

ESTTA Tracking number: **ESTTA709838**

Filing date: **11/20/2015**

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

Proceeding	91217154
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Date	11/20/2015
Attachments	Reply.pdf(130350 bytes )

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

NASTY PIG, INC.,	:	Opposition No.: 91217154
	:	
Opposer,	:	
v.	:	
	:	
JANOSKIANS, LLC.,	:	
	:	
Applicant.	:	

**APPLICANT’S REPLY TO OPPOSER’S OPPOSITION  
FOR LEAVE TO AMEND**

The following is the reply of Applicant, Janoskians, LLC., to the response (Dkt # 22) of Opposer, Nasty Pig, Inc., in opposition to the outstanding motion for leave. In Applicant’s motion for leave (Dkt # 20), it requests permission for the Board that it be allowed to amend its affirmative defenses, include an action for cancellation and also be allowed to seek discovery related to the newly-revealed meaning of the Opposer’s marks, “Nasty Pig.” In its response, the Opposer denies leave should be granted arguing that Applicant took too long to uncover the meaning of “Nasty Pig,” that Opposer waited too long to bring the request to the Board, that the revealed meaning of “Nasty Pig” is homophobic, and or that Applicant failed to allege a basis for relief (Dkt # 22).

1. The length of time it took Applicant to uncover the meaning of “Nasty Pig” was as a direct result of Opposer’s concealment

Applicant seeks cancellation based on, among other things, the recently discovered meaning of “Nasty Pig” which was and remains actively withheld by Opposer. Had Opposer disclosed the meaning of its mark to the USPTO, it would not have been allowed registration under 15 U.S.C. § 1052. Since instituting this proceeding, the Opposer has made no attempt to disclose the meaning of “Nasty Pig” to the Applicant, even though demand has been made in

discovery and by deficiency letter.<sup>1</sup> But for Opposer not being up front with the USPTO in the first place, or not disclosing material information prior to the opening of its trial period, Applicant was thwarted and or delayed in uncovering the true meaning of “Nasty Pig” (which directly affected its timing in revealing this information to the Board and requesting relief herein).

In its response, Opposer provides no legal support to justify how its concealment of the meaning of “Nasty Pig” should not toll any time restraints against Applicant, or how its concealment still somehow results in Applicant being in possession and or knowledge of a rather raunchy, XXX term. Instead, Opposer cites *Media Online Inc. v. El Clasificado, Inc.*, a case where the Board denied a motion for leave to amend for fraud and descriptiveness, based upon circumstances contrasting and distinguishable from the instant set of facts. 88 U.S.P.Q.2D (BNA) 1285 (TTAB 2008). In *Media Online Inc.*, Petitioner sought leave to amend its petition to add a claim of descriptiveness arguing that the mark “El Clasificado Online” was descriptive for “placing advertisements of others on a website via a global computer network.” *Id.* at 1285. (It should be noted, that prior to the proceeding for cancellation, the certificate of registration had translated “El Clasificado” in English to “The Classifieds” and the word “Online” was disclaimed. See *id.* FN 1.) In support of its argument that “The Classifieds” was a descriptive term, Petitioner cited the common definition of “classified.” *Id.* at 1286. As for its fraud allegation, the Petitioner referenced the Registrant’s website and argued that “anyone can see that [the Registrant’s website] does not offer the services its Certificate [of Registration] states.”

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<sup>1</sup> See Dkt #1, Opposer alleges in ¶ 10, that the “overall commercial impression” of Applicant’s “Dirty Pig” mark is “strikingly similar” to Opposer’s “Nasty Pig” mark. Being similar in overall commercial impression means “similar in sight, sound and meaning.” 4 McCarthy on Trademarks §23:21:50 (4th Ed.). In its discovery requests, Applicant has asked Opposer to provide documents that support its claim (request no. 5) and meaning as to “nasty” (request no. 39) and “dirty” (request no. 40) (Dkt # 20, Decl. DeFrancesco, Exh. D). See also deficiency letter (Dkt # 20, Decl. DeFrancesco, Exh. E).

*Id.* In denying the motion for leave, the Board noted that the claims Petitioner is seeking to add are “based on facts within petitioner’s knowledge at the time [it filed] the petition to cancel.” *Id.* at 1286.

*Media Online Inc.* is not consistent with the instant set of facts, because Opposer provides no argument and or allegation in its response to suggest that the XXX-rated meaning of “Nasty Pig” was in any way within Applicant’s PG-13 knowledge at any time, or otherwise within the knowledge of its counsel. Furthermore, Opposer would even be estopped from being able to argue that the XXX-rated meaning of “Nasty Pig” was known to Applicant, because the Opposer itself denies “Nasty Pig” has any meaning. (See Dkt #22, p. 7, “Opposer sharply disputes Applicant’s new claim regarding this alleged meaning of the mark NASTY PIG...and it does not have any documents in its possession, custody or control concerning this alleged meaning.”)

The Board in *Media Online Inc.* noted that “[t]he only explanation petitioner offers for its delay is that the parties were engaged in settlement discussions, and that it was surprised by respondent’s reliance on the ‘affirmative defense’ of priority not pleaded in its answer but purportedly raised as an issue for the first time in this case in respondent’s motion for judgment on the pleadings.” *Id.* at 1287. In its defense herein, the instant Applicant should not be charged with concrete or actual knowledge of XXX-terms. And, although the terms “Nasty” and “Pig” are in English and readily defined, the definitions assuredly do not involve the uncovered meaning of “Nasty Pig,” which was unbeknownst to Applicant until recently. Accordingly, based on the standard applied in *Media Online Inc.* the Opposer fails to argue how the revealed meaning of “Nasty Pig” was within Applicant’s knowledge and or possession at any time other than its recent discovery, which was swiftly revealed to the Board in the instant motion for leave.

2. Upon uncovering the meaning of Opposer's "Nasty Pig" mark, Applicant acted swiftly to reveal this new information to the Board

While Opposer argues that Applicant waited until the eve of Opposer's deadline to file its pretrial disclosures (Dkt # 22, p. 6), Opposer fails to advise the Board that Applicant brought this newly-discovered information to Opposer's direct attention nearly a month before Opposer's pretrial disclosures were due (*and Opposer waited three weeks thereafter to respond*)(see Decl. DeFrancesco, Exhs. E and F).

Furthermore, the Opposer reliance on *Int'l Fin. Corp. v. Bravo Co.*, 64 U.S.P.Q.2D (BNA) 1597, 1604 (TTAB 2002) to suggest Applicant's is untimely is deficient. In *Int'l Fin. Corp.* the Board denied a motion to amend, highlighting the fact that the "Opposer waited over two years, and only in response to applicant's motion for summary judgment, before filing a motion for leave to amend its pleading to add dilution." *Id.* The Opposition subject to *Int'l Fin. Corp. v. Bravo Co.* (No. 9111276) was filed August 6, 1998 and the subject motion for leave to amend was made November 7, 2001 (see Opposition No. 9111276, Dkt. # 39).<sup>2</sup> Furthermore, in *Int'l Fin. Corp.*, the Opposer admittedly knew of its dilution claim when it filed its Notices of Opposition (Opposition No. 9111276, Dkt. # 39 at pp. 1 and 2). In denying the motion to amend, the Board noted that "Opposer offers no explanation why it failed to raise its [known] dilution claim earlier." *Int'l Fin. Corp.* at 1604. The instant set of facts contrasts with *Int'l Fin. Corp.* as the instant Applicant has explained how it was unable to challenge the meaning of "Nasty Pig" earlier – because only by chance did Applicant uncover the real meaning (with no help of Opposer). However, upon this discovery, Applicant swiftly moved the Board for

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<sup>2</sup> The proposed amendment was to add a claim for dilution, which did not become available until enactment of the Trademark Amendments Act of 1999 on August 5, 1999. Which means the wait of "over two years" was twenty-seven months.

permission to amend. Unlike *Int'l Fin. Corp.*, the Applicant has not waited “over two years” (the instant proceeding has not even been pending that long).

3. The newly uncovered meaning of “Nasty Pig” is plainly indecent and immoral

In its response, Opposer attempts to divert attention from the XXX-rated meaning of “Nasty Pig” by trying to incite a political debate that “consensual gay sex is a protected liberty right” (Dkt # 22, p. 16) and or insinuating that the position of the Applicant is “homophobic” (Dkt # 22, p. 15).

The attempted diversion is futile. Be it heterosexual, homosexual, bisexual, asexual, etc. any term defined as “one who seeks out/participates in ‘out of the norm sex’ that involves one of a variety of the following acts: Multiple sex partners, unprotected sex, cum dumping, anonymous partnerships, pissing in orifices...to name a few” is flat out, offensive.

Opposer however urges the Board to consider “that contemporary attitudes toward coarse language are more accepting than they had been” (Dkt # 22, p. 16, citing *Accord In re Engine 15 Brewing Co., LLC*, Serial No. 86/038,803, at page 9 (T.T.A.B. Oct. 29, 2015)(which allowed the term “Nut Sack Double Brown Ale” to register for beer). Notwithstanding the fact that contemporary attitudes toward sex and sexual talk are more liberal than they were a generation ago, Opposer provides no citation and or support to suggest that “Nasty Pig” with respect to “cum dripping” and “pissing in orifices” has any commercial value, does not lower the standards of the United States Patent Office and or is not otherwise disparaging and or brings individuals (who are heterosexual, homosexual, bisexual, asexual, etc.) into contempt and disrepute.

Instead, Opposer argues that a substantial composite of the general public would not find “Nasty Pig” scandalous based on the “obscure” references (Dkt #22, p. 6) provided by Applicant that include the slang dictionary, Urban Dictionary ([urbandictionary.com](http://urbandictionary.com))(reference available at

Dkt #20, Decl. DeFrancesco, Exh. B). Contrary to Opposer's position, the Board does in fact accept Urban Dictionary definitions as indicative of what a term means to a composite of the general public until the evidence is rebutted. See *In re Star Belly Stitcher, Inc.*, 107 U.S.P.Q.2D (BNA) 2059, 2062 \*FN 3 (TTAB 2013). In this case, Opposer did not submit any alternative meanings of "Nasty Pig" or otherwise question the reliability of the definitions listed in Urban Dictionary. It should further be noted that Applicant submitted a second source to corroborate the Urban Dictionary definition, and Opposer has neither challenged the reliability of this reference either (reference available at Dkt #20, Decl. DeFrancesco, Exh. A).

4. Applicant alleges in the proposed counter petition what is known and requests that the Board consider its allegations sufficient to allow it the opportunity to take additional discovery and seek to cancel "Nasty Pig" from the Principal Registration.

Opposer has two registrations for the word mark "Nasty Pig." The first, registration no. 2800386, is incontestable and includes goods and services such as harnesses, (rubber) bed sheets, gauntlets, and retail services related to same. The second, registration no. 4809230, is not incontestable and includes goods such as leather bracelets and harnesses.

As previously stated, Applicant just recently uncovered the XXX-rated meaning of "Nasty Pig" to be "one who seeks out/participates in 'out of the norm sex' that involves one of a variety of the following acts: Multiple sex partners, unprotected sex, cum dumping, anonymous partnerships, pissing in orifices...to name a few..." Upon this discovery, Applicant swiftly revealed this to the Board asking permission to be allowed to seek cancellation of the mark because it is immoral, descriptive, generic and has meaning in the relevant trade that primarily refers to the target consumer rather than the source, among other things. Additionally Applicant requests permission to seek cancellation based on the allegation that the Opposer knowingly committed fraud in its applications and or renewal of the subject registration(s) by it withholding

material information to deceive the USPTO, whereby alleging it has the sole right to register such an immoral, descriptive, generic mark that has meaning in the relevant trade as primarily referring to the target consumer rather than the source.

a. Opposer attacks the generic claim

Opposer cites *Princeton Vanguard, LLC v. Frito-Lay North Am., Inc.*, which is misplaced because *Princeton Vanguard* has nothing to do with pleadings standard and or whether allegations could be proven. 786 F.3d 960 (Fed. Cir. 2015). Notwithstanding, *Princeton Vanguard* provides that “generic terms are by definition incapable of indicating a particular source of the goods or services.” *Id.* at 1830. Applicant has made this allegation in its proposed counter claim at ¶ 4 and therefore satisfy the alleged pleading requirement that Opposer asserts, based on *Princeton Vanguard* (see also Applicants proposed counter claim, ¶ 6).

Opposer further recites the test for genericism, by first asking what the genus of the goods is and then whether the mark is understood by the “relevant public” to refer to that genus (Dkt #22, p. 12). In this regard, Applicant provides that “Nasty Pig” is understood by the “relevant public” to refer to genus of goods and services that regards Opposer’s goods (i.e., leather harnesses)(see proposed counter claim at ¶ 4). To the extent Opposer disputes the understanding of the “relevant public,” this is a question of fact.

b. Opposer attacks the descriptiveness claim

According to Opposer, Applicant’s reference to the definition of “Nasty Pig” is “impermissibly vague” (Dkt #22, p. 13). While it was the undersigned’s choice to make the proposed pleadings rated PG, it is believed that the reference which was provided in the outstanding motion for leave (Dkt# 20, Decl. DeFrancesco, Exh. B) more than adequately

provided definition of “Nasty Pig.”<sup>3</sup> Although Opposer argues that “Nasty Pig” does not “immediately describe an ingredient, quality, characteristic or feature” of the registered goods and services, this argument is incomplete. In fact, it is Applicant’s position that the term “Nasty Pig” conveys information that regards not only a characteristic or feature, but also a function and or purpose of the leather harnesses sold by Opposer in context to the average purchaser and because of the manner of its use. See *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).<sup>4</sup>

c. Opposer attacks the fraud allegation.

Upon the recent uncover of the meaning of “Nasty Pig,” Applicant finds that the Opposer committed fraud when it filed for the subject marks, denied its meaning, and denied that other people have the right to the generic, descriptive and or scandalous mark (see proposed counter claim at ¶¶ 4, 5, 6, 7, 8). In its response, the Petitioner argues Applicant did not use the actual wording “intent to deceive” in ¶ 7, citing *Great Adirondack Steak & Seafood Cafe, Inc. v. Adirondack Pub & Brewery, Inc.*, 2015 TTAB LEXIS 321, at \*21(TTAB 2015). While *Great Adirondack Steak & Seafood Cafe, Inc.* is not citable as precedent, it is axiomatic that the proposed allegations which include (proposed counter claim at ¶7) that the Opposer “knowingly made false material representations” the “deception” of which was “relied upon by the USPTO” sufficiently avers the state of mind of Petitioner. See *Intellimedia Sports, Inc. v. Intellimedia Corp.*, 43 U.S.P.Q.2D (BNA) 1203, 1205 (TTAB 1997)(“[P]ursuant to Trademark Rule 2.116(a), the sufficiency of petitioner’s pleading of its fraud claim in this case also is governed by FRCP

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<sup>3</sup> “Nasty Pig” is defined as “one who seeks out/participates in ‘out of the norm sex’ that involves one of a variety of the following acts: Multiple sex partners, unprotected sex, cum dumping, anonymous partnerships, pissing in orifices...to name a few” (Dkt# 20, Decl. DeFrancesco, Exh. B).

<sup>4</sup> Opposer argues that its incontestable registration is not subject to the allegation. This is conceded, however, it is suggestively understood that the allegation was readily interpreted to mean Reg. No. 4,809,230 and likewise readily attended to by Opposer in its answer to the allegation if leave is granted.

9(b), which provides ... intent, knowledge, and other condition of mind of a person may be averred generally.”)

It is not disputed by the Opposer that it is in the business of “getting customers laid” (Dkt # 20, Decl. DeFrancesco, Exh. G) and that it deals almost exclusively in goods and services directed to homosexual men and deviances that may be considered taboo. Although Opposer urges the Board to believe “Nasty Pig” has no meaning, this is more likely than not a false truth considering the totality of the circumstances. Opposer knew when it filed for its mark that it would be capitalizing on the XXX-rated meaning of “Nasty Pig,” of which it knew others (heterosexuals and or homosexuals) had the right to use in relation to things such as harnesses, rubber bed sheets and gauntlets, for reasons that include the descriptiveness, genericness, and or scandalous nature of the mark itself.

WHEREFORE, Applicant requests it be granted leave to amend its affirmative defenses, be allowed to petition to cancel Opposer’s Registration Nos. 4809230 and 2800386, and, further be allowed to have discovery reopened to gather documents and materials that regard the meaning of “Nasty Pig” among the industry and consumers thereof.

Dated: November 20, 2015

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Reply was served by first class mail, on counsel for Registrant, Nasty Pig, Inc., on this 20th day of November 2015 at,

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