

Goodman

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

Mailed: April 15, 2009

Opposition No. **91188339**

Russell G. Weiner

v.

John Pisano and Edward
Hofrichter

Before Rogers, Zervas & Taylor, Administrative Trademark
Judges.

By the Board:

Opposer Russell G. Weiner, the alleged owner of numerous ROCKSTAR and ROCKSTAR composite marks for "energy drinks", has opposed registration of the DIVE BAR ROCK STAR mark by joint applicants John Pisano and Edward Hofrichter for various goods in International Classes 16, 21 and 25.¹ Opposer relies on a claim of priority and likelihood of confusion. On February 18, 2009, applicants filed their answer, concurrently with a motion for judgment on the pleadings.

Applicants seek judgment on the pleadings "in light of the dissimilarities between the marks as to appearance, sound, connotation and commercial impression, coupled with

¹ Application Serial No. 77501585, filed June 18, 2008, and with an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act.

the notable differences between the relevant goods" arguing "confusion between the marks is remote and unlikely."

Applicants also seek judgment on the pleadings with regard to opposer's allegations as to its ownership of "'numerous' unnamed, unregistered marks" contending that such allegation cannot "withstand a motion for judgment."²

In response, opposer argues that judgment on the pleadings is not appropriate because the allegations on the face of the complaint regarding the similarity of the parties' marks and the relatedness of the parties' goods, if taken as true, "support a finding of likelihood of confusion."

A motion for judgment on the pleadings provides a means of disposition of cases when the material facts are not in dispute and judgment on the merits can be achieved by focusing on the pleadings. See Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings will be granted when the moving party establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. See *Baroid Drilling Fluids, Inc. v. Sun Drilling Products*, 24 USPQ2d 1048 (TTAB 1992); See also, 5C Wright & Miller, Federal Practice and

² Opposer specifically has alleged that "Opposer is also the owner of numerous pending U.S. trademark applications for marks that include or consist of the term ROCKSTAR that were filed prior to the filing of Serial No. 77501585."

Procedure, Civil 3d §1367 (Thompson/West 2008). For purposes of the motion, all well pleaded factual allegations in the non-movant's pleading are assumed true, and all reasonable inferences therefrom are drawn in the light most favorable to the non-moving party. *Id.*

In paragraph 1 of the notice of opposition, opposer has pleaded ownership of six registrations for ROCKSTAR and ROCKSTAR composite marks as well as common law rights in those marks which predate the filing of the opposed application. In paragraph 2 of the notice of opposition, opposer has pleaded likelihood of confusion alleging that applicants' mark "so resembles Opposer's marks as to be likely when used on or in connection with the goods identified in Serial No. 77501585, to cause confusion, or to cause mistake, or to deceive."

We find that opposer's likelihood of confusion claim alleges enough facts to state a claim of relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Additionally, notwithstanding applicant's denial of opposer's allegations regarding the similarity of the marks and goods, we find genuine issues of fact as to such issues are presented by the notice of opposition, under

the favorable construction we must accord it in our review of applicant's motion.³

Accordingly, we find that judgment on the pleadings cannot be granted with regard to the likelihood of confusion claim. In view thereof, applicant's motion for judgment on the pleadings on the ground of likelihood of confusion is denied.

We do agree, however, that opposer's allegation regarding his ownership of numerous pending ROCKSTAR applications is insufficient for purposes of notice pleading under Fed. R. Civ. P. 8. Accordingly, in the absence of an amendment to the pleading, filed with an appropriate motion to amend, opposer will not be able to rely on any of the unspecified pending applications at trial.⁴

Proceedings herein are resumed.

The discovery conference, disclosures, discovery and trial dates are reset as follows:

Deadline for Discovery Conference	5/14/09
Discovery Opens	5/14/09
Initial Disclosures Due	6/13/09
Expert Disclosures Due	10/11/09
Discovery Closes	11/10/09
Plaintiff's Pretrial Disclosures	12/25/09
Plaintiff's 30-day Trial Period Ends	2/8/10

³ Whether a likelihood of confusion exists is a question of law, based on underlying factual determinations. *On-line Careline Inc. v. America Online Inc.*, 229 F3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000).

⁴ At the scheduled discovery conference, the parties can discuss possible amendments to the pleadings as well as settlement of the matter.

Defendant's Pretrial Disclosures	2/23/10
Defendant's 30-day Trial Period Ends	4/9/10
Plaintiff's Rebuttal Disclosures	4/24/10
Plaintiff's 15-day Rebuttal Period Ends	5/24/10

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. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stdnagmnt.htm>