

**THIS OPINION IS NOT  
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UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

Mailed: December 28, 2015

Opposition No. 91219820

*Blue Collar Brewery, Inc.*

v.

*Blue Collar Brewery, LLC.*

Before Cataldo, Shaw and Kuczma,  
Administrative Trademark Judges.

By Cataldo, Administrative Trademark Judge:

On April 1, 2014, Blue Collar Brewery, LLC (“Applicant”) filed Application Serial No. 86238657, seeking registration on the Principal Register of the standard character mark BLUE COLLAR BREWERY (“BREWERY” disclaimed) for

Beer; Beer, ale, lager, stout, porter, shandy; Brewed malt-based alcoholic beverage in the nature of a beer; Flavored beers; Ginger beer; Malt beer<sup>1</sup>

Beer making kit; Beer wort; Extracts of hops for making beer; Hop extracts for manufacturing beer; Malt extracts for making beer; Processed hops for use in making beer<sup>2</sup>

in International Class 32. During prosecution, Applicant amended its involved

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<sup>1</sup> Under Section 1(b) of the Trademark Act, based upon Applicant’s assertion of its bona fide intent to use the mark in commerce.

<sup>2</sup> Under Section 1(a) of the Trademark Act, based upon Applicant’s assertion of March 10, 2009 as a date of first use of the mark anywhere, and March 10, 2014 as a date of first use of the mark in commerce.

application to delete from the identification of goods all of the goods based upon Applicant's asserted bona fide intent to use the mark in commerce and deleted Section 1(b) as a filing basis.<sup>3</sup> Consequently, the identification of goods currently reads as follows:

Beer making kit; Beer wort; Extracts of hops for making beer; Hop extracts for manufacturing beer; Malt extracts for making beer; Processed hops for use in making beer.

On December 18, 2014, Blue Collar Brewery, Inc. ("Opposer") filed a notice of opposition alleging that it operates a brewery "using the name Blue Collar Brewery upon the labels applied to the containers in which its alcoholic beverages are offered."<sup>4</sup> As grounds for its opposition, Opposer makes the following allegations:<sup>5</sup>

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<sup>3</sup> Applicant's October 21, 2014 response to the Examining Attorney's first Office Action.

<sup>4</sup> 1 TTABVUE 3. Record citations are to TTABVUE, the Trademark Trial and Appeal Board's publically available docket history system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

<sup>5</sup> 1 TTABVUE 5.

COUNT I

13. In approving the application for publication, the Examining Attorney relied on the sworn statements of Applicant.

14. Among these statements was the one in the initial application claiming that the mark was in use for "beer".

15. Making the statement that the mark was in use for "beer" prompted the Examiner in reliance upon this statement to require the disclaimer of the term "brewery" in the mark.

16. Applicant's disclaimer of the term "brewery" resulted in the application being approved .

17. Applicant's removal "beer" from the goods description was fraud intended to obtain a registration for a brewery without actual use on beer or any other alcoholic beverage product.

COUNT II

18. Applicant has not used its mark on beer and cannot obtain appropriate governmental approval for such use, and is not a brewery.

19. The use of "brewery" in the mark in the application is deceptively misdescriptive under section 2(e)(1) of the Lanham Act..

Wherefore Opposer prays that this opposition be sustained and that serial no. 86238657 be refused registration.

Applicant, in its answer, denied the salient allegations of the notice of opposition.<sup>6</sup>

**Summary Judgment**

Now before the Board is Applicant's motion for summary judgment on both

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<sup>6</sup> 2 TTABVue 2-6. In addition, Applicant asserted as affirmative defenses that Opposer's claims are barred by the doctrines of unclean hands, laches and acquiescence.

grounds pleaded in the notice of opposition. The motion is fully briefed. By its motion, Applicant argues that Opposer's sole allegation in support of its claim of fraud is that Applicant filed the involved application alleging actual use on beer; that Applicant never alleged that it was using the mark on beer, but rather alleged its bona fide intent to use the mark thereon; and that, as a result, Opposer's fraud allegations must fail as a matter of law. Applicant further argues that multiple registered marks incorporate the term "brewery" for goods and services other than beer; that third parties use the term "brewery" to identify goods that do not originate in breweries; that definitions for the term "brewery" include meanings other than a commercial place for brewing beer; and that, in any event, if the term "brewery" in Applicant's mark is found to be deceptively misdescriptive, Applicant is prepared to make a showing of acquired distinctiveness under Section 2(f) of the Trademark Act or amend the application to seek registration on the Supplemental Register.

In support of its arguments, Applicant introduced into the record the following:

A copy of its prior registration for the mark BCB BLUE COLLAR BREWERY and design for "beer, beer wort, brewed malt-based alcoholic beverage in the nature of a beer, malt beer, malt liquor;"<sup>7</sup>

A copy of the file history of its involved application;<sup>8</sup>

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<sup>7</sup> Reg. No. 4231808, 9 TTABVue 51-53.

<sup>8</sup> 9 TTABVue 65-128. These documents automatically form part of the record in this proceeding and need not be introduced at summary judgment or trial. *See* Trademark Rule 2.122. *See also* TBMP § 704.03(a) and authorities cited therein.

Printed copies downloaded from the Internet regarding Opposer's entity information from the New York State Department of State Division of Corporations and pages from Opposer's website;<sup>9</sup>

Printed copies of third-party registrations containing the term "brewery;"<sup>10</sup> pages from third-party Internet websites showing use of the term "brewery" in connection with various goods and services other than beer;<sup>11</sup> and a dictionary definition of "brewery;"<sup>12</sup>

With regard to its allegation of fraud, Opposer argues in response to Applicant's motion as follows:

While it is true that Applicant deleted its 1(b) designation for "beer" for its [involved] BCB Mark, apparently Applicant only deleted said designation in order to deceive the USPTO and the Examiner to register its Mark.

Further, as Applicant indicated, Applicant owns U.S. Reg. No. 4,231,808 for BLUE COLLAR BREWERY & Design. Applicant filed a Section 7 request to delete "beer; beer wort; brewed malt-based alcoholic beverage in the nature of beer; malt beer; malt liquor" from its goods and services ... knowing that it is not a brewery, and knowing that it does not have the proper and required licensing to operate a brewery or produce beer for use in commerce.

Similarly, in the application being opposed, Applicant deleted its 1(b) designation for "Beer; Beer, ale, lager, stout, porter, shandy; Brewed malt-based alcoholic beverage in the nature of a beer; Flavored beers; Ginger beer; Malt beer" for the same reason; that is, Applicant is not a

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<sup>9</sup> 9 TTABVUE 129-136.

<sup>10</sup> 9 TTABVUE 137-145.

<sup>11</sup> 9 TTABVUE 146-152.

<sup>12</sup> 9 TTABVUE 153-155.

licensed brewery, does not and has never produced beer, and therefore has never used its mark on beer in commerce. Applicant deleted its designation only after the Examiner issued an Office Action on April 22, 2014 requiring Applicant to disclaim “BREWERY” from its mark. The Examiner stated that “brewery” is defined as “a place where beer is made commercially.” *See Exhibit 2 of Applicant’s Motion, containing the file wrapper to Applicant’s application and a USPTO Office Action dated 4/22/2014.*

Applicant, knowing that it does not and has never produced or made beer – and cannot do so without the proper licenses – disclaimed “BREWERY” and deleted its 1(b) designation for “Beer; Beer, ale, lager, stout, porter, shandy; Brewed malt-based alcoholic beverage in the nature of a beer; Flavored beers; Ginger beer; Malt beer” in an attempt to deceive the USPTO and fraudulently obtain a registration for a brewery without actual use on beer or any other alcoholic beverage product, and therefore obtain a registration to which Applicant is not entitled.<sup>13</sup>

With regard to its allegations of deceptive misdescriptiveness, Opposer argues as follows:

Applicant is not a brewery. Applicant has never used its mark on beer or any other alcoholic beverage product, and cannot obtain the appropriate governmental approval for such use. *See Opposer’s Notice of Opposition, Para. 12.*

The term “brewery” in Applicant’s BCB Mark is deceptively misdescriptive. The term “brewery,” as the Examiner of Applicant’s BCB Mark stated, is a “place where beer is made commercially.” *See Exhibit 2 to Applicant’s Motion, Office Action dated April 22, 2014 and Opposer’s Notice of Opposition, Para. 9.* Therefore, as Applicant is not a brewery, nor have they ever claimed to be same, the term “brewery” is inherently misdescriptive of the “character, function, composition . . . [and] use” of Applicant’s goods and services. *See TMEP 1203.02(b).*

Using Applicant’s own dictionary definition (*See Applicant’s Motion Exhibit 6*), a brewery is a “place where beer is made,” or is a “company that makes beer.” Under the first inquiry of the test outlined in TMEP 1203.02(b), Applicant’s mark is comprised [of] deceptive matter as the character of its company is not a brewery; it is not licensed or

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<sup>13</sup> 12 TTABVue 7-8.

regulated to be a brewery, and as such the quality of the company cannot be held to the same standards as licensed and legitimate breweries; it does not function as a brewery. It is likely that a purchaser would believe that the “brewery” portion of Applicant’s mark would actually describe Applicant and its mark.

Applicant’s mark, BLUE COLLAR BREWERY, conveys the immediate idea of a brewery and a place where beer is made. Applicant is not a brewery, and as such the immediate idea conveyed is false. Given the “brewery” term present in Applicant’s mark, as well as its goods and services description of various ingredients that might appear in actual breweries, it would be plausible to believe that Applicant’s mark represents a brewery. It is not a brewery and so the mark must be deceptively misdescriptive and thus unregistrable under §2(e)(1).

Further, in Exhibit 4 to Applicant’s Motion, Applicant includes various third-party registrations in an attempt to prove that its BCB Mark is not deceptively misdescriptive. Applicant’s use of third-party registrations deliberately mischaracterizes the goods and services of those registrations. With the exception of two of the registrations, every single registration cited is owned by a true and existing brewery, i.e., “a place where beer is made; a company that makes beer.” *See Applicant’s Motion, Exh. 6.*

Further, the two other registrations cited that are not breweries are services directly involved with actual breweries. Applicant purposely cherry picked these registrations for ones that represent the breweries’ products sold in support of the breweries, such as t-shirts and beer steins or mugs in an attempt to show that registrations purportedly exist that would support Applicant’s own application.

Additionally, Applicant reworded the registration goods and services description to further its own agenda. Applicant, in its motion, states that BREWERY SHERPA is for goods and services, “for, *inter alia*, websites for location special events.” *Applicant’s Motion, Para. 11.* However, a review of Applicant’s Motion, Exhibit 4 indicates that Applicant provides a copy of a Registration for BREWERY SHERPA, Reg. No. 4,588,605. The goods and services description for BREWERY SHERPA is as follows: “Providing a website that features technology enabling users to locate and travel to breweries while providing information about participating locations including events, specials and products.” *See, Applicant’s Motion, Exhibit 4 (emphasis added).* It is clear that Applicant specifically and deliberately did not mention

“breweries” and reconstructed and manipulated the goods and services of BREWERY SHERPA in an attempt to support its frivolous motion.

Applicant next attempts to confuse the record by stating that there are “dictionary definitions for BREWERY that do not mean a commercial place for making beer.” *Applicant’s Motion, Para. 14; Exhibit 6*. But Applicant’s evidence provides only the following definition: “a place where beer is made; a company that makes beer.” That is hardly multiple definitions, and it is clear that a brewery is a place that makes beer, which Applicant’s business decidedly does not.<sup>14</sup>

Summary judgment is appropriate only where there are no genuine disputes of material fact, thus allowing the case to be resolved as a matter of law. Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. *See Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy’s, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

The evidence on summary judgment must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant’s favor. *Lloyd’s Food Products, Inc. v. Eli’s, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA*, 23 USPQ2d at 1472. The Board may not resolve disputes of material fact; it may only ascertain whether disputes of material fact

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<sup>14</sup> 12 TTABVUE 9-11.



exist. *See Lloyd's Food Products*, 987 F.2d at 766, 25 USPQ2d at 2029; *Olde Tyme Foods*, 961 F.2d at 200, 22 USPQ2d at 1542.

### *Fraud*

Fraud in obtaining a trademark registration occurs “when an applicant knowingly makes false, material representations of fact in connection with his application.” *In re Bose Corp.*, 580 F.3d 1240, 91 USPQ2d 1938, 1939 (Fed. Cir. 2009), citing *Torres v. Cantine Torresella S.r.l.*, 808 F.2d 46, 1 USPQ2d 1483, 1484 (Fed. Cir. 1986); *Nationstar Mortg. LLC v. Ahmad*, 112 USPQ2d 1361 (TTAB 2014). To constitute fraud on the USPTO, the statement must be (1) false, (2) a material representation and (3) made knowingly with intent to deceive the USPTO. *Mister Leonard Inc. v. Jaques Leonard Couture Inc.* 23 USPQ2d 1064, 1065 (TTAB 1992).

In this case, Opposer claims that Applicant falsely stated in its application that it was using the mark in connection with “beer” and that such statement was a material misrepresentation made with intent to deceive the Office. With regard to this claim, and as discussed above, we find no genuine dispute as to the following:

Applicant filed the involved application based, in part, on Section 1(b) of the Trademark Act, asserting its bona fide intent to use the mark in commerce;

The goods identified in the involved application based upon Applicant’s allegation of its bona fide intent to use the mark in commerce include “Beer; Beer, ale, lager, stout, porter, shandy; Brewed malt-based alcoholic beverage in the nature of a beer; Flavored beers; Ginger beer; Malt beer;”

The goods identified in the involved application based upon Applicant’s

allegation of use in commerce under Section 1(a) of the Trademark Act do not include “beer,” but rather are identified as “Beer making kit; Beer wort; Extracts of hops for making beer; Hop extracts for manufacturing beer; Malt extracts for making beer; Processed hops for use in making beer;”

At no time during prosecution of the involved application did Applicant claim use of the involved mark on “beer;”

Applicant deleted “beer” as well as the remainder of the goods applied-for under its alleged bona fide intent to use the mark in commerce during prosecution of the involved application and deleted Section 1(b) of the Trademark Act as a filing basis therefor.

We find as a matter of law that Applicant never claimed it was using the mark in commerce in connection with “beer” or, for that matter, any of the goods applied-for under Section 1(b) of the Trademark Act as of date on which the underlying application was filed.<sup>15</sup> Opposer thus cannot meet the first element of the ground of fraud, namely, that Applicant made a false statement in connection with these goods. Accordingly, with regard to Opposer’s claim of fraud, Applicant’s motion for summary judgment is GRANTED, and judgment is entered in Applicant’s favor.

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<sup>15</sup> Had Applicant not deleted the goods applied-for under Section 1(b), it would have been necessary before registration could be granted for Applicant to file a timely statement of use, including, *inter alia*, a declaration that the mark is in use in commerce, a listing of the goods on or in connection with which the mark used, and providing the date of first use and use of the mark in commerce. Trademark Act § 1(d)(1); Trademark Rule 2.88(b).

*Deceptive Misdescriptiveness*

The test for deceptive misdescriptiveness under Section 2(e)(1) has two parts. First, we must determine whether the matter sought to be registered misdescribes the goods or services. In order for a term to misdescribe goods or services, “the term must be merely descriptive, rather than suggestive, of a significant aspect of the goods or services which the goods or services plausibly possess but in fact do not.” *In re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047, 1051 (TTAB 2002); *see also In re Shniberg*, 79 USPQ2d 1309, 1312 (TTAB 2006). Second, if the term misdescribes the goods or services, we must determine whether consumers are likely to believe the misrepresentation. *In re White Jasmine LLC*, 106 USPQ2d 1385, 1394 (TTAB 2013); *In re Phillips-Van Heusen Corp.*, 63 USPQ2d at 1048; *In re Quady Winery Inc.*, 221 USPQ 1213, 1214 (TTAB 1984). The Board has applied the reasonably prudent consumer test in assessing whether a mark determined to be misdescriptive also would deceive consumers. *See R. J. Reynolds Tobacco Co. v. Brown & Williamson Tobacco Corp.*, 226 USPQ 169, 179 (TTAB 1985) (“On this evidence, we do not believe reasonably prudent purchasers are apt to be deceived.”).

We have carefully considered all of the parties’ arguments and evidence in the record with respect to this claim, even if not specifically discussed;<sup>16</sup> and drawn all justifiable inferences in favor of Opposer as the non-moving party on motion. Based on the evidence presented, we find that Applicant has failed to establish that there

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<sup>16</sup> The evidence submitted in connection with a motion for summary judgment or opposition thereto is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period. *See Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).

are no genuine disputes of material fact, and that it is entitled to judgment as a matter of law on Opposer's claim that the term "brewery" in Applicant's mark is deceptively misdescriptive as applied to the identified goods.<sup>17</sup>

Therefore, Applicant's motion for summary judgment is DENIED with respect to Opposer's claim under Trademark Act Section 2(e)(1).

*Schedule*

Proceedings are resumed upon the following schedule:

Deadline for Discovery Conference	<b>CLOSED</b>
Discovery Opens	<b>1/2/2016</b>
Initial Disclosures Due	<b>2/1/2016</b>
Expert Disclosures Due	<b>5/31/2016</b>
Discovery Closes	<b>6/30/2016</b>
Plaintiff's Pretrial Disclosures	<b>8/14/2016</b>
Plaintiff's 30-day Trial Period Ends	<b>9/28/2016</b>
Defendant's Pretrial Disclosures	<b>10/13/2016</b>
Defendant's 30-day Trial Period Ends	<b>11/27/2016</b>
Plaintiff's Rebuttal Disclosures	<b>12/12/2016</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>1/11/2017</b>

In each instance, a copy of the transcript of any testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of that 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.

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<sup>17</sup> The fact that we identify only certain material facts that are genuinely in dispute should not be construed as a finding that these are necessarily the only issues that remain for trial.