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

Proceeding no.	91278157
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>OWN YOUR HUNGER INC., Applicant, v. Flowers Bakeries Brands LLC Opposer.</p>	<p>Opposition No. 91278157  US Serial No. 90805804 Mark: WONDERSPREAD Filed: July 1, 2021</p>
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## **I. SUMMARY OF THE CASE**

Applicant and Defendant OWN Your Hunger Inc. (“OWN”) seeks registration of Application Serial No. 90805804 for the standard character mark WONDERSPREAD in Class 29 for “Nut butters” (the “WONDERSPREAD mark”). Plaintiff and Opposer, Flowers Bakeries Brands LLC (“Flowers”) opposes Application Serial No. 90805804 on the grounds of Likelihood of Confusion. Given the widespread third-party use of the dominant "WONDER" portion of the Opposer's mark, which co-exists with a substantial number of third-party registrations without causing confusion (many existing within the same trade channels and for nearly identical goods), the marks being in different categories, and considering that the Applicant's mark is sufficiently distinct from the Opposer's marks, Applicant disputes any likelihood of confusion between nut butters sold under the WONDERSPREAD mark and the Opposer's WONDER marks for “bread and cake”.

## **II. DESCRIPTION OF THE TRIAL RECORD**

### **A. Evidence submitted by OWN**

1. Defendant’s Notice of Reliance, dated November 14, 2023, 22 TTABVUE
2. Affidavit and Testimony of Ruz Safai, CEO of OWN Your Hunger Inc., dated November 14, 2023, 23 TTABVUE.

### **B. Evidence Automatically of Record, 37 C.F.R. 21.22 (b)(1)**

1. Filing of U.S. Trademark Application Serial No. 90805804 for the WONDERSPREAD mark.

2. Filing of Opposition 91277665 by “The Wonderful Company”, co-opposer for U.S. Trademark Application Serial No. 9080580 for the WONDERSPREAD mark.

### **III. INTRODUCTION**

The opposition of Applicant’s Application for the WONDERSPREAD mark, based on likelihood of confusion, should be dismissed for the following reasons:

1. After more than three years since its initial use in commerce and generating over \$1 million in retail sales, neither the Applicant nor the Opposer has reported any actual confusion related to the WONDERSPREAD mark.
2. A significant number of third-party registrations already share the dominant "WONDER" portion of the Opposer’s marks and coexist with the Opposer's WONDER marks without causing any confusion, all while operating within the same trade channels and under identical products.
3. Some of these third-party registrants have co-existed without any known confusion, despite using their marks for at least a decade, and claim various degrees of fame.
4. Applicant’s and Opposer’s products are not related, have different purposes, look and feel different, and belong to different categories.
5. The "WONDER" portion of the Opposer’s mark has become so diluted and generic that consumers have learned to consider additional factors when determining the origin of the goods.

#### **IV. STATEMENT OF FACTS**

##### **A. OWN'S WONDERSPREAD Trademark**

OWN uses its WONDERSPREAD mark on nut butters and has filed Application Serial No. 90805804 to register the mark WONDERSPREAD in connection with “nut butters” in IC Class 29 (the “Application”).

##### **B. Presence in U.S. Commerce**

OWN has sold its nut butters under the mark WONDERSPREAD since April 1, 2021, with sales exceeding \$1 million, with distinctive packaging indicative of a premium food product catered towards the luxury segment. Defendant’s Testimony/Affidavit of Ruz Safai, “Safai Aff.”

¶ 7, Exhibit A, 23 TTABVUE.



### **C. Primary Channels of Trade**

OWN sells its nut butters bearing the WONDERSPREAD mark primarily through Amazon.com, where its peanut butter spread is consistently highlighted as “Amazon’s #1 Overall Pick” for various search terms, including “low calorie peanut butter”, with over 585 anonymous customer reviews. Defendant’s Testimony/Affidavit of Ruz Safai, “Safai Aff.” ¶ 8, 23 TTABVUE.

### **D. Instances of Actual Confusion**

Neither Opposer nor Applicant is aware of the occurrence of any actual confusion, and Opposer and Applicant admit that no actual confusion has occurred, “Safai Aff.” ¶ 11, 23 TTABVUE, and 22 TTABVUE 5, Response to Request for Admission No. 5.

## V. LIKELIHOOD OF CONFUSION ANALYSIS

### A. Standard for determining likelihood of confusion based on the Dupont Factors.

To determine whether there is a likelihood of confusion, the Board generally considers the thirteen factors set forth in *In re E.I. du Pont de Nemours & Co.*, 177 U.S.P.Q. 563, 567 (CCPA 1973). The Board need not consider all thirteen *DuPont* factors but may consider only those particular factors that are relevant to the case in hand. Applicant considers the following *DuPont* factors to be relevant for consideration, namely:

- Similarity or dissimilarity of marks (first *DuPont* Factor)
- Nature of the goods and services (second *DuPont* Factor)
- Trade channels used (third *DuPont* Factor)
- Purchasing conditions (fourth *DuPont* Factor)
- Fame of the existing mark (fifth *DuPont* Factor)
- Similar marks with similar goods (sixth *DuPont* Factor)
- Actual confusion between the marks (seventh *DuPont* Factor)
- The length of time during and the conditions under which there has been concurrent use without evidence of actual confusion. (eighth *DuPont* Factor)
- The variety of goods on which a mark is or is not used (ninth *DuPont* Factor)
- The extent to which applicant has a right to exclude others from use of its mark on its goods (eleventh *DuPont* Factor)
- The extent of potential confusion (twelfth *DuPont* Factor)
- Any other established fact probative of the effect of use (thirteenth *DuPont* Factor)

As is the case here that no actual confusion exists by Opposer's admission (22 TTABVUE 5, Response to Request for Admission No. 5), a conclusive finding of no likelihood of confusion between Applicant's mark WONDERSPREAD and the standard character WONDER mark means likelihood of confusion as to the other pleaded registrations containing the dominant portion WONDER that either are typed or standard character, stylized, or contain words and a design, would also not be found. *See In re Allegiance Staffing*, 115 USPQ2d 1319, 1325 (TTAB 2015) ("[I]f there is no likelihood of confusion between Applicant's mark and ALLEGIS in standard characters, then there would be no likelihood of confusion with the other ALLEGIS marks). Therefore, Applicant refers to Opposer's WONDER mark (Registration No. 215188) as the lowest-common denominator mark to assess the *DuPont* factors against to determine against likelihood of confusion.

#### **B. Diluted and blurred nature of Opposer's Marks**

When a trademark is used extensively within the same trade channels by different entities, it risks becoming diluted or even generic if consumers start to associate the mark not with a single source but as a descriptor of a type of product or service. Similarly, blurring occurs when a trademark loses its uniqueness and becomes associated with multiple sources. In *A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.* (2001), 237 F.3d 198 (3rd Cir. 2000) involving a dispute over the use of the word "MIRACLE" in the branding of women's swimwear and lingerie, the court's decision touched upon the strength of the "MIRACLE" component, indicating that widespread use of terms can impact their distinctiveness, and ultimately decided definitely in favor of the defendants (even after an extensive series of appeals) that there is no likelihood of direct confusion with respect to swimwear. Here, the "MIRACLE" component of a mark, which is in widespread use for swimwear, can appropriately be interchanged with the

"WONDER" mark, which is in widespread use in various food categories (in addition to being used widely in other categories). Consequently, the "WONDER" portion of the Opposer's mark has become so prevalent among various third parties operating within the same trade channels that its use is widespread. This prevalence allows unrelated entities within these channels to claim fame for the same dominant portion of the mark. Moreover, the mark has been pre-diluted to such an extent that it has almost entirely lost its distinctiveness, making the likelihood of confusion unlikely as per the sixth and ninth DuPont factors.

**C. Applicant's mark is not sufficiently similar to Opposer's marks (*DuPont* Factor 1)**

Applicant asserts its WONDERSPREAD mark for nut butters is not similar enough to Opposer's WONDER mark for bread and cake and is unlikely to cause confusion. Applicant's marks consist of the minor and generic component "WONDER", to convey a sense of awe regarding the product's qualities (due to its low caloric value), and the primary element of "SPREAD" as the descriptive and suggestive portion of the mark that it symbolizes a spreadable product. Opposer's "WONDER" mark consists of a single adjective containing the element "WONDER", without any other suggestive or descriptive components. When spoken, the presence of the suggestive and descriptive component "SPREAD" produces different sounds. Unlike Opposer's cited (13 TTABVUE 12) case of *In e.g., Centraz Indus., Inc.*, 77 U.S.P.Q.2d 1698, 1700-01 (P.T.O. Jan. 23, 2006) (likelihood of confusion found, in part, because ICE SHINE and !SHINE "sound remarkably similar" where only two letters differentiate the marks and the marks end with the same sound), "WONDER" and "WONDERSPREAD" differ by six letters ("SPREAD"), particularly with the inclusion of a suffix that serves as a strong descriptive component. Even in cases where the goods are identical but have marks that share a generic term

or description portion, the courts continue to find no likelihood of confusion. *In Re. Sunkist Growers, Inc. v. Intrastate Distributors, Inc., Opposition No. 91254647 (September 30, 2023) [not precedential] (Opinion by Judge Cheryl S. Goodman)* (an opposition involving legally identical goods for soft drinks where both parties share the term “KIST”, the Board concluded that applicant’s KIST marks are not likely to cause confusion with Opposer’s SUNKIST marks). Given the only similarity between the Applicant's mark and the Opposer's mark is a component that is already significantly diluted and blurred, coupled with the fact that the descriptive portion of the Applicant's mark bears no direct relation to any of the Opposer's existing categories, weighs against the likelihood of confusion in consideration of the first *DuPont* Factor.

**D. Distinct categories between Applicant’s and Opposer’s goods (*DuPont* Factors 2, 3, and 4)**

Despite Opposer’s repeated arguments in its trial brief that “spreads can be affixed to baked goods” and “the parties’ goods may be used together” (31 TTABVUE 49), such arguments are irrelevant given nut butters and bread/cakes are such fundamentally different products, created with fundamentally distinct ingredients, have no visual and texture similarities, and belong to distinctly different categories of IC 029 and IC 030. Opposer’s argument of conjoint use cannot be in any way reasonably considered with a product that has the ubiquities nature of bread that can, and is, commonly used with almost ingredient imaginable. The same could be said for slices of meat, cheese, fruit, and any other substance that can be described as “materials placed on (or between) slices of bread)” (30 TTABVUE Page 44) to be related goods. If such argument were to be considered valid, Opposer’s marks would be so broadly associated with nearly every food-related IC category containing an edible good capable of being placed on

top of, or in between bread slices, that its marks would reach levels of “epic genericness” and cease to have any level of distinction. To address Opposer’s claims that Applicant’s nut butters are often advertised as being on bread, Opposer has not provided any concrete evidence that consumers, even those that are the least informed, are likely to confuse individual foods that go together (versus foods that are actually related) as originating from same source. Opposer attempts to validate its position by citing Board decisions that find confusion between similar marks used in connection with bread, citing cases such as *Martin’s Famous Pastry Shoppe, Inc.*, 221 U.S.P.Q. 364, 366–67 (T.T.A.B. 1984) (denying registration MARTIN’S for “cheese” as opposed by MARTIN’S for “wheat bran and honey bread”), and *In re Am. Blanching Co.*, No. 76443653 (denying registration for CINDERELLA “peanut butter” as opposed by Walt Disney’s CINDERELLA “coffee, tea sugar, bread, pastry, candy, chocolate, etc.”). Yet, the key factor behind these decisions were based on the marks consisting of highly distinctive names of persons, identical “to the letter”, and nowhere near the prevalent third-party usage of the generic mark WONDER. Contrary to Opposer’s misinterpretation that Applicant erroneously repurposed testimony that was to be used in a related proceeding (30 TTABVUE Page 44, Footnote 9) and therefore makes no attempt to dispute the related nature of the parties’ goods, the example of nuts and nut butters being fundamentally different products (“Safai Aff., 23 TTABVUE ¶ 12) is indeed relevant here, that even in the case of foods sharing the same core ingredient (again, with nuts and nut butters as an ideal example), a transformative processes by itself results in unrelated products that ultimately require different marks, even if they were considered related at certain stages of processing prior to its end result as a finished good. To demonstrate the high bar required to consider the actual related nature of goods, Applicant reiterates the same relevant citing used in the related opposition proceeding that The Supreme Court has already ruled that

generic terms or descriptions of the goods themselves do not grant exclusive trademark rights, even when one company uses them for raw materials and another for the finished product. See *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111 (1938) (a dispute over the use of the term "Shredded Wheat" between two cereal manufacturers, the Supreme Court held that the term was generic for the product and that Kellogg's use of the term for its version of the cereal did not infringe National Biscuit Company's rights). The distinct difference in products, categories, their usages, and general non-related nature of the parties' goods regarding *DuPont* Factors 2, 3, and 8 weighs in favor of no likelihood of confusion.

**E. Trade channels and purchasing conditions (*DuPont* Factors 3 and 4)**

Applicant's nut butters are sold for \$15 per 12oz jar. 23 TTABVUE, Safai Affidavit ¶ 9, with products being a unique and specialized variation of nut butters engineered with a novel method of fat replacement technology to substantially reduce is caloric value (23 TTABVUE, Safai Aff. ¶ 5, ¶ 9), and this property justifies its premium price that a specific educated customer demographic is willing to pay for lower calorie food options. Opposer admits that its products are generally placed in the lower cost, budget, and/or affordable price categories, 22 TTABVUE 9, Request for Admission No. 15. The lack of evidence of purchasing conditions that lead customers confusing Applicant's and Opposer's products, despite being in the same channels that promote impulse purchases, weighs in favor of no likelihood of confusion for *DuPont* Factors 3 and 4.




**F. Lack of confusion with Applicant's marks (*DuPont* Factors 7 and 12)**

Lack of actual confusion does not guarantee confusion cannot occur in the future, and Applicant concedes that such argument would not carry significant weight to prove any future likelihood of confusion. Yet, given Opposer has already admitted that no actual confusion has taken place that it is aware of (22 TTABVUE 5, Response to Request for Admission No. 5), this fact remains worthwhile for the Board to take into consideration, as the seventh and twelfth factors in the 13 *DuPont* factors (*In re E.I. du Pont de Nemours & Co*) that do place partial weight based on the extent of actual confusion occurrence in determining the likelihood of confusion occurring.

**G. Substantial third-party registrations with similar marks and in same trade channels (*DuPont* Factor 9)**

The mark WONDER exists as a dominant or co-dominant part of at least 17 registered marks for food-related goods, all co-existing in the same trade channels. Relevant examples of similar co-existing food-related marks are all demonstrated in *Aff. Safai*, 23 TTABVUE Ex. C), including WONDERMILK (USPTO Registration 6740767 for Milk Substitutes), WONDERMEATS (USPTO Registration 6552085 for All natural meats) and WONDERFARM (USPTO Registration 6334874 for Non-carbonated fruit drinks). In fact, the prevalence of the WONDER mark is so significant, so widespread, and so generic, third-party registrations containing the mark WONDER already exist in goods that are essentially *identical* to Opposer's bread and baked goods, including WONDER WRAPS (USPTO Registration 6078191 for Sandwich Wraps), WONDER GRANOLA (Registration 5937379 for Granola), and WONDERJOY (Registration 5701149 for Cookies and crackers), implying WONDER is already

synonymous for wraps, grains, and baked goods (23 TTABVUE, Aff. Safai, Ex. C): .

<p>Wonder Wraps is a smart, healthy choice for the entire family. We never use refined sugar or chemical additives and our products are NON-GMO. Make your life better with General Nature.</p>  <h3>Wonder Wraps</h3> <p><b>ORIGINAL</b></p> <ul style="list-style-type: none"> <li>• No Trans Fat</li> <li>• No Refined Sugars</li> <li>• No Artificial Sweeteners</li> <li>• No Corn Syrup</li> <li>• No MSG</li> <li>• No Preservatives</li> <li>• No Soy</li> <li>• No Gluten</li> </ul> <p>Ingredients: Eggs, Pea protein, Agave, Glycerin</p>  <p>Home   Products   Contact Us</p>	<p><b>WONDER WRAPS</b>  Registration 6078191  IC 030. US 046. G &amp; S: Gluten free sandwich wraps made out of eggs, pea protein, agave, and glycerin. FIRST USE: 20190101. FIRST USE IN COMMERCE: 20190101</p>
<p>Wonder Granola is a smart, healthy choice for the entire family. We combined a medley of nuts and seeds with low-calorie sweeteners for a gluten-free, low-carb crunchy flavor you will love. Try it with milk, your yogurt or as a snack, anytime, any day. We never use refined sugar or chemical additives and our products are NON-GMO. Make your life better with General Nature.</p>  <h3>Wonder Granola</h3> <p><b>COFFEE</b></p> <ul style="list-style-type: none"> <li>• No Trans Fat</li> <li>• No Refined Sugars</li> <li>• No Artificial Sweeteners</li> <li>• No Corn Syrup</li> <li>• No MSG</li> <li>• No Preservatives</li> <li>• No Soy</li> <li>• No Gluten</li> </ul> <p>Ingredients: Almonds, sunflower seeds, flax seeds, astrupoo rice, inulin, psyllium, sunflower oil, honey, coffee, cinnamon, flavor, salt, stevia.</p> <p>For Wholesale Inquiries please contact us.</p>	<p><b>WONDER GRANOLA</b>  Registration 5937379  IC 030. US 046. G &amp; S: Granola. FIRST USE: 20190528. FIRST USE IN COMMERCE: 20190528</p>

Given this extensive list of third-party registrations for related goods that use WONDER, Applicant need not even need to specify the substantial presence of the mark WONDER in other categories. Outside this relevant category, a substantial number of registrations do exist for WONDER in numerous other categories, and many of those registrations possessing some level of fame, with notable examples including WONDERBRA (Registration 1415063 for Brassieres) and WONDER WOMAN (Registration 3779481 for Comic Magazines). As already demonstrated of the substantial number of third-party registrations that include the word "WONDER" across various categories, Applicant believes it would be overly burdensome and unreasonable to submit exhibits of registrations outside food-related categories that are of public record as provided by the USPTO. In a significant decision, the Federal Circuit has clarified the weight given to third-party registrations in determining the strength of the opposer's mark and has firmly placed the burden of showing non-use of such marks on the opposer. *In Re Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355 (Fed. Cir. 2023) (the Court reasoned that the existence of third-party registrations containing a common element is evidence that the element may have "a normally understood and well-recognized descriptive or suggestive meaning.", and the fifteen third-party registrations that consisted of composite marks with the common element "FLEX." Should not be discounted. Additionally, the Court clarified that once an applicant introduces similar third-party registrations as evidence that the opposer's mark is commercially weak, the burden to prove non-use of those marks is on the opposer. Proof of use or non-use is material because the sixth DuPont factor only considers similar marks "in use" on goods. Thus, the Court noted that while the burden of producing evidence of relevant registrations is on the applicant, the opposer bears the burden of proving non-use of those marks). Regarding *du Pont* Factor #6,

which considers the number and nature of similar marks used on similar goods, this factor leans towards a conclusion of no likelihood of confusion.

**H. Lack of confusion with third parties claiming fame and co-existing in the same trade channels (*DuPont* Factors 5, 7, 8, and 12)**

Although the absence of actual confusion between the Opposer's and the Applicant's marks does not conclusively predict the likelihood of future confusion, a more definitive comparison can be drawn between the Applicant's marks and other marks. These other marks share identical dominant elements, have coexisted for decades, continue to coexist, claim fame, and operate within similar trade channels. Here, Applicant readily acknowledges Opposer's mark having fame, albeit for its specific category of baked goods. As a notable example specific to this Opposition, aside from the substantial set of third-party registrations that contain the WONDER mark (23 TTABVUE, Ex. C), Application Serial 90805804 (i.e., this application for the mark WONDERSPREAD) has two opposers, with the other Opposer (The Wonderful Company LLC) equally claiming ownership, fame, and likelihood of confusion for the primary component WONDER, with the earliest registration on May 11, 2004 for goods consisting of "fresh fruit and vegetables", and subsequent registrations for "nuts". Presuming the registrations by The Wonderful Company LLC is still valid, the WONDER mark is also concurrently in use today after 20 years. This implies the two co-Opposers for this opposition (i.e. Opposition 91278157), both simultaneously claiming fame (including by Opposer of this opposition, in essentially the entirety of its trial brief, 30 TTABVUE), and co-exist today alongside Opposer's nearly century-old mark used still in the same trade channels (e.g. grocery stores). If there were a genuine likelihood of confusion, especially among owners of nearly identical—and particularly famous—

marks used in identical trade channels like grocery stores, it would be unlikely for Application Serial 90805804 to have two opposers who have coexisted long enough to file joint oppositions. Moreover, their continued coexistence to this day, presumably through the lack of significant confusion, further undermines the probability of lacking such confusion. Considering the duration and conditions of concurrent use with Opposer's mark, Applicant's mark, Co-opposer's mark, the vast number of third-party registrations using the same mark for the goods, and Opposer's failure to provide any evidence of confusion occurring in any of these scenarios, DuPont Factor #8 distinctly favors a finding of no likelihood of confusion.

## **VI. CONCLUSION**

Considering the factors related to both the Applicant's and Opposer's marks and goods, and based on the following observations: 1) the generic and already weakened nature of the "WONDER" portion of the Applicant's marks, 2) the distinct sound of the "WONDER" and "WONDERSPREAD" marks, 3) the widespread use of the "WONDER" element among various registrants within the same trade channels, across the same products, and essentially synonymous with bread and grain related products, 4) the distinct nature of the products being in different IC categories, 5) the absence of any actual confusion in overlapping trade channels, 6) the lack of confusion with famous third parties that have used the "WONDER" mark for decades within the same trade channels, 7) purchasing conditions that involve premium pricing and discernment among informed consumers, the Board should conclude that there is no cause for a likelihood of confusion among the other DuPont Factors considered relevant.

Therefore, Applicant requests the Board dismiss Opposition 91278157, and allow Application Serial 90805804 for WONDERSPREAD to proceed to registration.

Dated: May 13, 2024

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**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of the foregoing APPLICANT’S TRIAL BRIEF was served via email on May 13, 2024, on Opposer at the following address of record:

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