UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FARM AND TRADE, INC.,

Plaintiff,

v.

FARMTRADE, LLC, a North Carolina limited liability company, and DOES 1 through 25, inclusive,

Defendants.

No. 2:14-cv-00415-MCE-CMK

MEMORANDUM AND ORDER

Plaintiff Farm and Trade, Inc. ("Plaintiff") has filed a Second Amended Complaint ("SAC") (ECF No. 29) alleging trademark infringement and related claims against Defendant Farmtrade, LLC ("Defendant"). Presently before the Court is Defendant's Motion to Dismiss the SAC pursuant to Federal Rule of Civil Procedure 12(b)(6) (ECF No. 30).[1] For the reasons that follow, Defendant's Motion to Dismiss is denied.[2]

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[1] All subsequent references to "Rule" are to the Federal Rules of Civil Procedure.

[2] Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. See E.D. Cal. Local R. 230(g).

BACKGROUND[3]

A. Plaintiff

Plaintiff has been using the trade name and service mark "Farm and Trade" ("Mark") in commerce since June 2003, and has used the Mark continuously in commerce since Plaintiff's incorporation in July 2004. Since July 2004, Plaintiff has exclusively used the Mark to identify its international crop brokerage services and related advisory/consulting services pertaining to commodity crop (primarily rice) trading and exporting. Plaintiff acts as a buyer, broker, and consultant to rice growers in California and around the world. According to Plaintiff, the Mark has become publicly associated exclusively with Plaintiff and has become so closely associated with Plaintiff that Plaintiff has developed appreciable goodwill and industry-wide name recognition based on the Mark. Plaintiff therefore claims it has established protectable common law trademark rights flowing from its use of the Mark.

Plaintiff is also well known in the rice and commodity trading industry generally. For example, Plaintiff's October 2013 acquisition of California Rice Exchange was well-publicized in the commodity industry. Moreover, Plaintiff is active and involved in the rice and food commodity industries and is an active participant in state and federal commissions. Specifically, Plaintiff publishes a monthly Farm and Trade Report, which has a circulation of over 1500 electronic and 500 paper copies. When redistribution patterns are taken into account, Plaintiff estimates that its Report is seen by over 5,000 readers in California and several hundred in other parts of the country. Plaintiff also publishes The Rice Trader, a weekly market analysis bulletin devoted to rice, and until recently published Rice Today, which was sent by direct mail to 35,000 readers. Plaintiff's rice market publications are widely respected as authoritative in its field, and Plaintiff is widely considered to be an international rice industry leader. According to Plaintiff, these publications have created mental recognition in the minds of consumers

[3] The following statement of facts is based on the allegations in Plaintiff's SAC.

and substantial consumer awareness of Plaintiff's services, such that Plaintiff is widely recognized as the exclusive purveyor of goods under the Mark.

Plaintiff also sponsors and hosts national and international conferences that feature world-renowned rice industry leaders, decision makers, and research experts. Additionally, through its affiliate ICI, Plaintiff offers a fully integrated media source connecting clients to all critical aspects of the rice industry, including research, analysis, conferences, and trading.

Plaintiff has actual and potential consumers of its services worldwide, and has achieved a strong degree of consumer recognition through these efforts. Plaintiff's annual gross revenues have averaged approximately $5 million over the past five years and are projected to reach $100 million this year. These revenues reflect, in part, Plaintiff's goodwill and name recognition in the Mark.

Since its inception, Plaintiff has spent well over $1 million advertising and marketing the Mark in the form of advertisement placements, online promotions, printed and digital publications, personal meetings with growers, and industry conferences. As a further part of its commitment of funds and resources to promoting and controlling use of the Mark, Plaintiff owns and controls a host of internet domain names, many of which are used to enhance search engine optimization associated with online searches related to the Mark, including but not limited to "FARMANDTRADE.COM," "FARMANDTRADE.BIZ," "FARMANDTRADE.INFO," "FARMANDTRADE.NET," "FARMANDTRADE.ORG," and "FARMANDTRADE.US."

B. Defendant and the Dispute

Defendant currently operates an online trading floor for agricultural chemicals at XSAg.com, which is identified by the URL www.xsag.com and derivations thereof. Defendant promotes XSAg.com as "A Farmtrade™ Company." Defendant filed its articles of organization in North Carolina on December 14, 2012, then under the name FarmTrader, LLC. On February 7, 2013, Defendant changed its name to "FarmTrade, LLC" ("Accused Mark"). In May 2013, Defendant filed an application for federal

registration of the Accused Mark. In support of its application for registration, Defendant represented to the United States Patent and Trademark Office ("USPTO") its intent to use the Accused Mark in commerce; by public press releases and online announcements, Defendant has used and continues to use the mark in commerce in an attempt to build consumer name recognition in the Accused Mark. Plaintiff alleges Defendant is infringing on Plaintiff's rights in the Mark by causing potential and actual confusion among consumers.

On December 10, 2013, the USPTO issued a Notice of Allowance assigning the Accused Mark serial number 85931184. Plaintiff did not discover Defendant's application for registration until after the Notice of Allowance was issued, when Plaintiff received an online announcement that Defendant would change the name of its website from "XSAg.com" to "Farmtrade."

After learning of Defendant's intent to use the name, Plaintiff contacted Defendant by e-mail on December 17, 2013, and formally demanded that Defendant cease and desist using the Accused Mark. Plaintiff informed Defendant that Plaintiff had already experienced multiple instances of customer confusion—that is, according to Plaintiff, "customers mistaking Defendant for Plaintiff or Plaintiff's affiliate." ECF No. 15 ¶ 27. Plaintiff elaborates on this allegation in its SAC:

> Plaintiff received several telephone calls after the December 10, 2013 announcement asking if www.xsag.com was Plaintiff's company based upon the proposed name change. One of Plaintiff's customers forwarded the press release to Plaintiff on December 11, 2013, after the two discussed the issue over the telephone. Shortly after learning of Defendant's announcement and receiving the aforementioned phone calls expressing customer confusion, Plaintiff contacted Defendant . . . .

Plaintiff alleges that Defendant has done nothing to address Plaintiff's complaints and has taken no action to remedy the actual or probable consumer confusion caused by Defendant's use of the Accused Mark.

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STANDARDS

A. Rule 12(b)(6)

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations; however, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (internal quotation marks and citations omitted). A court is not required to accept as true a "legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004).

Furthermore, "Rule 8(a)(2) . . . requires a showing, rather than a blanket assertion, of entitlement to relief." Twombly, 550 U.S. at 556 n.3 (internal quotation marks and citation omitted). Thus, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. (citing 5 Charles Alan Wright & Arthur R. Miller, supra, at § 1202). A pleading must contain "only enough facts to state a claim to relief that is plausible on its face." Id. at 570. If the "plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id. However, "a well-pleaded complaint may

proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

B. False Designation of Origin

> Any person who, on or in connection with any goods or services . . . uses in commerce any . . . name, symbol, or device, or any combination thereof . . . which . . . is likely to cause confusion, or to cause mistake, or to deceive as to . . . the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

ANALYSIS

Defendant argues that the Court should dismiss Plaintiff's claim for false designation of origin because the SAC "fail[s] to allege any facts that establish likelihood of confusion." Def.'s Mot. at 10, Dec. 29, 2014, ECF No. 31. As the Ninth Circuit has explained:

> The "likelihood of confusion" inquiry generally considers whether a reasonably prudent consumer in the marketplace is likely to be confused as to the origin or source of the goods or services bearing one of the marks or names at issue in the case. To succeed, a plaintiff must show more than simply a possibility of such confusion.

Rearden LLC v. Rearden Commerce, Inc., 683 F.3d 1190, 1209 (9th Cir. 2012) (citations omitted).

The Court dismissed Plaintiff's First Amended Complaint because it did not allege sufficient facts to establish a likelihood of confusion. See Mem. and Order at 11, Nov. 21, 2014, ECF No. 28. In the SAC, however, Plaintiff added a specific factual allegation that Plaintiff received several telephone calls—including at least one from a customer—asking if Defendant's website was Plaintiff's company. SAC at 8. Thus,

Plaintiff now alleges more than a possibility of confusion, as the SAC describes a specific instance of consumer confusion. The Court finds that this new allegation nudges Plaintiff's claim across the line from conceivable to plausible, and is therefore sufficient to survive Plaintiff's Motion to Dismiss. See also Johnson v. City of Shelby, Miss., 135 S. Ct. 346, 347 (2014) (per curiam) (finding complaint satisfied Twombly and Iqbal because it "stated simply, concisely, and directly events that, [plaintiffs] alleged, entitled them to damages from the [defendant]").

Defendant further argues that because Plaintiff has not stated a claim for false designation of origin, the Court (1) does not have jurisdiction over Plaintiff's request for a declaratory judgment, and (2) should decline to exercise supplemental jurisdiction over Plaintiff's claims under California's Unfair Competition Law. Because the Court finds that the SAC adequately states a claim for false designation of origin, the Court has jurisdiction over Plaintiff's request for a declaratory judgment. Additionally, because this Court has original jurisdiction over Plaintiff's false designation of origin claim, the Court has supplemental jurisdiction over Plaintiff's Unfair Competition Law claims under 28 U.S.C. § 1367(a).

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint (ECF No. 30) is DENIED.

IT IS SO ORDERED.

Dated: April 9, 2015

MORRISON C. ENGLAND, JR, CHIEF JUDGE
UNITED STATES DISTRICT COURT