THIS ORDER IS A PRECEDENT OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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September 20, 2022

tab/cme

Opposition No. 91269057

PepsiCo, Inc.

v.

Arriera Foods LLC

Before Taylor, Goodman and English,
Administrative Trademark Judges.

By the Trademark Trial and Appeal Board:

This case is now before the Board on: (1) Applicant's June 4, 2021 motion to dismiss Opposer's originally-filed notice of opposition for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6);[1] (2) Applicant's June 30, 2021 motion to dismiss Opposer's proposed amended notice of opposition[2] under Fed. R. Civ. P. 12(b)(6); [3] and (3) Applicant's counsel's April 10, 2022 motion for withdrawal.[4]

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[1] 4 TTABVUE.

[2] 8 TTABVUE.

We note the entry of appearance and change of correspondence address of Opposer's counsel, both filed June 24, 2021. 6 and 7 TTABVUE. The Board's records have been updated accordingly.

[3] 9 TTABVUE.

[4] 11 TTABVUE. We address this motion at the end of this order. A copy of the motion to withdraw has been placed in the file for the application involved in this proceeding.

I. Preliminary Issue

Applicant seeks registration of the standard character mark TORTRIX for "corn-based snack foods," in International Class 30.[5] On March 3, 2021, the Board granted PepsiCo, Inc. ("PepsiCo") an extension of time until May 1, 2021 to oppose the application. On April 29, 2021, a notice of opposition was timely filed. The ESTTA coversheet to the notice of opposition identified PepsiCo as the sole opposer, but the body of the notice of opposition identified both PepsiCo and "its wholly owned subsidiary Fabrica de Productos Alimenticios Rene Y Cia S. En. C." ("Fabrica") as joint opposers.

Two or more parties may file an opposition, but "[t]he opposition **must** be accompanied by the required fee for each party joined as opposer for each class in the application for which registration is opposed." Trademark Rule 2.101(c), 37 C.F.R. § 2.101(c) (emphasis added); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 308.03 (2022). Because PepsiCo was the only opposer identified in the ESTTA coversheet to the notice of opposition, the fee for only one opposer, PepsiCo, was charged and paid.

Accordingly, Fabrica is not a party to this proceeding and, because the opposition period is closed, cannot be added as an opposer. *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1115 n.2 (TTAB 2009) (where only one opposer was identified and charged during the filing process, second named opposer not considered party to

[5] Application Serial No. 90171766, filed September 10, 2020, based on Applicant's alleged bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

proceeding); *SDT, Inc. v. Patterson Dental Co.*, 30 USPQ2d 1707, 1709 (TTAB 1994) (opposer's licensee, having failed to join opposer in filing opposition during extension of time to oppose, cannot be joined after opposition is filed); *see also* TBMP § 303.05(b) ("Once a timely notice of opposition has been filed, and the time for opposing has expired, the right to pursue the filed case is a right individual to the timely filer.").

II. Opposer's Amended Notice of Opposition Filed as a Matter of Course

Opposer filed its amended notice of opposition on June 24, 2021, within twenty-one days of service of Applicant's June 4, 2021 motion to dismiss. A plaintiff may amend its complaint once as a matter of course within twenty-one days after service of a responsive pleading or a motion to dismiss. Fed. R. Civ. P. 15(a)(1)(B). Accordingly, Opposer's amended notice of opposition was filed as a matter of course and is Opposer's operative pleading in this proceeding. *Id.*

Applicant's motion to dismiss Opposer's original notice of opposition is therefore moot and will be given no further consideration. *Dragon Bleu (SARL) v. VENM, LLC*, 112 USPQ2d 1925, 1926 (TTAB 2014).

III. Applicant's Motion to Dismiss Opposer's Amended Notice of Opposition

A. Background

In its amended notice of opposition, Opposer pleads the following grounds for opposition:[6]

> (1) "The TORTRIX mark is being or will be used by, or with the permission of, Applicant so as to misrepresent the source of the Goods on or in connection with which the mark is used. Registration of the Application therefore is unlawful and should be refused pursuant to 15 U.S.C. § 1064(3)";
>
> (2) Applicant did not and "does not have a bona fide intention to make lawful use of the TORTRIX mark in the United States"; and
>
> (3) "Applicant seeks to procure registration of the applied-for mark through fraud."

8 TTABVUE 5-6, ¶¶ 17, 19 and 20.

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[6] Opposer pleads two additional "counts" for opposition, namely, that (1) "Applicant is not entitled to use the TORTRIX mark in commerce. Registration of the Application should therefore be refused under 15 U.S.C. § 1051(b)," 8 TTABVUE 5, ¶ 16; and (2) "Registration of the Application is barred by 15 U.S.C. § 1051 because the facts recited in the Application are not true." *Id.* at ¶ 18. Neither "count" identifies a cognizable ground for opposition under the Trademark Act on its own. Rather, the first allegation is applicable to the entire opposition and the second allegation is subsumed within Opposer's fraud claim.

To the extent the amended notice of opposition may be construed as alleging that Applicant did not adopt the TORTRIX mark in good faith because it was aware of Opposer's use of the TORTRIX mark outside the United States (8 TTABVUE 3, ¶ 6), no such claim is available. *Person's Co. v. Christman,* 900 F.2d 1565, 14 USPQ2d 1477, 1480 (Fed. Cir. 1990) ("Knowledge of a foreign use does not preclude good faith adoption and use in the United States.").

In lieu of filing an answer to the amended notice of opposition, Applicant filed the motion to dismiss before us now, asserting that Opposer does not have "standing"; that Opposer has failed to allege "any interest in a US common law or federal trademark"; and that Opposer has not pleaded "any basis that would provide Opposer a claim upon which relief can be granted." 9 TTABVUE 3.

B. Analysis

A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the sufficiency of the complaint. *Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); *NSM Res. Corp. v. Microsoft Corp.*, 113 USPQ2d 1029, 1032 (TTAB 2014); *Covidien LP v. Masimo Corp.*, 109 USPQ2d 1696, 1697 (TTAB 2014). To withstand a motion to dismiss, a plaintiff need only allege facts that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that: (1) the plaintiff is entitled to bring a statutory cause of action;[7] and (2) a valid ground exists for seeking to oppose registration. *See, e.g., Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982); *Nike, Inc. v. Palm Beach Crossfit Inc.*, 116 USPQ2d 1025, 1028 (TTAB 2015).

[7] Board decisions have 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 Federal Circuit interpreting Sections 13 and 14 remain applicable. *See Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

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