

ESTTA Tracking number: **ESTTA628186**

Filing date: **09/19/2014**

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

Proceeding	91216576
Party	Defendant Terressentia Corporation
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Date	09/19/2014
Attachments	TERR-24-TM-L Reply Brief.pdf(175560 bytes )

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

CAROLINA MOON DISTILLERY, LLC,	)	
	)	
Opposer,	)	
	)	
	)	Opposition No. 91216576
	)	
v.	)	
	)	U.S. TM Appl. No. 86/011077
	)	
TERRESSENTIA CORPORATION,	)	
	)	
Applicant.	)	

**APPLICANT'S REPLY IN SUPPORT OF MOTION TO DISMISS**

Terressentia Corporation (hereinafter “Applicant”) in Opposition No. 91216576 filed by Carolina Moon Distillery, LLC (hereinafter “Opposer”), by and through its attorneys, hereby submits to the Trademark Trial and Appeal Board (hereinafter the “Board”) this reply in support of its motion to dismiss.

**Opposer Has Failed to Allege Sufficient Factual Matter to Allege Priority**

In order to state a claim upon which relief may be granted in an opposition proceeding, an opposer must allege facts which, if proved, establish (i) that it has standing to challenge the application against which the complaint is directed; and (ii) that there is a valid ground for opposing the application in question. Trademark Rule 2.104(a), 37 C.F.R. §2.104(a). Specifically, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 73 Fed. R. Serv. 3d 837 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 68 Fed. R. Serv. 3d 661 (2007) (internal quotations omitted). The factual allegations “must be enough to raise a right to relief above the speculative level.” See *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010) (emphasis added).

In the present case, Opposer fails to plead facts sufficient to state a claim for relief that is plausible on its face. More particularly, Applicant respectfully submits that Opposer’s factual allegations fail to raise priority over Applicant that rises above a mere speculative level.

In Opposer’s memorandum in response to Applicant’s motion to dismiss, filed September 5, 2014, Opposer submits that the “Prior Established ‘Use’ of the Name Carolina Moon Distillery” should preempt Applicant’s above opposed trademark application. (See Opposer’s Memorandum and Response to Applicant’s Motion to Dismiss, filed September 5, 2014, Pages 3-5 (hereinafter “Opposer’s Response”). In support, Opposer cites *Maryland Stadium Authority v. Becker*, 806 F.Supp. 1236 (1992), for support of the assertion that Opposer’s use of their company name before any sale of distilled spirits is sufficient to establish priority. (Opposer’s Response, Page 4). In *Becker*, the U.S. District Court of Maryland held that in certain situations, pre-sale activities can be

sufficient to “obtain rights in a mark as long as they occur ‘within a commercially reasonable time prior to the actual rendition of service,’ and as long as the totality of acts ‘‘ create[s] association of the goods or services and the mark with the user thereof.’ ” Becker, 806 F.Supp. at 1239 (quoting Kinark Corp. v. Camelot, Inc., 548 F.Supp 429, 442 (D.N.J. 1982), New West Corp. v. NYM Co. of California, Inc., 595 F.2d 1194, 1200 (9th Cir. 1979) (citations omitted)).

However, Applicant respectfully submits that the facts of Becker are quite different than those alleged by the Opposer in the present Opposition. For example, in Becker, it was clearly established that prior to the Defendant’s use of the Plaintiff’s mark, Plaintiff purchased the land on which the highly anticipated major league baseball stadium would be built, demolished the buildings that were previously on said land, and began constructing the “superstructure of the new park.” Becker, 806 F.Supp. at 1238. Additionally, prior to Defendant’s use of the Plaintiff’s mark, it was established that there was growing public excitement about the major league baseball park and “extensive public debate” regarding the major league baseball park. Id. Moreover, Defendant’s use of Plaintiff’s mark was obviously with knowledge of Plaintiff’s activities and was completely dependent on Plaintiff’s activities (i.e., selling shirts displaying the name of Plaintiff’s major league baseball stadium). See id. Accordingly, the Plaintiff in Becker clearly established the substantial and obvious impact the major league baseball stadium already had on the purchasing public prior to Defendant’s use, and the equities were clearly in Plaintiff’s favor.

Moreover, Applicant notes the subsequent Federal Circuit decision in T.A.B. Sys. v. Pactel Teletrac, 77 F.3d 1372 (Fed. Cir. 1996). In Teletrac, the Federal Circuit vacated a Board decision essentially applying the standard set forth above. Id. at 1378. Similar to the court in Becker, in the underlying case, the Board held that the advertising and promotional activities of the Opposer “were calculated to come to the attention of the relevant purchasing public,” and that those promotional activities were analogous to service mark use, indicating a source of forthcoming services. Pactel Teletrac v. T.A.B. Systems, 32 U.S.P.Q.2d 1668, at\*9 (T.T.A.B. 1994), vacated Teletrac, 77 F.3d 1372. The promotional activities referenced included press releases that were circulated nationally, slide show marketing presentations presented to several potential customer groups, establishing a presence at a relevant tradeshow attended by both persons in the trade and the general public, and distribution of marketing brochures to prospective customers. Id. at \*4-\*5.

However, in vacating the above decision, the Federal Circuit held that the above showings were insufficient, and that instead it must be shown that the “ ‘public exposure of a mark [] would be expected to have a *significant impact* on the purchasing public.’ ” Teletrac, 77 F.3d at 1377 (quoting Old Swiss House, Inc. v. Anheuser–Busch, Inc., 569 F.2d 1130, 196 USPQ 808 (CCPA 1978) (emphasis in original)). Further, the Federal Circuit held that the promotional activities must have reached “more than a negligible portion of the relevant market.” Id.

In the present Opposition, the alleged use Opposer highlights is that it incorporated its business with the Secretary of State of South Carolina, signed one or more contracts, made one or more purchases, and established its presence on the internet. (Opposer’s Response, Page 5). More particularly, Opposer alleges that it started an account on the social media site “Facebook” and posted an image of their logo. (Opposer’s Amended Opposition, filed July 1, 2014, Page 2). However, nowhere has Opposer alleged any facts that, even if accepted as true, state a claim upon which relief may be granted. For example, nowhere has Opposer alleged that it’s activities prior to Applicant’s filing of the above opposed trademark application exposed their mark publicly in such a manner that it would be expected to have had a substantial impact on the purchasing public. Further, nowhere has Opposer alleged that it’s promotional activities actually reached any of the relevant purchasing public, much less more than a negligible portion of the relevant market.

Accordingly, Applicant respectfully submits that Opposer’s factual allegations fail to raise priority over Applicant that rises above a merely speculative level, and thus Applicant submits that the Opposer has failed to establish its claim as a matter of law. Therefore, Applicant submits that the present Opposition should be dismissed under F.R.C.P. 12(b)(6) in accordance with Applicant’s previously submitted motion.

### Conclusion

For the foregoing reasons, as well as those set forth in the opening papers, Applicant's motion to dismiss should be granted.

Respectfully submitted.

DATED: September 19, 2014

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**CERTIFICATE OF SERVICE**

I, J. Rhoades White, Jr., hereby certify that a true and complete copy of this **APPLICANT'S REPLY IN SUPPORT OF MOTION TO DISMISS** regarding opposition no. 91216576 was served on Opposer's counsel of record via first class mail on September 19, 2014 as follows:

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