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Filing date: **07/25/2013**

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

Proceeding	91206921
Party	Plaintiff Rich Products Corporation
Correspondence Address	BRIAN E TURUNG FAY SHARPE LLP 1228 EUCLID AVE, THE HALLE BLDG 5TH FLOOR CLEVELAND, OH 44115 UNITED STATES bturung@faysharpe.com, skoenig@faysharpe.com, chutter@faysharpe.com
Submission	Motion to Amend Pleading/Amended Pleading
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Signature	/sandramkoenig/
Date	07/25/2013
Attachments	Motion for Leave.pdf(383070 bytes)

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

In the matter of Application Serial No. 85/577,551
For the mark BETTER ON TOP!
Published in the *Official Gazette* on August 14, 2012

Rich Products Corporation,)	
)	
Opposer,)	
)	Opposition No. 91206921
v.)	
)	
VegiPro Brands, LLC,)	
)	
Applicant.)	
_____)	

MOTION FOR LEAVE TO AMEND NOTICE OF OPPOSITION

Opposer, Rich Products Corporation, hereby moves for leave to amend its Notice of Opposition in the above-captioned case pursuant to Rule 2.107(a) of the Rules of Practice of the Patent and Trademark Office and Rule 15(a) of the Federal Rules of Civil Procedure, and further in accordance with the Order from the Interlocutory Attorney dated July 5, 2013 (“Order”). Specifically, Opposer seeks to amend its Notice of Opposition to remove paragraphs 10-13 which were stricken in the Order, and to reflect the granting of Reg. No. 4,215,194 for the mark ON TOP w/Design covering “non-dairy whipped topping,” subject of Application No. 8538093 filed July 26, 2011. The application was pending at the time the original Notice of Opposition was filed and referenced in paragraph 5 thereof. Opposer also seeks to make of record copies of the specifics of the registrations on which it bases the ground of likelihood of confusion pursuant to the Trademark Act § 2(d), 15 U.S.C. 1052(d).

ARGUMENT

A. **Justice Requires that Leave Be Granted by the Board to Permit Opposer to Amend the Notice of Opposition.**

As set out in 37 C.F.R. § 2.107(a):

Pleadings in an opposition proceeding against an application filed under section 1 or 44 of the Act may be amended in the same manner and to the same extent as in a civil action in a United States district court, except that, after the close of the time period for filing an opposition including any extension of time for filing an opposition, an opposition may not be amended to add to the goods or services opposed.

In light of 37 C.F.R. § 2.107(a) and as discussed in T.B.M.P. § 507.02, amendments to pleadings in an *inter partes* proceeding before the Board are governed by Fed. R. Civ.

P. 15. In particular, Fed. R. Civ. P 15(a) provides pertinent part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and ***leave shall be freely given when justice so requires.***

Fed. R. Civ. P. 15(a) (emphasis added).

Further to this point, T.B.M.P. § 507.02 provides that after a responsive pleading is served,

...a party may amend its pleading only by written consent of every adverse party or by leave of the Board; leave must be freely given when justice so requires. In view thereof, ***the Board liberally grants leave to amend pleadings at any stage of a proceeding*** when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party or parties. This is so even when a plaintiff seeks to amend its complaint to plead a claim other than those stated in the original

complaint, including a claim based on a registration issued to or acquired by plaintiff after the filing date of the original complaint.

See also *Boral Ltd. v. FMC Corp.*, 59 U.S.P.Q.2d 1701, 1702 (TTAB 2000) (“The Board liberally grants leave to amend pleadings **at any stage of a proceeding when justice so requires...**”).

As stated above, the Board will authorize an amendment to a pleading when justice so requires, so long as the entry of the proposed amendment would not violate settled law and would not be prejudicial to the rights of the adverse party. See *Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 U.S.P.Q.2d 1503, 1505 (TTAB 1993). Here, justice requires that the record properly reflect the trademark registration which forms a critical aspect of the controversy in the instant case and was identified as a pending application in the original complaint. Furthermore, this registration issued after the filing of the original Notice of Opposition. Accordingly, the Board should allow Opposer’s proposed amendment to add this registration. See, e.g., *Van Dyne-Crotty Inc. v. Wear-Guard Corp.*, 926 F.2d 1156 (Fed. Cir. 1991) (amendment to add later-acquired registration to tack on prior owner’s use); *Space Base Inc. v. Stadis Corp.*, 17 U.S.P.Q.2d 1216 (TTAB 1990) (notice of opposition amended during testimony period to add claim of ownership of newly issued registration).

Moreover, by placing acceptable status and title copies of its pleaded registrations into the record, priority will not be an issue in this proceeding. See *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 182 USPQ 108 (CCPA 1974). Thus, the sole issue in this proceeding is the likelihood of confusion between Applicant’s mark

BETTER ON TOP! with Opposer's marks ON TOP, ON TOP w/Design, and RICH'S ON TOP, all for identical goods.

B. Opposer's Proposed Amendment Will Not Prejudice Applicant.

Opposer's motion to amend the Notice of Opposition to add Registration No. 4,215,194 for ON TOP w/Design will not prejudice Applicant. Such registration issued after the Notice of Opposition was filed, and the case has since been suspended for a period of time. Moreover, Opposer acted expeditiously to amend its Notice of Opposition to include this registration as soon as these proceedings resumed upon issuance of the Order. Moreover, fact discovery has not yet commenced.

Furthermore, Applicant will not be prejudiced by the addition of the pleaded registration copies because all three of Opposer's trademark records were recited in the original Notice of Opposition and Applicant was on proper notice of them. Applicant should not have to reform any strategy or defense as a result of the First Amended Notice of Opposition. Accordingly Applicant will not be prejudiced by the Board granting this motion.

CONCLUSION

For the foregoing reasons, Opposer respectfully moves for leave to amend its Notice of Opposition in the above-captioned proceeding to allege the ON TOP & Design trademark registration and the pleaded registration copies. A copy of the proposed First Amended Notice of Opposition is attached in both redline (Exhibit 1) and as a clean copy (Exhibit 2), as recommended by the Board at TBMP § 507.01. The Status and

Title copies of Opposer's pleaded registrations are attached to the clean copy (Exhibit 2).

Dated: July 25, 2013

Respectfully submitted,

FAY SHARPE LLP

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Brian E. Turung
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Attorneys for Opposer

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2013, the foregoing **MOTION FOR LEAVE TO AMEND NOTICE OF OPPOSITION** was filed electronically. Notice of this filing was served by First Class Mail, postage prepaid, on the following attorney for Applicant:

BRUNO W. TARABICHI
OWENS TARABICHI LLP
111 N. MARKET ST., SUITE 730
SAN JOSE, CA 95113

/Sandra M. Koenig/
Sandra M. Koenig
Attorney for Opposer

RICH 701110US01 615193 1

EXHIBIT 1

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

In the matter of Application Serial No. 85/577,551
Published August 14, 2012

<hr/>	X	
Rich Products Corporation)	
)	
Opposer,)	
)	
v.)	Opposition No. 91206921
)	
VegiPro Brands, LLC)	
dba Exposure SMI Limited)	
)	
Applicant.)	
<hr/>	X	

FIRST AMENDED NOTICE OF OPPOSITION

Rich Products Corporation (hereinafter “Opposer”), a corporation of the state of Delaware having an address of One Robert Rich Way, Buffalo, New York 14213, believes it will be damaged by registration of the mark shown in Application Serial No. 85/577,551 filed by VegiPro Brands, LLC (“Applicant”) and hereby opposes registration of said mark.

COUNT I

1. Upon information and belief, Applicant filed an intent to use application and use application to register the mark “BETTER ON TOP!”, Application Serial No. 85/577,551 for “whipped topping” (“Applicant’s Goods”) in International Class 029 on March 22, 2012.
2. Upon information and belief, Applicant did not use “BETTER ON TOP!” for Applicant’s Goods prior to March 2012.
3. Opposer is now, and for many years, has been offering for sale and selling whipped topping products.
4. Opposer owns two registrations on the Principal Register pertaining to or

including the mark ON TOP, namely Reg. No. 1,882,377 for the mark “ON TOP” associated with “non-dairy whipped topping”; and Reg. No. 1,496,918 for the mark “RICH’S ON TOP” associated with “non-dairy whipped topping”. Each of these marks is valid and subsisting on the Principal Register. Each of these marks is also incontestable on the Principal Register. [True and correct copies of the specifics of Reg. Nos. 1882377 and 1496918 obtained from the U.S. Patent and Trademark Office TSDR database reflecting status and title are attached and made of record as Exhibits A and B, respectively.](#)

5. Opposer has filed a use application for the mark “ON TOP” and logo as Serial No. 85/380,953 on July 26, 2011 in association with the goods “non-dairy whipped topping.” This trademark application has been allowed and the Statement of Use was accepted on August 22, 2012. [The registration issued on September 25, 2012 under Reg. No. 4215194. A true and correct copy of the specifics of Reg. No. 4215194 obtained from the U.S. Patent and Trademark office TSDR database reflecting status and title is attached and made of record as Exhibit C.](#)

6. Opposer has used the mark “ON TOP” in association with whipped toppings long prior to the filing date of Applicant’s trademark application.

7. Opposer has continuously used the “ON TOP” trademarks to identify its products at least as early as 1986 and continues such use to this day.

8. Since long prior to the filing date of Applicant’s trademark application for “BETTER ON TOP!”, Opposer has extensively advertised and promoted its products under the “ON TOP” trademarks.

9. Upon information and belief, Applicant’s “BETTER ON TOP!” application consists of or comprises a phrase which, if used, would so resemble the “ON TOP” trademarks owned by Opposer, as to be likely, when used on or in connection with the goods sought to be

registered by Applicant, to cause confusion, or to cause mistake, or to deceive in violation of 15 U.S.C. §1052(d).

COUNT 2

~~10. Opposer incorporates the allegations of paragraphs 1-9 as if stated herein.~~

~~11. Applicant seeks registration of “BETTER ON TOP!” on “whipped topping.”~~

~~12. On information and belief, the sale of goods by Applicant under the “BETTER ON TOP!” mark is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of Applicant with Opposer or as to the origin, sponsorship or approval of Applicant’s goods by Opposer, in violation of 15 U.S.C. §1125(a)(1)(A).~~

~~13. Opposer, therefore, believes it will be damaged by the registration of Application Serial No. 85/577,551 to Applicant.~~

PRAYER FOR RELIEF

WHEREFORE, Opposer prays that Application Serial No. 85/577,551 be denied, that Applicant be enjoined from obtaining registration of Application Serial No. 85/577,551, that no registration be issued to Applicant and that this opposition be sustained.

A check for the filing fee for each class in which Applicant seeks registration has been presented with the initial Notice of Opposition. It is requested that any fee necessary be charged to Deposit Account No. 06-0308.

Respectfully submitted this ~~11th~~25th day of ~~September~~ July, 201223.

FAY SHARPE LLP

~~/signature on electronic submission form/
/Sandra M. Koenig/~~

By: Brian E. Turung
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Sandra M. Koenig
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skoenig@faysharpe.com

Attorneys for Opposer

CERTIFICATE OF SERVICE

~~I hereby certify that on this day I caused a true and correct copy of the foregoing
NOTICE OF OPPOSITION to be served upon Applicant, VegiPro Brands, LLC, dba Exposure
SMI Limited, by first class mail, postage prepaid, this 11th day of September, 2012, at the
address below:~~

~~2655 University Street
Eugene, Oregon 97403~~

~~FAY SHARPE LLP~~

~~/signature on electronic submission form/~~

~~By: Brian E. Turung
Ohio Bar No. 0052034
1228 Euclid Ave., 5th Floor
Cleveland, Ohio 44115
Telephone: 216 363 9000
Facsimile: 216 363 9001~~

E-Mail: burtung@faysharpe.com

RICH 701110US01 615623 1

EXHIBIT 2

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

In the matter of Application Serial No. 85/577,551
Published August 14, 2012

Rich Products Corporation)	
)	
Opposer,)	
)	
v.)	Opposition No. 91206921
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VegiPro Brands, LLC)	
dba Exposure SMI Limited)	
)	
Applicant.)	
	X	

FIRST AMENDED NOTICE OF OPPOSITION

Rich Products Corporation (hereinafter “Opposer”), a corporation of the state of Delaware having an address of One Robert Rich Way, Buffalo, New York 14213, believes it will be damaged by registration of the mark shown in Application Serial No. 85/577,551 filed by VegiPro Brands, LLC (“Applicant”) and hereby opposes registration of said mark.

COUNT I

1. Upon information and belief, Applicant filed an intent to use application and use application to register the mark “BETTER ON TOP!”, Application Serial No. 85/577,551 for “whipped topping” (“Applicant’s Goods”) in International Class 029 on March 22, 2012.
2. Upon information and belief, Applicant did not use “BETTER ON TOP!” for Applicant’s Goods prior to March 2012.
3. Opposer is now, and for many years, has been offering for sale and selling whipped topping products.
4. Opposer owns two registrations on the Principal Register pertaining to or

including the mark ON TOP, namely Reg. No. 1,882,377 for the mark “ON TOP” associated with “non-dairy whipped topping”; and Reg. No. 1,496,918 for the mark “RICH’S ON TOP” associated with “non-dairy whipped topping”. Each of these marks is valid and subsisting on the Principal Register. Each of these marks is also incontestable on the Principal Register. True and correct copies of the specifics of Reg. Nos. 1882377 and 1496918 obtained from the U.S. Patent and Trademark Office TSDR database reflecting status and title are attached and made of record as Exhibits A and B, respectively.

5. Opposer has filed a use application for the mark “ON TOP” and logo as Serial No. 85/380,953 on July 26, 2011 in association with the goods “non-dairy whipped topping.” This trademark application has been allowed and the Statement of Use was accepted on August 22, 2012. The registration issued on September 25, 2012 under Reg. No. 4215194. A true and correct copy of the specifics of Reg. No. 4215194 obtained from the U.S. Patent and Trademark office TSDR database reflecting status and title is attached and made of record as Exhibit C.

6. Opposer has used the mark “ON TOP” in association with whipped toppings long prior to the filing date of Applicant’s trademark application.

7. Opposer has continuously used the “ON TOP” trademarks to identify its products at least as early as 1986 and continues such use to this day.

8. Since long prior to the filing date of Applicant’s trademark application for “BETTER ON TOP!”, Opposer has extensively advertised and promoted its products under the “ON TOP” trademarks.

9. Upon information and belief, Applicant’s “BETTER ON TOP!” application consists of or comprises a phrase which, if used, would so resemble the “ON TOP” trademarks owned by Opposer, as to be likely, when used on or in connection with the goods sought to be

registered by Applicant, to cause confusion, or to cause mistake, or to deceive in violation of 15 U.S.C. §1052(d).

PRAYER FOR RELIEF

WHEREFORE, Opposer prays that Application Serial No. 85/577,551 be denied, that Applicant be enjoined from obtaining registration of Application Serial No. 85/577,551, that no registration be issued to Applicant and that this opposition be sustained.

A check for the filing fee for each class in which Applicant seeks registration has been presented with the initial Notice of Opposition. It is requested that any fee necessary be charged to Deposit Account No. 06-0308.

Respectfully submitted this 25th day of July, 2013.

FAY SHARPE LLP

/Sandra M. Koenig/

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RICH 701110US01 615743 1

EXHIBIT A

STATUS

DOCUMENTS

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Mark: ON TOP

No Image
exists for this
case.

US Serial Number: 74494842

Application Filing Date: Feb. 28,

US Registration Number: 1882377

Registration Date: Mar. 07,

Register: Principal

Mark Type: Trademark

Status: The registration has been renewed.

Status Date: Jul. 10, 2006

Publication Date: Dec. 13, 1994

Mark Information

Related Properties Information

Goods and Services

Note:

The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [..] indicate deleted goods/services;
- Double parenthesis ((..)) identify any goods/services not claimed in a Section 15 affidavit of
- Asterisks *..* identify additional (new) wording in the goods/services.

For: non-dairy whipped topping

International Class(es): 029 - Primary Class

U.S Class(es): 046

Class Status: ACTIVE

Basis: 1(a)

First Use: Feb. 05, 1986

Use in Commerce: Feb. 05,

Basis Information (Case Level)

Current Owner(s) Information

Attorney/Correspondence Information

Prosecution History

Maintenance Filings or Post Registration Information

TM Staff and Location Information

Assignment Abstract Of Title Information - None recorded

Proceedings - Click to Load

EXHIBIT B

STATUS

DOCUMENTS

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Mark: RICH'S ON TOP

No Image
exists for this
case.

US Serial Number: 73681042

Application Filing Date: Aug. 28,

US Registration Number: 1496918

Registration Date: Jul. 19, 1

Register: Principal

Mark Type: Trademark

Status: The registration has been renewed.

Status Date: Aug. 26, 2008

Publication Date: Apr. 26, 1988

Mark Information

Related Properties Information

Goods and Services

Note:

The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis ((...)) identify any goods/services not claimed in a Section 15 affidavit of
- Asterisks *..* identify additional (new) wording in the goods/services.

For: NON-DAIRY WHIPPED TOPPING

International Class(es): 029 - Primary Class

U.S Class(es): 046

Class Status: ACTIVE

Basis: 1(a)

First Use: Feb. 05, 1986

Use in Commerce: Feb. 05,

Basis Information (Case Level)

Current Owner(s) Information

Attorney/Correspondence Information

Prosecution History

Maintenance Filings or Post Registration Information

TM Staff and Location Information

Assignment Abstract Of Title Information - None recorded

Proceedings - Click to Load

EXHIBIT C

STATUS

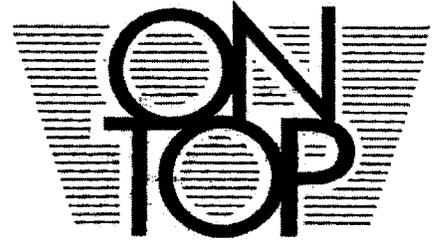
DOCUMENTS

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Mark: ON TOP



US Serial Number: 85380953

Application Filing Date: Jul. 26, 2011

US Registration Number: 4215194

Registration Date: Sep. 25, 2011

Register: Principal

Mark Type: Trademark

Status: Registered. The registration date is used to determine when post-registration maintenance documents are due.

Status Date: Sep. 25, 2012

Publication Date: Dec. 20, 2011

Notice of Allowance Date: Feb. 14, 2011

Mark Information

Related Properties Information

Goods and Services

Note:

The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis ((..)) identify any goods/services not claimed in a Section 15 affidavit of intent to use;
- Asterisks *.* identify additional (new) wording in the goods/services.

For: non-dairy whipped topping

International Class(es): 029 - Primary Class

U.S Class(es): 046

Class Status: ACTIVE

Basis: 1(a)

First Use: Jan. 01, 1986

Use in Commerce: Jan. 01, 1986

Basis Information (Case Level)

Current Owner(s) Information

Attorney/Correspondence Information

Prosecution History

TM Staff and Location Information

Assignment Abstract Of Title Information - None recorded

Proceedings - Click to Load