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ESTTA Tracking number: **ESTTA1164034**

Filing date: **10/05/2021**

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

Proceeding	91271308
Party	Defendant WhizSolve Pte. Ltd.
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Date	10/05/2021
Attachments	2021-10-05-WHIZSOLVE-Motion to Dismiss and for More Definite Statemen t.pdf(164016 bytes)

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

SNAP INC. Opposer, v. WHIZSOLVE PTE. LTD., Applicant.	Opposition No. 91271308 Serial No.: 88880340 Mark: SNAPSOLVE Classes: 9, 16, 41, 42 Published: April 27, 2021

MOTION TO DISMISS NOTICE OF OPPOSITION AND FOR A MORE DEFINITE STATEMENT

Applicant, Whizsolve Pte. Ltd. ("Whizsolve" or "Applicant"), in lieu of its Answer, hereby moves for dismissal of the cause of action for dilution by blurring under the Trademark Dilution Revision Act ("TDRA"), and for a more definite statement under Fed. R. Civ. P. 12(e) for the claim of likelihood of confusion under Section 2(d) of the Lanham Act.

I. FACTS

Opposer Snap, Inc. ("Snap" or "Opposer") has commenced its opposition against Whizsolve under the asserted grounds in its ESTTA cover sheet for "dilution by blurring" under the TDRA, 15 U.S.C. § 1125(c)(2)(A)-(B), and "priority and likelihood of confusion" under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), based on priority of registration, and common law uses with no defined first use. (1 TTABVUE.)

Notwithstanding the noticed grounds for opposition as stated in the ESTTA coversheet, the substantive Notice of Opposition pleading does not correspond to these grounds. Opposer does not plead the elements of a dilution by blurring claim, except to allege a conclusory statement of damage. (*See* 1 TTABVUE 12-13 at ¶ 16.)

On its Section 2(d) claim, in addition to alleging priority of rights based on registrations, Snap also asserts common law rights in SNAPCHAT for "non-downloadable software for providing solutions to math problems," but does not state an alleged first use date(s). (*See* 1 TTABVUE.) There is no corresponding date of such use in the Notice of Opposition. (*See id*.) The only first use dates alleged in the Notice are as to Snap's identified federal registrations. (1 TTABVUE 2 at ¶ 3.) The substantive pleading makes no mention of the common law use claimed.

These allegations are incomplete and must be dismissed, or with respect to any assertion of common law rights, Snap must either plead its first use or withdraw those "rights" as a basis for opposition.

II. ARGUMENT

A. Legal Standard

In deciding a motion to dismiss under Rule 12(b)6, the Board must accept as true all "well-pleaded factual allegations." However, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (*quoting Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Twombly*, 550 U.S. at 570). "A claim has facial plausibility," and thus survives a motion to dismiss, "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (*citing Twombly*, 550 U.S. at 556). Snap has asserted grounds of opposition that are not supported by its pleadings and has made no more than conclusory statements. Such allegations fail to meet the *Twombly*/*Iqbal* pleading standard.

B. Opposer Snap's Claim For Dilution By Blurring Should Be Dismissed Under Fed. R. Civ. P. 12(b)(6)

Snap's allegation of dilution by blurring under the TDRA must be dismissed for failure to state a claim for which relief may be granted. *See Twombly*, 550 U.S. at 570. It is a conclusory allegation with no facial plausibility. (*See* 1 TTABVUE 12-13 at ¶ 16.)

Snap has not met the plausibility standard required to withstand dismissal under Fed. R. Civ. P. 12(b)6. A claim is plausible on its face when the plaintiff pleads factual content that if proved, would allow the Board to conclude or draw a reasonable inference that the plaintiff has a valid ground for cancellation. *Corporacion Habanos SA v. Rodriguez*, 99 USPQ2d 1873, 1874 (TTAB 2011). Federal pleading rules call for "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This requires more than simply naming a claim (which Snap has done in the ESTTA coversheet) but, rather, "[a] plaintiff ... must plead facts sufficient to show that her claim has substantive plausibility." *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (*per curiam*) (*citing Twombly*, 550 U.S. 544, and *Ashcroft v. Iqbal*, 556 U.S. 662). Here, there are no factual allegations that "raise a right to relief [for dilution by blurring] above the speculative level." *Twombly*, 550 U.S. at 545. Thus, the claim is "fatally flawed," even if construed in the light most favorable to Opposer. *See Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993).

The ESTTA coversheet asserts "dilution by blurring" as a ground for opposition. The substantive pleading alleges in Paragraph 16 dilution by blurring under Section 43(c)(1) of the Lanham Act, 15 U.S.C. §1125(c)(1). (*See* 1 TTABVUE 12-13 at ¶ 16.) However, nowhere in the papers does Snap plead the necessary elements of the claim. The elements of a dilution by blurring claim require pleading and proving that 1) the plaintiff owns a famous mark; 2) the

defendant is using in commerce or intending to use a mark that allegedly dilutes the plaintiff's famous mark; 3) the defendant's use (or application) began after the plaintiff's mark became famous; and 4) the defendant's use is likely to cause damage. *Nike Inc. v. Maher,* 100 USPQ2d 1018, 1023 (TTAB 2011).

Other than asserting damage, Opposer's statements are entirely conclusory and do not withstand dismissal. Snap has not alleged fame of its mark under the TDRA. A mark is deemed famous if it "is widely recognized by the ***general consuming public*** of the United States as a designation of source of the goods or services of the mark's owner." 15 U.S.C. § 1125(c)(2)(A) (emphasis added). Niche fame is insufficient for pleading dilution by blurring under the statute. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1372, 101 USPQ2d 1713 (Fed. Cir. 2012). At best, Opposer alleges that it is known by and used by a niche group of consumers – it claims that it has a "79% market share among teenagers and young adults," which is a niche market. (1 TTABVUE 3-4 at ¶ 6.) There is no allegation that the mark is recognized by the general public. While Snap alleges that "an average of 249 million people use the SNAPCHAT application daily," there is no allegation that these are U.S. consumers. (*Id.* at ¶ 10.)

Moreover, there is no allegation that the SNAPCHAT mark became famous before the March 2020 priority date of Applicant's SNAPSOLVE application. *Coach Servs.*, 668 F.3d at 1373. A mere allegation of use prior to a defendant's adoption of a mark is insufficient to withstand dismissal of a TDRA claim. *Id*. at 1374. Finally, there is no allegation that the allegedly famous SNAPCHAT mark is famous in the United States.

Accordingly, Opposer Snap has failed to sufficiently plead its dilution by blurring claim under Rule 12(b)(6).

C. Applicant Requests A More Definite Statement Under Fed. R. Civ. P. 12(e) On Opposer's Claim Of Common Law Use

Applicant requests that Opposer either delete as a basis for opposition its purported common law use or amend its pleadings for a more definite statement. Fed. R. Civ. P. 12(e) allows a defendant to request a "more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." If a pleading "fails to specify the allegations in a manner that provides sufficient notice" or does not contain enough information to allow a responsive pleading to be framed, the proper motion to be filed is a motion for a more definite statement. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002). A court may "grant a Rule 12(e) motion 'when the pleading is so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith, without prejudice to [itself].'" *MK Strategies, LLC v. Ann Taylor Stores Corp*., 567 F. Supp. 2d 729, 736-37 (D.N.J. 2008) (citations omitted).

It is well-established that the ESTTA coversheet is considered part of the pleadings in an opposition. *See PPG Indus. Inc. v. Guardian Indus. Corp.*, 73 USPQ2d 1926, 1928 (TTAB 2005) ("Since ESTTA's inception, the Board has viewed the ESTTA filing form and any attachments thereto as comprising a single document or paper being filed with the Board") *accord*, *Urock Network, LLC v. Umberto Sulpasso*, 115 USPQ2d 1409 n.2 (TTAB 2015); *Hunt Control Sys. Inc. v. Koninklijke Philips Electronics N.V*., 98 USPQ2d 1558, 1561 (TTAB 2011) ("[The ESTTA] form, along with any attached supplementary elaboration of the basis for the opposition, serves as the complaint in the opposition proceeding"); *Schott AG v. Scott*, 88 USPQ2d 1862, 1863 n.3 (TTAB 2008) ("[T]he ESTTA generated filing form … is considered part of the plaintiff's initial pleading").

Snap has alleged in its ESTTA coversheet use of the SNAPCHAT mark for "non-downloadable software for providing solutions to math problems." Significantly, by not expanding on that allegation, or even mirroring a claim of such common law rights in the Notice of Opposition, Applicant cannot determine if the allegation should be dismissed under Rule 12(b)(6) as it is unclear whether Opposer has asserted a claim of priority. There is no way to respond to the allegation or defend against it since it is only found in the ESTTA coversheet. A party asserting common law rights in a mark as a basis to oppose registration under Section 2(d), 15 U.S.C. § 1052(d), must, in addition to proving a likelihood of confusion, prove that it has priority based on its alleged ownership of common law rights in its mark. *See, e.g., Hoover Co. v. Royal Appliance Mfg. Co*., 238 F.3d 1357, 57 USPQ2d 1720, 1721 (Fed. Cir. 2001). Without a written allegation, Whizsolve has no means to respond, dispute or move to dismiss. For this reason, the assertion of a common law use must be dropped, or plead in a manner that permits Whizsolve to respond.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that Opposer's allegation for dilution by blurring under the TDRA be dismissed, and Opposer's claim under Section 2(d) based on purported common law use either be dismissed, or that Opposer be directed to prepare a more definite statement.

Dated: October 5, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa Bollinger Gehman, hereby certify that on October 5, 2021, a true and correct copy of the foregoing MOTION TO DISMISS NOTICE OF OPPOSITION AND FOR A MORE DEFINITE STATEMENT has been served via e-mail upon counsel for the Opposer:

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