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

Proceeding	91182436
Party	Plaintiff Just Service, Inc.
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*ADMITTED IN CALIFORNIA AND ILLINOIS

April 8, 2008

Commissioner for Trademarks
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451

Re: U.S. TM Opposition No. 91182436
Just Service, Inc. v. BountyJobs, Inc.
Opposing Mark: BOUNTYJOBS
Our File No. 1015.79451

Dear Sir:

Enclosed please find Opposer's Memorandum in Opposition to Applicant's Motion to Dismiss for filing with the Trademark Trial and Appeal Board.

Respectfully submitted,

GREER, BURNS & CRAIN, LTD.

By

Paul G. Juettner
Attorney for OPPOSER

PGJ:scm

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

IN THE MATTER OF TRADEMARK APPLICATION

Serial No.	77/029,943
Filed :	October 26, 2006
By:	BountyJob, Inc.
Published:	October 16, 2007
For the trademark:	BOUNTYJOBS

JUST SERVICE, INC., Opposer, v. BOUNTYJOBS, INC., Applicant.	Opposition No. 91,182,436

OPPOSER'S MEMORANDUM IN
OPPOSITION TO APPLICANT'S MOTION TO DISMISS

Opposer Just Service, Inc. ("Opposer") by and through its attorneys, submits the following Memorandum in Opposition to BountyJobs, Inc.'s ("Applicant") Motion to Dismiss Opposition 91,182,436. In support, Opposer states as follows:

I. INTRODUCTION

In order to withstand a motion to dismiss for failure to state a claim, an opposer need only allege such facts as would, if proved, establish that (1) the plaintiff has standing to maintain the proceedings, and (2) a valid ground exists for opposing the mark. *Fair Indigo LLC v. Style Conscience*, 2007 TTAB LEXIS 89, 6-5 (T.T.A.B. 2007). Applicant does not dispute that

Opposer has standing in this opposition. *See* Applicant's Memorandum at pp. 1-2. However, Applicant attempts to evade this opposition proceeding by attacking the Board's jurisdiction and Opposer's pleaded grounds for the opposition. Contrary to Applicant's assertions, the Board has jurisdiction to consider right to register issues and the action taken below by the Examining Attorney. Opposer's grounds for opposition are all fully supported both factually and legally. Therefore, Applicant's Motion to Dismiss must be denied.

II. STATEMENT OF FACTS

On September 19, 2005 Opposer registered the domain name <bountywork.com> and, shortly thereafter, Opposer launched a website entitled BOUNTY WORK at <bountywork.com>. (Notice at ¶ 3-4). The BOUNTY WORK website has appeared on the Internet substantially continuously from September 2005 to November 2007, except for a brief period in December 2006 when the website was temporarily down. (Notice at ¶ 6). Opposer's BOUNTY WORK website has functioned and continues to function to inform the public of Opposer's planned online auctions services in which jobs, projects, and tasks to be auctioned are posted and bidding is done via the Internet. (Notice at ¶ 7).

Specifically, Opposer's <bountywork.com> is an Internet website that is being constructed to allow individuals and businesses to post a description of a work task that needs to be completed or outsourced. (Notice at ¶ 8). The workers will then bid in a reverse auction format to try to win the work task. *Id.* After a set amount of days, the reverse auction will end and the lowest bidder will win the work task. *Id.* The worker will then complete the work task and submit the work to the posting person or send confirmation that the task has been completed. *Id.* Once the posting person inspects and accepts the work, the money is released by Opposer to

the worker. *Id.* All of the transactions will take place via Opposer's BOUNTY WORK website at its <bountywork.com> domain. *Id.*

Since the launch of its website, Opposer has received Internet traffic to its <bountywork.com> website, and has received inquires from the public concerning Opposer's planned BOUNTY WORK auction services. (Notice at ¶ 9). Opposer has begun and continues to work on developing the systems needed to launch its reverse auction services under its BOUNTY WORK service mark, including software development and drafting profiles, forms, auction rules, instructions, business terms, task categories and other documentation for the site. (Notice at ¶ 10). Opposer has, beginning with its website launch in September 2005 developed valuable goodwill in its <bountywork.com> domain name and, as a result, Opposer has also begun developing goodwill in its BOUNTY WORK service mark. (Notice at ¶ 11-12).

On October 26, 2006, Applicant filed a federal service mark application, on a Section 1(b) intent to use basis, to register BOUNTYJOBS and was assigned Serial No. 77/029,943 ("the '943 Application"). (Notice at ¶ 14). The '943 Application is at issue in this opposition proceeding. On or about March 13, 2007, in the '943 Application, the U.S. Patent and Trademark Office Examining Attorney rejected the statement of services in part as indefinite in addition to taking other actions. (Notice at ¶ 15). On or about July, 2007, Applicant responded to the Official Action addressing some but not all of the issues in the Official Action. (Notice at ¶ 16). In particular, Applicant failed to address the indefinite services rejection raised by the Examining Attorney in the March 13, 2007 Office Action. *Id.* Subsequently, the '943 application for BOUNTYJOBS was published. (Notice at ¶ 18).

On February 20, 2007, Opposer filed a federal service mark application, Serial No. 77/111,567 to register BOUNTY WORK as a service mark for online auctions services in which

jobs, projects, and tasks to be auctioned are posted and bidding is done via the Internet based on intent to use, under Section 1(b) of the Trademark Act. (Notice at ¶ 13). Opposer's BOUNTY WORK application was subsequently suspended by the U.S. Patent and Trademark Office, as potentially conflicting with Applicant's '943 Application. (Notice at ¶ 19). Opposer has argued confusion is unlikely, but the Examining Attorney has maintained his position and has suspended Opposer's BOUNTY WORK application as potentially conflicting with Applicant's '943 Application.

In the interim, Applicant's '943 Application was published, and Opposer opposed.

III. ARGUMENT

In order to withstand a motion to dismiss for failure to state a claim, a plaintiff need only allege such facts as would, if proved, establish that (1) the plaintiff has standing to maintain the proceedings, and (2) a valid ground exists for opposing the mark. *Fair Indigo LLC v. Style Conscience*, 2007 TTAB LEXIS 89, 6-5 (T.T.A.B. 2007). The pleading must be examined in its entirety, construing the allegations therein liberally, as required by Fed.R.Civ.P. 8(f), to determine whether it contains any allegations which, if proved, would entitle plaintiff to the relief sought. *Kelly Services Inc. v. Greene's Temporaries Inc.*, 25 U.S.P.Q.2d 1460 (T.T.A.B. 1992); TBMP § 503.02. For purposes of determining whether a motion to dismiss for failure to state a claim upon which relief can be granted, all of plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to plaintiff. *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157 (Fed. Cir. 1993). Dismissal for insufficiency is appropriate only if it appears certain that opposer is entitled to no relief under any set of facts which could be proved in support of its claim. *Stanspec Co. v. American Chain & Cable Company, Inc.*, 531 F.2d 563 (C.C.P.A. 1976).

A. Opposer Properly Pled Its Claim Under Section 2(d) of the Act

Opposer's Count IV- Alternative Claim Under Section 2(d) of the Trademark Act alleges valid grounds for opposition. Section 309.03(c)(B) of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) provides:

> **Direct or Hypothetical Pleading of Likelihood of Confusion:** A plaintiff may plead likelihood of confusion directly or hypothetically. A hypothetical pleading may consist of assertions that if, as the trademark examining attorney (or the defendant) contends, plaintiff's mark so resembles defendant's mark as to be likely, when applied to the goods and/or services of the plaintiff, to cause confusion, then plaintiff will be damaged by the registration of defendant's mark. Of course, in order to state a claim upon which relief can be granted, a hypothetical pleading of likelihood of confusion must be coupled with a pleading of one or more grounds for opposition or cancellation, such as, that defendant's mark has been abandoned; that plaintiff has priority of use (here, the hypothetical pleading of likelihood of confusion serves both as a pleading of plaintiff's standing and as part of the pleading of a ground under Section 2(d) of the Act, 15 U.S.C. §1052(d)); etc.

Id. (citations omitted).

In the present case, Opposer's Alternative Section 2(d) claim has been properly pled. Opposer pled facts that establish standing, priority, and hypothetical likelihood of confusion. As mentioned above, Opposer has pled facts to establish standing, which Applicant does not contest. *See* Notice at ¶¶ 19-22. Opposer has also properly pled facts to establish priority. *See* Notice at ¶¶ 3-6, 14, 38. Applicant has not challenged Opposer's priority allegations. Finally, Opposer has pled that in the event the Trademark Trial and Appeal Board holds that there is a likelihood of confusion, Applicant's '943 Application should be refused registration under Section 2(d) of the Trademark Act (likelihood of confusion). (Notice at ¶ 39). Thus, Applicant has properly pled hypothetical likelihood of confusion.

The Board's decision in *Home Juice Co. v. Runglin Cos.*, 231 U.S.P.Q. 897, 899 (T.T.A.B. 1986) is directly on point. In *Home Juice* the petitioner's and the respondent's respective applications for registration were co-pending. The petitioner, the senior user but

junior applicant, strongly argued that there was no likelihood of confusion between the marks, but the examining attorney nevertheless maintained a Section 2(d) rejection. When the respondent's registration issued, the petitioner petitioned to cancel the same alleging priority of use and pleaded, contrary to its prior argument, that "there exists a likelihood of confusion, at least in the mind of the [Trademark Examining Attorney]." *Id.* at 897. The Board held that "hypothetical pleading of a likelihood of confusion is appropriate where a petitioner's standing is based on its inability to secure registration of its mark, albeit it is the senior user, because the registered mark has been cited as a reference by the Examining Attorney." *Id.* at 899.

The circumstances here are very similar to *Home Juice.* Opposer's position before the Examining Attorney and the Board is that there is no likelihood of confusion, but in the alternative, should the Board find that there is a likelihood of confusion, then in that event Opposer prays that Applicant be refused registration under Section 2(d) of the Trademark Act. (Notice at ¶ 39). The hypothetical pleading here, "[i]n the event that the Trademark Trial and Appeal Board holds that there is a likelihood of confusion" is substantially the same as the pleading in *Home Juice* "there exists a likelihood of confusion, at least in the mind of the [Trademark Examining Attorney]." Also, as in *Home Juice*, Opposer has pled priority. (Notice at ¶ 38). The pleading requirements for Opposer's Section 2(d) claim have been satisfied.

Applicant argues that Opposer has not alleged similarity between the respective marks and services, and that Opposer has actually made contrary allegations of dissimilarity between the respective marks and services. First, Opposer is entitled under to plead in the alternative no likelihood of confusion (Count II) and hypothetical likelihood of confusion (Count IV). Fed.R.Civ.P. 8(e)(2); *Humana Inc. v. Humanomics Inc.*, 3 U.S.P.Q.2d 1696, 1698

(T.T.A.B. 1987) (applicant could have raised the priority issue in a counterclaim by pleading likelihood of confusion hypothetically notwithstanding the inconsistency of that pleading with its position in the opposition that the marks are not confusingly similar). Second, Applicant has not cited any authority in support of its argument that that an Opposer must plead similarity of the marks and similarity of the goods to withstand a motion to dismiss. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098 (Fed. Cir. 1976) relied upon by Applicant does not state that an opposer must allege similarity of the marks and goods in order to adequately plead a cause of action under Section 2(d) of the Act. *Federated Foods* arose from a Trademark Trial and Appeal Board decision on the merits following trial. The case does not address pleading issues at all. It is submitted that all that is necessary under liberal pleading rules is that likelihood of confusion is alleged either directly or hypothetically. *See*, TBMP §309.03(c)(B). In the present case, Opposer has made a hypothetical pleading of likelihood of confusion and has specifically identified the statutory Section 2(d) of the Trademark Act. (Notice at ¶ 39). Opposer's pleading has therefore put Applicant on notice of the claim.[1] The motion to dismiss must be denied.

B. Opposer's Injury to Domain Name Rights Constitutes Proper Grounds for Opposition

Section 13 of the Trademark Act authorizes opposition to registration by "[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register...." 15 U.S.C. §1063(a). Registration of the '943 Application will cause Opposer to suffer damage to its domain name rights. (Notice at ¶ 21). Specifically, Opposer's domain name rights will be harmed if it cannot secure service mark registration for its name and mark. Service

[1] In the event, however, that the Board requires the pleading to be more specific, Opposer requests the opportunity to file an amended pleading. *See Miller Brewing Co. v. Anheuser-Bush Inc.*, 27 U.S.P.Q.2d 1711 (T.T.A.B. 1993).

mark, will provide Opposer rights under the Trademark Act, including the Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d) that it would not enjoy otherwise. If Opposer is prevented from obtaining registration for its mark, it will handicap its efforts to defend its domain name from third party attempts to register similar domain names and divert web traffic from Opposer's <www.bountywork.com> website. The action by the Examining Attorney in suspending Opposer's application, and a likely rejection of its application in the event that the '943 Application registers, is preventing Opposer from securing registration for its BOUNTY WORK mark (and domain name) and thus is causing damage to Opposer. It is submitted, therefore, that the requirements of damage under Section 13 of the Trademark Act have been met.

Further, it is submitted that domain names are valuable property rights that are in many respects analogous to trade name rights.[2] It is well known that domain names are often bought and sold for valuable consideration and are valuable commercial assets. Opposer has alleged that it has "beginning with its website launch in September, 2005 developed valuable goodwill in its <bountywork.com> domain name." (Notice at ¶ 11). The terms "trade name" and "commercial name" are defined as "any name used by a person to identify his or her business or vocation." 15 U.S.C. § 1127. A "domain name" is defined as an alpha numeric designation which is registered ... as part of an electronic address." *Id.* In this case, the domain name <www.bountywork.com> is more than a mere address. Like a trade name, it performs a source identifying function. Opposer's business is identified by its domain name <bountywork.com>. (Notice at ¶ 3-12, 33-34).

[2] The present case is distinguishable from *Washington Speakers Bureau Inc. v. Leading Authorities Inc.*, 33 F.Supp.2d 488 (E.D. Va. 1999) relied upon by Applicant in that Opposer has not alleged that use of a domain name confers trademark rights.

Domain names should be treated similarly to trade names. Use of a confusingly similar domain name or trade name subsequent in time to another's acquisition of trademark rights is actionable as an act of infringement. Conversely, an application for registration of a confusingly similar trademark subsequent in time to another's acquisition of trade name rights at common law is a basis for refusal of registration. 15 U.S.C. §1052(d). The rule should be no different for domain names as they serve the same source identifying function on the Internet as a trade name. It is submitted therefore that Opposer has common law rights and goodwill in its <bountywork.com> domain name (Notice ¶11) and that registration of Applicant's mark will likely result in damage thereto.

Opposer's Motion to dismiss Count III – Injury to Domain Name Rights must be denied.

C. The Board has Authority to Rule that there is No Likelihood of Confusion.

In Count II of its Notice of Opposition, Opposer seeks declaratory judgment of no likelihood of confusion. It is submitted that the Board has jurisdiction to determine the absence of a likelihood of confusion in the context of the right to register a service mark.

In opposition and cancellation proceedings the Board frequently rules on the presence or absence of a likelihood of confusion in the right to register context. *See, e.g. Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373 (Fed. Cir. 1998) (affirming the Board's finding of no likelihood of confusion between the respective marks); *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330 (Fed. Cir. 1991)(the Board's finding of no likelihood of confusion was upheld); *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, 82 U.S.P.Q.2d 1901 (T.T.A.B. 2007) ("we conclude that there is no likelihood of confusion in this case"). It is simply absurd to contend that Board does not have jurisdiction to rule "no likelihood of confusion" in a right to register case where the Opposer has established standing.

In support of its position, Applicant misapplies *Kelly Services Inc. v. Greene's Temporaries Inc.*, 25 U.S.P.Q.2d 1460,1464 (T.T.A.B. 1992). *Kelly Services* was a cancellation action where, in essence, the petitioner sought declaratory judgment that its use of clover leaf designs in conjunction with annual St. Patrick's day promotions was a fair use which did not infringe the respondent's mark. *Id.* at 1464. The Board declined jurisdiction because it was not empowered to render such a judgment, i.e., a judgment on issues of fair use and infringement in a right to use context. The Board's jurisdiction of course is limited to right to register issues. Similarly, in *Enterprise Rent-A-Car v. Advantage Rent-A-Car*, 62 U.S.P.Q.2d 1857 (T.T.A.B. 2002), relied upon by Applicant, the Board declined to exercise jurisdiction over a dilution claim based on state law.

In the present case, Opposer is not asserting that Applicant's mark infringes or otherwise violates state law. No request has been made for a ruling regarding fair use, infringement, or violation of state dilution laws. Opposer requests, in the right to register context, that the Board exercise its established authority to find that there is no likelihood of confusion between Applicant's BOUNTYJOBS mark and Opposer's BOUNTY WORK mark for their respective services as recited in the parties' applications for registration. The Board is empowered to determine the right to register. 15 U.S.C. §§1067, 1068, 1070, and 1092; *see also* TBMP §102.01.

Accordingly, Applicant's Motion to dismiss Count II of the Notice of Opposition must be denied.

D. The Board Can Properly Determine that Applicant's Recited Services Are Indefinite.

In Count I, Opposer pleads that Applicant's recited services "Operating on-line marketplaces for sellers of goods and/or services;" and "Providing on-line marketplaces for

sellers of goods and/or services" are indefinite. Specifically, the field of use of the services is not identified such that the recitation covers on-line sales of all conceivable goods and services without limitation. The recitation is overly broad, vague and indefinite, especially considering that Applicant does not sell any goods on-line and its services are limited to employee recruiting and placement. (Notice ¶ 17). Applicant's overly broad and indefinite statement of services was undoubtedly a factor in Examining Attorney's actions in suspending Opposer's BOUNTY WORK application because although the parties' actual services are different (Notice ¶ 28) the Applicant's recitation of services is all encompassing.

During the prosecution of Applicant's '943 Application, the Examining Attorney determined that the above quoted services were indefinite and rejected the '943 Application on this ground, as well as other grounds. Applicant's response failed to address the Examiner's indefinite services rejection. The Examining Attorney apparently overlooked that Applicant's response was non-responsive on the indefinite services issue, and passed the '943 Application to publication. Opposer submits that the Examining Attorney's rejection was proper and Applicant should be required to limit and clarify its services as being offered in the employee recruiting and placement field.

Applicant contends that the Board lacks jurisdiction to consider *ex parte* issues in *inter parte* proceedings. Contrary to Applicant's contention, precedent dictates that the Board can and should consider this defect in the application regardless if it is *ex parte* in nature. *See Crocker National Bank v. Canadian Imperial Bank of Commerce*, 223 U.S.P.Q. 909 (T.T.A.B. 1984)

> [T]he fact that no adverse action was taken cannot preclude an opposer with standing from raising the matter as a ground for opposing registration of the mark. Nor can this Board decline to consider and determine the issue because it is ex parte in nature. Once standing to oppose has been shown, an opposer may raise any legal defect of deficiency in the application.

Id. at 910, n.11. Since standing to oppose has been established, this ground for opposition is valid.

The cases cited by Applicant are distinguishable from the instant proceeding. Unlike the present case where a rejection was made by the Examining Attorney and not addressed by the Applicant, the cases relied on by Applicant arose in situations where a rejection was never made in the first place. In *Saint-Gobain Abrasives, Inc. v. Unova Industrial Automation Systems, Inc.*, the opposer's indefiniteness allegation was not allowed to stand because the Examining Attorney did not make a rejection and the applicant complied with all examination requirements. *Saint-Gobain Abrasives, Inc. v. Unova Industrial Automation Systems, Inc.*, 66 U.S.P.Q.2d 1355, 1357 (T.T.A.B. 2003). In *Century 21 Real Estate Corp. v. Century Life of Am.*, the Board similarly found that the opposer did not present a proper ground for an opposition where the opposer alleged the insufficiency of specimens. *Century 21 Real Estate Corp. v. Century Life of Am*, 10 U.S.P.Q.2d 2034, 2035 (T.T.A.B. 1989). However, like *Saint-Gobain Abrasives, Inc.*, the ground for opposition in *Century 21 Real Estate Corp.* was found improper because the examining attorney never actually made a rejection regarding the insufficiency of specimen. *Century 21 Real Estate Corp.*, 10 U.S.P.Q.2d at 2035. Conversely, in the instant action, a rejection was made by the Examining Attorney for indefiniteness and Applicant failed to address it. Therefore, the Board has jurisdiction to consider Count I.

Applicant asserts that its recitation of services is not indefinite, citing the Acceptable Goods and Services Manual. First, the Manual is not law and does not bind the Examining Attorney or this Board. Second, the Manual also provides numerous substantially identical services statements where identification of the specific field is required. See, e.g., "On-line retail

store services featuring {indicate field or type of goods}" and "Retail {indicate type or field, e.g. clothing, camera, department} stores." Exhibit A. Whether the statement of services is overly broad, vague and indefinite is a contested issue of fact that cannot be resolved on a rule 12 motion. Third, if the Board lacks jurisdiction to review the Applicant's failure to comply with the Examining Attorney's rejection, then the appropriate action is to remand the '943 Application to the Examining Attorney, not to perpetuate the error as urged by Applicant. Finally, the Board can overrule the Examining Attorney when clear error was committed. *See Century 21 Real Estate Corp. v. Century Life of Am*, 10 U.S.P.Q.2d 2034, 2035 (T.T.A.B. 1989) (We are not going to substitute our judgment for that of the Examiner, on the same facts that were before the Examiner, unless we are convinced that clear error was committed.) However, it is submitted that the clear error standard need not be applied because the Examining Attorney never ruled on whether the services recitation was proper. The Examining Attorney's only express ruling is that the services are indefinite.

For the foregoing reasons, Opposer's Count I alleges a valid claim and Applicant's Motion to Dismiss should be denied.

III. CONCLUSION

Opposer, Just Service, Inc. prays that the Board deny Bounty Jobs, Inc.'s Motion to Dismiss. If, however, the Board finds that any count of the Notice of Opposition fails to state a claim upon which relief can be granted, Opposer requests the opportunity to file an amended pleading. *See, Miller Brewing Co. v. Anheuser-Bush Inc.*, 27 U.S.P.Q.2d 1711 (T.T.A.B. 1993).

Respectfully submitted,

JUST SERVICE, INC.

By _____
Paul G. Juettner
Attorney for Opposer

DATED: April 8, 2008

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Hit No.	Class	Description	Status	Effective Date	Type	Note	Trilateral
24	035	Retail {indicate type or field, e.g. clothing, camera, department} stores	M	02 Jan 97	S	N	

EXHIBIT A

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this OPPOSER'S MEMORANDUM IN OPPOSITION TO APPLICANT'S MOTION TO DISMISS has been served upon the following counsel for Opposer:

Christopher M. Taylor
BUTZEL LONG
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Ann Arbor, MI 48104
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by electronic mail on this date.

By_____
Paul G. Juettner
Attorney for Opposer

DATED: April 8, 2008