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

Proceeding	91210103
Party	Defendant Soler Alberto, Soler Miriam
Correspondence Address	Laudis Moreira Banah Sugar/UR-COLA 215 SE 10th Ave (Banah SweetWay) MIAMI, FL 33010 cokicolahappymotion@gmail.com;urcocacoc
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Alberto Soler
Filer's e-mail	cokicolahappymotion@gmail.com
Signature	/Alberto Soler/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re: Application No. 85/672,347

Mark: COKI COLA HAPPY MOTION

Filed: July 10, 2012

Published: December 18, 2012

ALBERTO SOLER,
DBA **COKI LOCO**

and

MIRIAM SOLER

Applicants,

v.

Opposition: **91210103**

The Coca-Cola Company

Opposer.

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APPLICANT'S MOTION TO DISMISS

Pursuant to FRCP 12(b)(6), TTAB Manual of Procedures 307.02(6), Applicant Alberto Soler, DBA Coki Loco and hereinafter **Coki**, hereby moves for dismissal of The Coca-Cola Company (hereinafter TCCC) Notice of Opposition grounds (1) thru (3) for failure to plead acquired distinctiveness, stronger distinctiveness for dilution, and ground (4), knowing filing the application under a false owner's name can never constitute fraud because the misrepresentation defeats registration.

In support of the defense for a new beginning, Coki here also draws sword first to offense there will be no end;

TCCC COMPLAINS BUT NOT PROCLAIMS

1. TCCC'S great minds has forgotten that they can't complain unless they plead acquire distinctive; *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA1981) (*Towers v. Avent Software, Inc*, 913 F.2d 942 (Fed. Cir. 1990) (Otto rule also applicable to cancellation proceedings); for their King being born and claiming descriptiveness; *United States v. Forty Barrels and Twenty Kegs of Coca-Cola*, 241 US 265 (1916) but then later losing its robe for becoming part generic after swearing not true not to be dethroned. *Dixi-Cola Laboratories v. Coca-Cola Co*, 117 F.2d 352 (4th Cir. 1941); *Coca-Cola v. Snow Crest Beverages*, 162 F.2d 280 (1st Cir. 1947)

Under dilution, there must be a "stronger" showing of acquired distinctiveness. *Toro Company*, 61 USPQ2d 1164 (TTAB 2001)

Coki here is not waiving any affirmative defense that will be pleaded if and when *answer its due for that TCCC'S* golden mark has become instead a de facto secondary meaning and if not so, is deceptive or both and much worst, a monopoly. (*Canfield Co., v. Concord Beverages Co.*, 808 F.2d 291 (3rd Cir. 1986) (citing *Kellog Co., v. National Biscuit Co.*, 305 US 111 (1938))

TCCC grounds (1) thru (3) should be dismissed unless TCCC amends its opposition by establishing they have acquired/strong distinctiveness.

TCCC COMPLAINS WITH HOPES

2. TCCC'S minds goes to great pains voicing that Coki defrauded the USPTO by filing

the application under the wrong owner's name to obtain registration.

Are you kidding me

Misrepresentation on the true owner of the application defeats registration. *Tracie Martyn, Inc., v. Tracy Artman*, Opposition No. 91173009 (TTAB May 01, 2008) citing *Huang v. Tzu Wei Chen Food Co., Ltd.*, 7 USPQ2d 1335 (Fed. Cir. 1988)

Could it just be (1), a clerical mistake/misunderstanding, or (2), a misrepresentation that is material to deceive another not the USPTO or (3), there is no misrepresentation at all. (1) cannot survive with either (2) or (3), but **2** and **3** survives together leading us back to the only available ground justifying opposition for filing the application under the wrong owner's name, (1). *Maids to Order of Ohio, Inc., v. Maid-to-Order Inc.*, 78 USPQ2d 1899 (TTAB 2008)

Obviously then, there will be no need for TCCC to plead "upon information and belief" nor will it state a claim for fraud. *Exergen Corp v. Wal-Mart Inc.*, 91 USPQ2d 1656, 1670 (Fed. Cir. 2009)

TCCC's ground (4) should be dismissed unless TCCC amends the opposition to state the simple claim that the application was filed in the wrong owner's name, but TCCC will be just delaying these proceeding, for purposes of harassment, and to cause needless increase in the cost in contravention of 37CFR 11.18, if they decide such need to again plead such ground for opposition.

Coki here is not admitting nor conceding that the application was filed in the wrong *owner's name since its clear that we read Alberto Soler as the filer and owner of the application and Alberto Soler as the filer of the present motion to dismiss.*

Further and to assist those minds in need. TCCC does not need to plead bad faith/fraud on ground (5) lack of bona fide intent to use. SmithKline Beechm Corp. v. Omnisource DDS LLs., 97 USPQ2d 1300 (TTAB 2010)

There's no need to go further but further later if there's a need for the land to stay free. Henry a La Pensee, Inc., v. Societe a Responsabilite Limitee Henry a La Pensee, 243 F.2d 181 (CCPA 1957); Formica v. Lefkowitz, 590 F.2d 915 (Fed. Cir. 1979)

CONCLUSION

3. Wherefore, Coki respectfully requests the Board for dismissal of Opposer's grounds (1) thru (4) by directing TCCC to amend its complaint with the pleading requirements that states a claim for relief and/or any other resolution deem just and reasonable.

Respectfully submitted,

ALBERTO SOLER
Applicant/Coki Loco
4741 NW 5 Street
Miami, Fl 33126
305-815-8241
cocolahappymotion@gmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this motion was furnished via First Class mail and via email attachment this 22nd day of April 2013 to TCCC'S counsel of record as follow;

Cynthia R. Parks

Parks IP Law LLC

730 Peachtree Street, NE

Suite 600

Atlanta, GA 30308

cparks@parksiplaw.com

ALBERTO SOLER