

<p>This Opinion is not a Precedent of the TTAB</p>
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Blue Collar Brewery, Inc.

v.

Blue Collar Brewery, LLC

Opposition No. 91219820
to Application Serial No. 86238657

Charles H. Knull and Kate E. Rieber of Knull PC,
for Opposer, Blue Collar Brewery, Inc.

Brian S. Malkin of Ference & Associates LLC,
for Applicant, Blue Collar Brewery, LLC.

Before Cataldo, Shaw and Kuczma,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Blue Collar Brewery, LLC (“Applicant”) filed an application to register the mark
BLUE COLLAR BREWERY (standard character mark) for:

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, in International Class 32.¹

Blue Collar Brewery, Inc. (Opposer) opposes registration of Applicant's mark under Section 2(e)(1), 15 U.S.C. § 1052(e)(1), on the ground that the use of "brewery" in Applicant's mark is deceptively misdescriptive of Applicant's goods because Applicant is not a brewery.²

Applicant denied the salient allegations of the Notice of Opposition and asserted as affirmative defenses that Opposer's claims are barred by the doctrines of unclean hands, laches and acquiescence, which were not pursued at trial. Accordingly, the affirmative defenses are therefore waived. *Alcatraz Media, Inc. v. Chesapeake Marine Tours, Inc.*, 107 USPQ2d 1750, 1753 (TTAB 2013) *aff'd* 565 Fed. App'x 900 (Fed. Cir. 2014) (mem.); Trademark Board Manual of Procedure ("TBMP") § 801.01 (Jan. 2017).

I. Evidentiary Objections

Opposer objects to Applicant's Notices of Reliance Nos. 4 (website listing of Applicant's items sold on eBay) (27 TTABVUE 28-30), 5 (website listing of Applicant's items sold on Etsy) (27 TTABVUE 33-35), 7 (website pages of Applicant's competitors and their products) (27 TTABVUE 40-42) and 8 (website definitions or descriptions of "wort") (27 TTABVUE 44-53).³ "[I]f a document obtained from the Internet identifies

¹ Application Serial No. 86238657 was filed on April 1, 2014, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging March 10, 2009 as the date of first use of the mark and March 10, 2014 as the date of first use of the mark in commerce. "BREWERY" is disclaimed.

² Applicant's Motion for Summary Judgment was partially granted and judgment entered in Applicant's favor on Opposer's fraud claim (14 TTABVUE).

³ Record citations are to TTABVUE, the Board's publically available docket history system. See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

its date of publication or date that it was accessed and printed, and its source (e.g., the URL), it may be admitted into evidence pursuant to a notice of reliance.” Safer, Inc. v. OMS Investments, Inc., 94 USPQ2d 1031, 1039 (TTAB 2010) (emphasis in original). However, Applicant’s failure to identify the sources of the Internet information and/or the retrieval dates for the foregoing evidence it introduced are procedural deficiencies to which Opposer did not raise timely objections. Because the deficiencies could have been cured if Opposer had timely objected, Opposer’s objections are deemed waived. *See City National Bank v. OPGI Management GP Inc./Gestion OPGI Inc.*, 106 USPQ2d 1668, 1672 (TTAB 2013) (petitioner’s objection to respondent’s submission via notice of reliance of a business brochure prepared by a third party overruled; “[a]ny shortcomings in respondent’s original submission ... under notice of reliance, such as its failure to identify the URL and when the document was actually accessed (either printed out or downloaded), are procedural deficiencies that were not timely raised by petitioner and thus have been waived); TBMP § 704.08(b) (June 2016).⁴ Accordingly, Opposer’s objection is overruled.

II. The Record

In light of the foregoing, the record consists of Applicant’s application file and the pleadings. Trademark Rule § 2.122 (b), 37 CFR § 2.122 (b).

Additionally, Opposer introduced the following evidence:

⁴ The June 2016 edition of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) is the version applicable to the evidence which was submitted in this case between September 29, 2016 and January 10, 2017.

Notice of Reliance on a search on the Trademark Electronic Search System (“TESS”) for the term “brewery” listing the first 100 results. (Notice of Reliance 4) (15 TTABVUE);

Notice of Reliance on Applicant’s Responses to Interrogatory No. 5 and Request to Admit Nos. 8-12, 19-20, 25, 27-29, 32-35 (Notice of Reliance 1) (16 TTABVUE);

Notice of Reliance on online definitions provided by Merriam-Webster and Macmillan Dictionary submitted as Exhibit 6 to Applicant’s Motion for Summary Judgment (Notice of Reliance 2) (17 TTABVUE);

Notice of Reliance on Office Action of April 24, 2014 for Serial No. 86238657 showing definition of “brewery” cited by Examiner (Notice of Reliance 3) (18 TTABVUE);

Notice of Reliance on website printouts containing information of businesses cited by Applicant in its Motion for Summary Judgment attempting to claim such businesses as evidence of use of “brewery” by non-breweries (Notice of Reliance 5) (19 TTABVUE);

Notice of Reliance on of copy of §1203.02 of the TMEP (Notice of Reliance 6) (20 TTABVUE);

Notice of Reliance on Applicant’s response to October 21, 2014 Office Action showing Applicant’s removal of “beer” from goods and services listed in its Application (Notice of Reliance 7) (21 TTABVUE);

Notice of Reliance on copy of Applicant’s Exhibit No. 7 from Applicant’s Reply Brief filed in connection with its Motion for Summary Judgment (Notice of Reliance 8) (22 TTABVUE);⁵

Notice of Reliance on online definition of “wort” from Merriam-Webster.com (Notice of Reliance 9) (23 TTABVUE);

Notice of Reliance on pages from Sixth Edition of the Shorter Oxford English Dictionary showing definition of “brewery” (Notice of Reliance 10) (24 TTABVUE);

⁵ The Notice of Reliance states that copies of Applicant’s Exhibits 7 and 8 to Applicant’s Reply to Opposition to Construed Motion for Summary Judgment filed November 12, 2015 (13 TTABVUE) are attached. However, Applicant’s Reply brief regarding Summary Judgment Motion only contained Exhibit 7 and only Exhibit 7 was attached to Opposer’s Notice of Reliance. Thus, the reference to “Exhibit 8” is in error.

Notice of Reliance on Second Edition of the Oxford English Reference Dictionary showing definition of “brewery” (Notice of Reliance 11) (25 TTABVUE);

Notice of Reliance on Second Edition of the Oxford English Reference Dictionary showing definition of “wort” (Notice of Reliance 12) (26 TTABVUE);

Rebuttal Notice of Reliance on copy of the website www.howtobrew.com/book/glossary defining “wort” (First Supplemental Notice of Reliance) (28 TTABVUE);

Rebuttal Notice of Reliance on portion of Applicant’s website <http://www.bluecollarbrewery.com/about-us.html> (Second Supplemental Notice of Reliance) (29 TTABVUE);

Rebuttal Notice of Reliance on copy of the website www.craftbeer.com/beer/beer-glossary defining various terms associated with the brewing of beer and defining “wort” (on p. 17 of website) (Third Supplemental Notice of Reliance) (30 TTABVUE);

Rebuttal Notice of Reliance on copies of Applicant’s eBay page and Applicant’s eBay Feedback profile (Fourth Supplemental Notice of Reliance) (31 TTABVUE).

And, Applicant submitted the following evidence:

Applicant’s Notice of Reliance on 3 random examples of word mark trademarks, including the word “brewery,” where there is a disclaimer: “NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE ‘BREWEYRY’ APART FROM THE MARK AS SHOWN,” which Applicant submits is standard practice for trademarks containing the word BREWEYRY, by examining attorneys (27 TTABVUE 2-4);

Applicant’s Notice of Reliance on 9 examples of Live Registered Trademarks (from TESS) where the term BREWEYRY is part of the word mark and is used by a company that is not a brewery and/or for a class of goods and services that is not a beer (27 TTABVUE 6-24);

Applicant's Notice of Reliance on TMEP § 1203.02(a) citing language of 1203.02(a) and providing "live" link to http://www.bitlaw.com/source/tmep/1203_02_a.html (27 TTABVUE 25-26);⁶

Applicant's Notice of Reliance on screenshot of eBay Feedback profile for "bluecollarbrewery" (27 TTABVUE 28-30)⁷;

Applicant's Notice of Reliance on screenshot of BlueCollarBrewing Homepage showing items sold on Etsy (27 TTABVUE 33-35);

Applicant's Notice of Reliance on production of beer for personal consumption set forth in 27 CFR 25.205 Production with "live" link to Code of Federal Regulations at <https://www.law.cornell.edu/cfr/text/27/25.205> (27 TTABVUE 37-38);⁸

Applicant's Notice of Reliance on "Trade Name, Product Name, Website and Webpage Screenshots of Blue Collar Brewery LLC's competitors with brewery in the trade or product name" (27 TTABVUE 40-42);

Applicant's Notice of Reliance on website screenshots from websites offering general information or for brewing beer, where "wort" is defined or referred to as "unfermented beer." (27 TTABVUE 44-53);

Applicant's Notice of Reliance on Opposer's Responses to Requests for Admission 1-2, 5-7 (27 TTABVUE 55-59).

In addition to the foregoing, both Opposer and Applicant submitted trial briefs.

III. Standing

Standing is a threshold issue that must be proved in every *inter partes* case. *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

⁶ Providing a "live" link to a website without attaching a copy of the material appearing on the website is not sufficient to introduce the text of what is shown in the link into the record. *See* TBMP § 704.07.

⁷ While the Notice of Reliance indicates that it contains "Applicant's Homepage and Items Sold on ebay," the Notice of Reliance contains an eBay Feedback profile for Applicant's Blue Collar Brewery listing 14 entries.

⁸ *See* footnote 6.

In an opposition proceeding, the standing requirement has its basis in § 13 of the Trademark Act which provides in relevant part that “[a]ny person who believes that he is or will be damaged by the registration of a mark upon the principal register” may file upon payment of the prescribed fee, an opposition stating the grounds therefor. 15 U.S.C. § 1063. Our primary reviewing court, the U.S. Court of Appeals for the Federal Circuit, has enunciated a liberal threshold for determining standing, namely that a plaintiff must demonstrate that he possesses a “real interest” in a proceeding beyond that of a mere intermeddler, and “a reasonable basis for his belief of damage.” *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (quotation omitted), *cert. denied*, 135 S. Ct. 1401 (2015); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 213 USPQ at 189. “The facts regarding standing ... are part of a [petitioner’s] case and must be affirmatively proved. Accordingly, [petitioner] is not entitled to standing solely because of the allegations in its petition.” *Lipton Industries*, 213 USPQ at 189. *See also Ritchie v. Simpson*, 50 USPQ2d at 1027.

In order to establish its standing to object to the registration of an allegedly merely descriptive or deceptively misdescriptive term, a plaintiff need only show that it is engaged in the manufacture or sale of the same or related goods as those listed in the defendant’s involved application or registration and that the product in question is one which could be produced in the normal expansion of plaintiff’s business; that is, that plaintiff has a real interest in the proceeding because it is one

who has a present or prospective right to use the term descriptively in its business. *See Saint-Gobain Corp. v. 3M Co.*, 90 USPQ2d 1425, 1428 (TTAB 2007) citing *Federal Glass Co. v. Corning Glass Works*, 162 USPQ 279, 282-83 (TTAB 1969) (party need not be a manufacturer or seller of the goods in connection with which a descriptive, misdescriptive, or merely ornamental designation is used in order to object to the registration thereof. It is sufficient that the party objecting to such registration be engaged in the manufacture and/or sale of the same or related goods and that the product in question be one that could be produced in the normal expansion of that person's business); *Binney & Smith Inc. v. Magic Markers Industries, Inc.*, 222 USPQ 1003, 1010 (TTAB 1984) (allegations that a petitioner is engaged in the manufacture or sale of the same or related products as those listed in respondent's involved registration, or that the product in question is one which could be produced in the normal expansion of petitioner's business, constitute a sufficient pleading of standing); *Southwire Co. v. Kaiser Aluminum & Chemical Corp.*, 196 USPQ 566, 572-73 (TTAB 1977). Additionally, Opposer does not need to own a pending application for the mark, does not have to be using the term as a mark, or even use the term at all, in order to establish its standing. *See, e.g., Eastman Kodak Co. v. Bell & Howell Document Management Products Co.*, 23 USPQ2d 1878, 1879 (TTAB 1992), *aff'd* 994 F.2d 1569, 26 USPQ2d 1912 (Fed. Cir. 1993) (party challenging mark on descriptiveness grounds may establish standing by pleading and proving it is engaged in manufacture or sale of related products).

Because Opposer opposes registration of Applicant's mark BLUE COLLAR BREWERY on the grounds that "BREWERY" is deceptively misdescriptive of the goods, it need only assert an equal right to use the mark or that term for the goods. Proprietary rights in Opposer are not required. *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2024 (Fed. Cir. 1987); *Dewalt, Inc. v. Magna Power Tool Corp.*, 289 F.2d 656, 129 USPQ 275, 280 (CCPA 1961).

The Notice of Opposition alleges that Opposer is a New York corporation doing business in Poughkeepsie, New York, operating a brewery where it makes beer. Opposer has allegedly obtained all the necessary federal and state permits to operate the brewery under the name Blue Collar Brewery including a Certificate of Label Approval from the Alcohol and Tobacco Tax and Trade Bureau for BLUE COLLAR BREWERY, and uses the name Blue Collar Brewery on labels applied to the containers in which its alcoholic beverages are offered. (1 TTABVUE 3). In addition to not offering any evidence of proof of the foregoing, Opposer does not explain, either in its Notice of Opposition or otherwise, how it is or will be damaged by registration of Applicant's mark. Neither does Applicant's Answer and Affirmative Defenses include any admissions regarding Opposer's alleged business activities or Opposer's interest in either BREWERY or the mark BLUE COLLAR BREWERY. Likewise, Opposer does not address its standing to bring the instant opposition in its Trial Brief.

Although "[p]roof of standing in a Board proceeding is a low threshold." *Syngenta Crop Protection Inc. v. Bio-Check LLC*, 90 USPQ2d 1112, 1118 n.8 (TTAB 2009), the record lacks any evidence concerning the nature of Opposer's commercial activities

or its interest in Applicant's BLUE COLLAR BREWERY mark. Thus, on the record before us, Opposer has failed to establish a "real interest" and "reasonable belief in damage," *i.e.*, that it is not wholly without merit. Accordingly, the opposition proceeding is dismissed for Opposer's lack of standing. *See, e.g., Lumiere Productions, Inc. v. International Telephone and Telegraph Corp.*, 227 USPQ 892, 893 (TTAB 1985).

Even if Opposer had proved standing, the Opposition would be dismissed on its merits. Opposer's position that the term "BREWERY" is deceptively misdescriptive stops short. In order for Applicant's mark to be found deceptively misdescriptive within the meaning of § 2(e)(1), and thus unregistrable, it must immediately convey an idea about the goods, but that idea, though plausible, must be false. *Anheuser-Busch Inc. v. Holt*, 92 USPQ2d 1101, 1108 (TTAB 2009); *In re Woodward & Lothrop Inc.*, 4 USPQ2d 1412, 1413 (TTAB 1987). The test for determining whether Applicant's applied-for mark is deceptively misdescriptive as applied to its goods involves a two-part determination of: (1) whether the matter sought to be registered misdescribes the goods, and (2) whether anyone is likely to believe the misrepresentation. *See Anheuser-Busch Inc. v. Holt*, 92 USPQ2d at 1108; *In re Quady Winery, Inc.*, 221 USPQ 1213, 1214 (TTAB 1984).

Marks, like Applicant's mark, that contain registrable matter in addition to deceptively misdescriptive components can be registered with a disclaimer of the deceptively misdescriptive matter, when appropriate. *See In re Aluminum Co. of America*, 197 USPQ 761, 762 (TTAB 1978) (§ 6 of the Trademark Act allows

registration of deceptively misdescriptive matter as part of composite mark on Principal Register if such matter is disclaimed); TMEP § 1209.04. As noted above, the word “BREWERY,” whether it is considered to be descriptive or deceptively misdescriptive of Applicant’s goods, is disclaimed and Opposer has made no claim that the application may not proceed to registration absent a disclaimer for the words BLUE COLLAR.

Accordingly, Opposer has failed to show that Applicant’s mark as a whole is deceptively misdescriptive or that consumers are likely to believe any misrepresentation occasioned by the wording BREWERY, BLUE COLLAR or BLUE COLLAR BREWERY contained in Applicant’s mark.

Decision: The opposition to registration of the applied-for mark BLUE COLLAR BREWERY shown in Serial No. 86238657 is dismissed.