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

Proceeding	91235601
Party	Plaintiff Gluten Free Classes, LLC
Correspondence Address	VANGELIS ECONOMOU PO BOX A - 3220 CHICAGO, IL 60690-3220 UNITED STATES Email: Van@EconomouIP.com
Submission	Motion to Dismiss - Rule 12(b)
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Date	08/29/2017
Attachments	MEMORANDUM in Opposition to Motion to Dismiss.pdf(90051 bytes)

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

Applicant: JHMJLL Inc.]	
Application Serial Number: 86/958,449]	Opposition No. 91235601
Application Filing Date: 03/30/2016]	
Mark: NOW FIND GLUTEN FREE]	
Opposer: Gluten Free Classes, LLC]	

Interlocutory Attorney Contact:

Interlocutory Attorney: [MARY CATHERINE FAINT](#)
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**MEMORANDUM OF LAW IN OPPOSITION TO
APPLICANT’S MOTION TO DISMISS (Rule 12(b)(6)) and
IN OPPOSITION TO MOTION TO SUSPEND PROCEEDINGS**

Now comes Opposer Gluten Free Classes, LLC in Opposition to Applicant’s Motion to Dismiss and Motion to Suspend Proceedings Pending Disposition of Motion and argues as follows:

Contrary to the statements in Applicant’s Brief that the Opposer’s Notice to Oppose Applicant’s Registrations fails to state sufficient facts upon which relief can be granted, Opposer has provided sufficient Notice to Applicant regarding the issues raised by the Opposition proceeding, as recognized by the TTAB in issuing its Notice of Institution dated July 17, 2017.

The Law, Regulations and TMEP All Support Sufficiency of the Factual Allegations

Bringing an Opposition Proceeding pursuant to statute is necessarily governed by statutory interpretation. Although the Standing and Subject Matter Jurisdictional issues of Rule 12 of the Federal Rules of Civil Procedure have some relevance in the TTAB in extreme circumstances, these are for the most part a secondary consideration when the statutory requirements for Notice if an Opposition have been met. The Lanham Act and Regulations are met by Opposer’s Statement of Facts as set forth in the Notice of Opposition filed on July 17, 2017.

The applicable law, 15 U.S.C. §1063 (§13 of the Lanham Act), states in relevant part:

15 U.S. Code § 1063 - Opposition to registration

- (a)** Any person who believes that he would be damaged by the registration of a mark upon the principal register, including, may, upon payment of the prescribed fee, file an opposition in the Patent and Trademark Office, **stating the grounds** therefor, within thirty days after the publication under subsection (a) of [section 1062 of this title](#) of the mark sought to be registered. . . . An opposition may be amended under such conditions as may be prescribed by the Director. (emphasis added)

The applicable Trademark Regulations, 37 CFR § 2.104, states in relevant part:

§2.104 CONTENTS OF OPPOSITION.

- (a)** The opposition must set forth a **short and plain statement showing why the opposer believes he, she or it would be damaged by the registration** of the opposed mark and state the grounds for opposition. (emphasis added)

The TMEP § 309.03(c) states in relevant part as to what constitutes **valid grounds for opposition**:

. . . Examples of available grounds for opposition and for cancellation are listed below. This list is exemplary, not exhaustive.

(1) Trademark Act § 2(d), **15 U.S.C. § 1052(d)**: That defendant's mark so resembles a mark registered in the Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods or services of the defendant, to cause confusion, or to cause mistake, or to deceive.

The Facts Alleged in the Notice of Opposition Are Sufficient to Proceed to Trial

The Opposition Notice pleadings provide a full and complete short and plain statement of the factual basis for the Notice of Opposition as submitted on July 17, 2017, as required by 37 CFR §2.104. Included in the Notice were the identification of U.S. Trademark Registration Number 4,450,049 (Notice of Opposition Par. 4) of U.S. Trademark Application Ser. No. 87/328,794 (Notice of Opposition Par. 5), both owned by the Opposer, and a statement that Applicant's mark so resembles Opposer's previously used, applied for and registered marks as to be likely, when applied to the goods and services set forth in Applicant's application, to cause confusion, mistake or deception within the meaning of Section 2(d) of the Trademark Act (15

U.S.C. § 1052(d))” (Notice of Opposition Par. 11). Additionally, Opposer has plead that the registration to and/or use by Applicant of the mark “NOW FIND GLUTEN FREE”, further is likely to cause purchasers to believe that Applicant or its services/products are connected with Opposer, all to the detriment and damage of Opposer. (Notice of Opposition Par. 12). Further, Opposer has plead the detrimental effect that creation of statutory rights in the Applicant, which would be in violation and derogation of the earlier established rights granted by the United States Patent and Trademark Office to Opposer, and that such detrimental effects would harm the Opposer (Notice of Opposition Par. 13).

In view of the above facts plead in the concurrently filed Amended Notice of Opposition. Opposer contends that sufficient facts have been plead to provide the basis for both standing and substantive grounds on which an opposition is conducted in the normal course. Additional facts will be adduced in the course of the opposition proceeding that will prove the allegations made in the Notice. These proofs will substantiate those allegations and will address in full detail those issues and prove those facts sought by Applicant in its Motion for Dismissal. Respectfully, it is considered early in the process to formulate a complete opposition case at this stage of the proceedings before any discovery and before issues have been confronted.

To be “well pleaded,” Opposer need only allege sufficient facts which are accepted as true for the purposes of a §12(b)(6) motion. Opposer has alleged the existence of a similar mark, indeed a mark that was cited in the very application which is now being opposed. Opposer has further alleged that the Applicant is in the same industry and provides similar if not identical services to that of Opposer. Finally, Opposer has alleged sufficient facts to prove standing in that the allegations include harm and injury to the Opposer should the mark be registered.

Applicant has Failed in Showing Lack of Subject Matter Jurisdiction

Nothing in the record has shown otherwise, as Applicant’s Argument in support of its motion merely states that law as determined in some inapposite cases and states in bald conclusion that “Opposer has failed to allege a single fact” to indicate that (A) that Opposer’s use of the mark is in connection with any product or services related to “Computer application software” and (B) that Opposer has alleged any facts that show likelihood of confusion between the uses of the Opposer *vis-a vis* that of the Applicant.

To the contrary, Opposer has alleged that it has been using its mark “FIND ME GLUTEN FREE” since at least as early as July 1, 2010 for, among other goods, “Computer application software for mobile phones, namely, software for providing information about food and other product information regarding gluten free certified or identified gluten free products; . . .” in Class 009, the identical services and class of Applicant’s mark and application. That allegation is set forth in Pr. 11 of the Opposition Notice and is clear from the citation in Opposer’s Trademark Application Ser. No. 87/328,794, which has been allowed and was published of purposes of opposition on July 17, 2017. Opposer expects the registration for the Opposer’s mark to be granted in the next few months.

Applicant’s second line of attack, that there are not sufficient facts alleged that likelihood of confusion exists is also lacking in merit. Opposer has alleged the likelihood of confusion in paragraphs 9 and 11 of its Amended Notice filed concurrently herewith.

Applicant’s reliance on *Robert Doyle v. Al Johnson’s Swedish Restaurant & Butik, Inc.*, 101 USPQ2d 1780 (TTAB 2012) and the whole *Twombly* line of cases is inapposite. The TTAB in *Doyle* ruled that the Opposer lacked standing to bring the opposition because he could not show injury as result of registration of the mark, which comprised “goats on a roof” for “restaurant services” and “Retail store and online retail store services featuring gifts, food, clothing . . .” The TTAB specifically found that the Opposer lacked **standing** because he was not in the restaurant and gift shop business (emphasis added). Moreover, besides the procedural lack of standing, the opposer Doyle alleged that it would be injured because of the mark being registered. Indeed, the TTAB held that “petitioner fails to relate his alleged interest in taking such photographs to restaurant or gift shop services.”

Related Matters Being Addressed Concurrently Herewith

Opposer has further submitted concurrently herewith an Amended Notice of Opposition to correct for the inadvertent transposition of the marks in numbered Paragraphs 10 and 11 of the Opposition Notice.

Opposer further requests from the TTAB leave to amend its Notice of Opposition to include the following items:

- (1) To include the Registration Number of its expected registration for the mark FIND ME GLUTEN FREE in Class 009 which it expects to be granted from U.S. Trademark Application Ser. No. 87/328,794; and

(2) To consolidate as a second opposed application the present Opposition Applicant's corresponding Application Serial No. 87/294,026 for the mark NOW FIND GLUTEN FREE and logo for the goods Downloadable software in the nature of a mobile application for operating systems on mobile devices that present food and other product information for products sold to customers in Class 009.

Conclusion

Opposer has shown above that Applicant's Motion to Dismiss lacks merit, and indeed appears to border on the frivolous on its face. Opposer further has shown that sufficient facts have been alleged to indicate that when the allegations are taken as true, Opposer has both standing and has alleged sufficient injury to its reputation and trademark holdings such as to meet the requirements of §12(b)(6).

WHEREFORE, Opposer respectfully requests that Applicant's Motion to Dismiss be denied as soon as practicable, that the proceeding not be suspended for any period beyond that which is required to reset the trial dates, that the Opposition proceed with revised dates forthwith and that the registration to Applicant be refused.

/s/ Vangelis Economou/
Vangelis Economou
Attorney for Opposer/Registrant
Member Illinois State Bar

NOTICE OF FILING & CERTIFICATE OF SERVICE

Vangelis Economou, an attorney registered to practice by the State Bar of Illinois, and on behalf of Plaintiff/Opposer Gluten Free Classes, LLC, certifies that pursuant to 28 U.S.C. 1746, under penalties of perjury, he caused a copy of the above attached

**MEMORANDUM OF LAW IN OPPOSITION TO
APPLICANT’S MOTION TO DISMISS (Rule 12(b)(6)) and
IN OPPOSITION TO MOTION TO SUSPEND PROCEEDINGS**

to be filed via ESTTA with a copy served via email to Applicant/Defendant on this 29th day of August 2017 at the correspondence address listed in the opposition:

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Respectfully submitted,

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Dated: August 29, 2017