

ESTTA Tracking number: **ESTTA1019322**

Filing date: **12/02/2019**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Gardens Alive, Inc.
Granted to Date of previous extension	11/30/2019
Address	230 MARY AVENUE GREENDALE, IN 47025 UNITED STATES

Attorney information	IAN K. BOYD SIDEMAN & BANCROFT LLP ONE EMBARCADERO CENTER 22nd FLOOR SAN FRANCISCO, CA 94111 UNITED STATES iboyd@sideman.com, achang@sideman.com, clee@sideman.com, docket1@sideman.com 415-392-1960
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Applicant Information

Application No	86434363	Publication date	10/01/2019
Opposition Filing Date	12/02/2019	Opposition Period Ends	11/30/2019
International Registration No.	NONE	International Registration Date	NONE
Applicant	Mastronardi Produce Ltd. 900 Wilshire Drive Suite 300 c/o Dinsmore & Shohl LLP Troy, MI 48084 UNITED STATES		

Goods/Services Affected by Opposition


Class 031. First Use: 0 First Use In Commerce: 0
All goods and services in the class are opposed, namely: FRESH FRUITS, namely, FRESH STRAWBERRIES, RAW STRAWBERRIES; UNPROCESSED STRAWBERRIES, NOT FOR USE WITH FRUIT BASED BEVERAGES


Grounds for Opposition

Priority and likelihood of confusion	Trademark Act Section 2(d)
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Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	2073973	Application Date	08/05/1996
Registration Date	06/24/1997	Foreign Priority Date	NONE
Word Mark	WOW!		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 1996/06/21 First Use In Commerce: 1996/06/21 pre-emergent weed killer for lawns and gardens		

U.S. Registration No.	3055528	Application Date	11/26/2003
Registration Date	01/31/2006	Foreign Priority Date	NONE
Word Mark	WOW!		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 031. First use: First Use: 0 First Use In Commerce: 0 Roses		

U.S. Registration No.	5122304	Application Date	05/04/2016
Registration Date	01/17/2017	Foreign Priority Date	NONE
Word Mark	WOW!		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 031. First use: First Use: 2010/05/14 First Use In Commerce: 2010/05/14 Flower bulbs and corms; rhizomes; tubers; natural flowering plants and flowers;all of the foregoing excluding roses		

Attachments	79000522#TMSN.png(bytes) 87024609#TMSN.png(bytes) WOW NOO.pdf(18263 bytes)
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Signature	/Ian K. Boyd/
Name	IAN K. BOYD
Date	12/02/2019

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

GARDENS ALIVE, INC.,

Opposer,

v.

MASTRONARDI PRODUCE LTD.,

Applicant.

Opposition No.:

Application Serial No. 86434363

Mark: WOW

NOTICE OF OPPOSITION

Opposer Gardens Alive, Inc. (“Opposer”), a Delaware corporation, located at 230 Mary Avenue, Greendale, Indiana 47025, believes that it will be damaged by U.S. Application Serial No. 86434363, filed with the United States Patent and Trademark Office on October 24, 2014 by Applicant Mastronardi Produce Ltd. (“Applicant”), a Canadian corporation located at 2100 Road 4 East, Kingsville, Ontario N9Y 2E5, Canada, for the trademark WOW. Opposer hereby opposes Applicant’s application to register WOW and, as grounds for the Opposition, alleges:

Opposer’s Goods and WOW Marks

1. Opposer is a national lawn, agricultural and garden supply company that sells its products under several well-known WOW and WOW-formative marks, including but not limited to WOW! (collectively, “WOW Marks”). When Opposer was founded in 1984, it primarily sold environmentally responsible and natural pest control and fertilization products. Starting at least as early as 1996, Opposer sold such products under its WOW! mark. Opposer later expanded its WOW brand and use of its WOW Marks into other related garden products such as flowering plants, flowers, and fruit plants. Opposer has used the WOW Marks for flowering plants, flowers and fruit plants since at least as early as 2010.

2. In addition to long-standing common-law rights, Opposer owns the following registrations:

MARK	REG. NO.	REG. DATE	CLASS	GOODS
WOW!	2073973	6/24/1997	5	Pre-emergent weed killer for lawns and gardens
WOW!	3055528	1/31/2006	31	Roses
WOW!	5122304	1/17/2017	31	Flower bulbs and corms; rhizomes; tubers; natural flowering plants and flowers; all of the foregoing excluding roses

Each of the above registrations is currently valid and subsisting. Further, Reg. Nos. 2073973 and 3055528 are incontestable under 15 U.S.C. § 1065.

3. Opposer also owns U.S. Application Ser. No. 87749639 for WOW! for “Fresh fruit and vegetables; Live bushes; Live shrubs; Live trees; Living fruit plants; Seeds for flowers; Seeds for fruit and vegetables; the aforementioned expressly excluding roses,” which has been suspended, in part, pending the disposition of Applicant’s Application Ser. No. 86434363.

4. Opposer’s WOW Marks are arbitrary, inherently distinctive, and strong.

5. Opposer has continuously and exclusively used the WOW Marks in interstate commerce for its lawn, agricultural and garden products since as early as 1996 and for fruit plants, specifically, since as early as 2010.

6. Opposer has invested a significant amount of time and expense in promoting its WOW Marks for lawn, agricultural and garden products, including but not limited to fruit plants, and has thereby garnered significant consumer recognition and goodwill for its WOW Marks.

The Opposed Mark

7. On October 24, 2014, Applicant applied to register WOW for “Fresh fruits, namely, fresh strawberries, raw strawberries; unprocessed strawberries, not for use with fruit based beverages.”

8. Applicant's application to register WOW was published for opposition in the Official Gazette on October 1, 2019.

9. On October 31, 2019, Opposer timely requested, and the Board granted, a 30-day extension of time to oppose Applicant's WOW application.

10. On information and belief, Applicant only began using WOW for strawberries in commerce in the United States in 2019.

LIKELIHOOD OF CONFUSION

11. Opposer began using the WOW Marks for lawn and garden products, flowering plants and flowers, and fruit plants, prior to Applicant's applying to register, or use of, its WOW mark for strawberries.

12. Applicant's WOW mark is likely to cause confusion with Opposer's WOW Marks.

13. Applicant's WOW mark is essentially identical to Opposer's WOW Marks in terms of sight, sound, meaning, and commercial impression.

14. Moreover, Applicant's goods that it offers under the WOW mark are identical or closely related to the goods Opposer offers under its WOW Marks, namely flowering plants and fruit plants, including strawberry plants. These goods are normally marketed within the same or similar channels of trade and to the same types of consumers. If successful, Applicant's attempt to register a nearly identical mark to one used by Opposer will create a dangerous legal presumption in Applicant's favor harming Opposer's ability to fairly compete in the marketplace and to naturally expand its business into goods on which it uses its WOW Marks.

15. Consumers are likely to be confused as to the origin and/or sponsorship of Applicant's WOW-branded goods and misled into believing the parties' goods are in some way directly or indirectly associated with each other when they are not, thereby resulting in damage to Opposer, causing it to lose control of its reputation and goodwill in the WOW Marks.

16. Therefore, registration of Applicant's WOW mark should be refused under Section 2(d) of the Lanham Act as being inconsistent with Opposer's established trademark rights under the aforementioned registrations and the common law.

PRAYER

WHEREFORE, Opposer prays that its opposition be sustained and registration be denied and refused for Applicant's WOW mark.

Opposer hereby appoints as its attorneys in this proceeding: Ian K. Boyd and Anna P. Chang, who are each members of the Bar of the State of California and of the firm Sideman & Bancroft LLP, One Embarcadero Center, 22nd Floor, San Francisco, California 94111.

Dated: December 2, 2019

SIDEMAN & BANCROFT LLP

By: /Ian K. Boyd/

Ian K. Boyd
Anna P. Chang

Attorneys for Opposer
Gardens Alive, Inc.

CERTIFICATE OF TRANSMISSION

I hereby certify that a true and correct copy of the attached NOTICE OF OPPOSITION (Serial No. 86434363) is being electronically transmitted to the Trademark Trial and Appeal Board on December 2, 2019.

/Ian K. Boyd/
Ian K. Boyd

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