

ESTTA Tracking number: **ESTTA618100**

Filing date: **07/28/2014**

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

Proceeding	91205896
Party	Plaintiff Beau L. Tardy
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Submission	Opposition/Response to Motion
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Date	07/28/2014
Attachments	Objection to Motion to Compel.pdf(33684 bytes)

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

Opposition Proceeding 91205896

In the matter of Trademark Application No. 85509929

For the mark: DIZZY

Published for Opposition Date: June 5, 2012

Beau Tardy, Opposer

v.

Wild Brain Entertainment, Inc., Applicant

OBJECTION TO MOTION TO COMPEL

Opposer objects to Applicant's Motion to Compel in that it is based entirely on compelling Opposer to produce unnecessary documents that are related to chain of title arguments, abandonment and the withdrawn 2(d) claims. If these documents existed, they would not be admissible. None of the purported documents have any value to Applicant in preparing for trial.

Opposer is not relying on prior use in this proceeding and absent a 2(d) claim it is not necessary to show any prior use. Standing can be establishing merely by showing prior interest in using the mark. In its initial pleading, Opposer claimed its prior abandoned registrations whose records are as easily accessible to Applicant as they are to Opposer and in the amended Notice Opposer pleaded its new application into the record (which has been suspended because

of a likelihood of confusion with Applicant's mark) which is sufficient enough standing so that no other documents are necessary.

Standing is a threshold inquiry directed solely to establishing a plaintiff's interest in the proceeding. The purpose in requiring standing is to prevent litigation where there is no real controversy between the parties, where a plaintiff is no more than an intermeddler. See *Lipton Industries, Inc. v. Ralston Purina Co.*, 213 USPQ 185 (CCPA 1982).

Applicant's admission in its initial Answer of visiting Opposer's URL Dizzythecat.com and finding DIZZY cartoons that were created in 2006 should be enough to establish Opposer's interest beyond that of the general public.

The threshold for standing is low. Standing can be pleaded and proved by as little as the intent to file and intent-to-use application using the trademark in question. See *American Vitamin Products Inc. v. Dowbrands Inc.*, 22 U.S.P.Q.2d 1313 (TTAB 1992). See also TBMP 309.03(b).

If Applicant believed that Opposer did not make a sufficient claim of standing in its initial pleading, the remedy would have been to file a motion to dismiss. If a failure would have been found in the initial pleading, Opposer would have been given the opportunity to amend to cure this defect. Under *American Vitamin Products*, merely alleging the intent to file an application would have been sufficient to bring Opposer's interest beyond that of the general public.

Even though there was not a motion to dismiss, Opposer did amend the pleading to add the new application SN 85741800 which was properly pleaded into the record and contained self-authenticating web pages showing specimens of use proving Opposer's use of the DIZZY mark sufficient to bring Opposer's interest beyond that of the general public. Opposer has been

very forthright in this proceeding about amending and letter Applicant know exactly what claims are being alleged. Likelihood of confusion and priority are no longer issues.

Opposer believes that Board led discovery conference addressed the issue of standing and the issue of motions to compel and other unconsented motions in a very straightforward manner and followed up the discussion with a clear order on November 6, 2013: “Any party filing an unconsented motion to extend or suspend should notify the Board by telephone upon the filing thereof so that such motion can be resolved promptly by telephone conference.” Opposer attempted on multiple occasions to set up a telephone conference with Applicant and the Board to discuss this motion unsuccessfully. Inherent in a motion to compel is a motion to suspend. Opposer believes that Applicant is in direct violation of what was discussed in the discovery conference and in violation of this order with the unconsented filing of this Motion to Compel.

Opposer asks that the Board deny the Motion to Compel.

Submitted By: /Wendy Peterson/

Date: July 28, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2014, the foregoing was served upon Applicant's attorney by email to:

jreichman@kenyon.com, wmerone@kenyon.com, nsardesai@kenyon.com,
tmdocketny@kenyon.com

By: /Wendy Peterson/

Date: July 28, 2014

Wendy Peterson, Attorney for Opposer, Beau Tardy