

This Order Is Not a  
Precedent of the TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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Mailed: May 23, 2017

Opposition No. 91232530

*Fromm Family Foods, LLC*

*v.*

*Fromm Bros., Inc.*

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

This proceeding now comes before the Board for consideration of Applicant's motion (filed March 7, 2017) to dismiss the notice of opposition in its entirety pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. The motion is fully briefed.

**Background**

Applicant seeks registration of the mark in application Serial No. 86860885, as shown below:



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Application Serial No. 86860885, filed December 29, 2015, is based on a bona fide intent to use the mark in commerce in connection with the following goods and services:

International Class 5: Dietary and nutritional supplements; nutritional supplements; nutritional supplements for medical use; dietary nutritional supplements for medical use; dietary and nutritional supplements for animals and pets; nutritional supplements for animals and pets; animal feed supplements and dietary supplements for pets; hip and joint nutritional supplements for animals and pets; allergy medicine for animals and pets; animal feed supplements; ginseng capsules for medical purposes; herbs for medicinal purposes; dietary food supplements and dietary nutritional supplements containing ginseng; ginseng for medical use, namely, ginseng extracts; ginseng drops for medical use; ginseng capsules used as an herbal supplement.

International Class 14: Jewelry; rings; bracelets; necklaces; tie bars; scarf rings; pendants; ear clips; tie clips; cufflinks of precious metal; earrings; key holders made of precious metals; brooches; pins being jewelry; clocks; watches; anklets.

International Class 18: Animal pelts; fox pelts; mink pelts; fox pelts intended for scarfs or trimming for women's wear; fox pelts and fur pelts used in ladies' garments, namely, coats, jackets, capes, and scarves; purses; wallets; carryon bags; luggage; garment bags for travel; leather bags; tote bags; shoulder bags and backpacks; handbags; briefcases.

International Class 25: Ladies' garments made of fur, namely, coats, jackets, capes, scarfs and hats; ladies' garments of cloth trimmed with fur, namely, coats, jackets, capes and suits; fur coats; fur hats; fur jackets; gloves; hats; scarfs; clothing for men, women and children, namely, coats, jackets, capes, scarfs and hats.

International Class 29: Preserved ginseng for use as a vegetable; processed ginseng for use as a vegetable; cheese; cheese spreads; jams; meats.

International Class 30: Ginseng tea; processed ginseng, ginseng roots, ginseng slices, ginseng powder, ginseng capsules used as herb, spice or flavoring for food or beverages; maple syrup; honey; candy; candies; chocolate; chocolate candies; chocolate covered cookies; chocolate bars.

International Class 31: Unprocessed ginseng and ginseng roots; food for animals and pets; dog food; pet food; feed for animals, namely, feed for mink, fox, chinchillas.

International Class 35: Multilevel marketing business services, namely, providing marketing and business management consulting services to independent agents engaged in direct sales of goods; Multilevel marketing business services, namely, providing marketing and business management

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consulting services to independent agents engaged in direct sales of beverages; online retail store services featuring dietary and nutritional supplements; online retail store services featuring nutritional supplements, nutritional supplements for medical use, dietary nutritional supplements for medical use, dietary and nutritional supplements for animals and pets, nutritional supplements for animals and pets, animal feed supplements and dietary supplements for pets, hip and joint nutritional supplements for animals and pets, allergy medicine for animals and pets, animal feed supplements, ginseng capsules for medical purposes, herbs for medicinal purposes, dietary food supplements and dietary nutritional supplements containing ginseng, ginseng for medical use, namely, ginseng extracts, ginseng drops for medical use, ginseng capsules used as an herbal supplement, Jewelry, rings, bracelets, necklaces, tie bars, scarf rings, pendants, ear clips, tie clips, cufflinks of precious metal, earrings, key holders made of precious metals, brooches, pins being jewelry, clocks, watches, anklets, Animal pelts, fox pelts, mink pelts, fox pelts intended for scarfs or trimming for women's wear, fox pelts and fur pelts used in ladies' garments, namely, coats, jackets, capes, and scarves, purses, wallets, carryon bags, luggage, garment bags for travel, leather bags, tote bags, shoulder bags and backpacks, handbags, briefcases, Ladies' garments made of fur, namely, coats, jackets, capes, scarfs and hats, ladies' garments of cloth trimmed with fur, namely, coats, jackets, capes and suits, fur coats, fur hats, fur jackets, gloves, hats, scarfs, clothing for men, women and children, namely, coats, jackets, capes, scarfs and hats, Preserved ginseng for use as a vegetable, processed ginseng for use as a vegetable, cheese, cheese spreads, jams, meats, Ginseng tea, processed ginseng, ginseng roots, ginseng slices, ginseng powder, ginseng capsules used as herb, spice or flavoring for food or beverages, maple syrup, honey, candy, candies, chocolate, chocolate candies, chocolate covered cookies, chocolate bars, Unprocessed ginseng and ginseng roots, food for animals and pets, dog food, pet food, feed for animals, namely, feed for mink, fox, chinchillas.

International Class 41: Educational services, namely, providing classes and home study on-line classes, mentoring, personal training, and coaching in the field of network marketing and direct sales.

On January 27, 2017, Opposer filed a notice of opposition, opposing registration of Applicant's mark on the grounds of likelihood of confusion pursuant to Section 2(d) of the Trademark Act and lack of bona fide intent to use the mark under Section 1(b) of the Trademark Act.

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In support of its asserted claims, Opposer has pleaded ownership of Registration No. 2042404, for the mark FROMM FAMILY, in standard characters, for “food for animals” in International Class 31,<sup>1</sup> Registration No. 3639003, for the mark FROMM, in standard characters, for “food for animals” in International Class 31,<sup>2</sup> and Registration No. 4952678, for the mark FROMM FAMILY HEARTLAND GOLD, in standard characters, for “dog food; pet food” in International Class 31<sup>3</sup> (collectively, the “FROMM Marks”). Opposer has also pleaded that the Fromm family holds common law rights in the mark shown below, hereinafter the “Fromm Fox Logo:”



In lieu of filing an answer, Applicant filed a motion to dismiss Opposer’s claims on the ground that Opposer has failed to state a claim, because Opposer lacks standing and has “failed to specify any use or rights in or to a confusingly similar mark... .” 4 TTABVUE at 2.

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<sup>1</sup> Registration No. 2042404, issued March 4, 1997, claims January 11, 1996 as both the date of first use and the date of first use in commerce. Section 8 and 9 Affidavits were accepted on April 1, 2017.

<sup>2</sup> Registration No. 3639003, issued June 16, 2009, claims January 3, 1949 as the date of first use and August 1, 1949 as the date of first use in commerce. Section 8 and 15 Affidavits were accepted on June 12, 2015.

<sup>3</sup> Registration No. 4952678, issued May 3, 2016, claims January 4, 2016 as the date of first use and January 18, 2016 as the date of first use in commerce.

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After a careful review of the arguments raised by the parties in their respective motion papers, the Board makes the following findings and determinations.

### **Motion to Dismiss**

To survive a motion to dismiss, “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 (2009), quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 547, 127 S. Ct. 1955, 1974 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. See *Twombly*, 550 U.S. at 556-57. However, the plausibility standard does not require that a plaintiff set forth detailed factual allegations. *Id.* Rather, a plaintiff need only allege “enough factual matter ... to suggest that [a claim is plausible]” and “raise a right to relief above the speculative level.” *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010). Moreover, it is well established that whether a plaintiff can actually prove its allegations is not a matter to be determined upon motion to dismiss, but rather at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence. See *Libertyville Saddle Shop Inc. v. E. Jeffries & Sons, Ltd.*, 22 USPQ2d 1594, 1597 (TTAB 1992) (“A motion to dismiss does not involve a determination of the merits of the case...”).

For purposes of determining such a motion, all of the plaintiff’s well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to the plaintiff. See *Cardiovascular Systems Inc. v. SciMed Life*

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*Systems Inc.*, 988 F.2d 1157, 1161, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993). Dismissal for insufficiency is appropriate only if it appears certain that the plaintiff is entitled to no relief under any set of facts that could be proved in support of its claim. See *Stanspec Co. v. American Chain & Cable Co., Inc.*, 531 F.2d 563, 566, 189 USPQ 420, 422 (CCPA 1976).

In its motion to dismiss, Applicant argues that Opposer has failed to plead the requisite standing to bring the present opposition proceeding, because Opposer does not allege harm or rights in a confusingly similar mark. In response, Opposer contends that it has alleged that Opposer is comprised of and associated with members of the Fromm family, who have “a long history of using the Fromm Fox [Logo].” 6 TTABVUE at 4.

**Standing**

Section 13 of the Trademark Act provides that “[a]ny person who believes that he would be damaged by the registration of a mark upon the principal register ... may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office, stating the grounds therefor... .” Section 13 thus establishes a broad doctrine of standing; by its terms, the statute requires only that a person have a belief that he would suffer some kind of damage if the mark is registered. As interpreted in binding precedent, a plaintiff must have a “real interest” in the outcome of the proceeding, and a “reasonable basis” for its belief that it would suffer some kind of damage by the registration of the mark. See *Empresa Cubana del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (citing *Ritchie v. Simpson*, 170 F.3d 1902, 50 USPQ2d

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1023, 1025-26 (Fed. Cir. 1999)); *Universal Oil Prods. Co. v. Rexall Drug & Co.*, 463 F.2d 1122, 1123, 174 USPQ 458, 459 (CCPA 1972).

In support of its standing, Opposer pleads, *inter alia*, the following:

- “The Fromm Family sold the fox fur garments under the Fromm name in association with a logo consisting of a silhouette of a fox head (hereinafter ‘Fromm Fox Logo’...)” Notice of opposition at ¶ 6.
- The Fromm Family used the Fromm Fox Logo to emboss the labels of their fox fur garments...” *Id.* at ¶ 7.
- “The Fromm Family used the Fromm Fox Logo in advertising their fox fur garments in numerous magazines and publications...” *Id.* at ¶ 8.
- “In the early 1900s, the Fromm Family also founded a ginseng farm and started growing ginseng for sale.” *Id.* at ¶ 9.
- “The Fromm Family sold the ginseng under the Fromm name in association with the Fromm Fox Logo.” *Id.* at ¶ 10.
- “Due to the Fromm Family’s extensive use of the Fromm Fox Logo, the Fromm Family has acquired common law rights in the Fromm Fox Logo.” *Id.* at ¶ 11.
- “Due to the Fromm Family’s extensive use of the Fromm Fox Logo, a logo consisting of a silhouette of a fox head is closely associated with the Fromm name and has acquired secondary meaning.” *Id.* at ¶ 12.
- “Current members of the Fromm Family now own and operate Opposer, which consists of artisan pet food manufacturing facilities in Mequon and Columbus, Wisconsin.” *Id.* at ¶ 13.
- “Opposer holds rights in the Fromm Family name and owns numerous trademarks associated with the Fromm Family name.” *Id.* at ¶ 14.
- “Opposer owns the trademark FROMM FAMILY, U.S. Registration No. 2,042,404...” *Id.* at ¶ 15.
- “Opposer has been using its FROMM FAMILY mark in connection with the marketing and sale of pet food since at least as early as January 11, 1996.” *Id.* at ¶ 16.
- “Opposer owns the trademark FROMM, U.S. Registration No. 3,639,003...” *Id.* at ¶ 18.
- “Opposer has been using its FROMM mark in connection with the marketing and sale of pet food since at least as early as August 1, 1949.” *Id.* at ¶ 19.
- “Opposer owns the trademark FROMM FAMILY HEARTLAND GOLD, U.S. Registration No. 4,952,678...” *Id.* at ¶ 21.
- “Opposer has been using its FROMM FAMILY HEARTLAND GOLD mark in connection with the marketing and sale of pet food since at least as early as January 18, 2016.” *Id.* at ¶ 22.

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Opposer has failed to allege in the notice of opposition facts that, if proven, would establish a real interest in the proceeding, *i.e.*, a personal interest in the outcome of the proceeding and a reasonable basis for a belief of damage arising from the registration of Applicant's mark. *See McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, 1214 (TTAB 2006) ("The purpose of the standing requirement, which is directed solely to the interest of the plaintiff, is to prevent litigation when there is no real controversy between the parties."), *aff'd*, 240 Fed. Appx. 865 (Fed. Cir. 2007).

The notice of opposition pleads that unspecified members of the "Fromm family" acquired common law rights in the Fromm Fox Logo. Notice of opposition ¶ 11. Opposer then pleads that certain, unidentified individuals from the "Fromm family" now "own and operate" Opposer. *Id.* at ¶ 13. Opposer is correct that it need not allege proprietary rights in a mark in order to have standing. *See Int'l Nutrition Co. v. Horphag Research Ltd.*, 220 F. 3d 1325, 55 USPQ2d 1492, 1496 (Fed. Cir. 2000). Here, however, Opposer fails to plead a causal link between the Fromm family members' position with Opposer and Opposer's interest in opposing registration of the specific mark at issue in this proceeding. Opposer has not alleged a commercial interest in the Fromm Fox Logo, nor has Opposer alleged that Opposer or the unspecified Fromm family members use or intend to use the Fromm Fox Logo in the future. Opposer's claims are predicated on Opposer's rights in the FROMM Marks, not the Fromm Fox Logo. As pleaded, Opposer has failed to allege that it has a real interest in opposing registration of the Fromm Fox Logo.



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Moreover, the notice of opposition is devoid of any allegations sufficient to establish that Opposer holds a “reasonable basis” for a belief it may be harmed by registration of Applicant’s mark. In support of its claim of likelihood of confusion and its allegation of harm, Opposer alleges, *inter alia*, that “Applicant’s ***use of the Fromm name in connection with*** the Fromm Fox Logo is likely to cause confusion, mistake, or to deceive customers as to Applicant’s sponsorship of or affiliation with Opposer, which itself causes injury to Opposer and to the public.” Notice of opposition ¶ 55 (emphasis added).

Opposer’s allegations of harm are tied directly to Applicant’s use of the Fromm name in connection with the Fromm Fox Logo. Although Opposer alleges that Applicant’s mark and the Fromm Fox Logo are “nearly identical” (*Id.* at ¶ 54), there is no allegation that registration of Applicant’s mark is likely to harm Opposer. Opposer’s claims rely on its allegation that the Fromm Fox Logo “has become intertwined with the Fromm name” (Notice of opposition ¶ 52) and that use of Applicant’s mark in connection with the Fromm name is likely to cause confusion (*Id.* at 55). Any alleged use by Applicant of the Fromm name, even in conjunction with Applicant’s mark, is outside the purview of the Board. *See The Board of Trustees of the University of Alabama v. Pitts*, 107 USPQ2d 2001, 2020 (TTAB 2013) (finding question of whether applicant’s mark is being used in an infringing matter is outside the Board’s jurisdiction). “[T]he Board must resolve the issue of likelihood of confusion by reference to the marks of the parties...in the abstract.” *Po Folks, Inc. v. Kountry Folks Restaurants, Inc.*, 231 USPQ 313, 315 (TTAB 1986); *see also NSM*

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*Resources Corp. and Huck Doll LLC v. Microsoft Corp.*, 113 USPQ2d 1029, 1032-33 (TTAB 2014) (finding that standing must be predicated on an allegation of harm based on the applicant's mark, as applied for, not based on use of Applicant's mark in connection with another term). In view thereof, the Board finds that Opposer has failed to adequately plead its standing.

**Likelihood of Confusion**

For the same reason as above, the Board also finds that Opposer has failed to adequately plead a claim of likelihood of confusion. In order to adequately plead likelihood of confusion, Opposer need only allege it has priority of use and that the Applicant's mark so resembles Opposer's mark as to be likely to cause confusion. *See* Lanham Act Section 2(d), 15 U.S.C. § 1052(d); *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981). Although Opposer has alleged that Applicant's mark is nearly identical to the Fromm Fox Logo, Opposer has not alleged that there is a likelihood of confusion as to Applicant's mark, but only with respect to Applicant's mark when used "in connection with" the Fromm name. *See* Notice of Opposition at ¶ 55. A plaintiff must plead "some [ ] legitimate interest in preventing confusion between the pleaded mark on which it predicates its 2(d) claim and the mark whose registration it opposes." *See Holmes Prods. Corp. v. Duracraft Corp.*, 30 USPQ2d 1549, 1552 (TTAB 1994). Because Opposer's claim of likelihood of confusion relies upon Applicant's use of its mark in conjunction with the Fromm name, Opposer has failed to state a claim upon which relief may be granted.

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Nor has Opposer sufficiently pleaded priority. Although Opposer alleges that the Fromm family has common law rights which allegedly predate Applicant's filing date, Opposer has not pleaded that Opposer has prior rights in the Fromm Fox Logo or that Opposer is entitled to rely upon the Fromm family's use of the Fromm Fox Logo.

In view thereof, Applicant's motion to dismiss is **GRANTED**.

Notwithstanding the foregoing, the Board freely grants leave to amend pleadings found to be insufficient upon challenge under Fed. R. Civ. P. 12(b)(6), as is the case here. However, in its notice of opposition, Opposer apprised the Board of a potentially related civil action, *Fromm Family Foods, LLC v. Fromm Bros. Inc., et al.*, Case No. 2:16-cv-724, in the United States District Court for the Eastern District of Wisconsin. It is the policy of the Board to suspend proceedings when the parties are involved in a civil action that may be dispositive of or have a bearing on the Board case. *See* Trademark Rule 2.117(a); TBMP § 510.02(a) (Jan. 2017). Accordingly, within **twenty days** from the mailing date of this order, Opposer is required to file a copy of the complaint in the civil action, so that the Board may determine whether suspension of this proceeding pending final determination of the civil action is warranted.

Proceedings herein are otherwise ***suspended***. Upon resumption, Opposer's time for filing an amended notice of opposition and all other dates will be reset.