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

Proceeding no.	91290424
Party	Plaintiff Quality Is Our Recipe, LLC
Correspondence address	KIMBERLY C ARRIOLA PIRKEY BARBER PLLC 8251 GREENSBORO DRIVE SUITE 520 TYSONS, VA 22102 UNITED STATES Primary email: tmcentral@pirkeybarber.com Secondary email(s): tvold@pirkeybarber.com, ecombs@pirkeybarber.com, karriola@pirkeybarber.com, flau@pirkeybarber.com 571-395-4630
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Signature	/S. Erik Combs IV/
Date	05/10/2024
Attachments	Response to Motion to Dismiss.pdf(159879 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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QUALITY IS OUR RECIPE, LLC,	§	
	§	Opposition No. 91290424
Opposer,	§	
	§	
v.	§	
	§	
WENDY'S NUTS, LLC,	§	
	§	
Applicant.	§	

OPPOSER'S RESPONSE IN OPPOSITION TO APPLICANT'S MOTION TO DISMISS

Applicant's motion to dismiss (4 TTABVUE) identifies no legal defect or insufficiency in Opposer's notice of opposition. Instead, Applicant attempts to prematurely argue disputed facts on the merits. However, such factual arguments are not ripe for consideration—much less determination—at this stage of the proceedings. Opposer's notice of opposition easily satisfies the low threshold for a legally sufficient pleading, and accordingly, Applicant's motion should be denied.

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "is a test solely of the legal sufficiency of a complaint." *NSM Res. Corp. v. Microsoft Corp.*, 113 USPQ2d 1029, 1032 (TTAB 2014); TBMP § 503.02. To survive dismissal, the complaint need only allege facts that, if proved, would plausibly entitle the plaintiff to the relief sought; that is, that the plaintiff has entitlement to a statutory cause of action, and that a valid ground exists for denying the registration sought. *See Young v. AGB Corp.*, 152 F.3d 1377,1378 (Fed. Cir. 1998); *NSM Res. Corp.*, 113 USPQ2d at 1032; TBMP § 503.02. A motion to dismiss under Federal Rule 12(b)(6) challenges "the legal theory of the complaint, not the sufficiency of any evidence that might be adduced." *Adv. Cardiovascular Sys., Inc. v. SciMed Life Sys.*, Inc., 26 USPQ2d 1038, 1041 (Fed. Cir. 1993). When

considering a motion to dismiss, the Board takes an opposition's well-pleaded factual allegations as true, *Pro-Football, Inc. v. Nocona Leather Goods Co.*, 48 USPQ2d 1543, 1544 (TTAB 1998), and construes all disputed issues and draws all reasonable inferences in the opposer's favor, *Adv. Cardiovascular Sys., Inc.* 26 USPQ2d at 1041 (Fed. Cir. 1993); *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007).

"Pleading facts, which if proved, would establish a plaintiff's entitlement to a statutory cause of action in a Board proceeding 'is a low threshold, intended only to ensure that the plaintiff has a real interest in the matter and is not a mere intermeddler" *Ahal Al-Sara Grp. for Trading v. American Flash, Inc.,* 2023 USPQ2d 79, at *2 (quoting *Syngenta Crop. Protection v. Bio-Chek LLC*, 90 USPQ2d 1112, 1118 n.8 (TTAB 2009), and citing *Ritchie v. Simpson*, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999)).

Opposer met the "low threshold" to show entitlement to a statutory cause of action and that valid grounds exist for denying the registration sought. Opposer's well-pleaded factual allegations demonstrate a real interest in this proceeding and a reasonable belief that Applicant obtaining the exclusive rights at issue would cause harm to Opposer. Applicant has not shown otherwise. In particular, Opposer alleges that registration of the alleged marks would harm Opposer because, among other harms, purchasers are likely to attribute the source or sponsorship of Applicant's goods offered under Applicant's Mark to Opposer, and it would give Applicant a presumptive exclusive right to that mark in conflict with Opposer's prior established rights in its WENDY'S Marks. 1 TTABVUE ¶¶ 14–20. The forgoing may lead to Opposer being commercially harmed, including through reputational damage or lost sales.

Further, Opposer sufficiently pled each of its claims. To plead a claim under Trademark Act § 2(d), a plaintiff must allege proprietary rights that are prior to the defendant's rights, and

that the defendant's mark so resembles plaintiff's mark as to be likely to cause confusion. 15 U.S.C. § 1052(d); *Nike, Inc. v. Palm Beach Crossfit Inc.*, 116 USPQ2d 1025, 1030 (TTAB 2015). The notice of opposition alleges that Opposer's use of and registrations for its WENDY'S Marks "precede the filing date of the Application and any dates of first use or other basis upon which Applicant can rely." 1 TTABVUE ¶¶ 1–10. The opposition continues on to allege confusing similarity between the marks. *Id*. ¶ 14–16.

Claims of dilution by blurring and dilution by tarnishment under Lanham Act § 43(c) require that a plaintiff plead: (1) plaintiff owns a famous mark that is distinctive; (2) defendant is using a mark in commerce that allegedly dilutes plaintiff's famous mark; (3) defendant's use of its mark began after plaintiff's mark became famous; and (4) defendant's use of its mark is likely to cause dilution by blurring or by tarnishment. 15 U.S.C. § 1125(c); *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d 1713, 1723-24 (Fed. Cir. 2012); *Nike, Inc. v. Palm Beach Crossfit Inc.*, 116 USPQ2d 1025, 1030 (TTAB 2015). The opposition sets forth all the necessary elements for claims of dilution by blurring and by tarnishment. The opposition alleges that Opposer's WENDY's mark is famous, including within the meaning of 15, U.S.C. § 1125(c)(2)(A). 1 TTABVUE ¶ 5. Further, it alleges that Opposer's mark became famous before Applicant's first use of its mark or any other basis upon which Applicant can rely. *Id.* ¶ 11. The notice of opposition also alleges that Applicant's Mark is likely to dilute the distinctive quality of the WENDY'S mark by blurring or by tarnishment. *Id.* ¶ 18.

Applicant's motion to dismiss does not allege or demonstrate any legal insufficiency in the notice of opposition. Instead, Applicant's motion attempts to prematurely litigate the merits of the case. While Opposer is confident it can establish and prove its claims with evidence, in defending a motion to dismiss, a plaintiff does not bear the burden of proving its case in its complaint. *NSM*

Res. Corp., 113 USPQ2d at 1032; *Enbridge, Inc. v. Excelerate Energy Ltd. P'ship*, 92 USPQ2d 1537, 1543 n.10 (TTAB 2009). Though Applicant may disagree with Opposer's factual allegations, that is an issue for trial, not the pleadings stage.

Applicant's motion to dismiss is an attempt to prematurely litigate the merits. Opposer's notice of opposition easily meets the low threshold under Rule 12(b)(6) for sufficiently pleading Opposer's case. The motion should be denied.

Respectfully submitted,

Date: May 10, 2024

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ATTORNEYS FOR OPPOSER

CERTIFICATE OF SERVICE

This is to certify that on May 10, 2024, a copy of the foregoing OPPOSER'S RESPONSE IN OPPOSITION TO APPLICANT'S MOTION TO DISMISS was served via email on the Applicant at the address listed below:

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/S. Erik Combs IV/
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