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

Proceeding	91193433
Party	Defendant Franchise Brokers Association, Inc.
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Submission	Motion to Dismiss - Rule 12(b)
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

PATRICK J. FLYNN)	Opposition No. 91193433
)	
Opposer,)	Trademark: FBA FRANCHISE BROKERS ASSOCIATION and Design
)	
v.)	Application No. 77/785,165
)	
FRANCHISE BROKERS ASSOCIATION,)	
INC.)	
)	
Applicant.)	
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**APPLICANT’S ENTRY OF APPEARANCE AND COMBINED MOTION TO DISMISS
AND MEMORANDUM IN SUPPORT THEREOF**

COMES NOW Daniel T. Batten and Jason L. Ross with the law firm Greensfelder, Hemker & Gale, P.C. and hereby enter their appearance on behalf of Applicant Franchise Brokers Association, Inc. (“FBA”).

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and TBMP § 503, FBA hereby respectfully moves the Board to dismiss the Opposition to Trademark Application No. 77/785,165 filed by Opposer Patrick J. Flynn (“Mr. Flynn”) for the mark FBA FRANCHISE BROKERS ASSOCIATION (the “Mark”), on the basis that such Notice of Opposition fails to state a claim upon which relief can be granted.

INTRODUCTION

Mr. Flynn’s paltry Notice of Opposition fails to articulate any recognized basis for refusing registration of Applicant’s Mark. Specifically, Mr. Flynn fails to allege any proprietary trademark rights that may be damaged by such registration. Instead, Mr. Flynn’s opposition rests on the irrelevant and immaterial allegations that (1) he uses the domain names Fbexpo.com and FBAexpo.com, (2) FBA has demanded that Mr. Flynn not infringe on FBA’s trademark rights, and

(3) the registration would constitute a “restraint of trade” and would “bully [him] out of business.” (See Notice of Opposition, ¶ 1.) As none of these assertions, even if true, present a valid basis to deny registration of a trademark, this opposition is deficient on its face and must be dismissed for failure to state a claim.

ARGUMENT

A. Standard of Review for Motions to Dismiss.

“A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint.” TBMP §503.02; Intellimedia Sports, Inc. v. Intellimedia Corporation, 43 U.S.P.Q.2d 1203 (TTAB 1997). “For purposes of such a motion, all well pleaded factual allegations of the complaint are accepted as true and the complaint is viewed in the light most favorable to the non-moving party.” Id. “Accordingly, a motion to dismiss will not be granted unless it appears to a certainty that the plaintiff has failed to allege any facts which would support a cause of action under the statute.” Id.

B. Mr. Flynn Fails to State a Valid Claim.

Pursuant to Fed. R. Civ. P. 8 (a), 15 U.S.C. § 1063 (a) and 37 C.F.R. § 2.104, an opposition “must set forth a short and plain statement showing why the opposer believes that he, she or it would be damaged by the registration of the opposed mark and state the grounds for opposition.”

First, Mr. Flynn’s Opposition should be dismissed because it is so vague and ambiguous as to be unintelligible. His single paragraph incoherent complaint ignores the pleading requirements set forth in 37 C.F.R. § 2.126 and TBMP § 309.02. Specifically, Mr. Flynn fails to clearly state any legal basis or supporting facts for challenging the Mark, including how he will be damaged if the Mark is registered. Furthermore, completely absent from Mr. Flynn’s complaint is any allegation that he has any proprietary rights in the Mark (or any other mark, for that matter). Instead, although

far from clear, Mr. Flynn appears to allege, as a basis for denying the registration, that he uses the domain names Fbexpo.com and FBAexpo.com (for some unexplained purpose) and that FBA has demanded that Mr. Flynn not infringe on its trademark rights through these domain names. The threat of litigation, however, is not a recognized ground for opposing the registration of a trademark. Seculus Da Amazonia S/A v. Toyota Jidosha Kabushiki Kaisha, 66 U.S.P.Q.2d 1154 (TTAB 2003) (In dismissing an opposition grounded in claims of unfair competition and questions of infringement, the Board noted that “it is well-settled that the Board is not authorized to determine the right to use, nor may it decide broader questions of infringement or unfair competition”); Angel World, Inc. v. Treasures and Trinkets Inc., 2004 TTAB LEXIS 11 (TTAB 2004) (recognizing that claims of unfair business practices and infringement “are not grounds for opposition.”). Nor is the registration of a domain name alone sufficient to establish trademark rights; rather, the mark must be used as such in connection with the promotion or sale of goods and services. In re Roberts, 87 U.S.P.Q.2d 1474 (TTAB 2008) (citing In re Eilberg, 49 U.S.P.Q.2d 1955 (TTAB 1998) (in denying the applicant’s claim that the use of a term in a domain name also constitutes use as a trademark, the Board recognized that a domain name “merely indicates the location on the Internet where applicant’s web site appears. It does not separately identify” one’s goods or services.).

Mr. Flynn also appears to allege that allowing the Mark to be registered would be a “restraint of trade” to be used to “bully [him] out of business.” That complaint impermissibly challenges the bedrock principles underlying trademark rights and the Lanham Act: To protect consumers from deception and confusion over trade symbols and to protect one’s trademark as property. McCarthy on Trademarks and Unfair Competition § 2:2 at p. 2-4 (4th ed.). Furthermore, “allegations of unfair competition and restraint of trade are outside the Board’s subject matter jurisdiction.” Genesco, Inc. v. Levi Strauss & Co., 219 U.S.P.Q. 1205 (TTAB 1983); see also E. E. Dickinson Co. v. The T. N.

Dickinson Company, 221 U.S.P.Q. 713 (TTAB 1984) (recognizing that allegations of unfair competition are not within the Board's jurisdiction). Therefore, this proceeding must be dismissed for failure to state a claim.

CONCLUSION

WHEREFORE, Respondent prays that the Board (i) enter an order dismissing this proceeding with prejudice and (ii) grant such other and further relief as it deems just and proper.

Dated: February 3, 2010

Respectfully submitted,

/s/ Jason L. Ross
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the above and foregoing Combined Motion to Dismiss and Memorandum in Support was submitted to the Trademark Trial and Appeal Board electronically via the Internet on February 3, 2010, and was mailed via the United States Postal Service, with postage prepaid, on February 3, 2010, to the following:

Patrick Flynn
4124 Mona Park Road
Racine, WI 53405

/s/ Jason L. Ross