

ESTTA Tracking number: **ESTTA669587**

Filing date: **04/29/2015**

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

Proceeding	91220585
Party	Plaintiff Union Craft Brewing Company, LLC dba Union Craft Brewing Company
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Submission	Motion to Dismiss - Rule 12(b)
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Date	04/29/2015
Attachments	Opposers Combined Motion To Dismiss and Motion To Suspend.pdf(35775 bytes)

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

**In the Matter of Application Serial No. 86358183
for the mark SACTOWN UNION BREWERY & DESIGN
Published in the *Official Gazette* on October 14, 2014**

**UNION CRAFT BREWING COMPANY, LLC,
DBA UNION CRAFT BREWING COMPANY,**

Opposer,

v.

Opposition No. 91220585

**TOWER BREW CO., LLC DBA
SACTOWN UNION BREWERY,**

Applicant.

**OPPOSER'S COMBINED MOTION TO DISMISS COUNTERCLAIM
AND MOTION TO SUSPEND**

Opposer/Counterclaim Respondent Union Craft Brewing LLC DBA Union Craft Brewing Company (“Opposer”) moves to dismiss the Counterclaim filed by Applicant/Counterclaim Petitioner Tower Brew Co., LLC dba Sactown Union Brewery (“Applicant”) for failure to state a claim under Fed. R. Civ. P. 12(b)(6). As discussed below, Applicant has failed to state a claim to cancel Opposer’s pleaded registration for unlawful use in commerce. In addition, Opposer respectfully requests suspension of all proceedings pending disposition of this motion.

I. MOTION TO DISMISS

A. Relevant Factual Background

Opposer produces and sells beer under the marks and trade names UNION and UNION CRAFT BREWING and, in addition to its common law rights, owns Reg. No. 4,410,239 for the mark UNION CRAFT BREWING for “beers.” (Dkt. 1 at ¶1.) On February 5, 2015, Opposer

filed its Notice of Opposition against Application Serial No. 86358183 for the mark SACTOWN UNION BREWERY & DESIGN for “beer”. On March 23, 2015, Applicant filed its Answer and a Counterclaim for cancellation of Opposer’s pleaded registration. (Dkt. 4.) The Counterclaim is labelled as a claim based on “nonuse” of the mark. *Id.*

On March 30, 2015, the Board issued an order giving Opposer to April 29, 2015 to file its Answer or otherwise plead to the Counterclaim. (Dkt. 5.) In lieu of an Answer, Opposer files this combined motion to dismiss and suspend.

B. Argument

A motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a complaint. To withstand such a motion, a pleading must allege facts that would, if proved, establish that Applicant is entitled to the relief sought, *i.e.*, that Applicant has standing to maintain the proceeding and that a valid ground exists for cancelling the registration. *Young v. AGB Corp.*, 47 USPQ2d 1752, 1755 (Fed. Cir. 1998).

The “valid ground” for cancellation that must be alleged (and ultimately proved) must be a statutory ground that negates Opposer’s right to the subject registration. *Young*, 47 USPQ2d at 1754. 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, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claimant thus must allege well-pleaded factual matter and more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Iqbal*, 556 U.S. 662. Further, although well-pleaded factual allegations are accepted as true, and reasonable inferences are drawn in the claimant’s favor, the Board is “not required to indulge in unwarranted inferences in order to save a complaint from dismissal.” *Juniper Networks Inc. v. Shipley*, 643 F.3d 1346, 1350 (Fed.

Cir. 2011) (quoting *Metzler Inv. GmbH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064-65 (9th Cir. 2008)).

While labelled as a claim for “nonuse”, a more accurate description of the Counterclaim is that it is a threadbare claim for cancellation for unlawful use in commerce. In a single conclusory sentence that does not even identify a specific law that was allegedly violated, Applicant simply alleges (Dkt. 4 at ¶16.):

“On information and belief, Opposer had not made use of the mark UNION CRAFT BREWING in commerce as of the January 9, 2013 filing date for the Application Serial No. 85819370 based on the lack of a U.S. Treasury Tax [sic] and Trade Bureau (TTB) certificate of label approval which is required when shipping alcohol across state lines.”

In order to plead and prove a claim of unlawful use in commerce, Applicant must sufficiently allege and establish that (1) Opposer violated a specific law making the use of its mark unlawful, (2) Opposer’s violation of the applicable law “has previously been determined (with a finding of non-compliance) by a court or government agency having competent jurisdiction under the statute involved” or “there has been a per se violation”, and (3) the non-compliance was “material” and use of the mark was “so tainted” that it could create no trademark rights. *See General Mills Inc. v. Healthy Valley Foods*, 24 USPQ2d 1270, 1273-74 (TTAB 1992); *Kellogg Co. v. New Generation Foods, Inc.*, 6 USPQ2d 2045, 2047 (TTAB 1988); *Churchill Cellars, Inc. v. Graham*, 2012 WL 5493578, *6-*8 (TTAB Oct. 19, 2012).

The Counterclaim here clearly fails to allege *any* of the elements to state a claim for unlawful use in commerce. As a fundamental threshold matter, the Counterclaim is completely devoid of even a reference to any specific, identifiable law or regulation that is alleged to have been violated by Opposer’s alleged use of its trademark prior to receiving a certificate of label approval. Because Applicant fails to identify any specific applicable law that was allegedly violat-

ed and made Opposer's use of the mark unlawful, the Counterclaim fails to state a claim for unlawful use in commerce that is plausible on its face.

Moreover, while well-pleaded allegations are accepted as true for the purpose of this motion, that tenet is obviously inapplicable to legal conclusions and assertions such as Applicant's unsupported (and erroneous) allegation that "certificate of label approval ... is required when shipping alcohol across state lines." *Iqbal*, 556 U.S. at 677 ("the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"); *Twombly*, 550 U.S. at 555 (courts are "not bound to accept as true a legal conclusion couched as a factual allegation"). That is especially so here because Applicant's legal assertion regarding label approval is simply wrong. There is no blanket requirement for certificate of label approval, as Applicant alleges, "when shipping alcohol across state lines." On the contrary, federal law is clear that brewers are *exempted* from needing any certificate of label approval unless a particular State's law affirmatively imposes a requirement for such label approval for beer produced and sold within the State.

Section 205(f) of the Federal Alcohol Administration Act ("FAA"), 27 U.S.C. §205(f), broadly excludes brewers from the requirement of a certificate of label approval for "malt beverages" (*i.e.*, beer) and any other labelling requirements under the FAA unless a particular State's laws impose "similar requirements" for such label approval. The second to last paragraph of Section 205(f) expressly provides that federal labelling requirements for malt beverages "shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof ... ***only to the extent that the law of such State imposes similar requirements with respect to the labeling ... of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received***

in such State from any place outside thereof.” *Id.* (emphasis added). Thus, a brewer need *not* have a certificate of label approval unless a State’s law imposes a similar requirement for malt beverages produced and sold within the State.

Critically, the Counterclaim here fails to allege that there is any State law that imposes a requirement for certificate of label approval that Opposer allegedly has violated. The omission is no accident. Opposer knows of no applicable State statute imposing such a requirement.¹

As the Federal Circuit has observed, the purpose of a motion to dismiss under Rule 12(b)(6) is “to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus spare litigants the burdens of unnecessary pretrial and trial activity.” *Advanced Cardiovascular Systems, Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993). That is precisely the situation here.

The underlying premise of the Counterclaim is fatally flawed and destined to fail if Applicant cannot even allege that Opposer violated a specific State’s law requiring label approval. At bottom, Applicant does not and cannot state a claim that is plausible on its face unless it can identify a State statute that required such label approval and allege that Opposer violated it. Accordingly, the Board should dismiss the Counterclaim.

The Board should also dismiss the Counterclaim because Applicant fails to plead any other element to state a plausible claim for unlawful use in commerce. Notably, the Counterclaim makes no allegation that there has ever been any determination by a court or government agency that Opposer has acted unlawfully or that there has been a per se violation of any identi-

¹ It is also clear that Applicant *could not have* sufficiently pleaded this claim because there is no basis for alleging that any applicable State statute required certificate of label approval. Opposer’s use of its mark in commerce since 2012 is based on sales to the District of Columbia. Like a number of States, the District of Columbia has no label approval requirement.

fied State statute requiring labelling approval. Further, the Counterclaim also fails to make any allegation that any violation of an applicable statute was material and use of the mark was so tainted that it could create no trademark rights.

Because the Counterclaim is both factually and legally deficient and Applicant has failed to state a claim that is plausible on its face, the Counterclaim should be dismissed under Fed. R. Civ. 12(b)(6).

II. MOTION TO SUSPEND

Trademark Rule 2.117 provides that proceedings may be suspended pending disposition of a potentially dispositive motion or upon a showing of good cause. Opposer's motion to dismiss is potentially dispositive of Applicant's Counterclaim. Accordingly, Opposer respectfully requests that all proceedings not germane to the motion to dismiss be suspended pending disposition of the motion.

III. CONCLUSION

For the foregoing reasons and authorities, Opposer respectfully requests that its Combined Motion to Dismiss Counterclaim and Motion to Suspend be granted.

Dated: April 29, 2015

**UNION CRAFT BREWING, LLC dba
UNION CRAFT BREWING COMPANY,
Opposer**

/s/Glenn A. Rice

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has caused the foregoing Opposer's Combined Motion To Dismiss Counterclaim And Motion To Suspend to be served upon counsel of record for Applicant in these proceedings, Candace L. Moon, Esq., via email to candace@craftbeerattorney.com on this 29th day of April, 2015.

/s/Glenn A. Rice _____