

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

WINTER/DUNN

Mailed: August 28, 2007

Opposition No. 91168732

RA Scottsdale Corp.

v.

2 Manatees, L.L.C.

**Before Bucher, Holtzman, and Mermelstein,
Administrative Trademark Judges.**

By the Board:

This case comes up for consideration of opposer's motion (filed June 2, 2006) to amend the notice of opposition. The parties have fully briefed the motion.¹ Proceedings are considered to have been suspended with the filing of opposer's motion to amend the notice of opposition. The delay in acting upon this matter is regretted.

As a ground for the notice of opposition, opposer alleges likelihood of confusion based on common law use as well as ownership of Registration No. 2209246 (RA and design) and two pending applications (Serial No. 78641586 for the mark

¹ The Board has exercised its discretion to consider opposer's reply brief. See Trademark Rule 2.127(a), 37 C.F.R. § 2.127(a).

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RA; and Serial No. 78641594 for the mark IT'S MORE FUN IN THE RA). Opposer also sets out a claim of fraud in the procurement of the registration based on applicant's knowledge of opposer's use of its marks, and alleges that registration of the subject application should be refused based on examination errors.

Before turning to the merits of the motion to amend the notice of opposition, we address opposer's allegations regarding examination errors which appear in both the original and amended pleading, and find that these allegations fail to state a claim for which relief can be granted. See Fed. R. Civ. Pro. 12(b)(6). Whether the specimen of use supports the mark shown in the drawing of the subject application and whether the amendment to the mark constituted a material alteration are *ex parte* examination issues within the province of the examining attorney. It is well settled that examination errors are not proper grounds for an *inter partes* proceeding. See, e.g., *Saint-Gobain Abrasives, Inc. v. Unova Industrial Automation Systems, Inc.*, 66 USPQ2d 1355, 1359 (TTAB 2003); *Phonak Holding AG v. ReSound GmbH*, 56 USPQ2d 1057 (TTAB 2000); and *Century 21 Real Estate Corp. v. Century Life of America*, 10 USPQ2d 2034 (TTAB 1989).

Here, opposer moves to amend its pleading to plead newly issued registrations and to add factual allegations that

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conform to newly discovered evidence. On May 2, 2007, the two applications pleaded in the notice of opposition issued as Registration Nos. 3087775 (application Serial No. 78641586 for RA) and 3087776 (application Serial No. 78641594 for IT'S MORE FUN IN THE RA), and during discovery opposer learned of additional facts pertaining to its allegations of likelihood of confusion, fraud, and examination error. In opposition, applicant asserts that it will be prejudiced by amendment to add the newly issued registrations because applicant filed its application before opposer filed the applications which recently issued as registrations, and that it will be prejudiced by amendment to add the factual allegations because those allegations are misleading or baseless.

The Board liberally grants leave to amend pleadings at any stage of a proceeding when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party or parties. Fed. R. Civ. P. 15(a). See *Polaris Industries v. DC Comics*, 59 USPQ2d 1789 (TTAB 2001); *Boral Ltd. v. FMC Corp.*, 59 USPQ2d 1701 (TTAB 2000). This is so even when a plaintiff seeks to amend its complaint to plead a claim other than those stated in the original complaint, including a claim based on a registration issued to or acquired by plaintiff after the filing date of the original complaint. See *Van Dyne-Crotty*

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Inc. v. Wear-Guard Corp., 926 F.2d 1156, 17 USPQ2d 1866, 1867 (Fed. Cir. 1991) (amendment to add later-acquired registration to tack on prior owner's use); *Space Base Inc. v. Stadis Corp.*, 17 USPQ2d 1216, 1217 (notice of opposition amended during testimony period to add claim of ownership of newly issued registration). Whether or not the moving party can actually prove the allegation(s) sought to be added to a pleading is a matter to be determined after the introduction of evidence at trial or in connection with a proper motion for summary judgment. *Focus 21 International Inc. v. Pola Kasei Kogyo Kabushiki Kaisha*, 22 USPQ2d 1316, 1318 (TTAB 1992).

Here, we find no support for applicant's assertion of prejudice if the amendment is granted. Prejudice which warrants denying an amendment may be found by delay in bringing the amendment which denies the non-moving party an adequate opportunity to prepare his case on the new issues raised by the amended pleading, or results in the loss of valuable evidence or an important witness becoming unavailable. *Trek Bicycle Corporation v. Styletrek Limited*, 64 USPQ2d 1540, 1541 (TTAB 2001). See also *Wright & Miller*, 6 Fed. Prac. & Proc. Civ.2d §1488. Here, there has been no undue delay in opposer's filing of the motion to amend, the proceeding is still in the discovery stage, and applicant will have the opportunity to assert against the registrations any

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available defense or counterclaim. Thus, we find no prejudice to applicant in allowing the amendment.

Accordingly, except with regard to the legally insufficient claims of examination errors, the motion to amend the notice of opposition is **GRANTED**.

Opposer is allowed **THIRTY DAYS** to file a *corrected* amended notice of opposition, which deletes paragraphs 20 through 29. Applicant is granted **THIRTY DAYS** from the date of service of the second amended notice of opposition to file an answer to the amended pleading.

Proceedings are **RESUMED**. Trial dates, including the close of discovery, are reset as follows:

DISCOVERY PERIOD TO CLOSE:	February 17, 2008
Thirty-day testimony period for party in position of plaintiff to close:	May 17, 2008
Thirty-day testimony period for party in position of defendant to close:	July 16, 2008
Fifteen-day rebuttal testimony period to close:	August 30, 2008

IN EACH INSTANCE, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party **WITHIN THIRTY DAYS** after completion of the taking of testimony. See Trademark Rule 2.125, 37 C.F.R. §2.125.

Briefs shall be filed in accordance with Trademark Rule

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2.128(a) and (b), 37 C.F.R. §§2.125(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129, 37 C.F.R. §2.129.

