

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Faint

Mailed: May 25, 2014

Opposition No. 91213825

Paramount Farms International LLC

v.

Wonderfully Raw Gourmet Delights,
LLC

By the Trademark Trial and Appeal Board:

Applicant seeks to register the mark **WONDERFULLY RAW** in standard character form. Opposer opposes registration of the mark alleging likelihood of confusion and dilution with its eight registered **WONDERFUL** marks,¹ including, **WONDERFUL**; **WONDERFUL PISTACHIOS**; **WONDERFUL ALMONDS**;



for almonds, pistachios and nuts in Classes 29 and 31.

¹ Registration Nos. 3443097, 3463342, 3784763, 3907814, 3,907,815, 4,307,930, 3,984,224 and 4307923.

Applicant's mark was published for opposition on October 22, 2013, extensions of time to file a notice of opposition were granted by the Board extending the time to file the notice of opposition until February 19, 2014. This case now comes up on applicant's motion to dismiss, filed January 3, 2014 in lieu of an answer. The motion is contested.

A review of the record in this case shows applicant filed a post-publication amendment on November 19, 2013 amending the identifications of goods in Classes 29 and 30 by adding, "excluding nuts except as ingredient; excluding fruit except as ingredient." The notice of opposition was filed December 4, 2013, and the post publication amendment was entered on December 10, 2013.

Applicant argues the notice of opposition fails to state a claim upon which relief can be granted for either the likelihood of confusion or dilution grounds. Applicant asserts the amendments narrowed applicant's goods such that they are now "free from likelihood of confusion" with opposer's goods, and opposer's allegation in the notice of opposition that "[a]pplicant's goods are identical, similar and/or related to the goods used in connection with the WONDERFUL marks" is insufficiently pled, as there are no identical or overlapping goods, and none of the goods are related. (Motion to dismiss p. 2). On the dilution ground, applicant argues opposer has insufficiently pled dilution by failing to plead distinctiveness as a "threshold for a dilution claim," and argues that a dilution claim requires the mark "be identical or very or substantially similar." (Motion to dismiss p. 3).

In response, opposer argues that whether the goods are overlapping is a question of fact, unsuitable for determination on a motion to dismiss, and that despite applicant's post-publication amendment, the goods still overlap since both contain nuts, are sold as snacks, and are in the same class of goods. Opposer argues it has also sufficiently alleged dilution by its paragraph No. 19 alleging, "prior to [a]pplicant's claimed first use date, the WONDERFUL [m]arks became distinctive and famous in accordance with 15 U.S.C. 1125 (c)," and that opposer provided further detail by its allegations regarding the amount of sales, advertising and the scope of advertising. (Notice of Opposition ¶¶ 4-6 and 19).

At the pleading stage, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Doyle v. Al Johnson's Swedish Restaurant & Butik, Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In the context of inter partes proceedings before the Board, the claimant must plead factual content that allows the Board to draw a reasonable inference that the opposer has standing and that a valid ground for opposition exists *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); TBMP § 503.02.

To allege a valid ground of opposition under Section 2(d), opposer need only allege he has priority of use and that applicant's mark so resembles opposer's mark as to be likely to cause confusion. *See* Lanham Act § 2(d), 15 U.S.C. § 1052(d); *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981). A sufficient pleading of dilution against a use-based

application such as applicant's requires an allegation that opposer's mark became famous prior to applicant's use of the mark. *See Citigroup, Inc. v. Capital City Bank Group, Inc.*, 94 USPQ2d 1645, 1649 (TTAB 2010). For purposes of determining whether a valid ground exists for seeking to oppose registration, all of opposer's well-pleaded allegations must be accepted as true, and the notice of opposition must be construed in the light most favorable to opposer as the non-movant. *See Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993); *see also* 5B Wright, Miller, Kane and Marcus, *Federal Practice and Procedure: Civil 3d* § 1357 (Westlaw Update 2014).

Opposer in this case has sufficiently pled its standing with allegations of ownership of, and common law rights in, its WONDERFUL marks, priority and likelihood of confusion and dilution. Proof of standing, and the claims, is left to final decision.

While applicant amended its identifications of goods prior to filing the notice of opposition, applicant's arguments focus on the merits of the claims. There is no requirement that the goods be identical, or overlapping, or even complementary. The question is whether they travel in the same channels of trade, such that consumers would expect them to emanate from a common source, and such is a question of fact to be determined at final decision. *See Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 943, 16 USPQ2d 1783, 1788 (Fed. Cir. 1990),

With regard to applicant's argument that opposer has not alleged sufficient facts to support its claims, the Board finds the notice of opposition satisfies the pleading requirement of Fed. R. Civ. P. 8(a) and gives applicant fair notice of the claims.

Accordingly, applicant's motion to dismiss is **denied**.

Dates Reset

Proceedings are resumed. Dates are reset as set out below.

Time to Answer	6/30/2014
Deadline for Discovery Conference	7/30/2014
Discovery Opens	7/30/2014
Initial Disclosures Due	8/29/2014
Expert Disclosures Due	12/27/2014
Discovery Closes	1/26/2015
Plaintiff's Pretrial Disclosures Due	3/12/2015
Plaintiff's 30-day Trial Period Ends	4/26/2015
Defendant's Pretrial Disclosures Due	5/11/2015
Defendant's 30-day Trial Period Ends	6/25/2015
Plaintiff's Rebuttal Disclosures Due	7/10/2015
Plaintiff's 15-day Rebuttal Period Ends	8/9/2015

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.

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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.
