

THIS OPINION IS NOT A
PRECEDENT OF THE
TTAB

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

BUO

Mailed: March 10, 2016

Opposition No. 91221325 (Parent)
Cancellation No. 92061202

Red Bull GmbH

v.

Jordi Nogues, S.L.

Before Wolfson, Shaw, and Greenbaum,
Administrative Trademark Judges.

By the Board:

Jordi Nogues, S.L. (“Applicant”) seeks to register the mark shown below for “beer”
in International Class 32.¹



On April 1, 2015, Red Bull GmbH (“Opposer”) filed a notice of opposition opposing
the registration of Applicant’s mark on several grounds, including that Applicant did

¹ Application Serial No. 86324277, filed on June 30, 2014, was filed under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based upon a *bona fide* intention to use the mark in commerce. Although this proceeding is consolidated, we have limited our discussion to the opposition because the present motion pertains only to the opposition.

not have a *bona fide* intention to use the mark when the application was filed,² and “Applicant filed a false declaration on July 30, 2014.”³ Opposer alleges that the application was filed by “Nogues, Jordi,” who was identified as an “individual” and “citizen of Spain,”⁴ and that a “preliminary amendment” was filed on July 8, 2014, “purporting to change the listed owner of [the application] from Jordi Nogues, the individual, to Jordi Nogues, S.L., a corporation organized under the laws of Spain.”⁵ As for standing, Opposer alleges that it “is the owner of various Federal registrations and common law rights to trademarks for” marks alleged to be similar to the applied-for mark.⁶

Now before the Board is Opposer’s motion, filed November 12, 2015, for judgment on the pleadings in Opposition No. 91221325 on the basis that Applicant did not possess the requisite *bona fide* intent to use the applied-for mark at the time the application was filed.⁷ The motion is fully briefed.

² 1 TTABVUE 8, ¶ 37.

³ *Id.*, ¶¶37-38. The July 30, 2014 date in paragraph 38 appears to be a typographical error. For purposes of this order, we presume Opposer is referencing June 30, 2014, as that is the date the application was filed, and the allegation of no *bona fide* intent to use pertains to the original applicant. However, moving forward, Opposer is required to clarify the record by filing an amended notice of opposition only to address this error. The Board will presume that the answer filed to the original notice of opposition remains the same.

⁴ *Id.* at 4-5, ¶ 7.

⁵ *Id.*, at 5, ¶ 8.

⁶ *Id.*, at 4, ¶ 3.

⁷ Although Opposer has filed an identical motion in Cancellation No. 92061202, the relief sought is only in relation to application Serial No. 86324277 (“the ‘277 application”), the subject of this opposition. Therefore, Applicant’s contention that Opposer’s motion conflates the opposition and cancellation proceeding is unfounded because by its motion, Opposer seeks only that the opposition should be dismissed. However, the parties should note that inasmuch as these proceedings have been consolidated, only a **single** paper should be filed in this proceeding, *i.e.* only a single motion captioned with both proceeding numbers and only a

Motion for Judgment on the Pleadings

A motion for judgment on the pleadings is designed to provide a means of disposition of a case when the material facts are not in dispute and judgment on the merits can be achieved by focusing on the pleadings. *See* Fed. R. Civ. P. 12(c). It is a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board may take judicial notice. *See Media Online Inc. v. El Clasificado Inc.*, 88 USPQ2d 1285, 1288 (TTAB 2008). For purposes of the motion, all well-pleaded factual allegations of the nonmoving party must be taken as true, and the inferences drawn therefrom are to be viewed in a light favorable to the nonmoving party. *Id.* (citing *Baroid Drilling Fluids Inc. v. SunDrilling Prods.*, 24 USPQ2d 1048 (TTAB 1992)). Conversely, 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.

A motion for judgment on the pleadings will only be granted when the moving party establishes that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *See Baroid Drilling Fluids, Inc.*, 24 USPQ2d at 1049; *Media Online Inc.*, 88 USPQ2d at 1288. An unresolved material issue of fact may result from an express conflict on a particular point between the parties' respective pleadings or from defendant's pleading of new matter and affirmative

single response to that motion captioned with both proceeding numbers. As explained to the parties in the Board's December 1, 2015 order "[t]he parties should no longer file separate papers in connection with each proceeding, but file only a single copy of each paper in the parent case." 13 TTABVUE 2.

defenses in its answer. Thus, a party may not secure a judgment on the pleadings when the pleadings raise issues of fact that, if proved, would defeat the moving parties' claims or defenses. *Leeds Tech. Ltd. v. Topaz Comm. Ltd.*, 65 USPQ2d 1303 (TTAB 2002); *Baroid Drilling Fluids, Inc.*, 24 USPQ2d at 1049. Further, a judgment on the pleadings may be granted only where, on the facts deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment on the substantive merits of the controversy, as a matter of law. *See Baroid Drilling*, 24 USPQ2d at 1049. *See also* 5C Fed. Prac. & Proc. Civ. 3d § 1368 (2015).

Based on the pleadings in this case, Opposer cannot prevail as a matter of law on its claim that Applicant lacked a *bona fide* intent to use the applied-for mark in commerce. Specifically, we find that material issues of fact are raised by the express conflict between the parties' pleadings. In particular, Applicant has effectively denied paragraphs 1 through 6 of the notice of opposition, which comprise Opposer's allegations of standing, and Applicant has denied paragraphs 36 through 38 of the notice of opposition, which comprise Opposer's claim that Applicant lacked a *bona fide* intent to use the applied-for mark in commerce. At a minimum, Applicant's denials in these paragraphs are sufficient to raise genuine issues of material fact as to Opposer's standing and Applicant's lack of a *bona fide* intent to use the mark in commerce.

Accordingly, Petitioner's motion for judgment on the pleadings is **DENIED**.

Notwithstanding the foregoing, it appears that the issue of whether Applicant had a *bona fide* intention to use the mark when the application was filed, based on the allegations in paragraphs 7 and 8 of the notice of opposition pertaining to the original and current applicants, and Applicant's responses to each allegation, in its answer, that "the records of the U.S. Patent and Trademark Office shall speak for themselves[,]"⁸ appear to be ripe for determination by summary judgment.

Accordingly, Opposer is allowed, within **THIRTY DAYS** of the mailing date of this order, to file: (1) an amended notice of opposition as directed in footnote 3 of this order; and (2) a motion for summary judgment on its claim that Applicant did not possess the requisite *bona fide* intent to use the applied-for mark at the time the involved application was filed, providing evidence of its standing to bring this action and any additional evidence it deems relevant to the issue.⁹ Opposer's brief, any brief filed in response to the motion, and any reply brief, shall be filed in accordance with Trademark Rule 2.127(e)(1).

The proceeding remains **SUSPENDED**. The remaining discovery, disclosure, and trial dates will be reset upon resumption.

⁸ 5 TTABVUE 3, ¶¶ 7-8.

⁹ Neither party needs to submit a copy of the application file as it is of record by operation of Trademark Rule 2.122(b)(1).