

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

Goodman

Mailed: January 11, 2011

Opposition No. **91195666**

Philip Restifo

v.

Power Beverages, LLC

Before Bucher, Taylor and Mermelstein, Administrative  
Trademark Judges.

By the Board:

This case now comes up on applicant's motion (filed  
August 18, 2010) to dismiss under Fed. R. Civ. P. 12(b)(6).

Opposer filed, on September 24, 2010, a late response  
to applicant's motion, and also sought to suspend  
proceedings pending the outcome of Opposition No. 91181671,  
which involves the parties and the YING YANG VODKA mark.<sup>1</sup>  
To the extent this filing addresses the motion to dismiss,  
it is untimely and will not be considered. Nonetheless, the  
Board will consider the motion to dismiss on the merits, and  
not grant the motion as conceded. Trademark Rule 2.127(a).

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<sup>1</sup> Application Serial no. 77080324. The most recent assignment records for the involved application in Opposition No. 91181671 filed with the Office's Assignment Branch, identify Power Beverages LLC as assignee.

Opposition No. 91195666

Applicant did not file any responsive papers addressing suspension of this proceeding.

*Motion to Dismiss*

We turn first to the motion to dismiss.

In order to avoid dismissal at this stage of the proceeding, opposer need only allege such facts as would, if proved, establish that opposer is entitled to the relief sought. Therefore, opposer must allege that (1) he has standing to bring the proceeding, and (2) a valid ground exists for denying the registration sought. See TBMP § 503.02 (2d ed. rev. 2004). For purposes of a motion to dismiss, all of opposer's well pleaded allegations in the opposition must be accepted as true. *Id.*

When a party files a notice of opposition electronically, the generated ESTTA form is considered part of the notice of opposition. *PPG Indus. Inc. v. Guardian Indus. Corp.*, 73 USPQ2d 1926 (TTAB 2005). The ESTTA-generated form (hereinafter "ESTTA form") states the grounds for the proceeding, provides proof of service and other information. *O.C. Seacrets Inc. v. Hotelplan Italia S.p.A.*, 95 USPQ2d 1327, 1329 n.4 (TTAB 2010). In this case, the notice of opposition consists of the ESTTA form and the attachment, which is an exhibit, namely, a photograph of Ying Yang Vodka bottles.

*Standing*

To have standing, an opposer is required to have a legitimate personal interest in the opposition. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1026 (Fed. Cir. 1999). An allegation that plaintiff is the owner of the involved mark is sufficient for pleading an interest beyond that of the generic public. See *General Motors Corp. v. Aristide & Co., Antiquaire de Marques*, 87 USPQ2d 1179 (TTAB 2008) (standing pleaded and proven by allegation and evidence that opposer was the owner of the mark which it used until 1940).

In the ESTTA form opposer alleges that "Philip Restifo . . . are [sic] the true rightful owner of the trademark in question [identified on the ESTTA form as 77925974]. That said mark was created, developed, designed, bottled with Federal approvals and sold in commerce."

This allegation is sufficient for purposes of standing.

With regard to the requirements for pleading grounds for opposition, Fed. R. Civ. P. 8(a), as made applicable by Trademark Rule 2.116(a), in relevant part requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, "[t]he elements of a claim should be stated concisely, and directly . . . and should include enough detail to give the defendant fair notice of the basis for each claim." TBMP § 309.03(a). A plaintiff

has an obligation to provide factual allegations "sufficient to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true" which "requires more than labels and conclusions" in pleading the grounds for relief. *Bell Atlantic Corp. v. Twombly*, 55 U.S. 544 (2007).

*Dilution and Priority/Likelihood of Confusion Claims.*

With regard to the Section 2(d) and dilution claims, opposer has provided no facts to support the conclusory allegations of dilution and priority and likelihood of confusion identified on the ESTTA form. Accordingly, these claims are insufficiently pleaded. See e.g., *Otto Int'l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861, 1863 (TTAB 2007) (conclusory allegation of abandonment insufficient); *McDonnell Douglas Corp. v. Nat'l Data Corp.*, 228 USPQ 45, 47 (TTAB 1985) (bald allegations in the language of the statute did not provide fair notice of basis of petitioner's Trademark Act § 2(a) claim).

Accordingly, applicant's motion to dismiss is well taken with regard to these claims.

*Other Grounds*

With regard to the other grounds on the ESTTA coversheet, opposer has alleged that "the applicant is not and was not at any [sic] time of filing the rightful owner of the said mark." Opposer has also alleged that "applicant

Opposition No. 91195666

has no bone [sic] filed [sic] use of said mark in commerce prior or after the filing of said mark[.]” The Board finds these statements (i.e., applicant is not the owner of the mark and has not used the mark in commerce) set forth facts sufficient to provide fair notice of the claims and, thus, provide grounds for opposition. TBMP § 309.03(c) (no bona fide use of mark in commerce prior to the filing date of the application is a ground for opposition; applicant was not the rightful owner of the mark at the time of filing the application is a ground for opposition).

Accordingly, the motion to dismiss is denied with regard to these claims.

In summary, applicant’s motion to dismiss is granted with regard to the dilution and priority and likelihood of confusion claims but denied with regard to the ownership and nonuse claims.

It is the Board's practice, where appropriate, to permit a party to amend a defective pleading on consideration of a well taken motion to dismiss. Moreover, to the extent the ESTTA cover sheet contains sufficient allegations to state claims of lack of ownership and nonuse, the pleading is not in proper form as it does not comply with Fed. R. Civ. P. 8 and 10.

In view thereof, opposer is allowed until TWENTY DAYS from the mailing date of this order to file and serve an

amended notice of opposition. With regard to the amended notice of opposition, opposer is advised that it cannot merely adopt the pleading from the earlier filed opposition (91181671), as the only opposer in the present proceeding is Philip Restifo. Additionally, if opposer intends to assert a likelihood of confusion claim, its allegation of priority must be clearly alleged, which is not the case with respect to the allegations set forth in Opposition No. 91181761. Applicant is allowed until FORTY DAYS from the mailing date of this order to file and serve an answer to the amended notice of opposition. In the event no amended notice of opposition is filed, the priority and likelihood of confusion and dilution claims will be dismissed and the proceeding will go forward on the ownership and nonuse claims.

*Suspension*

We now turn to opposer's request to suspend. Opposer seeks to suspend proceedings pending the outcome of Opposition No. 91181671, which involves Phillip Restifo and Power Beverages LLC.<sup>2</sup> Opposer submits that "this case would

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<sup>2</sup> Although the notice of opposition indicates parties "Philip Restifo and/or Data Commodities Ltd.," the opposition was filed by Philip Restifo, individual as indicated by the ESTTA form. The Assignment record of the involved application indicates an assignment from Paul Kidd aka Ishmael Hassan to Power Beverages LLC, subsequent revocation of assignment from Paul Kidd aka Ishmael Hassan, and confirmation of assignment (i.e., withdrawal of revocation) from Paul Kidd aka Ishmael Hassan to Power Beverages LLC, recorded at Reel/Frame 3924/0580, 4119/0227 and 4247/0368 respectively.

Opposition No. 91195666

have a direct bearing on Power Beverages LLC., filing for Ying Yang international Class 33 (Spirits) trademark filed on February 2, 2010" and that this proceeding and the earlier-filed proceeding "would be the same grounds of Opposition."

If the final determination of a Board proceeding will have a bearing on the issues before the Board, the Board may suspend the proceedings. Trademark Rule 2.117(a); TBMP § 510.02(a). *Cf. Tamarkin Co. v. Seaway Food Town Inc.*, 34 USPQ2d 1587, 1592 (TTAB 1995) (suspended pending outcome of ex parte prosecution of opposer's application).

Upon review of the notices of opposition in Opposition No. 91181671 and the present proceeding, the Board finds that the ownership and non-use claims overlap, the parties are identical, the marks at issue are similar (YING YANG VODKA vs. YING YANG) and the goods are the same (vodka). Accordingly, the Board finds that a decision in Opposition No. 91181671 will have a bearing on this case.

In view thereof, the Board finds suspension appropriate.

Accordingly, opposer's motion to suspend is granted.

Upon receipt of the amended notice of opposition and answer, the Board will issue an order suspending this proceeding pending disposition of Opposition No. 91181671.

Opposition No. 91195666

Proceedings herein presently remain suspended under the suspension order issued for consideration of the motion to dismiss.