

ESTTA Tracking number: **ESTTA363812**

Filing date: **08/18/2010**

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

Proceeding	91195666
Party	Defendant Power Beverages, LLC
Correspondence Address	THOMAS L. MOSES MONAHAN & MOSES, LLC 13B W WASHINGTON ST GREENVILLE, SC 29601-2734 tom.moses@momolaw.com
Submission	Motion to Dismiss - Rule 12(b)
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Date	08/18/2010
Attachments	100818 Motion to Dismiss 12b6 - Ying Yang Opposition II.pdf (4 pages) (463261 bytes)

Opposer has not set forth any reasons why it would be damaged by the registration of the opposed mark, and thus has no standing.

Secondly, Opposer has stated that his grounds for this Opposition are based on Trademark Act Section 2(d) likelihood of confusion with U.S. Trademark Application Serial Number 77080324. This Trademark Application, relied on as grounds for the instant opposition, is owned by Applicant, and Opposer is attempting to use Applicant's own prior filed trademark as a basis for this Opposition proceeding, which demonstrates a fundamental misunderstanding of United States Trademark law and procedure. Pursuant to Section 2(d) of the Act, 15 U.S.C. § 1052(d), plaintiff must assert, and then prove at trial, that defendant's mark, as applied to its goods or services, so resembles **plaintiff's** previously used or registered mark or its previously used trade name as to be likely to cause confusion, mistake, or deception. Obviously, Opposer cannot rely on a prior filed Trademark Application in which he has no ownership interest, and especially when said prior filed application is owned by Applicant. These alleged grounds for opposition are ludicrous.

Additionally, the Trademark Trial and Appeal Board Manual of Procedure further states in section **309.03(a)(2)** that "[A]ll averments should be made in numbered paragraphs, the contents of each of which should be limited as far as practicable to a statement of a single set of circumstances." See Fed. R. Civ. P. 10(b) and *Isle of Aloe, Inc. v. Aloe Creme Laboratories, Inc.*, 180 USPQ 794, 794 (TTAB 1974) (while paragraphs were numbered, none of the paragraphs were limited to a statement of a single set of circumstances). In its Notice of Opposition, Opposer has not set forth any averments in numbered paragraphs, making it impossible for Applicant to properly respond in the form of an Answer.

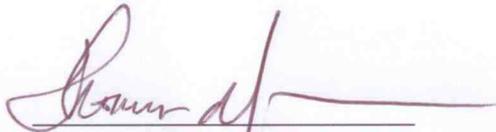
Further, the same section of the TTABMP requires that the pleading should include enough detail to give the defendant fair notice of the basis for each claim. See *McDonnell Douglas Corp. v. National Data Corp.*, 228 USPQ 45, 48 (TTAB 1985) (petitioner's Section 2(a)

allegations were merely conclusory and unsupported by factual averments). In the instant case, Opposer's allegations are merely conclusory, and are unsupported by any factual averments, whatsoever. Opposer has not set forth one single factual averment in its Notice of Opposition. Opposer may not rely on "mulled allegations," "legal conclusions masquerading as factual conclusions," or unwarranted deductions" to defeat a motion to dismiss. Bright, 380 F.3d at 735 (citing Morse v. Lower Merion School Dist., 132 F.3d 902, 905, 907 n.8 (3d Cir. 1997)).

In conclusion, Opposer's Notice of Opposition is merely a poorly written, ill-conceived, groundless and baseless claim including no factual allegations to support its conclusory allegations, set forth in a form that does not nearly conform to the requirements for a complaint as required by the TTAB or the Federal Rules of Civil Procedure. Applicant requests, therefore, that the TTAB dismiss this action forthwith.

Respectfully Submitted,

Date: August 18, 2010

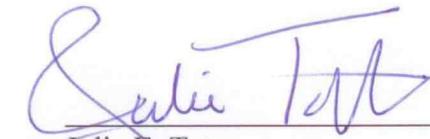


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT'S MOTION TO DISMISS** was served by First Class Mail this 18th day of August, 2010 to Opposer as follows:

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