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

Proceeding	91236279
Party	Defendant CHEF'S TOUCH SALES AND MARKETING, LLC
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Submission	Motion to Dismiss - Rule 12(b)
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Date	09/29/2017
Attachments	Applicant.Motion.Dismiss.signed.9.29.17.pdf(103955 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

FRITO-LAY NORTH AMERICA, INC.

OPPOSER,

V.

OPPOSITION NO. 91236279

MARK: LET'S TAILGATE!

CHEF'S TOUCH SALES AND MARKETING, LLC

SERIAL NO. 87/249,836

APPLICANT.

APPLICANT'S MOTION TO DISMISS OPPOSER'S NOTICE OF OPPOSITION

Applicant, Chef's Touch Sales and Marketing, LLC ("Applicant") moves to dismiss the Notice of Opposition which relies on Sections 1, 2 and 45 of the Lanham Act on the grounds that the mark fails to function as a trademark.

ARGUMENT

This case concerns a dispute regarding Applicant's mark LET'S TAILGATE! for use in connection with "cheese food; fruit-based snack food; meat-based snack foods; nut-based snack foods; potato-based snack foods; ready-t-eat meals comprised primarily of meats, cheese and also including pasta, rice, bean, grains, vegetables, nuts, seeds, fruit; regridgerated food package combinations consisting primarily of meat, cheese or processed vegetables for purposes of creating layered food for handheld consumption in the nature of a sandwich; vegetable-based snack foods" in International Class 29. Opposer objects to the registration of the mark with allegations on the general basis of Sections 1, 2 and 45 of the Lanham Act. Opposer does not cite specific statute claiming specific right of relief.

In addition, Applicant requests that the Trademark Trial and Appeal Board ("Board") suspend the proceedings pending disposition of his motion.

ARGUMENT

In order to withstand a motion to dismiss for failure to state a claim, the opposer needs to allege such facts as would, if proved, establish that (1) the opposer has standing to maintain the proceeding, and (2) a valid ground exists for opposing the mark. *Young v. AGB Corp.* 152 F.3d 1377, 47 USPQ2d 1752 (Fed. Cir. 1998); *Lipton Industriies, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); *see also* TBMP § 503.02. To survive a motion to dismiss, a Notice of Opposition must "state a claim to relief that is plausible on its face". *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S.662, 678 (2009). That is, the claimant must allege well-pleaded factual matter and more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555). *See, e.g., Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1926 (TTAB 2014) (motion to dismiss applicant's fraud, non-use and abandonment counterclaims granted); *Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 (TTAB 2014).

The Notice of Opposition in this case fails to assert a valid claim for opposing Applicant's mark.

A. FAILS TO STATE A CLAIM TO RELIEF THAT IS PLAUSIBLE ON ITS FACE

A sufficient pleading must "state a claim to relief that is plausible on its face". *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). Factual allegations must be enough to raise a right of relief above the speculative level on the assumption that all the allegations are true and must sufficiently suggest plausibility of the allegation. Id. Plausibility of an allegation requires sufficient facts in the pleadings to raise a reasonable expectation that discovery will reveal evidence of the claim for relief. *Id.*

Allegations No. 1, 2, and 3 comprise only speculative claims, reciting information only regarding the scope and nature of Opposer's business without further support over the question of functionality of Applicant's mark LET'S TAILGATE! As such, Allegations No. 1, 2, and 3 fail sufficiently provide or support a claim for relief and should each be dismissed.

Allegation No. 4 admits in its own language that the word "tailgate" refers to a type of event or an experience and not to the items found therein according to their individual or separate capacities. The language of Allegation No. 4 further admits that many otherwise unrelated

items may be found at or may occur at a "tailgate" event (beverages, vehicles, parking space, stadium or venue location, social gather of people, etc.) To disqualify any mark from registration based an allegation that a word contained therein is *de facto* informative of associated products, particularly in the case of "tailgate" where anything may be found at a tailgate event, would disqualify nearly every mark containing the word "tailgate". Allegation No. 4 should be dismissed for failing to allege and factually support the claim of relief that the word "tailgate" used in the context of LET'S TAILGATE! is informative of the products sought to be protected, specifically "cheese food, fruit-based snack foods; meat-based snack foods; nut-based snack foods; potato-based snack foods; ready-to-eat meals comprised primarily of meats, cheese and also including pasta, rice, beans, grains, vegetables, nuts, seeds, fruit; refrigerated food package combinations consisting primarily of meat, cheese or processed vegetables for purposes of creating layered food for handheld consumption in the nature of a sandwich; vegetable-based snack foods" in international class 29. Allegation No. 4 would require speculation to assume truth in the claim for relief.

Truth being the opposite, the USPTO has consistently found the word TAILGATE to be sufficiently functional as a trademark relating to items that may be found at a tailgate event according to their individual separate capacities, having issued multiple registrations to the mark TAILGATE among class 35 (retail clothing company) Reg. No. 4679730; class 38 (radio broadcasting programs) Reg. No. 4671609; class 12 (storage systems for vehicles) Reg. No. 4607484; and even to the phrase TAILGATE FOODS in class 30 (barbeque sauces, dressings, etc.) Reg. No. 3249132. By USPTO standards, the word "tailgate" by its mere use and meaning is not presumptively informative, descriptive or commonly understood in association with any of the individual items found at a tailgate event at their individual or separate capacities without further factual allegations to support the claim.

B. OPPOSER ALLEGES ONLY LABELS AND CONCLUSIONS, AND FORMULAIC RECITATION OF A CAUSE OF ACTION

It is Plaintiff's obligation to provide grounds of entitlement to relief, which requires more than labels and conclusions, and a formulaic recitation of a cause of action. *Id.* Notice of Opposition should be dismissed for failure to provide factual allegations sufficient to support a plausible claim of relief. Allegation Nos. 5 and 6 provide only conclusory statements that Applicant's

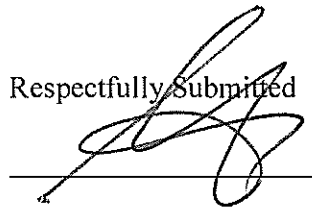
mark is either a "common laudatory phrase" or lacks "commercial impression of a source indicator". The lack of factual support over these conclusions would require a level of speculation to assume their truths. As such, Allegations No. 5 and 6 each fail to sufficiently state a claim for relief and should be dismissed. Allegation No.7 is further defective for merely reciting a cause of action in formulaic manner by labels and conclusions, providing no factual support, and should be dismissed for failing to sufficiently state a claim for relief.

CONCLUSION

Opposer's Notice of Opposition should be dismissed for failure to sufficiently state a claim for relief by its failure to 1) actually state a claim for relief in Allegations 1, 2, 3 and 4; 2) alleging only conclusory statements in Allegations 5 and 6; and 3) alleging only recitation of the cause of action and the law in Allegation 7. Each and all of the allegations of this Notice of Opposition fall short of sufficiently stating a claim of relief to give reasonable expectation that upon further discovery on the expressed allegations, evidence of the claim of relief would be revealed.

For the foregoing reasons, Applicant respectfully requests that the Board dismiss Opposers Notice of Opposition for failure to state a claim and suspend proceedings pending disposition of this motion.

Respectfully Submitted



September 29, 2017

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CERTIFICATE OF FILING

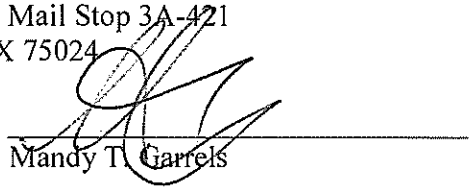
I hereby certify that this Motion to Dismiss was filed electronically through the TTAB's ESTTA (Electronic System for Trademark Trials and Appeals) system, on September 29, 2017.

By: _____
Mandy K. Garrels

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2017, this Motion to Dismiss is being deposited today with the United States Postal Service with sufficient postage as Express Overnight Mail in an envelope addressed to the Attorney of Record for the Opposer:

Jeanette S. Zimmer
7701 Legacy Drive, Mail Stop 3A-421
Plano, TX 75024

By: 
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