Trademark Trial and Appeal Board Electronic Filing System. https://estta.uspto.gov

ESTTA Tracking number: **ESTTA1125906**

Filing date: **04/08/2021**

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

Proceeding	91267975
Party	Defendant BrandLab Inc.
Correspondence Address	ZHENG "ANDY" LIU APTUM LAW 1875 S GRANT STREET SUITE 520 SAN MATEO, CA 94402 UNITED STATES Primary Email: andy@quan.legal Secondary Email(s): andy.liu@aptumlaw.us 650-475-6289
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	zheng liu
Filer's email	Andy.Liu@aptumlaw.us
Signature	/zal/
Date	04/08/2021
Attachments	Motion.pdf(202815 bytes)

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

In re the Matter of:

Li Jiajia and Sichuan Ziqi Culture) Culture Communication Co., Ltd.**,** **Opposer**, v. BrandLab Inc.**,** **Applicant**.	Opposition No. 91267975 Trademark Application Serial No. 88/977,902

MOTION TO DISMISS UNDER RULES 9(b) AND 12(b)(6); AND

MOTION FOR A MORE DEFINITIVE STATEMENT UNDER RULE 12(2)

PRELIMINARY STATEMENT

It is a chronicle problem known to the USPTO that Chinese company, like Sichuan Ziqi Culture Communication Co., has a lengthy history of making false statements and submitting forged specimens. In fact, the Commissioner for Trademark Mary Boney Denison opined that

> "in recent years, the USPTO has seen a significant increase in the number of applicants who are not fulfilling their legal and ethical obligations to file accurately and in good faith, particularly with respect to claims that the mark is in use in commerce.
>
> …..
>
> While some of the filings with inaccurate or possibly **fraudulent claims of use of the mark** are domestic, a significant and increasing number of these **come from overseas**, **primarily from mainland China**. Often, those applicants are

improperly represented by unauthorized Chinese practitioners who evade USPTO sanctions[1].

Further, at the last meeting of the Trademark Policy Advisory Council ("TPAC"), the Commissioner of Trademarks had this to say:

> "There's been a dramatic increase on ***Chinese filings***. A lot of seem to be not legitimate. . .
>
> It is a really dramatic increase and expected to continue to go up. But one of the things that hits our examining attorneys on a daily basis is specimens, because people are sending in fake ones. So, they're filing [a use based] application and sending in a photograph of, say, some shoes with a tag on them. It looks like a great specimen until you see the same pair of shoes with the same shadow in the photograph 10 times filed by different applicants with different marks. And then you realize, gee, somebody's gaming the system. So, we have an examining attorney on detail full time to try to find these."

In fact, the dramatic increase in Chinese filings have been detailed by the World Trademark Report and the USPTO, and the USPTO has launched a pilot program to allow third parties to help report fake specimens.

In contrast, unlike those associated with Opposers and their marks and specimens, all persons and entities associated with this Applicant are longtime residents of the United States, whom may be subject to severe sanctions for misconducts.

It is against this backdrop, that Applicant respectfully submits that this baseless opposition should be considered.

LEGAL STANDARD

A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a complaint. FED. R. CIV. P. 12(b)(6).

[1] https://www.uspto.gov/about-us/news-updates/statement-commissioner-trademarks-mary-boney-denison-united-states-house

To defeat such a motion, a plaintiff must plead such facts that, if true, would establish that 1) the plaintiff has standing to continue the proceeding, and 2) a just ground exists for dismissing the subject registrations. *Young v. AGB Corp.*, 47 U.S.P.Q.2d 1752, 1755 (Fed. Cir. 1998); TBMP § 503.02 (2015).

If there is no legal cause for a claim as pled by a litigant, the claim must be dismissed. *See Baroid Drilling Fluids Inc. v. Sun Drilling Prods.*, 24 USPQ2d 1048, 1049 (TTAB 1992); FED. RULE CIV. P. 12(b).

A. More definitive statement are required, otherwise neither Ms. Jiajia Li nor Sichuan Ziqi Culture Communication Co., Ltd., has standing.

In the notice of opposition, it is unclear what is the relationship between Ms. Jiajia Li and Sichuan Ziqi Culture Culture Communication Co.

Ms. Jiajia Li alleges that Sichuan Ziqi Culture Communication Co. is "her company," but fails to elaborate on what "her company" means legally. Namely, what is the percentage interest Ms. Jiajia Li owns in Sichuan Ziqi Culture Communication Co. Ms. Jiajili is an employee or independent contractor of Sichuan Ziqi Culture Communication Co.?

Without an ownership claim of some sort, Ms. Jiajia Li does not have standing to oppose this Application.

Further, Applicant respectfully request the Board order Opposers to provide a more definitive statement about what Ms. Jiajia Li's Chinese name is. The opposition pleads inconsistent statements in this regard: on one hand, Ms. Jiajia Li's China name is translated in this opposition as Jiajia Li; on the other hand, Opposers alleges that Ms. Jiajia Li's Chinese name is transliterated in to LIZIQI.

The phrase "Jiajia Li" is a word way from the phrase "LIZIQI."

Additionally, Sichuan Ziqi Culture Communication Co. claims to own related trademark application, but all allegations state about Ms. Jiajia Li being the network personality being affected.

Sichuan Ziqi Culture Communication Co. has thus not sufficiently pled its standing.

B. Opposers have no priority in commerce and its likelihood of confusion claim fails.

First, Opposers claim of priority is insufficiently pled.

To establish priority of use, a party must show that its owns a mark or trade name previously used in the United States and not abandoned.

In the opposition, Opposers merely state that "Opposers have used the LIZIQI Marks prior to Applicant's adoption, use and application to register the Opposed LIZIQI Mark." Opposes thus do not even alleged that they use the used the LIZIQI Marks prior to Applicant's adoption—in commerce.

In fact, all marks cited by opposers in this opposition proceeding are Intent-to-use marks. Opposers' allegations are thus contradicted by their own sworn statements made in the cited marks owned by them. The allegations made by Opposers in this oppositions are thus sham pleadings, which are an obviously frivolous or absurd pleading that is made only for purposes of vexation or delay. It is a written pleading that is factually false, not made in good faith, and that may be struck.

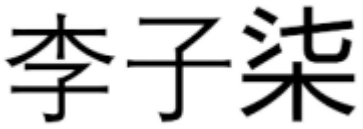
Second, without priority, the likelihood of confusion claims, all marks cited by Opposers were filed after the filing of Applicant's mark. Without a valid claim of priority, a later-filed mark has no likelihood of confusion claims against an earlier-filed mark.

Opposers' claim priority and likelihood of confusion claim should be dismissed without leave to amend, because Opposers' own sworn statements establishes that there can be no valid claim of priority.

C. Opposers' dilution claim must fail because Opposer's marks are not famous.

As a threshold matter, in all marks cited by Opposers (except for class 35), Opposers conceded under the penalty of perjury that they filed all other applications on the Intent to User basis. In other words, Opposers concede that they never used the mark in any classes outside class 35 before February 23, 2020—after Applicant filed its own mark in class 30 on December 18, 2019.

A mark could not be famous before it was even used. As such, Opposer's allegation that they mark is famous must fail.

Further, many similar marks existed before Opposers filed their marks. For example, https://liziqishop.com/ and https://liziqicn.com/ have used the phrase "LIZIQI" or its Chinese equivalent 

.

Opposers' mark is thus not famous. If a mark is not famous, there is no dilution claim.

D. Opposers' false connection claim must fail because it is incorrectly pled.

To establish that a proposed mark falsely suggests a connection with a person or an institution, it must be shown that:

1. the mark is the same as, or ***a close approximation of, the name or identity previously used by another person or institution***;
2. the mark would be recognized as such, in that it points uniquely and unmistakably to that person or institution;
3. the person or institution named by the mark is not connected with the activities performed by the applicant under the mark; and
4. the fame or reputation of the person or institution is such that, when the mark is used with the applicant's goods or services, a connection with the person or institution would be presumed.

In re Pedersen, 109 USPQ 2d 1185, 1188-89 (TTAB 2013);*see also Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co., 703 F.2d 1372, 1375-77, 217 USPQ 505, 508-10 (Fed. Cir. 1983) (providing foundational principles for the current four-part test used to determine the existence of a false connection).*

Here, Opposers merely alleged that "Applicant's Opposed LIZIQI Mark is the same as or a close *approximation of the LIZIQI Marks owned by Opposers.*"

An approximation to *another mark* owned by another entity does not support a false connection claim, because "a close approximation of, *the name or identity* previously used by another person or institution" is required.

Opposers false connection claim must thus be dismissed for having been inadequately pled.

E. Opposers' ownership claim is unavailing because Opposers concede under penalty of perjury that they did not own the marks that they claim they owned.

Opposers broadly allege that they are "the rightful owner of the LIZIQI Marks for [class 35] goods and services." To support this allegation, Opposers alleges that they began using the LIZIQI mark in in commerce since August 21, 2017—only for class 35.

As a threshold question, being owner of a mark in one class (e.g., class 35) does not provided a lack of ownership claim against another entity for a similar mark in a different class (e.g., class 30).

Thus, Opposers has not even sufficiently pled the ownership claim, which should thus be dismissed without leave to amend.

In fact, for all other classes in all other marks cited by Opposers, however, Opposers conceded under the penalty of perjury that they filed all other applications on the Intent to User basis. In other words, Opposers never used the mark before February 23, 2020—after Applicant filed its own mark in class 30 on December 18, 2019.

One could not own something that she did not have.

Here, Opposers could not be the owner of the LIZIQI mark outside the classes 35 before February 23, 2020. Thus, Opposers' ownership claim must fail, which should thus be dismissed without leave to amend.

F. Opposers' fraud-on-USPTO claims should be dismissed for failure to meet the heightened pleading standard under Rule 9(b).

As a threshold matter, Opposers' fraud claims fraud on the USPTO claims, because all claims of fraud relate to statements Applicant made to the USPTO.

In Cancellation Proceeding 92065388, the Board remarked that "the allegations of ownership and exclusive use contained in the declaration or verification accompanying an application are made upon 'belief' and/or 'information and belief' and, as such, are couched in such a manner as to preclude a definitive statement by the affiant that could be ordinarily used to support a charge of fraud" citing *Kemin Indus., Inc. v. Watkins Prods., Inc.*, 192 USPQ 327, 329 (TTAB 19776) and 6 *McCarthy on Trademarks and Unfair Competition* § 31:75-76 (5th ed.) (2017 update).

Allegations of fraud must be specific; a litigant cannot satisfy the deceptive intent requirement by mere inferences drawn from lesser evidence. *In re Bose Corp.*, 580 F.3d 1240, 1242 (Fed. Cir. 2009).

Thus, Opposers' allegation of fraud-on-USPTO made based on mere 'information and belief' do not meet the burden of pleading a sustainable fraud claim.

G. Opposers' request that the application is *void ab initio* is inappropriate and must be dismissed.

As a threshold matter, deeming an application *void ab initio* is not a cause of action. It is a type of relief that might be sought. It is thus inappropriate for application to list such as a ground for opposition.

Next, and more substantively, Opposers' allegations here are essentially the same fraud-on-USPTO claim as baselessly made above. Applicant has filed an allegation of use and with verified specimen—both under the penalty of perjury.

In contrast, except the fancy Latin phrase, Opposers present no actual evidence whatsoever about this supposed non-use and fraud-on-USPTO claims. Instead, Opposers, on mere "information and belief," allege these specimens and use statements filed under penalty of perjury as false.

Allegations of fraud must be specific; a litigant cannot satisfy the deceptive intent requirement by mere inferences drawn from lesser evidence. *In re Bose Corp.*, 580 F.3d 1240, 1242 (Fed. Cir. 2009).

Thus, Opposers' allegation application is *void ab initio* made based on mere 'information and belief' do not meet the burden of pleading a sustainable fraud claim.

CONCLUSION

Applicant respectfully request the Board dismiss this opposition in its entirety without leave to amend.

Dated: April 8, 2021

Respectfully submitted,

Zheng "Andy" Liu (SBN 279327)
Attorneys for Applicant