

ESTTA Tracking number: **ESTTA1355873**Filing date: **05/01/2024**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	91289331
Party	Plaintiff NIHC, Inc.
Correspondence address	KENT E BALDAUF JR THE WEBB LAW FIRM 420 FT DUQUESNE BLVD SUITE 1200 ONE GATEWAY CENTER PITTSBURGH, PA 15222 UNITED STATES Primary email: trademarks@webblaw.com Secondary email(s): kbaldaufjr@webblaw.com, gvadala@webblaw.com 412-471-8815
Submission	Opposition/Response to Motion
Filer's name	Kent E. Baldauf, Jr.
Filer's email	trademarks@webblaw.com, kbaldaufjr@webblaw.com, moliver@webblaw.com, gvadala@webblaw.com
Signature	/Kent E. Baldauf, Jr./
Date	05/01/2024
Attachments	Opposers Opposition to Applicants Motion to Dismiss.pdf(420444 bytes)

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

NIHC, INC.,)	Opposition No. 91289331
)	
Opposer,)	Application Serial No. 97/660,324
)	
v.)	Trademark: RACKS
)	
JAMES LINDSAY,)	Published: September 26, 2023
)	
Applicant.)	

**OPPOSER’S OPPOSITION TO APPLICANT’S MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM**

NIHC, Inc., (“Opposer”), by and through its undersigned counsel, hereby files this response in opposition to Applicant’s Motion to Dismiss. For the reasons expressed below, Opposer respectfully requests that Applicant’s motion be denied.

I. Background

On April 11, 2024, Applicant James Lindsay (“Lindsay”) filed a Motion to Dismiss under FRCP 9(b) and 12(b)(6). Lindsay correctly recites that in order to survive a motion to dismiss under FRCP 12(b)(6), “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) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Lindsay also relies on FRCP 9(b) which refers to the pleading requirements for fraud or mistake, and states of mind. However, neither fraud, mistake, nor any states of mind are at issue in this opposition.

II. Argument

Opposer stated a claim upon which relief can be granted. The Notice of Opposition (Dkt. 1) pleads with ample specificity a factual basis for opposition. The Notice plainly satisfies the *Twombly* standard.

Lindsay's motion does not address the relevant pleading standard and is improper at this stage of the proceedings. Instead of addressing the sufficiency of the pleadings, Lindsay argues the merits of this opposition, namely the ultimate issue of whether "RACK" and "RACKS" are similar enough to likely cause confusion. These arguments are premature and inappropriate in a motion to dismiss for failure to state a claim. Nevertheless, it must be noted that the sole case relied upon by Lindsay in its argument on the merits, *In re Hearst Corp.*, 982 F.2d 493, 494 (Fed. Cir. 1992) is misguided. In *Hearst*, the Federal circuit noted that "undoubtedly 'varga' and 'vargas' are similar" but the inclusion of "girl" reduced the likelihood of confusion. *Id.* Here, the Marks are "RACK" and "RACKS" which, like "VARGA" and "VARGAS", are undoubtedly similar but, unlike in *Hearst*, there is no additional word to negate confusion.

Again, the ultimate issue of a likelihood of confusion between "RACK" and "RACKS" is not the proper inquiry at this stage of the proceeding. Instead, under *Ashcroft* and *Twombly*, the Notice of Opposition must only contain sufficient facts, accepted as true, to set forth a plausible claim on its face. The Notice of Opposition easily satisfies this standard as it states with specificity a factual basis for opposition. Opposer goes well beyond legal conclusions and recitation of the elements. In the Notice of Opposition, Opposer asserts more than a general statement that the marks are confusingly similar. Rather, Opposer explains why there is a likelihood of confusion, namely, that Lindsay's mark is "similar in sound and appearance to Opposer's marks" (Dkt. 1, ¶10), that Lindsay's and Opposer's respective goods are "likely to be sold in the same channels of trade" (Dkt. 1, ¶11), that use of Lindsay's mark will "cause confusion or to cause mistake, or will deceive the public into believing that said goods emanate from Opposer and/or are licensed by Opposer and/or are approved by Opposer" (Dkt. 1, ¶12), and that if Lindsay's mark is to register it will adversely affect the "goodwill associated with Opposer's marks" (Dkt. 1, ¶13). Accepting

these statements as true, the Notice of Opposition easily meets the necessary requirements to survive a Motion to Dismiss for Failure to State a Claim under FRCP 12(b)(6).

III. Conclusion

WHEREFORE, Opposer respectfully requests that Applicant's Motion to Dismiss be denied.

Respectfully submitted,

THE WEBB LAW FIRM

Dated: May 1, 2024

s/ Kent E. Baldauf, Jr.

Kent E. Baldauf, Jr. (Reg. No. 36,082)

One Gateway Center
420 Ft. Duquesne Blvd., Suite 1200
Pittsburgh, PA 15222
412.471.8815
412.471.4094 (fax)
kbaldaufjr@webblaw.com
trademarks@webblaw.com
Attorneys for Opposer, NIHC, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2024, I electronically filed the foregoing **OPPOSER'S OPPOSITION TO APPLICANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** with the TTAB using the ESTTA system. A true and correct copy of same was also served, via email, upon the following:

Mr. William A. Wooten
WOOTEN LAW OFFICE
120 Court Square East
Covington, TN 38019
wawooten@gmail.com
wailindanieley@gmail.com
trey.gerrell@gmail.com
blair.chunn@gmail.com
(*Counsel for Applicant*)

THE WEBB LAW FIRM

s/ Kent E. Baldauf, Jr.
Kent E. Baldauf, Jr.