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

Proceeding	91208003
Party	Defendant Michael F. Ball
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

RED BULL GMBH,)	
)	
Opposer/Counterclaim Respondent)	
)	
v.)	Opposition No. 91208003
)	(Parent)
MICHAEL F. BALL,)	Opposition No. 91214448
)	
Applicant/Counterclaim Petitioner.)	

**APPLICANT’S RESPONSE
TO
OPPOSER’S MOTION TO DISMISS THE GROUND OF MERE DESCRIPTIVENESS
IN APPLICANT’S COUNTERCLAIM, AND STRIKE APPLICANT’S FIRST
AFFIRMATIVE DEFENSE IN APPLICANT’S ANSWER**

Michael F. Ball (hereinafter, “Applicant”), hereby responds to Red Bull’s (hereinafter, “Opposer”) motion to dismiss Applicant’s counterclaim against Reg. No. 3,939,863 on a claim under Lanham Act Section 2(e), 15 U.S.C. 1052(e) and to Opposer’s motion to strike Applicant’s first affirmative defense of paragraph 22. Applicant opposes the motion to dismiss for the reasons set forth below.

Applicant’s counterclaim seeks to cancel Opposer’s registration for the mark RED as it is applied to the goods identified in the registration, namely, energy drinks and soft drinks. The claim is based in part on the allegation that the mark is merely descriptive of the goods per Lanham Section 2(e). The facts supporting the Applicant’s claim are found in paragraphs 24 and subsequent of Applicant’s August 14, 2013 filing of the Answer to the Amended Notice of Opposition and Counterclaim for Cancellation.

In the instant motion, Opposer alleges that the facts in support of Applicant’s claim are irrelevant, insufficient, prejudicial, and accordingly, the claim should be dismissed per Rule 12(b)(6). Opposer also avers that, without the identified factual paragraphs at issue, the claim lacks the

necessary detail required to support the claim for relief. It is worth noting that all complaints, without their supporting factual paragraphs, could be found lacking necessary detail to justify the claim for relief. The factual paragraphs are there for a reason. Nonetheless, Opposer's arguments are addressed in the order in which they are put forth.

To survive a motion to dismiss under Rule 12(b)(6), the responding party need only allege sufficient factual matter that, if proved true, would establish that the party possesses standing to challenge the registration and that there is a valid ground why the registrant is not entitled under the law to maintain the registration. *Lipton Indus., Inc. v. Ralston Purina Co.*, 213 USPQ 185, 187 (CCPA 1982). Applicant's standing to assert the counterclaim arises from Applicant's position as a defendant in the Opposition proceeding initiated by Opposer. *Ohio St. Univ. v. Ohio Univ.*, 51 USPQ2d 1289, 1293 (TTAB 1999).

"A pleading should include enough detail to give the defendant fair notice of the basis for each claim. The elements of each claim should be stated simply, concisely, and directly, and taken together 'state a claim to relief that is plausible on its face.'" TBMP § 309.03(a)(2) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 & 570 (2007); and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)); *Johnson & Johnson v. Obschenstvo*, 104 USPQ2d 2037, 2038 (TTAB 2012). The court must construe the pleading liberally and in the pleader's favor. *Bell Atlantic*, 550 U.S. at 570. The court presumes that all well-pleaded allegations are true, resolves all reasonable doubts and inferences in the pleader's favor, and views the pleading in the light most favorable to the non-moving party. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009). No claim will be dismissed merely because the court disbelieves the allegations or feels that recovery is remote or unlikely. *Bell Atlantic*, 550 U.S. at 555-556.

A. The Factual Allegations in Applicant’s Counterclaim Provide Sufficient Detail to Support a Claim for Relief.

Opposer’s argument begins by stating “Applicant attempts to include facts to support its claim of mere descriptiveness, however, each and every one of Applicant’s ‘facts’ is entirely irrelevant to the matter at hand. . . . Without these ‘facts’, Applicant’s claim of mere descriptiveness is legally insufficient.” Opposer’s Brief at p4. Opposer then recites paragraphs 31-39 of Applicant’s counterclaim. Opposer’s Brief at p4-5. Relevancy is an evidentiary standard. It is not the standard for whether or not a claim is plausible. The court in *Bell Atlantic* concluded by saying that a pleading need contain “only enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic*, 550 U.S. at 570. Yet Opposer goes on to argue that because the facts alleged in those paragraphs are irrelevant, they are outside the scope of the Board’s jurisdiction, and therefore Applicant is attempting to broaden the Board’s jurisdiction by ruling on ex parte matters still before the Office, not the Board. Opposer’s Brief at p5-6. Opposer then concludes by arguing that if the Board considers such facts, Opposer will be prejudiced by the Board’s extra-jurisdictional ruling, which is unrelated to Applicant’s claim. Opposer’s Brief at p6.

It has long been held that statements made by a party in prosecution of its applications for registration may be used by an adverse party as evidence against the applicant in the nature of an admission against interest. *Eikonix Corp. v. CGR Medical Corp.*, 209 USPQ 607, 613 n.7 (TTAB 1981). In the paragraphs at issue, beginning in paragraph 31, Applicant states facts regarding Opposer’s ownership of an application for registration of the mark RED in standard characters, which is applied to energy drinks, soft drinks, and hypertonic drinks. The registration that is the subject of Applicant’s petition to cancel is also for the mark RED in standard characters, which is applied to energy drinks and soft drinks. There are no facts of particular controversy in paragraph 31. It is foundation for some paragraphs that follow.

Paragraphs 32-35 relate to Opposer's submissions and admissions made to the Office regarding Opposer's mark RED as applied to the goods detailed above. Applicant has alleged only facts pertaining to Opposer's prosecution. In summary, these facts include a specimen Opposer submitted to the Office to illustrate use of the mark; the Office's rejection of that specimen; Opposer made statements regarding the significance of the mark; and that the Office suspended Opposer's application. These paragraphs do not advance any opinion of Opposer or legal conclusion of Opposer on a question of law. *Cf. Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 198 USPQ 151, 153-154 (CCPA 1978). Per the Board's decision in *Eikonix*, cited above, Opposer's factual and evidentiary admissions may be used against them and are.

Paragraphs 36-39 contain further factual allegations supporting Applicant's claim under Section 2(e). The paragraphs do not cite to Opposer's ex parte admissions, yet Opposer lumps these with paragraphs 32-35 in saying, without any rationale or argument, that they are irrelevant and prejudicial. The facts put forth in these paragraphs pertain to and support the claims against Opposer's registration. More specifically, these paragraphs introduce the facts regarding Opposer's mark as well as the nature and quality of Opposer's products associated with that mark. All of these paragraphs allege facts simply and concisely. Taken together, they form part of the claim that is the basis for Applicant's petition to cancel Opposer's registration. Opposer's argument for insufficient factual detail hinges, rather, on excluding these paragraphs despite the factual details they contain. But there is no basis for excluding these paragraphs, whether through Opposer's theory of jurisdiction or not.

Opposer's argument that Applicant seeks an extra-jurisdictional determination by the Board on the registrability of the application is without merit. Applicant has not asked the Board to make a determination on the issues presented in the application and no such request should be implied. Whether Opposer would be prejudiced or estopped from enforcing trademark rights associated with

their application—should Applicant’s claim against the registration succeed—is not an issue for determination in this motion to dismiss. Should Opposer be estopped, it is no fault of Applicant that Opposer filed two applications for registration of identical marks on identical goods.

In conclusion, Opposer has not put forth any rational argument why the factual paragraphs in the counterclaim fail to provide sufficient detail to support a claim for relief. The pleading shows quite clearly that Applicant has asserted facts with sufficient detail for the claim for relief under Section 2(e) to be plausible on its face. Per the cases cited above, the Board must construe the pleadings liberally, in Applicant’s favor. Any doubt must be resolved in Applicant’s favor. Therefore the motion must be denied.

B. Applicant Does Not Contest the Motion to Strike the First Affirmative Defense.

Based on the facts and law discussed above, Applicant has sufficiently pleaded a claim for relief under Section 2(e) through a counterclaim for cancellation of Opposer’s registration. Accordingly, Applicant does not contest Opposer’s motion to strike the first affirmative defense of paragraph 22. Should the Board find Opposer’s motion to dismiss well taken, however, Applicant hereby requests leave to amend per Fed. R. Civ. P. 15.

* * * * *

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPLICANT’S RESPONSE TO OPPOSER’S MOTION TO DISMISS THE GROUND OF MERE DESCRIPTIVENESS IN APPLICANT’S COUNTERCLAIM, AND STRIKE APPLICANT’S FIRST AFFIRMATIVE DEFENSE IN APPLICANT’S ANSWER was deposited with the U.S. Postal Service, postage prepaid for delivery by First-Class Mail on counsel for Red Bull this 27th day of March 2014 as follows:

Martin R. Greenstein
TechMark a Law Corporation
4820 Harwood Road, 2nd Floor
San Jose, CA 95124-5273



Stephen A. Straub

CERTIFICATE OF FILING

I hereby certify that a copy of the foregoing APPLICANT’S RESPONSE TO OPPOSER’S MOTION TO DISMISS THE GROUND OF MERE DESCRIPTIVENESS IN APPLICANT’S COUNTERCLAIM, AND STRIKE APPLICANT’S FIRST AFFIRMATIVE DEFENSE IN APPLICANT’S ANSWER was filed with the U.S. Patent and Trademark Office using the ESTTA filing system on this 27th day of March 2014.



Stephen A. Straub