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

Proceeding	91213825
Party	Defendant Wonderfully Raw Gourmet Delights, LLC
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Submission	Motion to Dismiss - Rule 12(b)
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Date	01/03/2014
Attachments	Motion to Dismiss.pdf(39439 bytes)

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

Opposition Proceeding 91213825

In the matter of Trademark Application No. 85898315

For the mark: WONDERFULLY RAW

Publication Date: Oct. 22, 2013

Paramount Farms International LLC, Opposer

v.

Wonderfully Raw Gourmet Delights, LLC, Applicant

MOTION TO DISMISS

A motion to dismiss for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) is a test solely of the legal sufficiency of a complaint. In order to withstand such a motion, a pleading need only allege such facts as would, if proved, establish that petitioner is entitled to the relief sought, that is, that 1) opposer has standing to maintain the proceeding, and 2) a valid ground exists for opposing the subject application. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007).

LIKELIHOOD OF CONFUSION

On November 19, 2013 before the Opposition was filed, Applicant filed an amendment (shown in **bold**) to the goods for IC 29 Raw vegetable-based snack foods ***excluding nuts except as ingredient; excluding fruit except as ingredient*** and IC 30 Dehydrated raw cookies ***excluding nuts except as ingredient; excluding fruit except as ingredient***. This amendment was accepted by the USPTO and applied to the application on December 10, 2013 after the Notice of Opposition was filed.

Applicant believes that these amendments provide for Applicant's right to registration for a narrower class of goods which is free from likelihood of confusion problems vis-a-vis goods on which the Opposer has actually used its mark and exclude any overlapping channels of trade of Applicant and Opposer eliminating any ground for likelihood of confusion.

Additionally, Opposer's statement "Applicant's Goods are identical, similar and/or related to the goods used in connection with the WONDERFUL Marks" is insufficiently pled, conclusionary and does not give Applicant any notice of allegations of fact. There are no identical or overlapping goods. No goods that are on their face similar or related. These are just words recited by Opposer with no facts alleged or meaning behind them at all.

Applicant asks that the likelihood of confusion claim be dismissed from the Notice of Opposition as not being a valid ground for opposition in light of the amendment and/or as being insufficient allegations of fact to give notice to Applicant.

DILUTION

Courts have held that dilution is an "extraordinary remedy" and that a mark can be famous but not particularly distinctive and hence not vulnerable to dilution. *Toro Co. v. ToroHead Inc.*, 61 U.S.P.Q.2d 1164 (TTAB 2001).

Opposer has not sufficiently pled any allegation of distinctiveness that meets the threshold for a dilution claim. WONDERFUL is clearly on its face a mark that is purely laudatory (attributing quality or excellence to goods or services) and not distinctive. See *Duopross Meditech Corp. v. Inviro Medical Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1759 (Fed. Cir. 2012); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001); *In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999).

Merely citing the statute "in accordance with 15 U.S.C. 1125(c)" is not a sufficient pleading. Allowing an amendment by Opposer to plead dilution more sufficiently cannot succeed because of the nondistinctive nature of its laudatory mark.

Additionally a dilution claim requires that the marks are identical or "very or substantially similar." That the marks are "essentially the same." *Toro Co. v. ToroHead Inc.*, 61 U.S.P.Q.2d 1164 (TTAB 2001) This substantial similarity is not alleged by Opposer nor could an amendment by Opposer possibly succeed. Applicant's mark adds non-trivial features-the suffix LY and the word RAW. An amended dilution claim cannot succeed. Applicant asks that the Board dismiss the dilution claim from the Notice of Opposition and not allow Opposer to amend.

Neither of the two grounds for opposition, likelihood of confusion or dilution are available to Opposer and Applicant asks that the Opposition be dismissed in its entirety.

Submitted By: /Wendy Peterson/

Date: January 3, 2014

Wendy Peterson, Attorney for Applicant, Wonderfully Raw Gourmet Delights, LLC

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2014, the foregoing was served upon Opposer's attorney by first class mail to:

Michael Vasseghi, Esq.
Paramount Farms International LLC
11444 W. Olympic Blvd.
Los Angeles, CA 90064

By: /Wendy Peterson/

Date: January 3, 2014

Wendy Peterson, Attorney for Applicant, Wonderfully Raw Gourmet Delights, LLC