

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
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General Contact Number: 571-272-8500

CME

Mailed: December 10, 2014

Opposition No. 91210103

The Coca-Cola Company

v.

Alberto Soler d/b/a Coki Loco and  
Miriam Soler

**Before Cataldo, Taylor and Greenbaum,  
Administrative Trademark Judges.**

**By the Board:**

The application involved in this proceeding was filed jointly on July 10, 2012 by individuals Alberto Soler, doing business as Coki Loco, and Miriam Soler, based on Applicants' allegation of a *bona fide* intention to use the mark in commerce pursuant to Trademark Act Section 1(b), 15 U.S.C. § 1051(b).<sup>1</sup> On March 3, 2014, Applicant filed a paper that included the following statement, on page 7, attributed to Co-Applicant Alberto Soler:

Mr. Rodriguez and Mr. Akcime (Mr. Wright, Vuelta and others and William Soler, my brother and Miriam Soler my mother) are associates of mines [sic] and members of an association I planned for my business venture. I am in charge- owner of the association and legal authority over the marks the members have under their names. The association owns the marks not the applicants based on the business and contract term executed.

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<sup>1</sup> Serial No. 85672347 for the mark COKI COLA HAPPY MOTION, in standard characters, for various entertainment services in International Class 41.

In view of this statement, the Board issued an order on July 19, 2014 (“Prior Order”) allowing Applicants thirty days to show cause why judgment should not be entered against them on the ground that the involved application is *void ab initio* “[i]nasmuch as Mr. Soler has stated on the record that it is not Applicants but a business association that owns the involved mark.” See Prior Order, p. 8. This case now comes up on Applicants’ response to the Prior Order, filed August 18, 2014.<sup>2</sup>

Applicants do not attempt to refute Mr. Soler’s prior statement that it is a business association comprised of individuals including those other than Applicants, rather than Applicants, that owns the involved mark. Instead, Applicants assert three main arguments, namely that (1) the Board acted “corrupt[ly]” in issuing the Prior Order because it *sua sponte* questioned whether the involved application may be *void ab initio* rather than waiting for Opposer to assert the issue and allowing a trial on the matter; (2) Cola de Coki, the business association who owns the involved mark, was not capable of filing the involved application because, at the time of filing, it was an

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<sup>2</sup> The Board gives no consideration to the “Proclamation,” filed November 20, 2014, as the filing and certificate of service have been signed only by Alberto Soler. See Board’s order of February 3, 2014 (reminding Applicants “that all certificates of service must be **signed by both applicants.**”) (emphasis in original); Cf. TMEP § 712.01 (Oct. 2014) (a response to an Office action by joint applicants who are not represented by an attorney must be signed by each of the applicants, since they are individual parties and not a single entity). But even if we were to consider the “Proclamation,” the subject matter of the filing, namely, allegations that the Board is “unconstitutional,” is not within the Board’s jurisdiction, which is limited to determining the registrability of trademarks. See TBMP § 102.01 (2014) and cases cited in footnote 4 therein (“[T]he Board, being an administrative tribunal, has no authority to declare any portion of the Act of 1946, or any other act of Congress, unconstitutional.”).

unincorporated association under Florida law, which is an entity type that cannot sue or be sued; and (3) they have “the right to correct the record to reflect that the Association Cola de Coki was the owner of the application.” *Id.* at p. 5.

With respect to Applicants’ first argument, the Board will not expend its limited time and resources to consider an opposition when the record demonstrates that the involved application is *void ab initio* for failure to comply with the filing requirements set out in Section 1 of the Trademark Act. *See Huang v. Tzu Wei Chen Food Co. Ltd.*, 7 USPQ2d 1335 (Fed. Cir. 1988) (affirming the Board’s refusal to register the mark HEI CHIAO on the ground that the application was not filed by the owner of the mark and, in view thereof, further affirming the Board’s dismissal of an opposition pending against the application); *Cf. Carrini Inc. v. Carla Carini S.R.L.*, 57 USPQ2d 1067, 1071 (TTAB 2000) (“[T]he Board possesses the inherent authority to control the disposition of cases on its docket.”).

Turning to Applicants’ second argument, an application filed pursuant to Section 1(b) of the Trademark Act, like the one involved here, “must be filed by a party who is entitled to use the mark in commerce, and must include a verified statement that the applicant is entitled to use the mark in commerce and that the applicant has a *bona fide* intention to use the mark in commerce as of the application filing date.” Prior Order, p. 7 (quoting TMEP § 1201 (April 2014) and citing to Trademark Rule 2.33(b)(2)) (internal quotations

omitted). Applicants have provided no evidence to support their assertion that Cola de Coki was an unincorporated association at the time the involved application was filed. But even assuming this is true, and that unincorporated business associations under Florida law cannot sue or be sued, and therefore, cannot file a federal trademark application,<sup>3</sup> it is apparent from the record that the involved application still was not filed by the correct party or parties.

The record reflects that Cola de Coki is the true owner of the involved mark, *see* Prior Order, p. 6; that Cola de Coki was organized as an unincorporated association on February 14, 2012, which is prior to the application filing date here, *see* Response at p. 2; that as of that date, the members of the association were Alberto Soler, Carlos Garcia, William Soler and Juan Rodriguez, *see id.*; and that “on or about November 2013,” Miriam Soler became a member of Cola de Coki. *Id.* (emphasis removed). Based on this record, and treating as true the assertion that Cola de Coki was not capable of filing the involved application, the proper applicants would have been the owner(s) of the Cola de Coki business association as of the date the application was filed. While the record suggests that Mr. Soler was an owner

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<sup>3</sup> Section 1(b) of the Trademark Act provides that “[a] person who has a bona fide intention ... to use a trademark in commerce may request registration of its trademark on the principal register....” 15 U.S.C. § 1051(b). The Trademark Act defines “person” to include a natural person and a juristic person. *Id.* at § 1127. “The term ‘juristic person’ includes a firm, corporation, union, association, or other organization *capable of suing and being sued in a court of law.*” *Id.* (emphasis added).

of Cola de Coki as of the filing date of the involved application, there is no basis for finding that Miriam Soler was an owner or was otherwise entitled to use the involved mark as of the application filing date. Indeed, Applicants have admitted that Ms. Soler was not a member of Cola de Coki until more than fifteen (15) months *after* the involved application was filed.

Contrary to Applicants' third argument, if an intent to use application is filed in the name of a party who is not entitled to use the mark as of the filing date, the application is *void ab initio* and cannot be amended to specify the correct party as the applicant. *See* Trademark Rule 2.71(d); *see also* *Huang*, 7 USPQ2d at 1335-36; *Great Seats, Ltd. v. Great Seats, Inc.*, 84 USPQ2d 1235, 1239 (TTAB 2007); *American Forests v. Sanders*, 54 USPQ2d 1860, 1861-63 (TTAB 1999) (recognizing that strict compliance with Section 1 of the Trademark Act is required, particularly where an application is filed pursuant to an intent to use the mark), *aff'd*, 232 F.3d 907 (Fed. Cir. 2000); *In re Tong Yang Cement Corp.*, 19 USPQ2d 1689, 1691 (TTAB 1991); TMEP §§ 803.01 and 803.06. Because the involved application was not filed by the correct party or parties, the application is *void ab initio* and cannot be corrected.

In view of the foregoing, registration of the involved mark is refused and the opposition is dismissed as moot.

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