

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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Baxley

Mailed: January 28, 2015

Opposition No. 91210282  
Opposition No. 91214537  
Cancellation No. 92059220

*Red Bull GmbH*

*v.*

*Stockmarket Burger, Inc.*

Before Bucher, Lykos, and Hightower,  
Administrative Trademark Judges.

By the Board:

In Opposition No. 91210282, Red Bull GmbH (“Plaintiff”) opposes Stockmarket Burger, Inc.’s (“Defendant”) special form mark shown at right, for goods in International Classes 11, 25, 30, 32, and 33 and services in International Class 43<sup>1</sup> on grounds of: (1) likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d); and (2) no *bona fide* intent to use the mark in commerce on “some or all of” the identified goods.<sup>2</sup> In Opposition No. 91214537, Plaintiff



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<sup>1</sup> Application Serial No. 85680816, filed July 18, 2012, based on an assertion of a *bona fide* intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The application includes statements that “[c]olor is not claimed as a feature of the mark” and that “[t]he mark consists of an image of a fierce bull riding on top of the swirl.”

<sup>2</sup> In the original notice of opposition in Opposition No. 91210282, Plaintiff alleged only a Section 2(d) claim. On January 17, 2014, concurrently with the filing of the notice of opposition in Opposition No. 91214537, Plaintiff filed a motion for leave to

opposes registration of Defendant's mark shown at right for goods in International Classes 11, 25, 32, and 33<sup>3</sup> on the same



grounds as in Opposition No. 91210282.<sup>4</sup> Defendant, in its answer, denied the salient allegations of the notice of opposition. The above-captioned oppositions were consolidated in a March 13, 2014 Board order.

In the petition to cancel in Cancellation No. 92059220, Plaintiff seeks to cancel Defendant's registration for the mark shown at right, for services in International Class 43,<sup>5</sup> on essentially the same



Section 2(d) claim as was pleaded in the opposition proceedings; and (2) nonuse in association with the recited services at the time the statement of

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file an amended notice of opposition in Opposition No. 91210282, wherein it added the no *bona fide* intent to use claim and references to four registrations. After Defendant filed an answer to the amended notice of opposition on February 26, 2014, the Board, in a March 13, 2014 order, consolidated the opposition proceedings and granted the motion for leave to file an amended opposition in Opposition No. 91210282.

<sup>3</sup> Application Serial No. 85969820, filed June 25, 2013, based on an assertion of a *bona fide* intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The application includes the following statements: "The mark consists of a unique bull and swirl design. The bull's upper body rides on top of a swirl in an upward position. The stylized text 'STOCKMARKET' sits beneath the front legs of the bull, slightly below the center of the swirl. The swirl has a revolving circular motion with sharp edges, uneven thickness extending from the body of the bull."

<sup>4</sup> The original notice of opposition remains the operative complaint in Opposition No. 91214537.

<sup>5</sup> Registration No. 4481899, issued February 11, 2014, and alleging October 8, 2012 as the date of first use anywhere and date of first use in commerce. The registration includes the following statements:

Color is not claimed as a feature of the mark. The mark consists of a unique bull and swirl design. The bull's upper body rides on top of a swirl in an upward position. The stylized text 'STOCKMARKET' sits beneath the front legs of the bull, slightly below the center of the swirl. The swirl has a revolving circular motion with sharp edges, uneven thickness extending from the body of the bull.

use was filed in support of the application for the involved registration. Cancellation No. 92059220 was consolidated with the previously consolidated opposition proceedings in the Board's September 16, 2014 order.

This case now comes up for consideration of: (1) Defendant's motion (filed June 26, 2014) for partial judgment on the pleadings in the above-captioned opposition proceedings; and (2) Defendant's motion (filed October 16, 2014) for partial dismissal of Cancellation No. 92059220 for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In both motions, Defendant seeks dismissal of the Section 2(d) claims in these consolidated proceedings. The motions have been fully briefed.

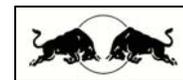
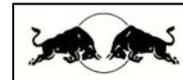
***Motion for partial judgment on the pleadings in oppositions***

As an initial matter, Plaintiff correctly notes that the Board did not issue the order suspending the opposition proceedings following the filing of the motion for partial judgment on the pleadings until July 25, 2014 and that dates herein continued to run until such issuance. However, we treat that suspension as relating back to the June 26, 2014 filing date of that motion. *See Leeds Technologies Ltd. v. Topaz Communications Ltd.*, 65 USPQ2d 1303, 1305-06 (TTAB 2002); TBMP § 510.03(a). Accordingly, Plaintiff's request in its brief in response to the motion for judgment on the pleadings that the Board deem admitted the requests for admission that Plaintiff served in opposition proceedings on May 23, 2014, is denied.

Through the motion for partial judgment on the pleadings, Defendant seeks entry of judgment on the pleadings in its favor on the pleaded Section 2(d) claims in the opposition proceedings on the ground that its applied-for marks are so dissimilar to Plaintiff's pleaded marks that confusion among prospective consumers is unlikely. For purposes of this motion only, Defendant concedes all of the remaining factors relevant to determining likelihood of confusion under *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), including that Plaintiff's pleaded marks are famous, in Plaintiff's favor. In response, Plaintiff contends that the pleadings indicate that there are triable issues of fact and that Defendant's motion is a "spurious attempt to ... avoid ... [Defendant's] clear discovery obligations."

In paragraphs 3 through 6 of the operative complaints in the opposition proceedings, Plaintiff identifies the following four registrations:

- Registration No. 2946045, issued May 3, 2005, for the mark shown at right, for "[n]on-alcoholic beverages, namely energy drinks and hypertonic drinks" in International Class 32;<sup>6</sup>
- Registration No. 3051994, issued January 31, 2006, for the mark shown at right, for goods in International Classes 6, 9, 11, 14, 16, 18, 20 through 22, 24 through 28, and 32 and services in



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<sup>6</sup> Section 8 declaration accepted, Section 15 declaration acknowledged. The registration includes the following statements: "Color is not claimed as a feature of the mark. The mark consists of Two Opposing or Charging Bulls, with a circular, globe or sun background." Plaintiff refers to this mark in paragraph 3 of the operative complaints as "the Bull Logo Mark."

International Classes 35, 38, 41, and 42;<sup>7</sup>

- Registration No. 3561283, issued January 13, 2009, for the mark mark shown at right, for goods in International Classes 6, 11, 12, 16, 18 through 22, 24, 25, 27, 28, 32, and 33 and services in International Classes 35, 41, and 43;<sup>8</sup> and
- Registration No. 4031959, for the mark mark shown at right, issued September 27, 2011 for the mark RED BULL ARENA and design in the following form for services in International Classes 35, 41, 43, and 45.<sup>9</sup>



In paragraph 17 of the operative complaints in the opposition proceedings, Plaintiff alleges that the involved mark “so resembles [Plaintiff’s] **RED BULL and Bull Logo Marks** as to be likely ... to cause confusion, mistake or deception among purchasers, users, and the public, thereby damaging [Plaintiff].” In paragraph 7 of those operative complaints, Plaintiff identifies its RED BULL and Bull Logo Marks as the “trademarks RED BULL, RED

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<sup>7</sup> Section 8 declaration accepted, Section 15 declaration acknowledged. The registration includes the following statement: “Color is not claimed as a feature of the mark.” Plaintiff refers to this mark in paragraph 4 of the operative complaints as “the Bull Logo Mark.”

<sup>8</sup> Combined Section 71 and 15 declaration pending. The registration includes the following statement: “Color is not claimed as a feature of the mark.” Plaintiff refers to this mark in paragraph 5 of the operative complaints as “the RED BULL & Bull Logo Mark.”

<sup>9</sup> The registration includes the following statements:

The color(s) red, white, blue, grey, and yellow is/are claimed as a feature of the mark. The mark consists of a red bull with white accents against a yellow soccer ball inside a stadium. The outline of the stadium is blue. The inside of the stadium is blue and grey. The stylized wording ‘RED BULL ARENA’ appears beneath the design. The wording ‘RED BULL’ appears in the color red. The wording ‘ARENA’ appears in the color blue.

Plaintiff refers to this mark in paragraph 6 of the operative complaints as “the RED BULL ARENA & Device Mark.”

BULL & Two Bulls Logo, Two Bulls Logo and (Single) Bull Logo, and other marks incorporating the word BULL, and/or the design of a bull or bovine Animal for various goods and services, all of which are collectively referred to herein as [Plaintiff's] '**Red Bull and Bull Logo Marks**' (emphasis in original). In paragraph 8 of the operative complaints, Plaintiff alleges use of those marks on "beverages, energy drinks, sports drinks, soft drinks, various items of clothing, including but not limited to shirts, pants, jackets, hats and other clothing items, as well as restaurant and café services, and various other products and services." Taken together, we treat the Section 2(d) claims set forth in the operative complaints in the opposition proceedings as alleging likelihood of confusion with the word mark RED BULL and the marks in the four pleaded registrations on "beverages, energy drinks, sports drinks, soft drinks, ... shirts, pants, jackets, hats and ... restaurant and café services" and the specific goods and services for each registered mark in the registration therefor.<sup>10</sup>

Plaintiff has not specifically identified "any ... other marks incorporating the word BULL, and/or the design of a bull or bovine Animal" upon which it intends to rely in support of its Section 2(d) claim. Thus, to the extent that Plaintiff intends to rely on additional marks in support of its Section 2(d)

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<sup>10</sup> To avoid ambiguity, Plaintiff should have referred to the marks in the pleaded registrations consistently throughout its pleadings. However, we construe the reference to the "RED BULL & Two Bulls Logo" as identifying the mark in Registration No. 3561283, the reference to the "Two Bulls Logo" as identifying the mark in Registration Nos. 2946045 and 3051994, and the reference to "(Single) Bull Logo" as referring to the mark in Registration No. 4031959.

claims to those identified *supra*, Plaintiff has failed to provide fair notice thereof. Rather, pleadings are intended to provide fair notice of the claims and defenses asserted in a case or proceeding. *See* TBMP § 506.01 and authorities cited therein. That is, a defendant should not be required to guess which marks are being asserted against it and the goods and/or services upon which those marks are used. Thus, to provide fair notice of the basis for a Section 2(d) claim, a plaintiff must specifically identify each mark upon which it intends to rely and the goods and/or services upon which each pleaded mark is used. *See The Phillies v. Phila. Consol. Holding Corp.*, 107 USPQ2d 2149, 2153 (TTAB 2013).

A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board will take judicial notice. For purposes of the motion, all well pleaded factual allegations of the non-moving party must be accepted as true, while those allegations of the moving party which have been denied (or which are taken as denied, pursuant to Fed. R. Civ. P. 8(b)(6), because no responsive pleading thereto is required or permitted) are deemed false. Conclusions of law are not taken as admitted. *See Baroid Drilling Fluids Inc. v. SunDrilling Products*, 24 USPQ2d 1048 (TTAB 1992). All reasonable inferences from the pleadings are drawn in favor of the nonmoving party. *Id.* A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine dispute as to any material fact remaining to be resolved, and

the moving party is entitled to judgment on the substantive merits of the controversy, as a matter of law. *Id.*

Defendant correctly notes that “one *DuPont* factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks.” *See Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998). Indeed, the Board may enter judgment on the pleadings for a defendant based solely on the dissimilarity of the marks at issue. *See Ava Enterprises Inc. v. P.A.C. Trading Group Inc.*, 86 USPQ2d 1659 (TTAB 2008) (judgment on the pleadings granted and Section 2(d) claim dismissed where the marks at issue were PAC BOOSTER THE PERFECT SOUND and BOSS AUDIOSYSTEMS).

However, as noted *supra*, Defendant, in its brief in support of the motion for judgment on the pleadings, conceded for purposes of this motion all of the *du Pont* factors other than similarity or dissimilarity of the marks at issue and has expressly conceded that Plaintiff’s pleaded marks are famous. Famous marks enjoy a broad scope of protection or exclusivity of use in view of their extensive public recognition and renown. *See Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002).

Turning to the marks at issue, Defendant’s applied-for marks feature representations of bulls, whereas Plaintiff’s pleaded marks include the word mark RED BULL and the registered RED BULL and design mark. Color is

not claimed as a feature of the applied-for marks. By making no claim to any specific color, the involved applications encompass presentation of the applied-for marks in all colors, including red. *See, e.g., In re Data Packaging Corp.*, 453 F.2d 1300, 172 USPQ 396 (CCPA 1972); TMEP § 807.14(e)(i) (January 2015). Further, Plaintiff alleges in the operative complaints that Defendant “has used” its involved marks “in the color red, the primary color used by [Plaintiff] (and the image equivalent of [Plaintiff’s] corporate name and house mark) on or in connection with the well-known and famous” pleaded marks. Operative complaints at paragraph 15. Under the doctrine of legal equivalents, which is based on a recognition that a pictorial depiction and equivalent wording are likely to impress the same mental image on purchasers, a design mark may be found to be confusingly similar to a word mark consisting of the design’s literal equivalent. *See, e.g., In re Rolf Nilsson AB*, 230 USPQ 141 (TTAB 1986) (holding applicant’s mark consisting of a silhouette of a lion’s head and the letter “L,” for shoes, and registrant’s mark, LION, for shoes, likely to cause confusion); *Puma-Sportschuhfabriken Rudolf Dassler KG v. Garan, Inc.*, 224 USPQ 1064 (TTAB 1984) (holding applicant’s marks featuring a design of a mountain lion, for clothing items, and opposer’s marks, a puma design and PUMA (with and without puma design), for items of clothing and sporting goods, likely to cause confusion); TMEP § 1207.01(c)(i).

Based on the foregoing, we find that Defendant has failed to establish that there is no genuine dispute as to the similarity or dissimilarity of the marks at issue in their entirety. Noting in addition the denials set forth in Defendant's answers, we find that entry of judgment on the pleadings dismissing of the Section 2(d) claims in the opposition proceedings is inappropriate. In view thereof, Defendant's motion for partial judgment on the pleadings in the opposition proceedings is denied.

***Motion to dismiss Cancellation No. 92059220***

In the petition to cancel in Cancellation No. 92059220, Plaintiff alleges (1) likelihood of confusion with its previously used word mark RED BULL and the marks in the pleaded registrations for "beverages, energy drinks, sports drinks, soft drinks, ... shirts, pants, jackets, hats and ... restaurant and café services" and the specific goods and/or services for each registered mark set forth in the registration therefor under Trademark Act Section 2(d), 15 U.S.C. § 1052(d); and (2) nonuse on the recited services at the time the statement of use was filed. By the motion to dismiss, Defendant seeks dismissal of the Section 2(d) claim on the ground that its applied-for marks are so dissimilar to Plaintiff's pleaded marks that confusion among prospective consumers is unlikely. Defendant further contends that because Petitioner's standing rests on an implausible Section 2(d) claim, Petitioner's remaining claim should be dismissed for lack of standing.

A motion to dismiss under Rule 12(b)(6) is solely a test of the legal sufficiency of a complaint. *See* TBMP § 503.01. To survive such a motion, a plaintiff need only allege sufficient factual matter as would, if proved, establish that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the mark. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 187 (CCPA 1982). Specifically, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009) (*quoting* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In deciding such a motion, the Board must accept as true all well-pled and material allegations of the complaint, and must construe the complaint in favor of the complaining party. *See Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987).

In its motion, Defendant prematurely argues the merits of the pleaded Section 2(d) claim in the cancellation proceeding. For reasons set forth above in our decision on the motion for judgment on the pleadings, we find that Plaintiff has adequately pleaded a plausible Section 2(d) claim in the petition to cancel. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). We further find that Plaintiff has adequately pleaded its standing to maintain this proceeding. *See Lipton Industries, Inc.*, 213 USPQ at 187. Whether or not Plaintiff can prevail on that claim is a

matter to be determined after the introduction of evidence at trial. *See Flatley v. Trump*, 11 USPQ2d 1284, 1286 (TTAB 1989). In view thereof, Defendant's motion to dismiss Cancellation No. 92059220 is denied.<sup>11</sup>

Although not raised in the motion to dismiss, we note that, in the nonuse claim set forth in the petition to cancel, Plaintiff alleges that Defendant had not rendered the recited services in commerce prior to October 8, 2012, the date of first use in commerce set forth in the statement of use in support of the application for the involved registration, or as of the October 15, 2013 filing date of that statement of use and that the registration should therefore be cancelled "on the grounds of nonuse and false declaration." However, a nonuse claim is not based on failure to use a mark in commerce as of the date of first use in commerce set forth in a statement of use. Rather, a nonuse claim is based on alleged nonuse in commerce as of the filing date of the use-based application, amendment to allege use, or statement of use at issue. *See Clorox Co. v. Salazar*, 108 USPQ2d 1083 (TTAB 2013); *DaimlerChrysler Corp. v. American Motors Corp.*, 94 USPQ2d 1086 (TTAB 2010).

Further, the mere filing of a false declaration is not a basis for cancellation of a registration. Rather, a false representation of material fact is a necessary element of a fraud claim. Fraud in procuring or maintaining a trademark registration occurs when an applicant for registration or a

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<sup>11</sup> The Board, in controlling the conduct of cases on its docket, will not entertain any further pretrial motions from Defendant seeking dismissal of any of the Section 2(d) claims in these consolidated proceedings based on dissimilarity of the marks at issue.

registrant in a declaration of use or a renewal application knowingly makes specific false, material representations of fact in connection with an application to register or in a post-registration filing with the intent of obtaining or maintaining a registration to which it is otherwise not entitled. *See In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009). There is no fraud if the false material representation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive. *Smith Int'l, Inc. v. Olin Corp.*, 209 USPQ 1033, 1044 (TTAB 1981). Based on the foregoing, the nonuse claim in Cancellation No. 92059220 will go forward based only on the allegation of nonuse as of the October 15, 2013 filing date of the statement of use.

Proceedings herein are resumed. The parties are allowed until thirty days from the mailing date set forth in this order to serve responses to any outstanding discovery requests that were served in the opposition proceedings prior to the June 26, 2014 filing of the motion for judgment on the pleadings in the opposition proceedings. Remaining dates are reset as follows.<sup>12</sup>

Answer Due in Cancellation No. 92059220	<b>2/28/2015</b>
Deadline for Discovery Conference in Cancellation No. 92059220	<b>3/30/2015</b>
Discovery Opens in Cancellation No. 92059220/ Reopens in Opposition Nos. 91210282 and 91214537	<b>3/30/2015</b>

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<sup>12</sup> Unless otherwise noted, dates apply to all of the consolidated proceedings.

Initial Disclosures Due in Cancellation No. 92059220	<b>4/29/2015</b>
Expert Disclosures Due	<b>8/27/2015</b>
Discovery Closes	<b>9/26/2015</b>
Plaintiff's Pretrial Disclosures Due	<b>11/10/2015</b>
Plaintiff's 30-day Trial Period Ends	<b>12/25/2015</b>
Defendant's Pretrial Disclosures Due	<b>1/9/2016</b>
Defendant's 30-day Trial Period Ends	<b>2/23/2016</b>
Plaintiff's Rebuttal Disclosures Due	<b>3/9/2016</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>4/8/2016</b>

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125. Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129. If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.