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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Baxley

Mailed: August 25, 2016

Opposition No. 91223456

Brouwerij Nacional Balashi NV

v.

t & beer, inc

Before Mermelstein, Bergsman, and Heasley,
Administrative Trademark Judges.

By the Board:

t & beer, inc (“Applicant”) seeks to register the mark BALASHI SPIRITS in standard characters for “Distilled Spirits” in International Class 33.¹ Brouwerij Nacional Balashi NV (“Opposer”) filed a notice of opposition to registration of Applicant’s mark. As grounds for opposition, Opposer alleges that (1) Applicant did not have a bona fide intent to use the mark in commerce when it filed its involved application; and (2) there is a likelihood of confusion with its previously used marks that include the word BALASHI for “beer.”² Applicant, in its answer, denied the salient allegations of the notice of opposition and asserted affirmative defenses.

¹ Application Serial No. 86566095, filed March 17, 2015, based on an assertion of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The application includes a disclaimer of SPIRITS.

² In the notice of opposition, Opposer pleads the following pending applications:

Application Serial No. 86734984 for the mark BALASHI in standard characters for “Beer” in International Class 32, filed August 24, 2015, based on an assertion of use in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a), and alleging January 1, 1999 as the

This case now comes up for consideration of the following motions: (1) Applicant's motion (filed March 5, 2016) for judgment on the pleadings; and (2) Opposer's motion (filed March 21, 2016) for summary judgment. The motions have been fully briefed.

We turn first to Applicant's motion for judgment on the pleadings. Entry of judgment on the pleadings is appropriate where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is

date of first use anywhere and November 1, 2004 as the date of first use in commerce.

Application Serial No. 86701463, for the mark BALASHI PREMIUM BEER BREWED IN ARUBA and design in the following form, , for "Clothing, namely, t-shirts, golf shirts, shorts; headgear, namely, visors, baseball caps and bandanas" in International Class 25 and "Beer" in International Class 32, filed July 22, 2015, based on an assertion of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C § 1051(b), and Aruban Registration No. 29411 under Trademark Act Section 44(e), 15 U.S.C. § 1126(e). The application includes a disclaimer of PREMIUM BEER and BREWED IN ARUBA in International Class 32 only.

Application Serial No. 86701470 for the mark BALASHI PREMIUM BEER BREWED IN ARUBA BROUWERIJ NACIONAL BALASHI N.V. and design in the following form, , for "Clothing, namely, t-shirts, golf shirts, shorts; headgear, namely, visors, baseball caps and bandanas" in International Class 25 and "Beer" in International Class 32, filed July 22, 2015, based on an assertion of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C § 1051(b), and and Aruban Registration No. 29412 under Trademark Act Section 44(e), 15 U.S.C. § 1126(e). The application includes a disclaimer of PREMIUM BEER BREWED IN ARUBA in International Class 32 and BROUWERIJ NACIONAL and N.V. in both classes.

Application Serial No. 86701475 for the mark BALASHI PREMIUM BEER BREWED IN ARUBA ARUBA'S BEER and design in the following form, , for "Clothing, namely, t-shirts, golf shirts, shorts; headgear, namely, visors, baseball caps and bandanas" in International Class 25 and "Beer" in International Class 32, filed July 22, 2015, based on an assertion of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C § 1051(b), and Aruban Registration No. 29417 under Trademark Act Section 44(e), 15 U.S.C. § 1126(e). The application includes a disclaimer of PREMIUM BEER, BREWED IN ARUBA, and ARUBA'S BEER in International Class 32 only.

Opposer's applications all include statements that the term BALASHI has no meaning in a foreign language.

entitled to judgment on the substantive merits of the controversy as a matter of law. *See Media Online Inc. v. El Clasificado Inc.*, 88 USPQ2d 1285, 1288 (TTAB 2008); *Baroid Drilling Fluids Inc. v. Sun Drilling Products*, 24 USPQ2d 1048, 1049 (TTAB 1992); TBMP § 504.02 (June 2016). In addition, a motion for judgment on the pleadings can be used to raise an assertion of failure to state a claim upon which relief can be granted raised after the filing of an answer. *See Fed. R. Civ. P. 12(c) and 12(h)(2)*; TBMP § 503.01.

Through its motion for judgment on the pleadings, Applicant alleges that Opposer has failed to plead a valid ground for opposition to registration of Applicant's mark and that dismissal is therefore warranted. Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." To state a claim upon which relief can be granted, Opposer need only allege facts that, if proved, would establish that it is entitled to the relief sought; that is, it has (1) standing to bring this proceeding,³ and (2) a valid ground for opposing the subject application. *See Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007).

³ Applicant did not seek dismissal based on failure to allege standing. Nonetheless, the arguable similarities in the parties' marks and the arguable relatedness of their goods as set forth in Opposer's pleaded 1(b) and 44(e) applications and Applicant's application (1 TTABVUE, paragraphs 11 through 14), along with Opposer's allegation of use in commerce since at least as early as November 2004 of the mark BALASHI for "beer" (1 TTABVUE, paragraphs 10 and 15 through 18) are sufficient for us to find that Opposer has met the statutory requirement of pleading facts which, if proven, would establish that it has a reasonable belief of damage and a real interest in the proceeding. *See Spirits International B.V. v. S.S. Taris Zeytin Ve Zeytinyagi Tarim Satis Kooperatifleri Birliigi*, 99 USPQ2d 1545, 1548 (TTAB 2011). Accordingly, we find that Opposer has adequately pleaded its standing to maintain this proceeding.

Rule 8(a)(2) does not require detailed factual allegations, but requires more than labels, conclusions, formulaic recitations of the elements of a cause of action, and naked assertions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although the Board, in deciding a motion for judgment on the pleadings, must accept as true all factual allegations in the complaint, it is not bound to accept as true a legal conclusion couched as a factual allegation. *See id.* at 555.

Regarding the pleaded “no bona fide intent-to-use” claim, Trademark Act Section 1(b), 15 U.S.C. § 1051(b), states in relevant part that: “A person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce may apply to register the trademark under this Act....”

An applicant's bona fide intention to use a mark must reflect an intention that is firm, though it may be contingent on the outcome of an event (that is, market research or product testing). ... In addition, an applicant's bona fide intent must reflect an intention to use the mark ... “in the ordinary course of trade, . . . and not [made] merely to reserve a right in a mark”.

Commodore Electronics Ltd. v. CBM Kabushiki Kaisha, 26 USPQ2d 1503, 1507 n.7 (TTAB 1993) (quoting Senate Judiciary Comm. Rep. on S. 1883, S. Rep. No. 515, 100th Cong., 2d Sess. 24-25 (1988)). The legislative history of the Trademark Law Revision Act discusses an applicant's bona fide intent and sets forth an illustrative list of circumstances that “may cast doubt on the bona fide nature of the intent or even disprove it entirely.” *Research In Motion Ltd. v. NBOR Corp.*, 92 USPQ2d 1926, 1931 (TTAB 2009) (quoting S. Rep. No. 100-515, 100th Cong. 2d Sess. at 23-25). Those

circumstances include the filing of numerous intent-to-use applications to replace applications which have lapsed because no timely statement of use was filed. *See id.*

In addition,

To state a claim of no bona fide intent to use, “an opposer only has to notify the applicant of the general “circumstances, occurrences, and events” causing the flaw in the application. Although the complaint need not go into detail, it must at least notify the applicant of how the general circumstances fail to show intent.

Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc., 525 F.3d 8, 86 USPQ2d 1527, 1538 (D.C. Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555 n.3 (2007)).

In the notice of opposition, Opposer alleges as follows:

1. Nearly three years ago, on December 6, 2012, Applicant filed U.S. Trademark Application No. 85/795,933 seeking to register the standard character mark BALASHI BEER for eventual use in connection with “Beer” in International Class 032 (the “933 Application”). Applicant filed the ’933 Application under Section 1(b) of the Lanham Act by alleging an intent-to-use the mark in commerce. However, after two extensions of time, Applicant chose not to request any further extensions of time and failed to file a Statement of Use. Therefore, the ’933 Application was declared abandoned on February 23, 2015.
2. Less than a month later, on March 17, 2015, Applicant filed the application that is the subject of the instant Notice of Opposition: U.S. Trademark Application No. 86/566,095. Through Application No. 86/566,095, Applicant is seeking to register the standard character mark BALASHI SPIRITS for use in connection with “Distilled spirits” in International Class 033 (the “095 Application”).
3. Applicant filed the ’095 Application under Section 1(b) of the Lanham Act by alleging an intent-to-use the BALASHI SPIRITS mark in commerce. The Applicant has not converted the ’095 Application to a Section 1(a) (*i.e.*, actual use) basis or otherwise filed any allegation or statement of use in commerce of BALASHI SPIRITS in connection with distilled spirits (or any other type of alcohol beverage).

4. Upon information and belief, Applicant did not have a bona fide intent to use in commerce the BALASHI SPIRITS mark in connection with distilled spirits, or any other form of alcohol beverage, when it filed the '095 Application on March 17, 2015.

5. Upon information and belief, Applicant had not marketed, planned to use, or otherwise taken any concrete steps toward using the BALASHI SPIRITS mark in connection with distilled spirits prior to filing the '095 Application on March 17, 2015.

6. Upon information and belief, Applicant had not invested financial resources toward using the BALASHI SPIRITS mark in commerce in connection with distilled spirits prior to filing the '095 Application on March 17, 2015.

7. Applicant's lack of action or meaningful investment in the BALASHI SPIRITS mark prior to filing the '095 Application on March 17, 2015, suggests that Applicant only intended to reserve the BALASHI SPIRITS mark and, therefore, lacked the requisite *bona fide* intent to use the BALASHI SPIRITS mark in commerce when it filed the '095 Application.

By such claim, Opposer is essentially alleging that the involved application is replacing an earlier application that was abandoned due to applicant's failure to file a statement of use, and that Applicant's activities in connection with its mark are insufficiently firm to constitute a bona fide intent to use that mark at the time Applicant filed its involved application. Notwithstanding the common use of the word BALASHI in the respective marks, the '933 Application was for a different mark, BALASHI BEER, for different goods, "beer" from the mark, BALASHI SPIRITS, and goods, "[d]istilled [s]pirits," at issue in this proceeding. Nonetheless, we find that Opposer has provided adequate notice pleading of the general circumstances that give rise its claim of no bona fide intent to use the mark in commerce.⁴

⁴ Whether Opposer can prevail on that claim is a matter for resolution based on the evidence of record. See *Flatley v. Trump*, 11 USPQ2d 1284, 1286 (TTAB 1989).

Regarding the pleaded Section 2(d) claim, Trademark Act Section 2(d) states that a mark must be refused registration if it “so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name *previously used in the United States* by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive” (emphasis added). *See also King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974) (a Section 2(d) claim requires allegation of previous use in the United States or registration of a mark with the USPTO).

In the notice of opposition, Opposer alleges in relevant part as follows:

10. Opposer has been doing business since 1999, including through the production, offering and sale of beer to consumers, including but not limited to U.S. citizens.

...

14. Opposer owns U.S. Trademark Application No. 86/734,984 for the standard character mark BALASHI in connection with beer in International Class 032. (the “’984 Application”). The ’984 Application was filed pursuant to Section 1(a) of the Lanham Act and is supported by use in commerce at least as early as November 2004.

15. Opposer also owns the common law word mark BALASHI in connection with beer, which is also supported by use in commerce at least as early as November 2004.

16. The Opposer’s common law BALASHI mark and the marks reflected in [Opposer’s pending applications] shall be collectively referred to as “Opposer’s BALASHI marks.”

17. Opposer’s use in commerce of Opposer’s BALASHI marks began many years before the Applicant filed the ’933 Application and the subject ’095 Application.

18. Opposer’s BALASHI marks have been in continuous use in commerce since many years before the Applicant filed the ’933 Application and the subject ’095 Application.

19. Through use in commerce, including foreign trade with U.S. citizens, U.S. beer consumers have come to exclusively associate Opposer’s BALASHI marks with the Opposer and the beer it produces. As a result,

Opposer's BALASHI marks have developed substantial and valuable goodwill among U.S. consumers.

20. Indeed, many U.S. citizens have toured Opposer's beer production facility in Aruba and purchased Opposer's beer marked with one or more of Opposer's BALASHI marks.

21. Moreover, many U.S. consumers have imported Opposer's BALASHI beer into the United States through U.S. Customs. Upon information and belief many of those U.S. consumers then distribute some of their BALASHI beer supply to friends and family within the United States.

22. Opposer has further engaged in commercial intercourse with U.S. citizens by receiving and responding to offers from U.S. citizens to more formally act as a U.S. distributor of Opposer's BALASHI beer.

23. Opposer has also engaged in commercial intercourse with U.S. citizens by receiving and responding to offers from U.S. citizens to assist Opposer with its online marketing efforts.

24. Opposer's BALASHI marks have not been abandoned and continue to be used in commerce, including foreign trade with U.S. citizens who continue to use the Opposer's BALASHI marks as a means of identifying and distinguishing Opposer's beer from other beer offered by Opposer's competitors.

25. Nevertheless, due to the frequency of inquiries from U.S. consumers over the years as to whether and where Opposer's BALASHI beer is sold inside of the United States, the Opposer has engaged in formal discussions with United States citizens who are experienced in alcohol beverage importation and distribution with respect to establishing a formal importation and distribution program for Opposer's BALASHI beer within the United States in order to make it more convenient for U.S. citizens to obtain Opposer's BALASHI beer without having to travel to Aruba and import it into the United States themselves. As a result, Opposer is preparing to launch sales and distribution of its BALASHI beer inside the United States.

...

27. Applicant has disclaimed the term "SPIRITS" within its proposed BALASHI SPIRITS mark and, thus, the dominant portion of Applicant's proposed mark is the term "BALASHI."

28. Applicant's proposed BALASHI SPIRITS mark is substantially similar in appearance, sound and commercial impression to Opposer's BALASHI marks.

29. Applicant's proposed BALASHI SPIRITS mark is confusingly similar to Opposer's BALASHI marks.

30. Consumers who encounter the Parties' respective marks would be likely to assume a connection between the Parties.

31. Applicant's proposed goods (distilled spirits) and Opposer's goods (beer) are related given that they are all alcoholic beverages.

32. Applicant's proposed goods (distilled spirits) and Opposer's goods (beer) are likely to be marketed in the same channels of trade.

33. Consumers who encounter the Parties' goods bearing their respective marks will be misled into believing that the Parties' respective goods share, emanate from, are affiliated with, and/or are sponsored by a common source.

Opposer has adequately pleaded the likelihood of confusion portion of its Section 2(d) claim. *See King Candy Co., supra; In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). With respect to priority, Opposer based its allegation of priority on sales of beer under its BALASHI mark in Aruba since 2004 to United States citizens who then transport that beer back to the United States as a basis for its asserted priority. However, the Trademark Act clearly and unambiguously states that a Section 2(d) claim must be based "upon a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States."⁵ 15 U.S.C. § 1052(d). Because the concept of territoriality is central to trademark law, a Section 2(d) claim cannot be based on foreign use of a mark. *See Person's Co. Ltd. v. Christman*, 900 F.2d 1565, 14 USPQ2d 1477, 1479-80

⁵ Opposer's reliance upon *Int'l Bancorp LLC v. Societe des Bains de Mer et du Cercle des Etrangers a Monaco*, 329 F.3d 359, 66 USPQ2d 1705 (4th Cir. 2003), in support of its asserted priority is unpersuasive. *Int'l Bancorp* stated that "use in commerce" under Trademark Act Section 45, 15 U.S.C. § 1127, encompasses casino services rendered to United States citizens in Monaco, but did not address whether such casino services would form a basis for Section 2(d) priority.

(Fed. Cir. 1990); *Aktieselskabet af 21. November 2001 v. Fame Jeans Inc.*, 77 USPQ2d 1861, 1864 (TTAB 2006), *aff'd* 525 F.3d 8, 86 USPQ2d 1527 (D.C. Cir. 2008).

By its own admission, Opposer has not registered its mark with the USPTO and is only “preparing to launch sales and distribution of its BALASHI beer inside the United States.” Notice of Opposition, Paragraph 25, 1 TTABVUE 12. Even if we assume that Opposer has sold its goods to United States citizens visiting Aruba, Opposer cannot rely upon those sales as a basis for asserting priority in this case. Thus, even if we assume that United States tourists purchase Opposer’s BALASHI beer in Aruba and transport that beer back to the United States where they serve it to their social guests, all commerce conducted by Opposer and connected with that purchase was outside of the United States and does not provide a basis for asserting priority in a Section 2(d) claim. The statute is clear that one seeking to establish priority must show that its mark was “previously used *in the United States.*” Trademark Act § 2(d) (emphasis added).

Based on the pleadings, neither party has alleged use in commerce. Nonetheless, either party may, contingent on the ultimate registration of its applied-for mark, rely on the filing date of its intent-to-use application as its constructive date of use in commerce. *See* Trademark Act Section 7(c), 15 U.S.C. § 1057(c); *Zirco Corp. v. American Telephone and Telegraph Co.*, 21 USPQ2d 1542, 1543 (TTAB 1991). Applicant filed its intent-to-use application on March 17, 2015, and may rely on that date as its constructive use date. Because Opposer’s pleaded applications were all

filed subsequent to Applicant's constructive use date, Opposer cannot at this time establish priority.⁶ Accordingly, Opposer's Section 2(d) is insufficient.

Based on the foregoing, Applicant's motion for judgment on the pleadings is denied with regard to the no bona fide intent-to-use claim and granted with regard to the Section 2(d) claim.⁷ Because Opposer's Section 2(d) claim is insufficient, Opposer's motion for summary judgment on that claim will receive no consideration.

In the interests of completeness and narrowing the scope of potential discovery, we have also reviewed Applicant's affirmative defenses to determine their sufficiency. Applicant, in paragraph 1 of its defenses, alleges that Opposer has failed to state a claim upon which relief can be granted. 4 TTABVUE 6. In view of our determination that Opposer has adequately pleaded its standing and a claim of no bona fide intent to use, we *sua sponte* strike this defense. *See* Fed. R. Civ. P. 12(f); TBMP § 506.01.

Applicant, in paragraph 2, alleges that Opposer's claims "lack merit and are insufficient to warrant denial of Applicant's application for registration." 4 TTABVUE 6. This defense is redundant of Applicant's denials in its answer of the salient allegations set forth in the notice of opposition and is stricken on that basis. *See* Fed. R. Civ. P. 12(f); TBMP § 506.01.

⁶ Although Opposer's pleaded application Serial No. 86734984 for the mark BALASHI in standard characters for "Beer" in International Class 32, is based on use in commerce and alleges January 1, 1999 as the date of first use anywhere and November 1, 2004 as the date of first use in commerce, dates of use set forth in an application are not evidence of use; dates of use must be established by competent evidence. *See* Trademark Rule 2.122(b)(2).

⁷ Opposer is allowed leave to replead its Section 2(d) claim.

Applicant, in paragraph 3, alleges that it has neither abandoned nor discontinued use of its involved mark. However, Opposer did not allege abandonment in the notice of opposition. 4 TTABVUE 6. In any event, Applicant filed its application under Trademark Act Section 1(b) and has yet to file an allegation of use. Use of a mark that is the subject of a Section 1(b) application is not required until the applicant files an allegation of use, and an abandonment claim cannot be based on activities that precede the filing of an allegation of use. *See Consolidated Cigar Corp. v. Rodriguez*, 65 USPQ2d 1153, 1155-56 (TTAB 2002). Because abandonment is not at issue in this case, this defense is stricken as irrelevant. *See* Fed. R. Civ. P. 12(f); TBMP § 506.01.

Applicant, in paragraph 4, alleges that Opposer's pleaded applications are invalid "and will be opposed upon publication, and therefore, cannot serve as a basis for opposing Applicant's application for registration." 4 TTABVUE 6. Opposer's pleaded applications are suspended in *ex parte* examination and therefore outside of the Board's jurisdiction. Moreover, as noted *supra*, Opposer's pleaded applications provide a basis for its standing. Accordingly, this defense is stricken as insufficient. *See id.*

Applicant, in paragraphs 5 through 7 alleges that Opposer does not sell goods under its pleaded mark in the United States, that Opposer's pleaded mark is neither valid nor enforceable, and that Applicant's application has priority over Opposer's pleaded applications. 4 TTABVUE 6. These allegations are not affirmative defenses but simply serve to amplify the denials set forth in its answer and provide further information concerning Applicant's intended defense herein. *See Order of Sons of*

Italy in America v. Profumi Fratelli Nostra AG, 36 USPQ2d 1221, 1223 (TTAB 1995); *Textron, Inc. v. Gillette Co.*, 180 USPQ 152, 153 (TTAB 1973); TBMP § 506.01. Accordingly, they are acceptably pleaded.

In paragraphs 8 through 10, Application alleges that the opposition is barred by laches, estoppel, and the applicable statute of limitations. 4 TTABVUE 7. Applicant's laches and estoppel defenses are insufficiently pleaded because Applicant has alleged no specific conduct which would give rise to these defenses. *See Lincoln Logs Ltd. v. Lincoln Precut Log Homes, Inc.*, 971 F.2d 732, 23 USPQ2d 1701, 1703 (Fed. Cir. 1992); *Midwest Plastic Fabricators Inc. v. Underwriters Labs. Inc.*, 5 USPQ2d 1067 (TTAB 1987). Because Opposer acted at its first opportunity to object to registration of Applicant's BALASHI SPIRITS mark and is not alleged to have made any representation to Applicant that it would not so oppose, Applicant would appear to have no basis for either a laches or estoppel defense against Opposer with regard to the involved application. *See Lincoln Logs Ltd.*, 23 USPQ2d at 1703. Further, because Opposer timely opposed registration of Applicant's mark, Applicant has no basis for alleging that the opposition is barred by the applicable statute of limitations. *See Trademark Act Section 13*, 15 U.S.C. § 1063; Trademark Rule 2.101. Based on the foregoing, these defenses are *sua sponte* stricken. *Nat'l Cable Television Ass'n v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1431-32 (Fed. Cir. 1991); TBMP § 506.01.

Regarding Opposer's motion for summary judgment on the no bona fide intent-to-use claim, we note that the factual question of intent is particularly ill-suited for

disposition by summary judgment. *See Copelands' Enterprises Inc. v. CNV Inc.*, 945 F.2d 1563, 20 USPQ2d 1295, 1299 (Fed. Cir. 1991). Opposer contends that, although Applicant's intent-to-use application was filed on March 17, 2015, the earliest document that Applicant has produced to corroborate such intent is an invoice for design of labels for Balashi rum dated October 22, 2015, more than seven months later.

A "determination whether an applicant has a bona fide intention to use the mark in commerce is an objective determination, based on all the circumstances." *Boston Red Sox Baseball Club L.P. v. Sherman*, 88 USPQ2d 1581, 1587 (TTAB 2008). Correspondence sent nine months after an intent-to-use application filing date, considered in conjunction with evidence regarding a predecessor's activities and experience in licensing a prior mark for goods of the type, has been found sufficiently contemporaneous to an application filing date to corroborate an assertion of a bona fide intent to use. *See Lane Ltd. v. Jackson Int'l Trading Co.*, 33 USPQ2d 1351, 1356 (TTAB 1994). Whether it does so in this case is a question of fact, which may not be resolved on a motion for summary judgment.

In view of the invoice and evidence of Applicant's activities in connection with marketing wine under a different mark, we find that Opposer has failed to meet its burden of establishing that there is no genuine dispute that Applicant did not have a bona fide intent to use the mark in commerce when it filed its involved application.

Accordingly, Applicant's motion for summary judgment on its pleaded no bona fide intent-to-use claim is denied. Proceedings are resumed. Opposer is allowed until

twenty days from the mailing date set forth in this order to file an amended notice of opposition repleading its Section 2(d) claim, failing which that claim will be dismissed with prejudice.⁸ *See* TBMP § 503.03. Applicant's answer or other response to the amended notice of opposition is due by **forty days from the mailing date set forth in this order**. Remaining dates are reset as follows.

Expert Disclosures Due	9/26/2016
Discovery Closes	10/26/2016
Plaintiff's Pretrial Disclosures Due	12/10/2016
Plaintiff's 30-day Trial Period Ends	1/24/2017
Defendant's Pretrial Disclosures Due	2/8/2017
Defendant's 30-day Trial Period Ends	3/25/2017
Plaintiff's Rebuttal Disclosures Due	4/9/2017
Plaintiff's 15-day Rebuttal Period Ends	5/9/2017

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of 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. If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.

⁸ Opposer is reminded that any amended notice of opposition must comply with Patent and Trademark Rule 11.18(b) and Federal Rule of Civil Procedure 11.