

ESTTA Tracking number: **ESTTA1034581**

Filing date: **02/08/2020**

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

Proceeding	91253336
Party	Defendant NATURE'S MARK, LLC
Correspondence Address	CHARLES LEE THOMASON 6608 HARRODS VIEW CIRCLE PROSPECT, KY 40059 thomason.20@buckeyemail.osu.edu no phone number provided
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Charles L. Thomason
Filer's email	thomason@spatlaw.com
Signature	/Charles L. Thomason/
Date	02/08/2020
Attachments	NM_MoDismiss_Stndg_02_08_2020.pdf(181958 bytes)

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

In the Matter of Serial No. 88343315
Mark: POT POURRI

SCENTSIBLE, LLC

Petitioner,

v.

NATURES MARK, LLC.

Respondent.

Opposition No: 91/253336

MOTION OF RESPONDENT TO DISMISS.

Respondent NATURES MARK LLC by and through its undersigned counsel, moves pursuant to §13 of the Lanham Act, and Rule 12(b), Fed. R. Civ. Proc. to dismiss the opposition, and to suspend proceedings pursuant to Trademark Rule 2.127(d).

To invoke the limited jurisdiction of the Board, the petitioner must meet the §13 statutory tests of being a “person who believes that he would be damaged by the registration of a mark upon the principal register.” The first part of §13 limits the grant of jurisdiction to a “person” within the zone of interests protected by the Lanham Act. Second, the person must plead and ultimately prove that the respondent’s alleged use of the mark being opposed has a nexus to being “damaged.”¹

¹ The §13 statutory text is equivalent to §13. “The Court GRANTS Belmora's Motion ... and REVERSES the TTAB's holding that Bayer had standing to seek cancellation of the registration of Belmora's mark under Section 14(3) of the Lanham Act, 15 U.S.C. § 1064(3), because Bayer lacks standing to sue pursuant to *Lexmark* as Bayer's interests do not fall within the zone of interests Congress intended to protect under Section 14(3) and Bayer did not sufficiently plead economic injury or an injury to business reputation proximately caused by Belmora's use of the FLANAX mark.” *Belmora LLC v. Bayer Consumer Care AG*, 84 F. Supp. 3d 490, 513 (E.D. Va. 2015), *reversing TTAB*, and *affirmed in relevant part, vacated and remanded*, 819 F.3d 697 (4th Cir. 2016), *cert. denied*, 137 S.Ct. 1202 (2017), *aff'd on remand*, 338 F.Supp.3d 477 (E.D.Va. 2018), on appeal 4th Cir. (filed October 19, 2018).

Standing to commence an administrative proceeding is jurisdictional. Standing “is a threshold jurisdictional issue,” that is, “a jurisdictional question.” *Alps South, LLC v. The Ohio Willow Wood Co.*, 787 F.3d 1379, 1382 (Fed. Cir. 2015); *Myers Investigative & Sec. Servs., Inc. v. U.S.*, 275 F.3d 1366, 1369 (Fed. Cir. 2002).

On questions of jurisdiction, only the un-controverted allegations in the petition are accepted as if true for purposes of the motion. Thus, “only uncontroverted factual allegations are accepted as true for purposes of” deciding this motion challenging Scentsible’s §13 standing. *Myers Invest., supra*; *IHS Glob. Inc. v. U.S.*, 106 Fed. Cl. 734, 743 (2012) (controverted averments of standing “not controlling”), *citing Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993), *citing Gibbs v. Buck*, 307 U.S. 66, 72 (1939).

Several averments in the petition are controverted. Petitioner Scentsible is in the “Poo” business, that is, “bathroom” business. Petition, ¶4. The marks pleaded in the Petition begin prominently with “Poo.” Applicant sells into the “Pot” business, and the mark prominently identifies as related to “Pot.”

Applicant identifies the goods associated with its POT POURRI mark in International Class 005 as “Odor neutralizing preparation for general use indoors on airborne pot odors.” See, Exhibit A, submitted herewith; contra, Petition, ¶1.

Scentsible mis-identified the goods in its its applications and registrations to be "air fresheners" and/or "air deodorizer." Petition, ¶4. Upon information and belief, petitioner has pleaded in federal courts² and stated in commercial publications that the goods identified with its

² In the matter *Scentsible v Prelam*, 3:16-CV-2951 (N.D. Tx), Scentsible’s complaint ¶6 alleged its products are “made up of a blend of essential oils that creates a protective barrier or film on the water’s surface.” The film or barrier works “to keep unpleasant bathroom odors from coming into contact with the air.”

marks are formulated of “essential oils” that float on water such that it “creates a film,” which “creates a barrier - trapping odor under the surface” of the water, including in the following:



11. I am already using Air freshener sprays which does the job and at a better price, why do I need Poo Pourri?

Air freshener sprays come into action when your bathroom\toilet has already experienced the devastating power of the nuclear bomb that was just detonated. Trying to mask the odor after it happened is not really helpful since you & others have already smelled your creation. Is it not better to stop the odor before it even happens and spreads?

And on top of that, Poo Pourri products are based on essential oils, herbs, flower petals, spices, dry leaves. All NATURAL instead of aerosol sprays which contain harmful chemicals and irritates the eyes. This is a premium product as it is based on essential oils, so the comparison with air sprays cannot be done.

The petition weakly alleges Scentsible as being, per §13, a person who “would be damaged” by the registration, and does not allege that it “believes” or reasonably believes that. The Petition alleges that the Opposer Scentsible “will be damaged” since “somehow” somebody might “believe” that its “Poo” products are affiliated with “Pot” products. Petition, ¶4.

Based on the foregoing, the opposition should be dismissed. Scentsible’s petition does not sufficiently plead economic injury or an injury to business reputation proximately caused by applicant Natures Mark's use of its Pot Pourri mark, per *Belmora, supra*, 84 F. Supp. 3d at 518, as identifying “Odor neutralizing preparation for general use indoors on airborne pot odors.”

Date: February 8, 2020

Respectfully submitted
By: s/Charles L. Thomason/
6608 Harrods View Circle
Prospect, KY 40059
Attorney for Natures Mark LLC

CERTIFICATE OF SERVICE

The undersigned certifies that a true and complete copy of the foregoing Motion was filed electronically via ESTTA, and has been served via email on counsel of record RICHARD LAW GROUP by forwarding said copy on February 8, 2020, via email to:

Molly Buck Richard
molly@richardlawgroup.com
RICHARD LAW GROUP
13355 Noel Road, Suite 1350
Dallas, TX 75204
(214) 206-4300
Attorneys for Petitioner Scentsible, LLC

This the 8^h day of February, 2020.

Trademark Snap Shot Amendment & Mail Processing Stylesheet
(Table presents the data on Amendment & Mail Processing Complete)

OVERVIEW

SERIAL NUMBER	88343315	FILING DATE	03/17/2019
REG NUMBER	0000000	REG DATE	N/A
REGISTER	PRINCIPAL	MARK TYPE	TRADEMARK
INTL REG #	N/A	INTL REG DATE	N/A
TM ATTORNEY	ALLEN, BIANCA LEIGH	L.O. ASSIGNED	N50-NOT FOUND

PUB INFORMATION

RUN DATE	02/04/2020		
PUB DATE	12/17/2019		
STATUS	774-OPPOSITION PENDING		
STATUS DATE	01/08/2020		
LITERAL MARK ELEMENT	POT POURRI		
DATE ABANDONED	N/A	DATE CANCELLED	N/A
SECTION 2F	NO	SECTION 2F IN PART	NO
SECTION 8	NO	SECTION 8 IN PART	NO
SECTION 15	NO	REPUB 12C	N/A
RENEWAL FILED	NO	RENEWAL DATE	N/A
DATE AMEND REG	N/A		

FILING BASIS

FILED BASIS		CURRENT BASIS		AMENDED BASIS	
1 (a)	YES	1 (a)	YES	1 (a)	NO
1 (b)	NO	1 (b)	NO	1 (b)	NO
44D	NO	44D	NO	44D	NO
44E	NO	44E	NO	44E	NO
66A	NO	66A	NO		
NO BASIS	NO	NO BASIS	NO		

MARK DATA

STANDARD CHARACTER MARK	YES
LITERAL MARK ELEMENT	POT POURRI
MARK DRAWING CODE	4-STANDARD CHARACTER MARK
COLOR DRAWING FLAG	NO

CURRENT OWNER INFORMATION

PARTY TYPE	20-OWNER AT PUBLICATION
------------	-------------------------

NAME	NATURE'S MARK, LLC
ADDRESS	2358 East Walnut Ave. Fullerton, CA 92831
ENTITY	16-LTD LIAB CO
CITIZENSHIP	Texas

GOODS AND SERVICES

INTERNATIONAL CLASS	005
DESCRIPTION TEXT	Odor neutralizing preparation for general use indoors on airborne pot odors

GOODS AND SERVICES CLASSIFICATION

INTERNATIONAL CLASS	005	FIRST USE DATE	02/08/2019	FIRST USE IN COMMERCE DATE	02/08/2019	CLASS STATUS	6-ACTIVE
---------------------	-----	----------------	------------	----------------------------	------------	--------------	----------

MISCELLANEOUS INFORMATION/STATEMENTS

CHANGE IN REGISTRATION	NO
------------------------	----

PROSECUTION HISTORY

DATE	ENT CD	ENT TYPE	DESCRIPTION	ENT NUM
02/03/2020	CHPB	I	CHANGES/CORRECTIONS AFTER PUB APPROVAL ENTERED	021
01/30/2020	APET	A	ASSIGNED TO PETITION STAFF	020
01/08/2020	OP.I	T	OPPOSITION INSTITUTED NO. 999999	019
01/08/2020	OPPF	T	OPPOSITION PAPERS RECEIVED AT TTAB	018
12/17/2019	EPPA	I	TEAS POST PUBLICATION AMENDMENT RECEIVED	017
12/17/2019	NPUB	E	OFFICIAL GAZETTE PUBLICATION CONFIRMATION E-MAILED	016
12/17/2019	PUBO	A	PUBLISHED FOR OPPOSITION	015
11/27/2019	NONP	E	NOTIFICATION OF NOTICE OF PUBLICATION E-MAILED	014
11/13/2019	ALIE	A	ASSIGNED TO LIE	013
11/07/2019	CNSA	O	APPROVED FOR PUB - PRINCIPAL REGISTER	012
11/06/2019	TEME	I	TEAS/EMAIL CORRESPONDENCE ENTERED	011
11/05/2019	CRFA	I	CORRESPONDENCE RECEIVED IN LAW OFFICE	010
11/05/2019	TROA	I	TEAS RESPONSE TO OFFICE ACTION RECEIVED	009
07/10/2019	GNRN	O	NOTIFICATION OF NON-FINAL ACTION E-MAILED	008
07/10/2019	GNRT	F	NON-FINAL ACTION E-MAILED	007
07/10/2019	CNRT	R	NON-FINAL ACTION WRITTEN	006
07/08/2019	DOCK	D	ASSIGNED TO EXAMINER	005
06/28/2019	DOCK	D	ASSIGNED TO EXAMINER	004
04/15/2019	DOCK	D	ASSIGNED TO EXAMINER	003
04/11/2019	NWOS	I	NEW APPLICATION OFFICE SUPPLIED DATA ENTERED IN TRAM	002
03/20/2019	NWAP	I	NEW APPLICATION ENTERED IN TRAM	001

CURRENT CORRESPONDENCE INFORMATION

ATTORNEY	CHARLES LEE THOMASON
CORRESPONDENCE ADDRESS	CHARLES LEE THOMASON 6608 HARRODS VIEW CIRCLE PROSPECT, KY 40059
DOMESTIC REPRESENTATIVE	NONE

PRIOR OWNER INFORMATION

PARTY TYPE	10-ORIGINAL APPLICANT
NAME	NATURE'S MARK, LLC
ADDRESS	2358 East Walnut Ave. Fullerton, CA 92831
ENTITY	16-LTD LIAB CO
CITIZENSHIP	Texas

POT POURRI