

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Ferrell

February 16, 2024

Opposition No. 91287431

Troop Nutrition, Inc.

v.

BW Essentials LLC

By the Trademark Trial and Appeal Board:

This proceeding comes before the Board for consideration of BW Essential LLC's ("Applicant") motion, filed November 10, 2023, to dismiss Troop Nutrition, Inc.'s ("Opposer") notice of opposition for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).¹ The motion is fully briefed.²

¹ 4 TTABVUE. Citations to the Board record refer to TTABVUE, the Board's online docketing system. See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding "TTABVUE" corresponds to the docket entry number, and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear.



The parties' future submissions, including trial briefs, motions, responses, and replies, should use citations to the TTABVUE record created throughout the proceeding and during trial to facilitate the Board's review of the evidence throughout the proceeding and at final hearing. See *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *14-15 (TTAB 2022); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 801.03 (2023).

² See 5 TTABVUE (Opposer's response); 7 TTABVUE (Applicant's reply).

The Board has fully considered the parties’ briefs, and addresses the parties’ arguments and the record only to the extent necessary to set forth the Board’s analysis and conclusions. *Guess? IP Holder LP v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

I. Relevant Background

In the following applications, Applicant seeks to register the following marks for the following goods:

Application Serial No.	Mark	Goods
97591423 ³		“Dietary supplements; Dietary supplements in the form of gummies, capsules, and powder; Dietary supplements for sleep and relaxation and mood enhancement; Dietary supplements using natural nootropic ingredients; Nutritional supplements; Nutritional supplements in the form of gummies, capsules, and powder” in International Class 5
97591430 ⁴		“Dietary Supplements. Dietary Supplements in the form of gummies, capsules, and powder. Dietary Supplements for sleep and relaxation and mood enhancement. Dietary Supplements using natural nootropic ingredients. Nutritional Supplements. Nutritional Supplements in the form of

³ The application was filed on September 14, 2022, pursuant to Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The application includes a disclaimer of the word “NOOTROPICS”. The application also includes the following color claim and description of the mark: “Color is not claimed as a feature of the mark.” “The mark consists of the stylized bold wording ‘troomy’ with the letters ‘oo’ connected above the stylized wording ‘NOOTROPICS’.”

⁴ The application was filed on September 14, 2022, pursuant to Section 1(b). The application includes the following color claim and description of the mark: “Color is not claimed as a feature of the mark.” “The mark consists of the stylized bold wording ‘troomy’ with the letters ‘oo’ connected.”


		gummies, capsules, and powder” in International Class 5
97834056 ⁵	TROOMY (in standard characters)	“Dietary supplements; Dietary supplements for sleep, relaxation, and mood enhancement; Dietary supplements in the form of gummies, capsules, oil, and powder; Dietary and nutritional supplements; Dietary and nutritional supplements containing natural nootropic ingredients” in International Class 5
97834082 ⁶	TROOMY NOOTRIPICS (in standard characters)	“Dietary supplements; Dietary supplements for sleep, relaxation, and mood enhancement; Dietary supplements in the form of gummies, capsules, oil, and powder; Dietary and nutritional supplements; Dietary and nutritional supplements containing natural nootropic ingredients” in International Class 5

Opposer filed a notice of opposition on October 2, 2023, wherein it alleged the sole ground of likelihood of confusion pursuant to Trademark Act Section 2(d), 15 U.S.C. § 1052(d).⁷ In support of its entitlement to a statutory cause of action, Opposer alleges that it owns common law rights in and applications for the following marks and the following goods and services:

⁵ The application was filed on March 10, 2023, pursuant to Section 1(b).

⁶ The application was filed on March 10, 2023, pursuant to Trademark Act Section 1(a), 15 U.S.C. § 1051(a), with a claimed first use and first use in commerce date at least as early as October 12, 2022. The application includes a disclaimer of the word “NOOTROPICS”.

⁷ 1 TTABVUE.

Application Serial No.	Mark	Goods
90731049 ⁸	TROOP (in standard characters)	“dietary and nutritional supplements containing mushroom extract; nutritional supplement bars containing mushroom extract; powdered drink mix containing mushroom extract for use as a nutritional supplement” in International Class 5 and “protein-enriched coffee containing mushroom extract” in International Class 30
97753680 ⁹		“dietary and nutritional supplements containing mushroom extract” in International Class 5, “protein-enriched coffee containing mushroom extract” in International Class 30, and “providing an online retail store featuring dietary and nutritional supplements containing mushroom extract” in International Class 35 ¹⁰

Opposer further alleges that it “believes it will be damaged” and “will suffer harm” by registration of Applicant’s trademarks.¹¹

⁸ The application was filed on May 24, 2021, pursuant to Section 1(b). Opposer filed an amendment to allege use on October 23, 2023, pursuant to Section 1(a), with a claimed first use and first use in commerce date at least as early as October 19, 2023.

⁹ The application was filed on January 13, 2023, pursuant to Section 1(a) for the goods and services in International Classes 5 and 35 and Section 1(b) for the goods in International Class 30. For the goods in International Class 5, the application includes a claimed first use and first use in commerce date at least as early as January 21, 2022. For the services in International Class 35, the application includes a claimed first use and first use in commerce date at least as early as January 20, 2022. The application includes the following color claim and description of the mark: “Color is not claimed as a feature of the mark.” “The mark consists of stylized letters TROOP with the two Os in the word TROOP interlocking.”

¹⁰ 1 TTABVUE 2-3, 5-6.

¹¹ *Id.* at 4, 6-7.

In lieu of an answer, on November 10, 2023, Applicant filed a motion to dismiss the notice of opposition.¹²

II. Legal Standard

To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S. Ct. 1937, 1949 (2009), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 5470, 127 S. Ct. 1955, 1974 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. See *Twombly*, 550 U.S. at 556-57. However, the plausibility standard does not require that a plaintiff set forth detailed factual allegations. *Id.* Rather, a plaintiff need only allege “enough factual matter . . . to suggest that a claim is plausible” and “raise a right to relief above the speculative level.” *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010).

For purposes of determining a motion to dismiss for failure to state a claim upon which relief can be granted, the complaint must be examined in its entirety, construing the allegations therein liberally, as required by Fed. R. Civ. P. 8(e), to determine whether it contains allegations which, if proved, would entitle the plaintiff to the relief sought. *Petroleos Mexicanos v. Intermix SA*, 97 USPQ2d 1403, 1405 (TTAB 2010); *IdeasOne Inc. v. Nationwide Better Health*, 89 USPQ2d 1952, 1953 (TTAB 2009); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB

¹² 4 TTABVUE.

2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” and are not accepted as true. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). However, all well-pleaded, material allegations in the complaint are accepted as true and construed in the light most favorable to the plaintiff. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1027 (Fed. Cir. 1999); *Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *Fair Indigo*, 85 USPQ2d at 1538.

Further, it is well established that whether a plaintiff can actually prove its allegations is not a matter to be determined upon a motion to dismiss, but rather at final hearing or upon consideration of a motion for summary judgment, after the parties have had an opportunity to submit evidence. *See, e.g., Nike, Inc. v. Palm Beach Crossfit Inc.*, 116 USPQ2d 1025, 1030 (TTAB 2015) (“Whether Opposer is able to prove its allegations . . . is not a matter for determination on a motion to dismiss.”); *Libertyville Saddle Shop Inc. v. E. Jeffries & Sons, Ltd.*, 22 USPQ2d 1594, 1597 (TTAB 1992) (“A motion to dismiss does not involve a determination of the merits of the case”). Accordingly, in deciding Applicant’s motion, the Board has not considered arguments that go to the merits of the case or whether Opposer ultimately will be able to prove its allegations. *See Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 n.3 (TTAB 2017).

III. Analysis and Order

For a legally sufficient pleading, Opposer need only allege such facts which, if proven, would establish that: (1) it is entitled to a statutory cause of action under

Trademark Act Section 13, 15 U.S.C. § 1063;¹³ and (2) a valid statutory ground exists for opposing the application. *See Fair Indigo*, 85 USPQ2d at 1538.

Entitlement to a statutory cause of action must be pleaded and proved in every inter partes proceeding. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020); *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie*, 50 USPQ2d at 1025. To sufficiently plead entitlement to a statutory cause of action, an opposer must allege that (i) its interest in opposing the application is within the zone of interests protected by the statute, and (ii) it has a reasonable belief of damage proximately caused by registration of the mark. *See Australian Therapeutic Supplies*, 2020 USPQ2d 10837 at *3.

Applicant appears to argue that Opposer lacks entitlement to a statutory cause of action because Opposer's "allegation that it has suffered damage is entirely speculative."¹⁴ In particular, Applicant argues that because Opposer's applications have both been refused registration based on third-party marks, "Opposer would only be damaged from the continued registration of" those third-party marks and "not from the registration of Applicant's" applications."¹⁵

¹³ Board decisions previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." Despite the change in nomenclature, the Board's prior decisions and those of the Court of Appeals for the Federal Circuit interpreting Sections 13 and 14 remain applicable. *See Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

¹⁴ *See* 4 TTABVUE 6.

¹⁵ *Id.* at 4, 6-7.

The Board finds that Opposer has adequately pleaded its entitlement to a statutory cause of action based on its claimed ownership of common law rights for a similar mark for related goods and services.¹⁶ *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009) (common law use of similar mark sufficient to establish standing). Applicant's argument that Opposer can only be damaged by registration of third-party marks based on a trademark examining attorney's refusal is not supported by any authority known to the Board. Furthermore, this argument goes to the merits of the underlying claim and is not appropriate for determination in a motion to dismiss, which is a test solely of the sufficiency of the pleading.

Turning to Opposer's claim of likelihood of confusion, to allege a valid ground of opposition for likelihood of confusion under Trademark Act Section 2(d), a plaintiff need only allege it has priority of use and that defendant's mark so resembles plaintiff's mark as to be likely, when used in connection with the goods or services of the defendant, to cause confusion, or to cause mistake, or to deceive. *See* 15 U.S.C. § 1052(d); *Otto Roth & Co. v. Univ. Foods Corp.*, 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981).

In its notice of opposition, Opposer alleges, inter alia, as follows:

5. Opposer owns and uses the mark TROOP in connection with goods and services offered in interstate commerce in the United States.
6. Opposer has been using the mark TROOP since at least as early as March 23, 2022, well before Applicant filed the Applications for registration.

¹⁶ *See* 1 TTABVUE 2-3, 5-6.

7. Opposer is the owner of, inter alia, United States Trademark Application No. 90/731,049 for the mark TROOP in standard characters, for use in connection with dietary and nutritional supplements containing mushroom extract; nutritional supplement bars containing mushroom extract; powdered drink mix containing mushroom extract for use as a nutritional supplement in Class 005, and protein-enriched coffee containing mushroom extract in Class 030.
8. Opposer is the owner of, inter alia, United States Trademark Application No. 97/753,680 for the mark TROOP both in stylized form, for use in connection with dietary and nutritional supplements containing mushroom extract; nutritional supplement bars containing mushroom extract; powdered drink mix containing mushroom extract for use as a nutritional supplement in Class 005; protein-enriched coffee containing mushroom extract in Class 030; and providing an online retail store featuring dietary and nutritional supplements containing mushroom extract in Class 035.
9. As a result of promotion of its goods and services throughout the United States, Opposer has built up highly valuable goodwill in its TROOP marks. Such goodwill has become closely and uniquely identified and associated with Opposer prior to the filing of the Application by Applicant and prior to any use of the TROOMY and/or TROOMY NOOTROPICS marks in the United States by Applicant.
10. Applicant's TROOMY and/or TROOMY NOOTROPICS marks so resembles Opposer's TROOP marks as to result in a likelihood of confusion.
11. Applicant's TROOMY and/or TROOMY NOOTROPICS marks will be used for related and confusingly similar goods and services in the United States such that the marks are likely to be confused¹⁷

When Opposer's claim is read in its entirety, and construed so as to do justice in accordance with Fed. R. Civ. P. 8(e), the allegations that Opposer owns and uses the mark TROOP and has done so since at least as early as March 23, 2022, in conjunction with the specification of goods and services contained in each of its applications, are

¹⁷ *Id.* at 5-6.

sufficient to plead a claim of likelihood of confusion based on Opposer’s common law rights. *See Giersch*, 90 USPQ at 1023. In particular, the Board construes Opposer’s allegations of common law rights as limited to those marks and goods and services included in its applications for registration. Accordingly, Applicant’s arguments that Opposer has not sufficiently identified the goods and services used in connection with its marks is not well-taken.¹⁸ The allegations are sufficient to place Applicant on notice of the claim of likelihood of confusion based on Opposer’s common law rights.

In view of the foregoing, Applicant’s motion to dismiss is **denied**.

IV. Proceedings Resumed; Dates Reset

Proceedings are **resumed**. Remaining dates are reset as follows:

Time to Answer	3/21/2024
Deadline for Discovery Conference	4/20/2024
Discovery Opens	4/20/2024
Initial Disclosures Due	5/20/2024
Expert Disclosures Due	9/17/2024
Discovery Closes	10/17/2024
Plaintiff’s Pretrial Disclosures Due	12/1/2024
Plaintiff’s 30-day Trial Period Ends	1/15/2025
Defendant’s Pretrial Disclosures Due	1/30/2025
Defendant’s 30-day Trial Period Ends	3/16/2025
Plaintiff’s Rebuttal Disclosures Due	3/31/2025
Plaintiff’s 15-day Rebuttal Period Ends	4/30/2025
Plaintiff’s Opening Brief Due	6/29/2025
Defendant’s Brief Due	7/29/2025
Plaintiff’s Reply Brief Due	8/13/2025
Request for Oral Hearing (optional) Due	8/23/2025

¹⁸ See 4 TTABVUE 5-6; 7 TTABVUE 2-3.

IMPORTANT TRIAL AND BRIEFING INSTRUCTIONS

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, 37 C.F.R. §§ 2.121-2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, 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), 37 C.F.R. §§ 2.128(a) and (b). Such briefs should utilize citations to the TTABVue record created during trial, to facilitate the Board's review of the evidence at final hearing. *See* TBMP § 801.03. 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), 37 C.F.R. § 2.129(a).