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

Proceeding	91196469
Party	Plaintiff Farm Fleet Supplies, Inc.
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Date	04/26/2012
Attachments	Opposer's Opposition to Applicant Blain Supply, Inc.'s Motion to Strike 91196469.pdf (13 pages)(390922 bytes)

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

Farm Fleet Supplies, Inc.,

Opposer, Opposition No. 91196469

vs. Ser. Nos. 77/894710; 77/894766 and 77/894812

Blain Supply, Inc.,

Applicant.

OPPOSER FARM FLEET SUPPLIES, INC.'S OPPOSITION TO APPLICANT BLAIN SUPPLY, INC.'S MOTION TO STRIKE

I. INTRODUCTION

Opposer, Farm Fleet Supplies, Inc. submits this Memorandum in Opposition to Applicant Blain Supply, Inc.'s Motion to Strike Opposer Farm Fleet Supplies' Notice of Reliance Nos. 1-3. Each of the alleged justifications for striking the Notices of Reliance are discussed below, and for the reasons set forth in this memorandum, applicant's motion should be denied in its entirety.

II. DISCUSSION

A. Notices of Reliance Nos. 1-3 Properly Indicate the Relevance of the Material Being Offered.

In its motion, applicant states as follows:

> Applicant admitted in its Answers to each of the consolidated Oppositions that FARM & FLEET is descriptive and affirmatively alleged that FARM & FLEET is distinctive and has acquired secondary meaning as to Blain Supply and its licensees.
>
> Applicant's Motion to Strike at 2.

All three of the applications at issue in this Opposition involve applicant's attempt to register the phrase "farm & fleet". Opposer's Notice of Reliance Nos. 1-3 all key in on the fact that innumerable parties, completely unrelated to applicant, are using the phrases farm & fleet and farm and fleet in descriptive and generic fashions to designate a type of store. These uses are in the same fashion that the terms "hardware" or "grocery" are used to designate types of stores. These descriptive and generic uses are to be found in, among many other things, third party promotional materials, Securities and Exchange Commission filings, phone book listings, Secretary of State Office listings, and even in the description of goods set forth in a Federally Registered Trademark registered in 1982.

Applicant has fully admitted, both in its pleadings as well as in the instant motion, that the words farm & fleet are descriptive. Applicant's entire argument for registering the marks at issue in this proceeding, therefore, must be based on the theory that, in applicant's own words, "farm & fleet is distinctive and has acquired secondary meaning". Applicant's Motion to Strike at 2.

Opposer absolutely takes issue with applicant's assertion that its use of farm & fleet "is distinctive and has acquired secondary meaning". Opposer will prove beyond doubt that innumerable third parties have used and use the subject phrase generically and descriptively in connection with farm & fleet stores and services. "When the record shows that purchasers are confronted with more than one (let alone numerous) independent users of a term or device, an application for registration under Section 2(f) cannot be successful, for distinctiveness on which purchasers may rely is lacking under such circumstances". Levi Strauss & Co. v. Genesco, Inc., 742 F.2d 1401, 1403, 222 U.S.P.Q. 939, 940-41 (Fed. Cir.1984).

Opposer's Notice of Reliance Nos. 1-3 prove that applicant's use of the subject phrase has not been and is not now substantially exclusive, and that the phrase farm & fleet/farm and fleet is descriptive and generic. Applicant Blain has the burden of establishing, via a preponderance of the evidence, a prima facia case that the wording farm & fleet has become distinctive. Opposer's Notice of Reliance materials establish that this burden cannot be met.

Based on the above, opposer respectfully contends that the statements associated with Notice of Reliance Nos. 1-3 such as "each and every one of the above-cited publications will be relied upon by opposer in support of the position that the phrases 'farm & fleet' and 'farm and fleet' are used typically, regularly, and understandably as wholly generic and descriptive terms" (see Notice of Reliance No. 2) more than reasonably indicate what the subject documents will be relied on for. Opposer's descriptions reasonably set forth that the documents at issue in these notices will be used for the purpose of establishing generic and descriptive uses of the subject phrase by countless other parties that are unrelated to applicant.

For the reasons set forth above, Applicant's Motion to Strike Opposer's Notice of Reliance Nos. 1-3 must be denied.

B. Opposer's Notice of Reliance No. 2 Documents Were all Produced in a Proper and Timely Fashion

Through the omission of facts, opposer attempts to convince this Board that opposer's document production relevant to the December 23rd request was somehow untimely. In particular, opposer's motion neglects to inform the Board that opposer's responses to the subject document requests were served on applicant on January 23rd in a timely fashion, and that the documents at issue in opposer's response were forwarded to applicant on January 26th, a mere three days after the responses were served.

Applicant has not and cannot assert that a party who produces the actual documents requested in connection with a document request a mere three days after written responses were served in a timely fashion is entitled to any relief whatsoever from a tribunal, much less relief that entails the suppression of evidence that substantially supports an opponent's case.

If applicant was so concerned about the timing of the document production, one would think that it would have filed a motion to compel. That approach, however, could not have worked in the instant situation. Opposer, quite properly, served applicant with its written discovery responses via U.S. Mail on the due date, January 23rd. The actual document production, as set forth in applicant's motion papers, was undertaken electronically on January 26th. In other words, the documents and the written responses, in all likelihood, arrived at the offices of applicant's attorneys at about the same time.

Given the substance of the documents at issue in this aspect of applicant's motion, it is understandable that applicant would want them to be suppressed by this Board. Be that as it may, the subject documents are completely proper for this Board to consider in this proceeding.

C. Applicant's Assertion that Certain Notice of Reliance Documents Either Do Not Have the Required URL or are Not Publicly Available

Applicant asserts in Sections C and E of its motion that certain of the documents produced by opposer as part of its Notice of Reliance should be excluded for a variety of URL-based reasons. Applicant has broken these documents down to particular groups, and set forth below is a discussion of each particular group as set forth by applicant.

1. Documents Lacking a URL

Those documents designated N-0208, N-0209, N-0359, N-0360, and N-0433 were printed off from a pdf format. As such, they did not have URLs visibly associated with them.

Submitted herewith an Exhibit A is a clear and concise chart setting forth the URLs associated with the above-noted documents.

2. Documents Having Incomplete URLs

Some of the documents produced by opposer incorporated lengthy URLs that did not transpose in a complete fashion. In particular, the following documents are noted:

Notice of Reliance No. 1: N-0115, N-0452, and N-0242 through N-0246;

Notice of Reliance No. 2: N-0423, N-0425 through N-0426, N-0569, N-0570, N-0579, N-0593; and

Notice of Reliance No. 3: N-0031, N-0141, N-0265.

Submitted with this response as Exhibit B is a listing of the complete URLs associated with each of the documents set forth immediately above. Accessing these web addresses will confirm that the documents produced by opposer coincide with the URLs listed.

3. Lexis Documents

Applicant contends that it cannot access Notice of Reliance No. 1 documents designated as N-0092, N-0094, N-0407 through N-0408, and N-0410 through N-0411. These documents were all taken from the Lexis/Nexis database, and as such qualify as printed publications under Trademark Rule 2.122(e).

These documents are properly part of the record relevant to this proceeding, and may be fully relied upon by opposer moving forward.

4. Documents Allegedly Not Available at the Specified URL

Applicant contends that Notice of Reliance No. 2 document N-0224 as well as Notice of Reliance No. 3 documents N-0133, N-0135, N-0136, N-0139, and N-0282 "are not available at the specified URL". As for document N-0224, as can be seen from applicant's submission,

applicant has attempted to access a website ending in ".hmtl" as opposed to "html". In other words, applicant appears to have simply "misspelled" the domain name at issue.

As for the other documents said to be "not available at the specified URL", applicant has, apparently, attempted to locate these documents using an incorrect URL. These documents concern Dexknows.com electronic phone listings for businesses unrelated to applicant and designated as Quality Farm & Fleet, Highland Tire Farm & Fleet, Dinsmore Farm and Fleet, Mike's Farm & Fleet Repr., and Steve's Farm & Fleet. Applicant wrongly believes that the end of the URL, after the "fleet-" portion of it utilizes a numeric 1 as opposed to a small case L. For the purposes of this motion, opposer simply notes that the full and proper URL information is contained on all of the produced electronic phonebook documents discussed above.

5. Notice of Reliance No. 3 Document N-0451 was Properly Submitted

Applicant contends that U.S. Reg. No. 1,193,481 is "misleading". Applicant contends that opposer was required to set forth particularized information regarding the testimony of applicant's CFO and was required to set forth that the registration had been canceled in 1988 under Section 8. The subject registration is being offered merely to show that it issued. Applicant will not be relying on any §7(b) presumptions. As such, a plain copy of the subject registration is sufficient. See TBMP §704.03(b)(1)(B).

III. CONCLUSION

Based on the above, opposer respectfully contends that all of the materials submitted in connection with Notice of Reliance Nos. 1-3 are properly before this Board. Applicant's Motion to Strike should be denied in its entirety for the reasons set forth herein.

Respectfully submitted,

Date: April 26, 2012

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Attorney for Opposer,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing OPPOSER FARM FLEET SUPPLIES, INC.'S OPPOSITION TO APPLICANT BLAIN SUPPLY, INC.'S MOTION TO STRIKE was served upon Blain Supply, Inc.'s attorney at their address of record via first class mail postage prepaid and email (njohnson@brennansteil.com) to:

Nancy B. Johnson
BRENNAN STEIL S.C.
One E. Milwaukee St.
Janesville, WI 53547-1148

Respectfully Submitted,

Date: April 26, 2012

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Attorney for Opposer,
Farm Fleet Supplies, Inc.

URL for documents designated N-0208 through N-0209

http://wranglerwestern.wrangler.com/press/ww_pr_wnpatriot_0912.pdf

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URL for documents designated N-0359 through N-0360

http://www.wrsweeney.com/pressroom/Solar_Powered_Sonic_Spikes%20FINAL%2009-19-09.pdf

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URL for document designated N-0433

http://www.faribault.org/assets/c/commercialmarketpotentialfaribaultminnesota.pdf

EXHIBIT

A

www.legaldocs.com No. 7113

URL for document designated N-0115

http://www2.sos.state.oh.us/pls/bsqry/f?p=100:7:4276859577061448::NO:7:P7_CHARTER_NUM:1625680

URL for document designated N-0452

http://coraweb.sos.louisiana.gov/CommercialSearch/TradeServiceSearchDetails_Print.aspx?TradeServiceMainID=85536

URL for documents designated N-0242 through N-0246

http://www.getfilings.com/o0000950129-05-003249.html

www.legalstore.com No. 7113
EXHIBIT
B

URL for document designated N-0423

http://www.mn2020.org/issues-that-matter/economic-developmentviews/the-little-city-that-would

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URL for documents designated N-0425 through N-0426

http://webcache.googleusercontent.com/search?q=cache:5yuS-4wXn0oJ:www.allbusiness.com/marketing-advertising/branding-brand-development/4688630-1.html+%22farm+and+fleet+:big+box+store%22&cd=1&hl=en&ct=clnk&gl=us

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URL for document designated N-0569

http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=24844248

URL for document designated N-0570

http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=114123630

URL for document designated N-0579

http://www.researchandmarkets.com/reports/264027/us_top_10_farm_and_fleet_retailers_by_1999_sales

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URL for document designated N-0593

http://roofingresource.roofingcontractor.com/roofingresource/results/listing?code=192&company=3053519&page=7

URL for document designated N-0031

http://www.fastline.com/v100/farm-equipment-dealers/Sedam-Farm-Fleet-Tire-Service-Perry-NY/df369c7a-d52a-4c93-849b-d792e0673731.aspx

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URL for document designated N-0141

http://www.dexknows.com/business_profiles/ganda_s_diesel__farm_and_fleet_services-l822782155

URL for document designated N-0265

http://www.superpages.com/bp/Coloma-MI/Daves-Farm-Fleet-Service-L2064297807.htm