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

Proceeding	91168732
Party	Plaintiff RA SCOTTSDALE CORP.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Mark: In The Raw (block letters)

Serial No.: 76/574049

Applicant: 2 Manatees, L.L.C.

Opposer: RA Scottsdale Corp.

Opposition No. 91168732

Serial No. 76/574049

For the mark IN THE RAW

**OPPOSER'S REPLY IN SUPPORT OF MOTION TO AMEND NOTICE OF
OPPOSITION**

Opposer RA Scottsdale Corp. submits its Reply in support of its Motion to Amend its Notice of Opposition. In its Response, Applicant 2 Manatees, L.L.C. alleges that granting the Motion would be “highly prejudicial” to Applicant based on its “belief” that “the facts in existence at the time Opposer filed its opposition should remain static.” Applicant’s “belief” of what the rule should be is in fact contrary to Board precedent, as demonstrated below. Furthermore, Applicant’s Response is also materially defective in the following additional ways: (i) Applicant fails to provide any legal citation in support of any of the positions in the Response and (ii) Applicant fails to explain how it would suffer any undue prejudice by the granting of the Motion to Amend. Accordingly, Opposer’s Motion to Amend should be granted.

I. LEGAL ARGUMENT

As discussed in Opposer’s Motion, the Board liberally grants leave to amend “when justice requires.” FED. R. CIV. P. 15(a); *see also* 37 C.F.R. § 2.107(a) (“Pleadings in an opposition proceeding against an application filed under section 1 or 44 of the Act may be amended in the same manner and to the same extent as in a civil action in a United States district court”). To defeat a Motion to Amend, Applicant must show that the proposed amendment either would violate settled law or would be unduly prejudicial

to Applicant. *Karsten Manufacturing Corp. v. Editoy AG*, 2006 WL 1258869, at *2 (TTAB May 4, 2006); *Polaris Industries v. DC Comics*, 59 U.S.P.Q.2d 1789 (TTAB 2001). Applicant does not argue that the Amended Notice of Opposition violates settled law. Applicant only argues that it would be “unduly prejudiced,” but never explains how it believes it would be unduly prejudiced. The simple fact is that no such undue prejudice exists.

Applicant’s first claims that allowing Opposer to plead its two new registrations for RA (block letters) and IT’S MORE FUN IN THE RA! (block letters) would cause undue prejudice because “those grounds [for opposition] did [not] exist when Manatees filed its original application and Opposer filed its Notice of Opposition.” [Response, pp. 2-3] Applicant is incorrect; the Board routinely permits opposers to amend their notices of opposition to include claims based on registrations issued to or acquired by opposer after the filing date of the original complaint. *See, e.g., Van Dyne-Crotty Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 17 U.S.P.Q.2d 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 U.S.P.Q.2d 1216, 1217 (TTAB 1990) (notice of opposition amended during testimony period to add claim of ownership of newly issued registration). Thus, no undue prejudice would arise from Opposer’s addition of its newly acquired registrations.

Tellingly, Applicant cites no authority whatsoever to support its “belief” that “the facts in existence at the time Opposer filed its opposition should remain static.”

[Response, p. 3] In fact, Applicant cites no authorities at all anywhere in its Response. Moreover, this argument, when taken to its logical conclusion, leads to an absurd result. In short, Applicant argues that Opposer must not be permitted “to add two additional grounds for opposition” – the two new registrations – because adding new grounds would be unduly prejudicial to Applicant. [Response, p. 2] If simply adding new grounds for opposition created undue prejudice sufficient to deny a motion to amend, then hardly any motion to amend would ever be granted. Again, Applicant’s belief is contrary to Board

precedent. *See, e.g., Fioravanti v. Fioravanti Corrado S.R.L.*, 230 U.S.P.Q. 36, 39 (TTAB 1986), *recon. denied*, 1 U.S.P.Q.2d 1304 (TTAB 1986) (permitting applicant to amend opposition to assert grounds for opposition other than those in original notice of opposition); *Pegasus Petroleum Corp. v. Mobil Oil Corp.*, 227 U.S.P.Q. 1040, 1044 (TTAB 1985) (same).

Applicant then objects to Opposer's proposed amendments which add allegations regarding Opposer's newest restaurant locations and "Best Of" awards it has received. Applicant argues that these facts are "not relevant" to this opposition because they "did not exist at the pendency of the opposition." [Response, p. 3] First, relevancy is not the standard for granting or refusing leave to amend a notice of opposition. Second, Applicant fails to show how the addition of these factual allegations could possibly cause undue prejudice when Applicant has sufficient time in the discovery period to conduct discovery into the new allegations.¹ *See Trek Bicycle Corp. v. Styletrek Ltd.*, 64 U.S.P.Q.2d 1540, n. 3 (TTAB 2001) (in considering a motion to amend, "there generally will be no prejudice to a defendant if the defendant is allowed a full opportunity for discovery on the issues raised in the amended pleading"). Thus, Applicant would not suffer any undue prejudice should the Board grant leave to amend.

Finally, Applicant makes a conclusory and circular argument that Opposer's likelihood of confusion allegations are "baseless" and "prejudicial to Manatees' application"² because Applicant believes the two marks shown in its Exhibit B are "very dissimilar." [Response, p. 3] Applicant's unsupported opinion that the Opposer's RA and Design and Applicant's IN THE RAW design marks are "very dissimilar" is

¹ In fact, Applicant acknowledges that it already is seeking discovery into the new allegations by presenting to the Board its recent discovery requests regarding the timing of Opposer's applications for RA (block letters) and IT'S MORE FUN IN THE RA!, among other things. [See Response, p. 2 and Exhibit A]

² Of course, prejudice to Applicant's application is irrelevant to this Motion. Rather, to defeat the Motion, Applicant must demonstrate undue prejudice to its case in this proceeding, i.e., an inability to take discovery on the new allegations. *See Commodore Electronics Ltd. v. CBM Kabushiki Kaisha*, 26 U.S.P.Q.2d 1503 (TTAB 1993) (finding no undue prejudice in part because sufficient time remained in the discovery period for applicant to serve additional discovery requests).

irrelevant to this Motion. *See Focus 21 International Inc. v. Pola Kasei Kogyo Kabushiki Kaisha*, 22 U.S.P.Q.2d 1316, 1318 (TTAB 1992) (“Whether or not petitioner can actually prove the claim is a matter to be determined after the introduction of evidence and not at the present time [on a motion to amend]”); TBMP § 507.02, at 500-32, 500-33 (“[W]hether 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”). If Applicant believes Opposer’s likelihood of confusion claim is “baseless,” Applicant is free to conduct discovery on the issue and challenge the claim as this opposition progresses. Thus, Applicant’s opinion regarding the similarity or dissimilarity of the marks at issue is not a reason to deny leave to amend.

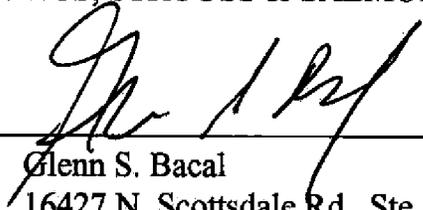
II. CONCLUSION

Applicant has failed to identify any undue prejudice it would suffer as a result of the Board granting leave to amend, and Applicant has failed to provide any citation in support of any of the positions taken in the Response. Opposer requests that the Board grant the Motion for leave to amend.

Respectfully submitted this 7th day of July, 2006.

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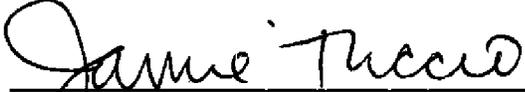
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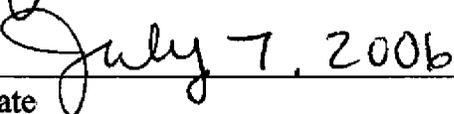
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I hereby certify that this Reply in Support of Motion for Leave to Amend Notice of Opposition is being filed electronically with the United States Trademark Trial and Appeal Board 37 C.F.R. § 1.8.

I hereby further certify that this Reply in Support of Motion for Leave to Amend Notice of Opposition is being deposited with the United States Postal Service addressed to:

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