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

Proceeding	91187644
Party	Defendant Stork Store LLC
Correspondence Address	WATSON-CAMPBELL, STEPHANIE WATSON-CAMPBELL, STEPHANIE 59 HERBERT ST APT 2R BROOKLYN, NY 11222-5029 info@storkstorenyc.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Jonathan Zucker
Filer's e-mail	jjzuck@gmail.com
Signature	/jonathan zucker/
Date	12/22/2008
Attachments	stork12b6.pdf (12 pages)(112931 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD
----------X
MOTHER'S NUTRITIONAL CENTER,

Opposer-Plaintiff,

-AGAINST-

NOTICE OF MOTION
Fed. R. Civ. P. 12(b)(6)
Application Number: 77452966
Opposition Number: 91187644

STORK STORE LLC,

Applicant-Defendant.
----------X

PLEASE TAKE NOTICE that upon the annexed affirmation of JONATHAN ZUCKER, attorney for Stork Store LLC, dated December 22, 2008, annexed memorandum of law, and upon all the papers and proceedings had herein, the undersigned will move this tribunal for an order dismissing Plaintiff's Opposition, pursuant to the Federal Rules of Civil Procedure Rule 12(b)(6) made applicable to these proceedings by 37 C.F.R. § 2.116(a) (1997), on the grounds that Plaintiff lacks standing and has failed to sufficiently plead grounds upon which relief can be granted.

Dated: New York, New York
December 22, 2008

The Stork Store, LLC
By: Jonathan Zucker, Esq.
27 N. Moore St., 5th Floor
New York, NY 10013
(212) 344-1459
jjzuck@gmail.com

TO:

The Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

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UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD
- -X
MOTHER'S NUTRITIONAL CENTER,

Opposer-Plaintiff,

-AGAINST-

STORK STORE LLC.,

Applicant-Defendant.
- -X

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS

Application Number: 77452966
Opposition Number: 91187644

JONATHAN ZUCKER, Esq., affirms under the penalty of perjury that the following is true and correct:

1. I represent Applicant Stork Store LLC in the above captioned matter. I submit this affirmation in support of the instant motion requesting dismissal of the Opposition to Stork Store's application for a trademark.

2. I have prepared this affirmation on personal knowledge based on the previous filings in this matter and, on information and belief, based on conversations with Stephanie Campbell-Watson, principal and founder of Stork Store LLC.

3. In late March 2008, Stork Store LLC began operations at 580 Manhattan Avenue, Brooklyn New York, 11222, a 585 square foot storefront in the Greenpoint neighborhood of Brooklyn. The business primarily provides educational services to expecting and newborn mothers and additionally sells high-end, eco-friendly, infant-care products.

4. On April 20, 2008, Stork Store LLC filed its initial trademark application. After receiving an Office Action on August 5, 2008, Stork Store LLC slightly amended its proposed

trademark to remove the letters "TM" from the proposed mark and disclaimed the word "Store" from the application.

5. Shortly thereafter the mark received approval for publication and on October 21, 2008, the trademark was published in the Official Gazette.

6. On November 20, 2008, Plaintiff, a grocery store operating in California, filed its opposition. Plaintiff attached its own stork logo trademark and without providing any detail, alleged that Stork Store's trademark will cause confusion, mistake or is likely to deceive.

7. For the reasons more fully set forth in the accompanying Memorandum of Law, this Court should dismiss the Opposition because Plaintiff fails to adequately allege facts to establish standing or in support of a claim on which relief can be granted.

WHEREFORE, the Stork Store LLC respectfully requests that this Court grant Applicant's motion in all respects and grant trademark registration on the principal register.

Dated: New York, New York
December 22, 2008

/s/ Jonathan Zucker
JONATHAN ZUCKER, Esq.

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

- -X

MOTHER'S NUTRITIONAL CENTER,

Opposer-Plaintiff,

-AGAINST-

Application Number: 77452966
Opposition Number: 91187644

STORK STORE LLC,

Applicant-Defendant.

- -X

MEMORANDUM OF LAW

The Stork Store, LLC
By: Jonathan Zucker, Esq.
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THE FACTS

The facts relied upon in this memorandum of law are found in the Affirmation of JONATHAN ZUCKER, dated December 22, 2008, Plaintiff's Opposition, and the trademark application approved for publication.

ARGUMENT

POINT

THIS COURT SHOULD DISMISS THE OPPOSITION BECAUSE PLAINTIFF LACKS STANDING AND FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN GRANTED AS DEMONSTRATED BY A TOTAL FAILURE TO ARTICULATE ANY FACTS INDICATING HOW HIS CUSTOMERS IN CALIFORNIA WILL BE CONFUSED OR DECEIVED BY, OR MISTAKEN ABOUT A STORK LOGO THAT DOES NOT RESEMBLE ITS OWN LOGO IN A NEW YORK STORE.

The stork images speak for themselves and Stork Store LLC's (hereinafter "Applicant") proposed trademark does not resemble Mother's Nutritional Center's (hereinafter "Plaintiff") in any appreciable manner. Highlighting the primary differences, Plaintiff's consists of a stork's head carrying a baby in a sheet while in Applicant's logo the entire body of the stork forms the letter "S" and is used to begin the words "Stork" and "Store" and thus, the image of the stork is fully integrated into applicant's logo, the name of a store. Significantly, both stores have geographically diverse client bases on opposite coasts of America. Furthermore, one business is a grocery store and the other provides educational services and high-end, eco-friendly products to mothers of new born babies. Perhaps these differences explain Plaintiff's utter failure to articulate any facts in the pleadings. Rather Plaintiff merely attaches two black and white reproductions of the marks and alleges in conclusory terms that mistake, confusion or deception would result if the application is granted. The case law and regulatory framework make clear that dismissal is the appropriate remedy under the instant circumstances as Plaintiff failed to adequately plead his case and lacks standing to proceed.

It is now axiomatic that "a party opposing a registration pursuant to Section 13 of the

Lanham Act must show (1) that he has standing and (2) a statutory ground which negates the applicant's entitlement to registration." *Young v. AGB Corp.*, 152 F.3d 1377, 1380 (Fed. Cir. 1998). "Moreover, an opposer must at the pleading stage allege facts in support of both" requirements. *Young v. AGB Corp.*, 152 F.3d at 1380. These requirements are consistent with this tribunal's regulatory rules, which require an opposition to "set forth a short and plain statement showing why the opposer believes it would be damaged by the registration of the opposed mark and state the grounds for opposition." 37 C.F.R. § 2.104(a).

Plaintiff fails both the common law and regulatory requirements. First, he does not address, with any degree of specificity, how any harm could result should Applicant's mark receive trademark protection. Instead, Plaintiff merely restates the statutory language from 15 U.S.C. § 1052(d) regarding mistake, confusion, or deception. *See* Opposition ¶ 7. But contrary to the requirement of that statute, there is nothing in the pleading about how the mark, in connection with its use, is likely to cause mistake, confusion or deception. No additional facts can be found in the bare pleading. This is fatal to Plaintiff's cause of action, as an opposer to registration of a trademark "must show a real and rational basis for his belief that he would be damaged by the registration sought to be cancelled, stemming from an actual commercial or pecuniary interest in his own mark." *Star-Kist Foods, Inc. v. P.J. Rhodes & Co.*, 735 F.2d 346 (9th Cir. 1984).[1]

Arguably, Plaintiff's failure to allege any facts in its opposition papers demonstrates that there are no facts in support of Plaintiff's claim. There is simply no nexus between the customers of Applicant's tiny storefront in Greenpoint, Brooklyn that sells products to mothers of newborn babies and Plaintiff's grocery store in California. "The purpose in requiring standing is to prevent

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1 Even though *Star-Kist v. P.J. Rhodes & Co.*, involves a cancellation proceeding and the instant proceeding involves an opposition, the Federal Circuit has held that both Section 13 and Section 14 of the Lanham Act follow the same standing rule. *See generally Young v. AGB Corp.*, 152 F.3d at 1380. Indeed, this is the same requirement of 37 C.F.R. § 2.104(a).

litigation where there is no real controversy between the parties, where a plaintiff, petitioner or opposer, is no more than an *intermeddler*." *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1028-29 (C.C.P.A. 1982) (emphasis supplied). Here, Plaintiff's bare pleading demonstrates that it is nothing more than an intermeddler.

Furthermore, even if there is some rational nexus between the two businesses where mistake, confusion or deception could theoretically result, the marks are sufficiently distinct as to prevent any confusion. Of course, Plaintiff has failed to articulate how it believes the marks are similar. The best conclusion drawn from that omission is that the marks are not similar in the slightest. Indeed, the only similarity is that both marks have images of a stork carrying a baby in a blanket, but such a commonly used image cannot form the basis for Plaintiff's objection. Plaintiff can not claim exclusive use of the image of any stork carrying any baby in every circumstance.

A closer examination of the black and white image provided by Plaintiff in the Opposition demonstrates the following fourteen clear and substantive differences between the marks: (1) the stork in Plaintiff's mark wears a hat; Applicant's stork wears no hat (2) the hat has the name "Wicki" on it, (3) Plaintiff's mark only shows the stork's head; Applicant's is a full body of a stork in which the body is shaped like the letter "S" and forms the first letter in the words "Stork" and "Store" (4) Plaintiff's mark shows the stork "head on" while Applicant's stork is in profile, (5) the face of Plaintiff's stork looks animated like the Vlasic Pickle stork,[2] while Applicant's stork looks like a stick figure, (6) the baby in Plaintiff's mark has no hair, while the baby in Applicant's mark has one prominent curl of hair (7) the baby in Plaintiff's mark has no feet, while Applicant's baby has two feet sticking out of the blanket, (8) the baby in Plaintiff's mark has a smile that curves up at the corners of her mouth, which does not occur on the baby's face in Applicant's mark (9) the ears on Plaintiff's baby are drawn onto the head, which is a full circle, while Applicant's baby has

2 *See* http://www.vlasic.com

ears that fit into the outline of its head, (10) the blanket in Applicant's mark has fold lines, which are absent from Plaintiffs, (11) Plaintiff's stork emerges from a circle, like Bugs Bunny emerges from the Looney Tunes logo,[3] (12) on top of the circle in Plaintiff's mark are the words "Since 1995," (13) Plaintiff's mark is framed by a square filled in darkly around the circle, both of which are lacking from Applicant's mark, (14) the fonts in both marks are entirely different.

The differences listed above are based entirely on the images contained in Plaintiff's black and white pleadings. As Plaintiff did not file or serve Applicant with a color copy of his trademark in connection with this Opposition proceeding, the undersigned drafted this motion assuming that his trademark contains no color. But perhaps Plaintiff chose to omit a color comparison because the color schemes further differentiate the marks.[4] In any event, for the purpose of this motion the pleadings should be judged as submitted and Plaintiff's black and white mark cannot be confused with Applicant's colored mark.

Plaintiff's bare pleadings fail in two related respects. First, because the pleadings do not allege harm in anything but conclusory terms that simply quote statutory language, he has failed to establish standing. Second, for the same reason, he has failed to properly articulate facts supporting a cause of action upon which relief can be granted. Even accepting all of the factual statements (and not the conclusory allegations) as being true, Plaintiff fails to articulate any grounds for how his customers would possibly be confused, mistaken or deceived by Applicant's proposed mark. Consequently, the Opposition should be dismissed.

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3 *See* http://en.wikipedia.org/wiki/File:Bugs-ending.jpg

4Briefly looking at Plaintiff's website confirms that the color scheme using vibrant pinks and oranges in that stork image looks absolutely nothing like the color scheme in Applicant's mark. *See* http://www.mncinc.com/Welcome_to_Mothers.html

CONCLUSION

APPLICANT'S MOTION TO DISMISS SHOULD BE GRANTED, THE OPPOSITION DISMISSED AND THE TRADEMARK GRANTED.

Respectfully submitted,

The Stork Store, LLC.
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Certificate of Service

I **Una Chae** hereby certify that on December 22, 2008, a copy of the Motion to Dismiss was served on Plaintiff by United States Postal Service First Class Mail, postage prepaid, at the following address:

Rod S. Berman, Esq.
Jeffer, Mangels, Butler & Marmaro LLP
Attorneys for Plaintiff
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Date: December 22, 2008

/s/ Una Chae
UNA CHAE

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