a likelihood of confusion and priority.

The Applicant, on the other hand, in its motion to dismiss, makes repeated conclusory statements without any evidentiary or other legally sufficient showing for the same. For example, Applicant states that "ARCWARE has failed to allege facts sufficient to establish that AGGRECOST's BidBox mark, as set forth and described in its application is the same use case and it's [*sic*] marks. It also does not meet such precedent tests." However, Applicant never appears to state how Opposer has failed to sufficiently allege a ground for relief or what precedent tests (and the factors thereof) Applicant alludes. Instead, the Applicant spends the near entirety of its motion on making grandiose statements regarding its BIDBOX "use case" and disparaging Opposer (without merit/evidence) which has no bearing on the deciding of a motion to dismiss for a failure to state a claim.

Thus, the Applicant's motion to dismiss fails to put forth any discernible reason for which the Opposer has not sufficiently plead a likelihood of confusion and priority concerning the BIDBOX trademark. Applicant's motion to dismiss is replete with meandering and muddled "arguments" not supported by any evidence or case law and appears to attempt to argue the overall merits of the Present Proceeding over whether the Notice of Opposition is sufficiently pleaded. A motion to dismiss is an improper vehicle to argue the merits of a case and any such argument should be wholly disregarded by the Board. To the extent necessary, Opposer vehemently denies and condemns any and all specious allegations made by Applicant in its motion to dismiss concerning the Opposer or otherwise.

In the event that the Board finds, upon determination of Applicant's motion, that the complaint fails to state a claim upon which relief can be granted, the Board is requested to allow Opposer an opportunity to file an amended pleading and issue an order regarding the same,

otherwise, the Applicant must be ordered to immediately answer Opposer's Notice of Opposition in the Present Proceeding.

CONCLUSION

As Opposer asserts that Opposer has standing and has sufficiently pleaded a claim for relief in its Notice of Opposition, the Opposer respectfully requests that the Applicant's Motion to Dismiss be denied, and the Board order the Applicant submit an answer to Opposer's Notice of Opposition.

Respectfully submitted,

Dated: May 6, 2021

*s/*Richard Gearhart

Richard Gearhart
James Klobucar
Gearhart Law, LLC
41 River Road
Summit, New Jersey 07901
Telephone: (908) 273-0700
Fax: (908) 273-0711
Email: rgearhart@gearhartlaw.com
james@gearhartlaw.com
ustmdocket@gearhartlaw.com

ATTORNEYS FOR OPPOSER

CERTIFICATE OF SERVICE

I hereby certify that the foregoing OPPOSER'S MEMORANDUM OF LAW IN OPPOSTION TO APPLICANT'S MOTION TO DISMISS OPPPOSER'S NOTICE OF OPPOSITION was served on Applicant by email at the address(es) below on May 6, 2021:

Anthony P. Urbano
anthony@aggrecost.com
Aggrecost LLC
PO Box 973
Orange, Connecticut 06477

By: *s/*James Klobucar