UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Baxley

Mailed: June 15, 2016

Opposition No. 91225704

True LLC

v.

Trapsoul, Inc.

By the Trademark Trial and Appeal Board:

Trapsoul, Inc. ("Applicant") filed an intent-to-use application under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), to register the mark TRAPSOUL in standard characters for "Audio and video recordings featuring music and artistic performances" in International Class 9 and "Entertainment, namely, live music concerts" in International Class 41.[1] True LLC ("Opposer") filed a notice of opposition to registration of Applicant's mark. The ESTTA cover form of the notice of opposition indicates that Opposer alleges claims of (1) priority and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on the mark TRAPSOUL for goods in International Class 25 and services in International Class 41.[2]

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[1] Application Serial No. 86613095, filed April 28, 2015.

[2] Opposer pleads its intent-to-use Application Serial No. 86614447, filed April 29, 2015, for the mark TRAPSOUL for "A-shirts; Apparel for dancers, namely, tee shirts, sweatshirts, pants, leggings, shorts and jackets; Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Athletic shirts; Baseball caps and hats; Body shirts; Button down shirts; Camouflage shirts; Clothing, namely, shirts and hats; Collared

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In lieu of an answer, Applicant, on February 16, 2016, filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Because such motion was served by mail on February 16, 2016, Opposer's brief in response to that motion was due by March 7, 2016. *See* Trademark Rules 2.119(c) and 2.127(a). After Opposer filed an untimely brief in response on March 10, 2016, Applicant, on March 22, 2016, filed a motion to strike Opposer's brief in response to the motion to dismiss.

Although no brief in response to the motion to strike is of record, the Board, in its discretion, will decide that motion on the merits. *See* Trademark Rule 2.127(a); TBMP § 502.04 (2015). For the Board to consider Opposer's brief in response, Opposer must make a showing that its failure to timely respond to the motion to dismiss was caused by excusable neglect.[3] *See* Fed. R. Civ. P. 6(b)(1)(B); TBMP §

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shirts; Dress shirts; Fashion hats; Golf shirts; Graphic T-shirts; Hats; Hats for infants, babies, toddlers and children; Headgear, namely, hats, caps; Hooded sweat shirts; Leather hats; Long-sleeved shirts; Moisture-wicking sports shirts; Night shirts; Open-necked shirts; Over shirts; Polo shirts; Rain hats; Rugby shirts; Shirt fronts; Shirts; Shirts and short-sleeved shirts; Shirts and slips; Shirts for infants, babies, toddlers and children; Shirts for babies, adults, children, women, men; Short-sleeved or long-sleeved t-shirts; Short-sleeved shirts; Sleep shirts; Small hats; Sport shirts; Sports caps and hats; Sports shirts; Sports shirts with short sleeves; Sweat shirts; T-shirts; T-shirts for babies, adults, children, women, men; Tee shirts; Toboggan hats; Turtle neck shirts; Wearable garments and clothing, namely, shirts; Wind shirts; Women's clothing, namely, shirts, dresses, skirts, blouses; Women's hats and hoods; Yoga shirts" in International Class 25 and "Multimedia publishing of books, magazines, journals, software, games, music, and electronic publications; On-line journals, namely, blogs featuring hip hop music, culture, and lifestyle; Providing a website featuring blogs and non-downloadable publications in the nature of articles in the field(s) of hip hop music, culture, and lifestyle; Providing on-line magazines in the field of hip hop music, culture, and lifestyle; Providing on-line non-downloadable general feature magazines; Publication of electronic magazines" in International Class 41.

[3] There are four factors to be considered, in the context of all the relevant circumstances, to determine whether a party's neglect of a matter is excusable. They are: (1) the danger of prejudice to the non-moving party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and, (4) whether the moving party has acted in good

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509.01(b). A review of Opposer's brief in response indicates that it includes no showing of excusable neglect. Accordingly, Applicant's motion to strike is granted as well-taken, and Opposer's brief in response to the motion to dismiss will receive no consideration in deciding the motion to dismiss.

Notwithstanding the foregoing, the filing of the brief in response to the motion to dismiss clearly indicates that Opposer does not concede the motion to dismiss. Accordingly, the Board, in its discretion, will decide the motion to dimiss on the merits. *See* Trademark Rule 2.127(a); TBMP § 502.04.

A motion to dismiss for failure to state a claim is a test solely of the legal sufficiency of the complaint.[4] To withstand a motion to dismiss for failure to state a claim in a Board cancellation proceeding, the plaintiff need only allege such facts as would, if proved, establish that (1) it has standing, and (2) a valid ground exists for cancelling the subject registration. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982). Specifically, "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, 129 S. Ct. 1937, 1949-50 (2009), *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In particular, a plaintiff

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faith. *See Pioneer Investment Services Company v. Brunswick Associates Limited Partnership,* 507 U.S. 380, 395 (1993). These factors do not carry equal weight. *See FirstHealth of the Carolinas Inc. v. CareFirst of Maryland Inc.,* 479 F.3d 825, 81 USPQ2d 1919, 1921-22 (Fed. Cir. 2007) (Court affirmed finding of no excusable neglect based on second and third factors, with third weighed heavily in the analysis). The Board has noted on numerous occasions that, as several courts have stated, the third factor may be considered the most important factor in any particular case. *See, e.g., Pumpkin Ltd. v. The Seed Corps,* 43 USPQ2d 1582, 1586 n.7 (TTAB 1997).

[4] Accordingly, the exhibits to the notice of opposition have received no consideration. *See* Trademark Rule 2.122(c); TBMP § 503.04.

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need only allege "enough factual matter ... to suggest that [a claim is plausible]" and "raise a right to relief above the speculative level." *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346 (Fed. Cir. 2010).

Regarding Opposer's standing to oppose, the starting point for a standing determination in an opposition proceeding is Trademark Act Section 13(a), 15 U.S.C. § 1063(a), which provides that "[a]ny person who believes that he would be damaged by the registration of a mark upon the [P]rincipal [R]egister ... may ... file an opposition in the Patent and Trademark Office, stating the grounds therefor...." Section 13 of establishes a broad class of persons who are proper opposers; by its terms the statute only requires that a person have a belief that he would suffer some kind of damage if the mark is registered. That is, that person must have a real interest in the proceedings, i.e., a personal interest in the outcome of the proceeding, and a reasonable basis for a belief of damage. *See, e.g., Universal Oil Prod. Co. v. Rexall Drug & Chem. Co.*, 463 F.2d 1122, 1123, 174 USPQ 458, 459 (CCPA 1972). There is no requirement that actual damage be pleaded and proved to establish standing or to prevail in an opposition proceeding. *See Ritchie v. Simpson,* 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

Regarding Opposer's pleading of standing, the allegations set forth in paragraphs 1 through 3 and 9 and 10 would ordinarily indicate a personal interest in the proceeding and a reasonable belief of damage. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189-90 (CCPA 1982);

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American Vitamin Products Inc. v. Dow Brands Inc., 22 USPQ2d 1313, 1314 (TTAB 1992). However, the allegations in paragraphs 14 through 18 of the notice of opposition indicate that Articles of Dissolution of Opposer were filed with the Secretary of State of the State of Kentucky on August 18, 2015. Opposer alleges that such filing was fraudulent and ineffective because such articles were filed without the written consent of all of Opposer's members in compliance with Kentucky Revised Statute § 275.285(3). However, Opposer raised the issue of its dissolution without clarifying that was active and in good standing when it filed the notice of opposition.

Under Kentucky Revised Statute § 275.300 (2010), a "dissolved limited liability company shall continue its existence but shall not carry on any business except that appropriate to wind up and liquidate its affairs…." If Opposer was dissolved, its filing of the notice of opposition may not constitute business appropriate to wind up and liquidate Opposer's affairs and therefore may have been impermissible under Kentucky law.[5]

Opposer must plead and later establish that it had standing when it filed the notice of opposition. *See Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2008 (TTAB 2015). Because the notice of opposition raises questions regarding whether Opposer was dissolved when it filed the notice of opposition, Opposer has failed to adequately plead its standing to maintain this proceeding. *Cf. Paradise Creations Inc. v. UV Sales Inc.*, 315 F.3d 1304, 65 USPQ2d 1293, 1296 (Fed. Cir. 2003)

[5] The Board is empowered only to determine registrability and is not authorized to make determinations regarding a business entity's alleged dissolution. *See* TBMP § 102.01.

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