UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: August 29, 2012

Opposition No. 91196469

Farm Fleet Supplies, Inc.

v.

Blain Supply, Inc.

Kenneth Solomon, Managing Interlocutory Attorney

This matter comes up on applicant's fully-briefed motion filed April 11, 2012, to strike opposer's Notices of Reliance Nos. 1-3, in whole or in part. The issues raised in the motion are addressed below.

Motion to Strike Notices of Reliance Nos. 1-3 for alleged failure to properly indicate the relevance of certain documents identified therein

As a preliminary matter, it is noted that applicant has admitted that phrase "Farm & Fleet," which is the entirety of the mark in two of the opposed applications and a portion of the mark of the other opposed application, is descriptive, see Answer, Para. 3, and applicant's subject motion, p. 2, and further asserts the phrase is distinctive and has acquired secondary meaning for applicant. *Id.*

In its motion, applicant requests that Notices of Reliance Nos. 1-3 be stricken; arguing that the notices do not properly indicate the relevance of certain documents identified therein. Applicant contends that opposer's notices of reliance state that such documents are "being submitted to show the descriptive and generic use of the terms." Applicant claims that such a statement is not sufficient to indicate the relevancy of the documents because, according to TBMP 704.08(b), "it is not sufficient for the propounding party to broadly state that the materials are being submitted to support the ground at issue" and because opposer failed to make any reference to secondary meaning, identify which documents allegedly reflect that the term is generic or specifically explain how such documents reflect the public's perception of the term.

Applicant is asking that opposer provide too much in connection with its the notices of reliance. Opposer need not produce its arguments in the notices of reliance, as applicant seems to desire. Moreover, the notices do not merely state broadly that "the materials are being submitted to support the ground at issue." Rather, the notices identify the specific issues to which the documents are relevant and state how they are relevant to those issues. Therefore, the notices of reliance are sufficient in this respect and applicant's motion is **denied**

with respect to the sufficiency of the explanation of the relevance of the documents submitted pursuant to opposer's Notices of Reliance Nos. 1-3.

Motion to Strike Notice of Reliance No. 2 due to alleged untimely production of certain documents

By its motion, applicant also requests that Notice of Reliance No. 2 be stricken because certain documents identified therein, namely, documents N-0586, N-0587, N-0544, N-0545, N-0546, N-0548, N-0549, N-0569, N-0570, N-0574, N-0579, N-0580, N-0581, N-0588, N-0589, N-0590, N-0593, N-0601, N-0614 and N-0534, were not printed from the Internet or sent to applicant until three days *after* opposer's written response to applicant's document request and a month after the close of discovery.

Applicant states that the response to the document requests in question were due by January 23, 2012, while opposer states (and applicant does not contest) that the requests were served on December 23, 2011, which, if the request was served by mail, would make the response deadline January 27, 2012. Trademark Rule 2.119(c). The request has not been submitted to the Board and the method of service has not been identified. Therefore, the deadline for the discovery response cannot be determined from the parties' submissions.

In any event, however, viewed by either deadline, January 23 or January 27, it is undisputed that opposer's written response to the document request was timely. It is also undisputed that opposer produced to applicant the documents in question three days later, on January 26, 2012. Applicant has not established that this is an untimely response or that it was prejudiced by the three day delay in producing the documents themselves. Indeed, as opposer points out, applicant filed no motion to compel their production. Nor is there any record of applicant even attempting to exercise a good faith effort to resolve its alleged concern opposer about delayed production of documents.

The fact that the documents were printed from the Internet on January 26, 2012, establishes nothing more than the date they were printed for applicant, not that they were only sought and discovered on that date. Even had the documents been discovered on January 26, 2012, there was no undue delay in producing them to applicant since they were turned over to applicant on that same date. And the fact that the documents were submitted after the close of discovery is irrelevant. That is simply a function of the proximity of the discovery deadline when the request was served. The close of discovery sets a deadline for serving discovery requests; not for their responses. See TBMP § 403.03.

Accordingly, applicant's motion to strike Notice of Reliance No. 2 because of alleged untimely production of documents N-0586, N-0587, N-0544, N-0545, N-0546, N-0548, N-0549, n-0569, N-0570, N-0574, N-0579, N-0580, N-0581, N-0588, N-0589, N-0590, N-0593, N-0601, N-0614 and N-0534 is **denied**.

Motion to Strike Notice of Reliance No. 2 for failure of opposer to include the date and URL of certain documents

By its motion, applicant also requests the Board to strike Notice of Reliance No. 2 for failure of opposer to include the date and URL of certain documents (N-0208, N-0209, N-0359, N-360 and N-433) submitted with the Notice of Reliance. Opposer now has provided the necessary information in its response to applicant's subject motion.

As noted by applicant, admission into evidence of an Internet document pursuant to a notice of reliance requires identification of the document's date of publication or the date it was accessed and printed, and its source. TBMP § 704.08(b). Although, as opposer notes, the documents in question are in pdf format, which typically does not include the date printed or a URL, the documents are Internet print-outs and so it was incumbent on opposer to include the required information with the notice of reliance, even is such information is provided by way a separate listing rather than on the documents themselves. Nevertheless, applicant should have been able to obtain the

needed information simply by requesting it from opposer. Indeed, opposer already has provided it.

"When, on a motion to strike a notice of reliance on the ground that it does not meet the procedural requirements of the rule under which it was filed, the Board finds that the notice is defective, but that the defect is curable, the Board may allow the relying party time to cure the defect, failing which the notice will stand stricken." TBMP § 707.02(b)(2). Because opposer's failure to include such information was a curable, procedural matter, the Board may allow time to cure its defect. Applicant has not alleged any prejudice resulting from the oversight and delayed submission of the information. Moreover, applicant has not indicated any such minimal effort or, indeed, any good faith effort to resolve this issue, which the parties should have been able to work out without Board involvement. Because the required information has been provided, the defect has been cured and no further time to do so is necessary. Accordingly, applicant's motion to strike Notice of Reliance No. 2 with respect to documents N-0208, N-0209, N-0359, N-360 and N-433 is **denied**.

Motion to Strike Notice of Reliance Nos. 1-3 because certain documents have incomplete URLs

By its motion, applicant also requests the Board to strike Notice of Reliance No. 1 because documents N-0115, N-0452 and N-

0242-0246, Notice of Reliance No. 2 because documents N-0423, N-0425, N-0426, N-0569, N-0570, N-0579 and N-0593, and Notice of Reliance No. 3 because documents N-0031, N-0141 and N-0265, have incomplete URLs. Apparently, the URLs are incomplete because they were lengthy and cut off. Opposer has provided the complete URLs with response to applicant's motion. For the reasons discussed above with respect to the pdf documents, the motion with respect to these documents is also **denied**.

Motion to Strike Notice of Reliance Nos. 2 and 3 for failure of certain documents to be available at their specified URLs

By its motion, applicant requests that the Board strike Notice of Reliance No. 2 with respect to document N-0224 and Notice of Reliance No. 3 with respect to documents N-0133, N-0135, N-0137, N-0139, N-0282 for failing to be available at their specified URLs. Opposer pointed out that applicant's inability to locate the noted documents was the result of an error in interpreting a numeric "l" for a lower-case letter "1." For that reason, applicant has withdrawn its motion with respect to documents N-0133, N-0135, N-0137, N-0139, N-0282. Accordingly, no further consideration will be given to the motion with respect to such documents.

However, applicant has maintained its motion with respect to document N-0224, which it states it still cannot find. It is noted that document N-0224 is a Craigslist entry, which entries

typically are available for only a limited time. Thus, it appears that the document cannot be found because it is no longer available. "The nonoffering party may verify the Internet document through the date and source information on the face of the document, and may rebut the probative value of the document by showing that there has been a significant change to the document as submitted by the offering party. Due to the transitory nature of the Internet, the party proffering information obtained from the Internet runs the risk that the website owner may change the information contained therein." TBMP § 704.08(b). Thus, applicant's objection goes to weight that will be given document N-0224, not to the insufficiency of the notice of reliance. Therefore, applicant's motion is **denied** with respect to document N-0224.

Motion to Strike Notice of Reliance No. 1 because certain documents require special access through Lexis

By its motion, applicant seeks to strike Notice of Reliance No. 1 with respect to documents N-0092, N-0094, N-0407, N-0408, N-0410 and N-0411 because they are Lexis/Nexis print-outs that are "not available by (*sic*) the public and require special access through Lexis or otherwise." Applicant's position is not well-taken. See *Int'l Assn. of Fire Chiefs v. H. Marvin Ginn Corp.*, 225 USPQ 940, 942 n.6 (TTAB 1985), rev'd on other grounds, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986) (excerpts from the

Lexis/Nexis database were admissible through notice of reliance because the materials "clearly identify the excerpted articles by their dates of publication and sources, all of which are readily available in published materials"); see also *In re National Data Corp.*, 222 USPQ 515, 517 n.3 (TTAB 1984), rev'd on other grounds, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) (magazine articles obtained through Lexis/Nexis search admissible because they were clearly identified and therefore there was "no credibility problem"); and *In re Capital Formation Counselors, Inc.*, 219 USPQ 916, 918 n. 3 (TTAB 1983) (Lexis/Nexis articles are clearly identified by name and date therefore applicant could have easily checked the articles). Therefore, Applicant's motion is **denied** with respect to documents N-0092, N-0094, N-0407, N-0408, N-0410 and N-0411.[1]

Motion to Strike Notice of Reliance No. 3 with respect to document N-0451 for failure of Opposer to reveal allegedly relevant information

By its motion, applicant requests the Board to strike Notice of Reliance No. 3, document N-0451, for failure of Opposer to reveal allegedly relevant information about it. Document N-0451 is U.S. trademark Registration No. 1,193,481. The information applicant claims opposer failed to reveal about

[1] The Board notes in passing that the documents appear to contain information from the records of various State Secretaries of States (i.e., OH, MO and PA). The information may be publicly available without submission of a fee by going to the individual State websites.

that registration is that it had been cancelled (for failure to file an affidavit or declaration of continued use under Section 8 of the Trademark Act (15 U.S.C. §1058)) and that the owner of the particular registration was a vendor of the product for applicant's Farm & Fleet stores. Applicant claims that withholding such information renders the registration misleading. Opposer counters that the cancellation of the registration is irrelevant to why opposer is citing it. Opposer asserts that it is citing it merely to show that it issued. Accordingly, applicant’s motion to strike Notice of Reliance No. 3 with respect to document N-0224 is **denied**. If applicant believes that the current status of the registration or other information about the owner of that registration is relevant, it may submit evidence providing such information in its own testimony period.

In sum, applicant’s motion to strike is **denied** in its entirety.

Proceedings resumed

Proceedings are now resumed. Briefs are due as follows:

Defendant's 30-day Trial Period Ends	**10/15/12**
Plaintiff's Rebuttal Disclosures	**10/30/12**
Plaintiff's 15-day Rebuttal Period Ends	**11/30/12**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.l25.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.