ESTTA Tracking number: **ESTTA426289**

Filing date: **08/22/2011**

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

Proceeding	91200639
Party	Defendant Cintron Beverage Group, LLC
Correspondence Address	Evelyn H. McConathy Montgomery, McCracken, Walker & Rhoads, 123 South Broad Street Philadelphia, PA 19109 emcconathy@mmwr.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Evelyn H. McConathy
Filer's e-mail	emcconathy@mmwr.com,mschwarz@mmwr.com
Signature	/evelyn h mcconathy/
Date	08/22/2011
Attachments	Cintron Motion to Dismiss.pdf (10 pages)(327867 bytes)

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

In re Trademark Application:

Serial No.: **77807941**

Mark: CINTRON

Published in the Official Gazette on March 15, 2011 in International Classes 030 and 032

VEDOZI, INC., Opposer, v. CINTRON BEVERAGE GROUP, LLC, Applicant.	Serial No. 77/807,941 Opposition No.: 91200636

In re Trademark Application:

Serial No.: **77807946**

Mark: CINTRON

Published in the Official Gazette on March 22, 2011 in International Classes 030 and 032

VEDOZI, INC., Opposer, v. CINTRON BEVERAGE GROUP, LLC, Applicant.	Serial No. 77/807,946 Opposition No.: 91200639

MOTION OF APPLICANT CINTRON BEVERAGE GROUP, LLC TO DISMISS VEDOZI, INC.'S OPPOSITION NOS. 91200636 AND 91200639

Applicant Cintron Beverage Group, LLC ("Cintron"), through its undersigned counsel, moves the Board to dismiss Vedozi, Inc.'s ("Vedozi's") Opposition Nos. 91200636 and 91200639 (the "Oppositions") for failure to state a claim for which relief can be granted under Fed. R. Civ. P. 12(b)(6) and Trademark Rule 2.116(a), as Vedozi's Oppositions do not assert a cognizable basis to oppose the CINTRON word and stylized word trademark applications.

In order to oppose a trademark application, a party must submit a notice of opposition that provides "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8; 37 C.F.R. §2.104(a); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This pleading standard does not require "detailed factual allegations," but it does require "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

A party seeking to oppose a trademark registration under 15 U.S.C. § 1063 must prove: (1) that it has standing; and (2) that there are valid grounds for opposing the registration. *See Cunningham v. Laser Golf Corp.*, 222 F.2d 943, 945 (Fed. Cir. 2000); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1026 (C.C.P.A. 1982). In order to establish standing, the party must "believe[] that he would be damaged" by the registration and demonstrate that he has a "real interest" in the proceeding and a "'reasonable' basis for his belief of damage." 15 U.S.C. § 1063; *Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999); *Federated Foods, Inc., d/b/a Hy-Top Prods. Div. v. Fort Howard Paper Co.*, 192 USPQ 24 (C.C.P.A. 1976). In order to demonstrate a "real interest," the party must plead facts demonstrating that they have "a direct and personal stake in the outcome of the opposition." *Ritchie*, 170 F.3d at 1098; *Universal Oil Products Co. v. Rexall Drug and Chemical Co. d/b/a Fiberfil*, 174 USPQ 458, 459 (C.C.P.A.

1972). If a party does not plead facts sufficient to show a personal interest in the outcome, the case may be dismissed for failure to state a claim. *See Lipton*, 670 F.2d at 1028.

Vedozi, which served as Cintron's distributor, has failed to plead any facts suggesting, much less demonstrating, that it has standing to oppose Cintron's trademark registrations. The only allegation that Vedozi makes concerning its standing to oppose Cintron's trademark registrations is that it "believes it will be damaged by registration" of the CINTRON word and stylized word marks. (*See* Oppositions at p. 1.) Vedozi offers no facts demonstrating either (1) that it has a personal stake in the registration of these marks or (2) that it has a reasonable belief that it will be damaged if those registrations are granted. Accordingly, Vedozi has not demonstrated that it has standing to oppose Cintron's trademark registrations and Vedozi's Oppositions must be dismissed.

In further support of this motion, Cintron incorporates by reference the attached brief.

Respectfully submitted,

Cintron Beverage Group, LLC
a Maryland corporation

By: */s/ Evelyn H. McConathy*
USPTO Registration No. 35,279
Ronald E. Hurst
Carmon M. Harvey
Lathrop B. Nelson
Co-Counsel for Applicant

Date: August 22, 2011

Montgomery, McCracken, Walker & Rhoads, LLP
123 South Broad St., Avenue of the Arts
Philadelphia, PA 19109
Tel: (215)772-4776
Fax: (215)772-7620
emcconathy@mmwr.com

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

In re Trademark Application:

Serial No.: **77807941**

Mark: CINTRON

Published in the Official Gazette on March 15, 2011 in International Classes 030 and 032

VEDOZI, INC.,	:	
Opposer,	:	
v.	:	Serial No. 77/807,941
CINTRON BEVERAGE GROUP, LLC,	:	Opposition No.: 91200636
Applicant.	:	

In re Trademark Application:

Serial No.: **77807946**

Mark: CINTRON

Published in the Official Gazette on March 22, 2011 in International Classes 030 and 032

VEDOZI, INC.,	:	
Opposer,	:	
v.	:	Serial No. 77/807,946
CINTRON BEVERAGE GROUP, LLC,	:	Opposition No.: 91200639
Applicant.	:	

BRIEF IN SUPPORT OF THE MOTION OF APPLICANT CINTRON BEVERAGE GROUP, LLC TO DISMISS VEDOZI, INC.'S OPPOSITION NOS. 91200636 AND 91200639

Defendant Vedozi, Inc. (d/b/a Vedozi Limited) ("Vedozi") has failed to state a claim with respect to Opposition Nos. 91200636 and 91200639 (the "Oppositions"). Vedozi asserts in its Oppositions that Cintron's trademark applications should be refused, but fails to plead sufficient facts to establish a right to relief. Accordingly, Cintron respectfully requests that the Board dismiss the Oppositions in their entirety, with prejudice, pursuant to Fed. R. Civ. P. 12(b)(6) and Trademark Rule 2.116(a).

I. FACTUAL BACKGROUND[1]

Cintron is a Delaware limited liability company with its principal place of business in Philadelphia and is in the business of developing, marketing, selling, and promoting energy drink products and other beverage products. (Verified Compl. ¶ 2; *see also* Oppositions ¶ 11.) Cintron manufactures its beverages in the United States using cans and bottles produced by a U.S. supplier and then ships the final products to its distributors across the globe for sale to end customers. (Verified Compl. ¶ 11.)

Cintron began selling energy drinks under the CINTRON brand in the United States in 2006 and, in 2007, began selling teas and fruit beverages as well. (*Id.* at ¶ 12.) In July and August of 2006, respectively, Cintron filed trademark applications with the U.S. Patent and Trademark Office ("USPTO") for CINTRON 21 (Registration No. 3,410,949) and CINTRON ENERGY ENHANCER (Registration No. 3,600,401), which registrations were granted on April 8, 2008 and March 31, 2009, respectively. (*Id.* at ¶ 16.) On August 19, 2009, Cintron filed

[1] Cintron attaches hereto as Exhibit 1 its Verified Complaint ("Compl.") in *Cintron Beverage Group, LLC v. Vedozi, Inc. & Victor Edozien*, Civ. .A. No. 11-3926 (E.D. Pa.), in which Cintron has asserted claims against Vedozi for, among other things, trademark and copyright infringement, unfair competition, fraudulent misrepresentation, breach of contract, and declaratory and injunctive relief. While not necessary to a decision on this motion, by way of background given the sparse facts asserted in the Opposition, Cintron provides the following factual recitation based on the allegations in its Verified Complaint in that pending matter.

trademark applications with the USPTO for the above-referenced CINTRON word mark (Trademark Application No. 77,807,941) and the stylized CINTRON word mark (Trademark Application No. 77,807,946). (*Id.* at ¶ 17.) These applications, having been found by the USPTO to have acquired distinctiveness, were moved to publication and published for opposition by the USPTO on March 15, 2011 and March 22, 2011, respectively. (*See id.* at ¶ 17.) (The trademarks and pending trademarks referenced in the foregoing paragraph are collectively referred to as the "CINTRON Trademarks.")

On or about March 24, 2008, Cintron and Vedozi entered into a Distribution Agreement whereby Cintron granted Vedozi the exclusive right to distribute Cintron's products directly and through affiliates and subdistributors in certain African countries. (*Id.* at ¶ 6.) By way of a Fourth Addendum to the Distribution Agreement executed May 26, 2009, Vedozi's exclusive right to distribute Cintron's products was expanded to the entire continent of Africa. (*Id.* at ¶ 7.) (A copy of the Distribution Agreement and Fourth Addendum (collectively, the "Agreement") is attached to the Verified Complaint as Exhibit A.)

The Agreement provides that Vedozi would have the right to use Cintron's Intellectual Property as hereinafter defined to promote the goodwill and sale of Cintron's products in Africa; as Cintron's distributor, Vedozi has no ownership rights in or to Cintron's Intellectual Property. (*See id.* at ¶ 32 (referring to Ex. A thereto, at ¶ ¶ 10.1 & 10.2).) The Agreement further provides that "[a]ll trademarks, trade dress, copyright and goodwill as they relate to the Product [which is defined in the Agreement to include all of Cintron's then-existing and future products], packaging, image, merchandising and advertising materials (the "Intellectual Property") remain the sole and exclusive property of" Cintron. (*See id.* at ¶ 33 (referring to Ex. A thereto, at ¶ 10.1).) The Agreement further explicitly provides that Cintron "is the owner of the Intellectual

Property [and] that it has and will have the right to license the Intellectual Property to [Vedozi] throughout the term of the Agreement." (*See id.* at ¶ 34 (referring to Ex. A thereto, at ¶ 10.2).)

II. ARGUMENT

A. Standard of Review

Under Fed. R. Civ. P. 8, an opposition must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8; 37 C.F.R. §2.104(a); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This pleading standard does not require "detailed factual allegations," but it does require "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). In assessing a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for lack of standing to oppose or cancel a trademark registration, a court must accept the truth of all factual allegations in the complaint and must draw all reasonable inferences in favor of the non-movant. *Ritchie v. Simpson*, 170 F.3d 1092, 1097 (Fed. Cir. 1999); *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp.*, 823 F.2d 490, 492 (Fed. Cir. 1987).

B. Vedozi Has Failed To Plead Sufficient Facts To Establish Standing to Oppose Cintron's Trademark Registrations.

Vedozi's Oppositions should be dismissed because its allegations fall short of the factual averments necessary to establish standing to oppose Cintron's trademark registrations. In its Oppositions, Vedozi asserts that the U.S. Patent and Trademark Office ("USPTO") should not grant registration for the CINTRON trademarks because the marks allegedly (1) primarily consist of a surname and (2) have not become distinctive of their goods sufficient to otherwise warrant registration. (*See* Oppositions ¶¶ 1, 16.) Vedozi claims that it has standing to oppose the marks because "it believes it will be damaged by registration of the mark[s]." (*See id.* at

Vedozi "believes it will be damaged by registration" of the CINTRON word and stylized word marks, Vedozi offers no facts demonstrating either (1) that it has a personal stake in the registration of these marks or (2) that it has a reasonable belief that it will be damaged if those registrations are granted. The absence of any conceivable damages supporting Vedozi's assertion of standing to oppose Cintron's trademark applications demonstrates that Vedozi is precisely the type of "intermeddler" that the standing requirements are meant to weed out and strongly suggests that that the purpose of the Oppositions is something other than a legitimate assertion of a claim in connection with the trademarks at issue.

The only possible conclusion from the facts as pleaded is that Vedozi has no standing to oppose Cintron's marks because Vedozi's rights with respect to Cintron's products and trademarks were only those of a distributor pursuant to the Agreement. Indeed, Vedozi explicitly disclaimed any ownership interest in Cintron's Intellectual Property when it executed the Agreement and, therefore, cannot *reasonably* believe "it will be damaged by registration" of Cintron's marks.[2] Accordingly, Vedozi's Oppositions fail to state claims for which relief can be granted and should be dismissed in their entirety.

---

[2] Moreover, given Vedozi's argument that the marks are not the proper subject of registration at all (with which Cintron vehemently disagrees), Vedozi cannot logically also take the position that it has a personal interest in those names (putting aside the fact that the Agreement precludes Vedozi from asserting such an interest).

III. CONCLUSION

For the reasons set forth above, Cintron Beverage Group, LLC respectfully requests that the Board grant its motion and dismiss Vedozi's Oppositions, with prejudice.

Respectfully submitted,

Cintron Beverage Group, LLC
a Maryland corporation

By: */s/ Evelyn H. McConathy*
USPTO Registration No. 35,279
Ronald E. Hurst
Carmon M. Harvey
Lathrop B. Nelson
Co-Counsel for Applicant

Date: August 22, 2011

Montgomery, McCracken, Walker & Rhoads, LLP
123 South Broad St., Avenue of the Arts
Philadelphia, PA 19109
Tel: (215)772-4776
Fax: (215)772-7620
emcconathy@mmwr.com

CERTIFICATE OF SERVICE

I, Evelyn H. McConathy, hereby certify that on the date below, I caused a true and correct copy of the foregoing Motion of Applicant Cintron Beverage Group, LLC to Dismiss Vedozi, Inc.'s Opposition Nos. 91200636 and 91200639 and brief in support thereof to be served by first-class United States mail and electronic mail on the following:

Jeremy D. Bisdorf
Peter M. Falkenstein
Joan H. Lowenstein
Lawrence R. Jordan
Jaffe Raitt Heuer& Weiss
27777 Franklin Road, Suite 2500
Southfield, MI 48034

Counsel for Opposer
Vedozi, Inc.

/s/ Evelyn H. McConathy
Evelyn H. McConathy

Dated: August 22, 2011