UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Faint

Mailed: July 28, 2016

Cancellation No. 91227572

Hummel Holding A/S

v.

Thread Wallets

By the Trademark Trial and Appeal Board:

This case now comes before the Board for consideration of Applicant's motion, filed June 3, 2016, pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Opposer's notice of opposition for failure to state a claim upon which relief may be granted. Opposer filed a timely response to Applicant's motion.[1]

Background

Applicant seeks to register the mark:

[1] Applicant filed two motions to dismiss on the same date. By its order of June 9, 2016, the Board noted that the docket entry number 5 was the operative motion.

for backpacks and wallets in Class 18.[2]

By the notice of opposition, filed April 27, 2016, Opposer alleges claims of priority and likelihood of confusion under Trademark Act § 2(d), that the mark is void ab initio as to backpacks because the mark was not used in commerce for those goods prior to the filing of Applicant's use-based application, and fraud based on non-use as to backpacks.

In lieu of filing an answer to the notice of opposition, Applicant filed a motion to dismiss for failure to state a claim upon which relief may be granted. In support of its motion, Applicant maintains that Opposer has failed to set forth allegations to support any of its asserted claims.[3]

Analysis

To withstand a motion to dismiss for failure to state a claim upon which relief can be granted, a plaintiff need only allege sufficient factual matter that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the mark. *Doyle v. Al Johnson's Swed. Rest. & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) (*citing Young v. AGB Corp.*, 152 F.3d 1377, 47

[2] Application Serial No. 86798882, filed October 26, 2015, claiming dates of first use and first use in commerce of April 1, 2014. The mark description, "The mark consists of two arrows sitting side by side pointing to the right bounded by a square box," is of record, and color is not claimed as a feature of the mark.

[3] To the extent Applicant has argued the merits of Opposer's asserted claims, the Board has not given any consideration to such arguments. The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits of the case. *See Scotch Whiskey Ass'n v. United States Distilled Prods. Co.*, 18 USPQ2d 1391 (TTAB 1991).

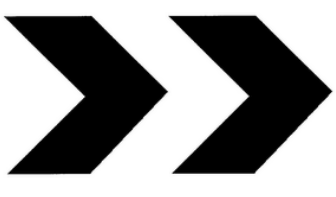
USPQ2d 1752, 1754 (Fed. Cir. 1998)); *see also* TBMP § 503.02 (2015). Specifically, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Doyle*, 101 USPQ2d at 1782 (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). 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." *Iqbal*, 556 U.S. at 678 (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

For purposes of determining such motion, all of the plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to the plaintiff. *See Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993).

Dismissal for insufficiency is appropriate only if it appears certain that the plaintiff is entitled to no relief under any set of facts which could be proved in support of its claim. *See Stanspec Co. v. American Chain & Cable Co., Inc.*, 531 F.2d 563, 189 USPQ 420 (CCPA 1976).

Standing and the Ground of Priority and Likelihood of Confusion

The Board, after reviewing Opposer's pleading, finds that Opposer has sufficiently alleged a "real interest" and a "direct and personal interest" in the outcome of this proceeding. Specifically, Opposer has pleaded common-law trademark rights in and ownership of registrations and an application for the following marks:

 [4]  ,[5] and  [6]

prior to Applicant's filing of its application, that its trademark rights predate Applicant's filing date, that the marks are similar, that Opposer uses its marks for related goods and services, and that the marks are likely to be confused. Opposer therefore has sufficiently alleged its standing and the ground of priority and likelihood of confusion. *See Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009). Proof of Opposer's standing and ground are left to final decision. *See Boswell v. Mavety Media Group Ltd.*, 52 USPQ2d 1600, 1605 (TTAB 1999) (at

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[4] Registration No. 3115908, registered July 18, 2006 for, "Leather and imitations of leather and goods made of these materials, namely athletic and shoulder bags, sport bags, handbags; animal skins and hides; trunks and travelling bags, umbrellas, parasols and walking sticks; whips, harnesses and saddlery" in Class 18, as well as goods in Classes 25 and 28, under Trademark Act § 44(e). The mark description, "The mark consists of 2 CHEVRONS appearing side by side," is of record, and color is not claimed as a feature of the mark.

[5] Registration Nos. 2980889 and 3389216, registered August 2, 2005 for goods in Class 25 and Feb. 26, 2008 for, "Bags, namely, athletic bags, sports bags, all-purpose carrying bags, duffel bags, traveling bags, backpacks, haversacks, tote bags, fanny packs; luggage; purses, hand bags, shoulder bags" in Class 18 and goods in Classes 25 and 28, respectively. The description of the mark, "The mark consists of 2 CHEVRONS in vertical position," is of record in Registration No. 2980889, which is based on Trademark Act § 44(e). Registration No. 3389216 is based on Trademark Act § 66(a).

[6] Registration No. 4975465, registered June 14, 2016, for "Bags, namely, athletic bags, sports bags, all-purpose carrying bags, duffel bags, traveling bags, backpacks, haversacks, tote bags, fanny packs; luggage; purses, hand bags, shoulder bags," in Class 18 and goods in Class 25, based on Trademark Act § 66(a). The mark description, "The mark consists of two downward-pointing chevrons within a stylized badge design" is of record. At the time the notice of opposition was filed, the trademark had not yet registered.

final decision, inquiry is not whether pleading of standing is sufficient, but whether allegations have been proven).

Where a plaintiff has alleged standing as to at least one properly pleaded ground, its allegation of standing satisfies the standing requirement for any other legally sufficient ground. *See, e.g.*, *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1377, 101 USPQ2d 1713, 1727-28 (Fed. Cir. 2012) ("[O]nce an opposer meets the requirements for standing, it can rely on any of the statutory grounds for opposition set forth in 15 U.S.C. § 1052."); *Petróleos Mexicanos v. Intermix S.A.*, 97 USPQ2d 1403, 1405 (TTAB 2010).

Based on the foregoing, Applicant's motion to dismiss for failure to properly plead a claim of priority and likelihood of confusion is **denied**.

Ground of Non-Use

An application filed based on use in commerce is void ab initio if, at the time of filing the application, the mark was not used in commerce with only some, or all, of the goods in the identification of goods. *Grand Canyon West Ranch, LLC v. Hualapai Tribe*, 78 USPQ2d 1696, 1697 (TTAB 2006).

Opposer alleges Applicant was not using its mark in commerce with backpacks at the time of filing its use-based application, and that the application is void ab initio. The Board finds the pleading is sufficient for a claim of non-use.

Applicant's motion to dismiss for failure to properly plead a claim of non-use is **denied**.

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