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

Proceeding	91267752
Party	Plaintiff Oatly AB
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Attachments	AWAP043.002TIS-1stAmendNotOpp.pdf(98617 bytes) Exhibit 1.pdf(93375 bytes) Exhibit 2.pdf(1445685 bytes) Exhibit 3.pdf(2398453 bytes) Exhibit 4.pdf(1195338 bytes)

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

OATLY AB,

Opposer,

v.

THE NOT COMPANY SPA,

Applicant.

)
) Opposition No.: 91267752
)
) Serial No.: 88/886,704
)
) **NOT**
) Mark:
)
)
)
)
)

FIRST AMENDED NOTICE OF OPPOSITION

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Oatly AB, a Swedish aktiebolag (ab) with an office at Stora Varvsgatan 6 A Malmö, Sweden 21119 believes that it would be damaged by the registration of the mark shown in Application Serial No. 88/886,704 and hereby opposes the same under the provision of Section 13 of the Trademark Act of July 5, 1946, as amended, 15 U.S.C. § 1063.

As grounds for opposition, it is alleged:

1. Opposer is a Swedish company with a principal place of business in Sweden.
2. Opposer is informed and believes and on that basis alleges that The Not Company SpA is a Chilean Corporation with its principal place of business in Chile.
3. Opposer is the owner of pending federal trademark applications for the marks



and OATLY NOT MILK (hereinafter the “NOT MILK Marks”) for “oat-based

drinks for use as a milk substitutes” in International Class 29 (hereinafter “Opposer’s Goods”).
See U.S. App. Nos. 90/239637 and 90/239617. True and correct copies of printouts from the electronic database records of the Patent and Trademark Office showing the status for these applications are attached hereto as Exhibit 1.

4. By the Application filed on April 24, 2020, Applicant filed Application Serial No. 88/886,704 (hereinafter “Applicant’s Application”) for registration of the mark **NOT** (hereinafter “Applicant’s Mark”) for use in connection with “vegetable-based spreads; coffee and tea substitutes; vegetable-based caramels and chocolates; vegetable-based food seasonings; vegetable-based candy and caramels; Vegetable-based thickening agents for cooking foodstuffs; cookies and pastries made with egg and milk substitutes; ice cream substitutes; gravies containing meat substitute; food condiment consisting primarily of ketchup and salsa made with plant-based sugar substitutes; egg-free and dairy-free mayonnaise and mustard substitute; honey substitute; fresh pizzas” in International Class 30 (hereinafter “Applicant’s Goods”), based on Applicant’s alleged intent-to-use the mark in interstate commerce.

5. Opposer is in the business of marketing and selling oat-based food and beverage products, including oat-based drinks for use as a dairy milk substitute.

6. Opposer markets and sells its goods through various channels, including but not limited to its online website, us.oatly.com.

7. “NOT” is a term used to stand for the negative of a preceding group of words.

8. Sample dictionary definitions of the term “NOT,” include:

- Merriam Webster’s online dictionary, defines “NOT” as “a logical operator that produces a statement that is the inverse of an input statement.” (internal citations omitted).

- Dictionary.com LLC's online dictionary, defines "NOT" as "used to express negation, denial, refusal, or prohibition."

9. Opposer has a real interest in the registration of the Applicant's Mark because such registration would damage Opposer by interfering with its right to the lawful descriptive or generic use of the term "not", as well as its applications for its NOT MILK Marks.

10. Numerous other entities, especially those in the non-dairy market, already employ the descriptive use of the term "not" in connection with non-dairy food and beverage products. Such descriptive use by Opposer and other non-dairy entities demonstrates that the term "not" should not be controlled by or exclusively registered to one person or entity and must remain in the public domain for use by all others to describe their products.

11. Applicant concedes that its use of the word NOT is to describe to its consumers that its products are "not milk," not butter," etc. For example, Applicant's CEO and founder, Matias Muchnick, admits that the use of the word NOT is to convey to the consumer that its products are "not" something:

"We foresaw that coming. We know how powerful the dairy industry is. So we created this concept of creating transparency with the consumer, saying we're not milk. We have all that you want from milk and nothing that you don't want from milk".

See <https://www.livekindly.co/vegan-milk-created-by-ai-whole-foods-nationwide/> attached as Exhibit 2 (last visted June 21, 2021) (emphaiss added).

12. Applicant owns numerous other federal applications and registrations for marks that include the word NOT that include a disclaimer of the word NOT. For example, U.S. Reg.



No. 5,034,959 for the mark NOT MAYO disclaims the words "NOT MAYO" and covers "vegetable-based spread; mayonnaise substitute," in Class 30; U.S. Trademark Application Serial

No. 88/431,693 for the mark X NOTCO NOT ICE CREAM disclaims the words “NOT ICE CREAM” and covers “Non-dairy ice cream substitute,” in Class 30. See file history of U.S. Reg. No. 5,034,959 attached hereto as Exhibit 3 and U.S. Trademark Application Serial No. 88/431,693 attached hereto as Exhibit 4.

13. Under Section 1213.01(d) of the Trademark Manual of Examining Procedure, Applicant’s disclaimer of the term “not” in the Applicant’s prior filings “constitutes a concession that the [term “not”] is not inherently distinctive or registrable” in connection with the goods in the Applicant’s applications.

14. Applicant has not made substantially exclusive and continuous use of the word NOT as mark on Applicant’s Goods.

15. Accordingly, even if Applicant can establish the mark is not generic and is descriptive, the mark is not inherently distinctive and has not acquired distinctiveness.

16. Should Applicant receive registration for the mark and use of the descriptive term, “not”, Opposer as well as other entities, may be precluded from making fair, legitimate, descriptive use of the term “not” to describe non-dairy products. Granting Applicant a registration for a mark that exclusively consists of the term “not” would provide Applicant with a monopoly over the common term and bar or unduly hinder the legitimate use by others of the term. Accordingly, Opposer has a statutory cause of action.

17. Applicant’s use of the term “not” as used in connection Applicant’s Goods is not being used by the Applicant as a trademark but, rather, as a highly descriptive term, incapable of federal registration without an extraordinary showing of secondary meaning, insofar as it immediately describes an ingredient, quality, characteristic and feature of the specified goods. See 15 U.S.C. § 1052(e)(1).

18. Applicant’s use of the term “not” is incapable of distinguishing Applicant’s

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