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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Mailed: March 19, 2018

Opposition No. **91236279**

Frito-Lay North America, Inc.[1]

v.

Chef's Touch Sales and Marketing, LLC

By the Trademark Trial and Appeal Board:

On October 18, 2017, proceedings herein were suspended pending disposition of Applicant's motion to dismiss filed on September 29, 2017. Due to Applicant's failure to properly serve the motion in accordance with Trademark Rule 2.119(b) until October 16, 2017, the Board reset the deadline for Opposer's response to November 5, 2017. On November 3, 2017, Opposer filed an amended notice of opposition along with a separate response to the motion noting that its filing of an amended notice of opposition rendered Applicant's motion to dismiss moot pursuant to TBMP § 503.03. On November 15, 2017, Applicant filed a putative reply in support of its motion and further sought dismissal of the amended notice of opposition. Opposer filed a response thereto on November 21, 2017.

[1] The notice of appearance and change of correspondence filed October 19 and November 3, 2017, respectively, on behalf of Opposer have been noted and entered into the proceeding.

Before reaching the merits of Applicant's motion to dismiss, the Board must first address the procedural posture of this proceeding as well as the apparent confusion surrounding which pleadings and which motions are the operative filings herein.

In its filing of November 15, 2017, Applicant reiterated its request for suspension pending the Board's disposition of its motion. 14 TTABVUE 2. However, this matter has remained under suspension since the Board's order of October 18, 2017. *See* 9 TTABVUE 2. As such, a further request for suspension is unnecessary and will be given no further consideration.

As to Opposer's filing of an amended notice of opposition, Opposer was permitted to do so as a matter of course within twenty-one (21) days of the effective service date of Applicant's motion pursuant to Fed. R. Civ. P. 15(a)(1). Since the amended notice of opposition was filed within eighteen (18) days of service, it became Opposer's operative pleading thereby rendering Applicant's motion of September 29, 2017, moot insofar as it applies to the initial notice of opposition. *See Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1926 (TTAB 2014) (motion to dismiss moot in view of amended pleading filed in response thereto). Further, because Applicant's filing of November 15, 2017, addresses the amended notice of opposition, the Board has construed the filing as the operative motion rather than as a reply in support of the original motion which has been rendered moot but which the Board has, nevertheless, considered to the extent the arguments therein remain applicable to the amended pleading. Opposer's filing of November 21, 2017, is, therefore,

received as a response in opposition to Applicant's motion to dismiss the amended pleading rather than as a surreply. *See* Trademark Rule 2.127(a).

Turning, then, to the merits of Applicant's motion, a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint. *See Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993). To withstand a motion to dismiss, a plaintiff need only allege sufficient factual content that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing an application or cancelling a registration. *Doyle v. Al Johnson's Swedish Rest. & Butik Inc.*, 101 USPQ2d 1780 (TTAB 2012). The complaint, therefore, must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009) (plausibility standard applies to all federal civil claims). In considering a motion to dismiss for failure to state a claim, all of plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the light most favorable to plaintiff. *See Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007).

On the question of standing, the purpose of the requirement is to avoid litigation where there is no real controversy between the parties, i.e., to weed out intermeddlers. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 213 USPQ 185, 189

(CCPA 1982). Thus, a plaintiff need only demonstrate that it has a "real interest," i.e., a personal stake, in the outcome of the proceeding and a reasonable basis for its belief of damage. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S.Ct. 1401 (2015); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). Such standing is often found where the plaintiff is able to establish a legitimate commercial interest relating to the subject mark. *See Empresa Cubana Del Tabaco*, 111 USPQ2d at 1062.

Here, Opposer has pleaded that it is "one of the largest manufacturers of snack foods in the United States" [*Amended Notice of Opposition*, 12 TTABVUE 3 at ¶ 1], that "Applicant intends to manufacture and sell snack foods in conjunction with the Mark" [¶ 2], that "Opposer is a competitor of Applicant" [¶ 2], that the "concept of attending a 'tailgate' is commonly understood by the general public in the United States" [¶ 5], that the "concept of 'tailgating' includes the consumption of snack foods" [¶ 5], that "LET'S TAILGATE! is a slogan that is merely informational in nature, or is a common laudatory phrase or call to action that would ordinarily be used by the public … to specifically refer to an event where there is the consumption of food, especially snack foods" [¶ 6] and that "Opposer will be damaged by the registration sought by Applicant because such registration will give color and exclusive statutory right to Applicant in violation and derogation of Opposer's equal right to use the words in Applicant's applied-for mark in advertising and in the manner that is customary to the public and in the relevant industry" [¶ 13]. These

allegations clearly plead Opposer's legitimate commercial interest vis-à-vis the subject mark and are, therefore, sufficient to plead Opposer's standing.[2]

As to whether a valid ground for opposition exists, it is Opposer's claim that the subject mark is merely an informational slogan, common laudatory phrase, or call to action that fails to function as a trademark. *Amended Notice of Opposition*, 12 TTABVUE 4. The critical inquiry in determining whether matter functions as a trademark is how the mark would be perceived by the relevant public. *See D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1713 (TTAB 2016). Here, Opposer's allegations as to the public's understanding and usage of the terms "tailgate" and "tailgating" as they relate to food as well as allegations of the public's perception of "Let's tailgate!" as merely informational matter rather than as an indication of source [¶¶ 5-10] are sufficient to place Applicant on notice of the claim being asserted as they are more than simply "[t]hreadbare recitals of the elements of a cause of action." *See Ashcroft v. Iqbal*, 556 U.S. at 678.

In view thereof, Applicant's motion to dismiss is hereby **DENIED**. Applicant is allowed until **APRIL 16, 2018**, to answer the amended notice of opposition.

Proceedings are **RESUMED** and dates are **RESET** as follows:

Time to Answer	**4/16/2018**
Deadline for Discovery Conference	**5/16/2018**
Discovery Opens	**5/16/2018**
Initial Disclosures Due	**6/15/2018**
Expert Disclosures Due	**10/13/2018**
Discovery Closes	**11/12/2018**

[2] Of course, Opposer must ultimately prove its standing if it is to prevail at trial or on summary judgment. *See Sinclair Oil Corp. v. Kendrick*, 85 USPQ2d 1032, 1037 (TTAB 2007).

Plaintiff's Pretrial Disclosures Due	**12/27/2018**
Plaintiff's 30-day Trial Period Ends	**2/10/2019**
Defendant's Pretrial Disclosures Due	**2/25/2019**
Defendant's 30-day Trial Period Ends	**4/11/2019**
Plaintiff's Rebuttal Disclosures Due	**4/26/2019**
Plaintiff's 15-day Rebuttal Period Ends	**5/26/2019**
Plaintiff's Opening Brief Due	**7/25/2019**
Defendant's Brief Due	**8/24/2019**
Plaintiff's Reply Brief Due	**9/8/2019**
Request for Oral Hearing (option) Due	**9/18/2019**

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence.

Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

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