

Goodman

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

Mailed: July 18, 2013

Opposition No. 91208873

Herb Pharm, LLC

v.

Sunflower Meadows Herb Farm  
LLC

**By the Board:**

This case now comes up on applicant's motion, filed February 25, 2013, to dismiss under Fed. R. Civ. P. 12(b)(6). The motion is fully briefed. The Board presumes the parties' familiarity with the facts and arguments and does not recount them here except as necessary to explain the decision.

In order to avoid dismissal at this stage of the proceeding, opposer need only allege such facts as would, if proved, establish that opposer is entitled to the relief sought. Therefore, opposer must allege that (1) it has standing to bring the proceeding, and (2) a valid ground exists for denying the registration sought. See TBMP § 503.02 (3d ed. rev.2 2013). For purposes of a motion to dismiss, all of opposer's well pleaded allegations in the

opposition must be accepted as true and the complaint must be construed in the light most favorable to opposer. See *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993).

However, despite the requirement that the Board must treat all well-pleaded allegations as true, there are facts the Board may consider when a party has filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) that are not subject to proof, and the Board may look to Office records for such facts to determine if a party's allegations are well-pleaded. *Compagnie Gervais Danone v. Precision Formulations LLC*, 89 USPQ2d 1251, 1256 (TTAB 2009). When factual allegations taken as true cannot state a claim for relief as a matter of law, dismissal is appropriate. *Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1784 (TTAB 2012).

At the motion to dismiss stage, the Board does not consider the merits of opposer's standing or its claims, but only considers whether the pleading is sufficient to state a claim to relief that is plausible on its face.

*Bell Atl. Corp. v Twombly*, 550 U.S. 544, 570 (2007).

"Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and are not accepted as true. *Ashcroft v. Iqbal*, 556 U.S.

662 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. at 555). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. at 678. A plaintiff is only required to provide a sufficient factual basis to show its claim is facially plausible, and, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Enterprise Management Ltd., Inc. v. Warrick* No. 12-1135, \_\_\_F.3d \_\_\_, 2013 WL 2167657 (10<sup>th</sup> Cir. May 21, 2013) citing *Bell Atl. Corp. v. Twombly*, 550 U.S. at 563.

In this case, opposer bases its priority and likelihood of confusion claim on its ownership of HERB PHARM word marks.<sup>1</sup> Applicant argues that opposer's attempt to prevent registration of its involved Sunflower composite mark based on likelihood of confusion grounds due to the inclusion of the disclaimed wording HERB FARM in its mark is not plausible on its face, and insufficient as a matter of law.

Opposer, on the other hand, argues that applicant's "creative argument" is misplaced and not the proper subject of a motion to dismiss. Opposer further argues that

---

<sup>1</sup> Opposer's registrations include a disclaimer of "Herb."

disclaimed matter must be considered in the likelihood of confusion analysis.

Standing

The Board turns first to the question of standing. With respect to the question of standing, all that is required is that opposer have a "real interest" in the opposition proceeding. *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 220 USPQ 1017, 1020 (Fed. Cir. 1984). In most cases, a direct commercial interest satisfies the "real interest" test. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 955 USPQ2d 1842, 1844 (Fed. Cir. 2000). See *American Vitamin Products Inc. v. Dow Brands Inc.*, 22 USPQ2d 1313, 1314 (TTAB 1992) (standing found sufficiently pleaded based on allegations that petitioner is engaged in the sale of goods related to those identified in the registration and that it has a bona fide intent to use an assertedly similar mark as that sought to be cancelled in connection with the goods); *Intersat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154 (TTAB 1985) (finding standing to oppose mark Intelsat based on opposer's pleading of use and ownership of the mark Intersat). See also *William & Scott Co. v. Earl's Restaurants Ltd.*, 30 USPQ2d 1870, 1873 n.2 (TTAB 1994) (opposer's allegations of priority and likelihood of

confusion "constitute a legally sufficient pleading" of opposer's real interest in the proceeding for purposes of standing).

Opposer's pleading provides plausible factual support for its allegations of standing. In particular, opposer has pleaded that it is the owner of HERB PHARM marks and that it sells dietary, nutritional and herbal supplements. Opposer has pleaded valid and continuous use of HERB PHARM prior to the filing date of applicant's application. Additionally, opposer has pleaded likelihood of confusion between applicant's mark and opposer's HERB PHARM marks.

Grounds for Opposition

Turning next to the grounds for opposition, to sufficiently plead likelihood of confusion, opposer must plead both priority of use and allegations either directly or hypothetically, that applicant's mark as applied to its goods or services so resembles the marks previously used by opposer as to be likely to cause confusion or mistake.

*Intersat Corp. v. International Telecommunications Satellite Organization*, 226 USPQ 154 (TTAB 1985).

In this case, opposer has alleged that it has made valid and continuous use of the mark HERB PHARM long before applicant filed for registration of its mark and that it owns registrations for the mark HERB PHARM. Opposer has

also alleged that the parties' marks are confusingly similar in sound and commercial impression and the parties' goods are the same or closely related and likely to be marketed in the same channels of trade.

Considering the factual allegations pleaded, the Office records which are not subject to proof, and the reasonable inferences the Board can draw from the factual allegations, the Board cannot find as a matter of law that plaintiff has not stated a facially plausible priority and likelihood of confusion claim. Although applicant has argued that these allegations lack facial plausibility because its composite word and design mark includes a disclaimer of the term HERB FARM, and the entry of a disclaimer by applicant of the terms HERB FARM forecloses any opposition based on those terms, the entry of a disclaimer "does not remove the disclaimed matter from the purview of determination of likelihood of confusion." *In re Shell Oil Co.*, 992 F2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); see *In re National Data Corporation*, 753 F2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("The technicality of a disclaimer [in] . . . an application to register its mark has no legal effect on the issue of likelihood of confusion. The public is unaware of what words have been disclaimed during prosecution of the trademark application

at the PTO.") While applicant may have disclaimed HERB FARM from its composite word and design mark, the Board's reviewing court has found that the dominant portion of a composite word and design mark may be the literal portion, even where the literal portion has been disclaimed. See e.g., *In re Viterra Inc.*, 101 USPQ2d 1905 (Fed. Cir. 2012) citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570-71, 218 USPQ 390 (Fed Cir. 1983) (registered word and design mark for X-SEED, seed disclaimed, cited by examining attorney found confusingly similar to XCEED, in standard character form; marks were phonetic equivalents); *In re RSI Systems LLC*, 88 USPQ2d 1445 (TTAB 2008) (RSI and DESIGN, RSI disclaimed; RSI portion of mark found dominant term and similar in sound, appearance, and commercial impression to RSI registered word mark). To the extent that applicant has attempted to argue that HERB FARM is a descriptive term which has little or no source indicating significance, that is a merits-based argument which the Board does not address on a motion to dismiss.

Accordingly, the motion to dismiss is denied.

Opposer's request for leave to file an amended pleading to clarify that opposer is a Delaware limited

liability company is granted. The amended notice of opposition, filed March 18, 2013, is accepted and entered.

Proceedings are resumed.

Dates are reset as follows:

Time to Answer	8/14/2013
Deadline for Discovery Conference	9/13/2013
Discovery Opens	9/13/2013
Initial Disclosures Due	10/13/2013
Expert Disclosures Due	2/10/2014
Discovery Closes	3/12/2014
Plaintiff's Pretrial Disclosures Due	4/26/2014
Plaintiff's 30-day Trial Period Ends	6/10/2014
Defendant's Pretrial Disclosures Due	6/25/2014
Defendant's 30-day Trial Period Ends	8/9/2014
Plaintiff's Rebuttal Disclosures Due	8/24/2014
Plaintiff's 15-day Rebuttal Period Ends	9/23/2014

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 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

***By the Trademark Trial  
and Appeal Board***