

This Opinion is not a
Precedent of the TTAB

Mailed: November 20, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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NH Beach Pizza, LLC

v.

Cristy's Pizza Inc.
—

Cancellation No. 92058955
—

Patrick D. Archibald
for NH Beach Pizza, LLC.

Steven E. Grill of Devine Millimet & Branch
for Cristy's Pizza Inc.

—
Before Quinn, Cataldo and Ritchie,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

NH Beach Pizza, LLC (Petitioner), seeks to cancel Cristy's Pizza Inc.'s (Respondent) Registration No. 4503226, issued on the Principal Register for the mark BEACH PIZZA (standard characters, "PIZZA" disclaimed) for "pizza" in International Class 30.¹

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¹ Issued on March 25, 2014.

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As grounds for cancellation, Petitioner alleges that BEACH PIZZA is generic as applied to “pizza;” that in the alternative, BEACH PIZZA is merely descriptive of “pizza” and has not acquired secondary meaning; and that Respondent committed fraud in obtaining its registration for BEACH PIZZA.² In its answer, Respondent denied the salient allegations of the petition for cancellation.³

A. Evidentiary Objections

Respondent has objected to certain evidence introduced by Petitioner. Specifically, Respondent objects to Exhibits 5, 7-11 to Petitioner’s notice of reliance.⁴

Respondent objects to Exhibit 5 and 8 on the ground of relevance and also interposes relevance among its objections to Exhibits 7, 10 and 11.⁵ The Board is capable of weighing the relevance and strength or weakness of the objected-to evidence in the cases litigated before us, including any inherent limitations, and this precludes the need to strike the evidence in question. Ultimately, except as otherwise noted below, we have considered the entire record, keeping in mind Respondent’s objections, and have accorded the evidence whatever probative value it merits.

² 1 TTABVUE 1-5. Citations to the record are to TTABVUE, the docket history system for the Trademark Trial and Appeal Board. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

Petitioner asserted additional grounds for cancellation but did not pursue them at trial. Accordingly, they are deemed waived. *See, e.g., Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313, 1314 n.4 (TTAB 2005).

³ 4 TTABVUE 1-4.

⁴ 12 TTABVUE and 19 TTABVUE.

⁵ Respondent raised its objection to Exhibit 8 in its original motion to strike (12 TTABVUE) but did not continue the objection in its renewed motion to strike (19 TTABVUE). To the extent Respondent intended to continue its objection, we consider it here.

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Respondent objects to Exhibit 7, a copy of a printed article, on several grounds, including that the article is illegible. We agree with Respondent that the quality of the article is such that it is nearly impossible to discern its content beyond the headlines, photographs and advertisements. Simply put, the article is too blurry to see many of the details contained therein. As such, we can give this article little, if any, probative value on the issues before us in this case. *See, e.g., Hard Rock Café Licensing Corp. v. Elsea*, 48 USPQ2d 1400, 1404 (TTAB 1998) (“It is [a party’s] responsibility to review documents it submits as evidence to ensure that such submissions meet certain basic requirements, such as that they are legible ...”).

Respondent objects to Exhibit 9, a handwritten, unverified statement submitted as the “testimony” of Mr. Marco Ribeiro on numerous grounds, including that it was neither noticed nor taken in the proper format. We agree. Under our present rules, parties may only introduce testimony by declaration or affidavit upon written stipulation. Trademark Rule 2.123 (b); 37 C.F.R. § 2.123(b). There is no indication that the parties to this proceeding have so stipulated. The “testimony” in question is simply an unverified statement from a third party that does not conform to our rules of practice and, in any event, appears to have little, if any, probative value.

Respondent objects to Exhibits 10 and 11, printed copies of reviews of Respondent and a third party from the Internet website Yelp, on the ground that they are impermissible hearsay. Trademark Rule 2.122(e) involves printed publications and official records and, generally, provides that they may be introduced in evidence by filing a notice of reliance. In *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031

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(TTAB 2010), the Board liberalized the practice and interpretation of Rule 2.122(e) by “expanding the types of documents that may be introduced by notice of reliance to include not only printed publications in general circulation, but also documents such as [printouts from] websites, advertising, business publications ... prepared for or by a party or non-party, if, and only if, they can be obtained through the Internet as publicly available documents.” *Safer* at 1039. The Yelp reviews clearly are publicly available, are dated and provide the URL indicating their source. As such, they may be introduced by notice of reliance. We hasten to add, however, that the reviews have limited probative value inasmuch they are admissible solely for what they show on their face. They cannot be considered to prove the truth of any matter stated therein. *See, e.g., 7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1717 n.2 (TTAB 2007) (materials made of record by notice of reliance under 37 C.F.R. § 2.122(e) not admissible for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters); *Midwest Plastic Fabricators Inc. v. Underwriters Laboratories Inc.*, 12 USPQ2d 1267, 1270 n.5 (TTAB 1989) (annual report in evidence only for what it showed on its face), *aff'd*, 906 F.2d 1568, 15 USPQ2d 1359 (Fed. Cir. 1990). As such, Internet printouts are admissible to show not the truth of their content but rather the consumer perception thereof.

B. The Record

In light of the foregoing, the record consists of the pleadings and the file of the involved registration. Trademark Rule 2.122; 37 C.F.R. § 2.122. In addition,

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Petitioner submitted by notice of reliance the following materials not excluded above:

A Printed copy of an article from Boston Globe regarding a third party (Tripoli Bakery);”

Printouts from Respondent’s Facebook page (Facebook.com);

Respondent’s answers to Petitioner’s written discovery requests;

Printed copies of reviews from Yelp (yelp.com/biz) of Respondent and third party Tripoli Bakery; and

A copy of Respondent’s Business Entity Summary from the Commonwealth of Massachusetts Corporations Division Business Entity Corporate records.⁶

Respondent submitted by notice of reliance the following materials:

Photographs submitted with Respondent’s answers to Petitioner’s Interrogatory Nos. 4, 5 and 12 but not introduced into the record by Petitioner;

Copies of Respondent’s Food Establishment Permit Application submitted to the town of Salisbury, Massachusetts for its services under the BEACH PIZZA mark;

Copies of printed advertisements for Respondent’s goods under its BEACH PIZZA mark;

Copies of printouts from tripadvisor.com showing a photograph of Respondent’s use of its involved mark; and

⁶ Petitioner submitted an additional copy of the file of Respondent’s involved registration with its notice of reliance. As discussed above, the file of the involved registration automatically forms part of the record in this proceeding, and Petitioner’s resubmission thereof with its notice of reliance was duplicative and unnecessary.

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A printed copy of an article from wikitravel.org regarding Salisbury, Massachusetts.

C. Petitioner's Standing

Standing is a threshold issue that must be proved in every *inter partes* case. *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). In order to meet the standing requirement, a plaintiff need only show that it has a real interest, *i.e.*, a personal stake, in the outcome of the proceeding. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1026 (Fed. Cir. 1999); and *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2012, 2023-24 (Fed. Cir. 1987).

The purpose of the standing requirement, which is directed solely to the interest of the plaintiff, is to prevent litigation when there is no real controversy between the parties. In the case of a cancellation proceeding, the standing requirement has its basis in Section 14 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, a petition to cancel stating the grounds therefor. 15 U.S.C. § 1064. 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.” *See Ritchie v. Simpson*, 50 USPQ2d at 1025-26. A “real interest” is a “direct and personal stake”

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in the outcome of the proceeding. *Id.* at 1026. “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 its petition for cancellation, Petitioner alleges that

Petitioner will be damaged should it be prevented from using the generic term “beach pizza” in the advertising of its goods, and has received claims of likelihood of confusion with the mark by Registrant.⁷

However, the petition to cancel does not contain any further allegations regarding the nature of Petitioner’s business or the goods with which it uses or intends to use the term “beach pizza.” Further, Petitioner does not explain, either in its petition to cancel or otherwise, the nature of the asserted “claims of likelihood of confusion” with Respondent’s mark. Respondent’s answer to the petition for cancellation does not include any admissions regarding Petitioner’s alleged business activities or Petitioner’s interest in the mark BEACH PIZZA.

In its brief, Petitioner argues:

Petitioner NH Beach Pizza is in the business of selling pizza, is a competitor of Registrant Cristy’s, and is in the position to use BEACH PIZZA in a generic or descriptive manner, as can be readily seen by its trade name. The two companies compete in the market place and sell identical or similar goods, and as such NH Beach Pizza has standing to challenge the registration.⁸

⁷ 1 TTABVUE 3.

⁸ 17 TTABVUE 6-7.

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In its brief, Respondent does not directly challenge Petitioner's standing. Respondent's only discussion of Petitioner or its asserted business activities is as follows:

Petitioner, NH Beach Pizza, LLC, describes itself as being in the business of selling pizza and as being a competitor to Cristy's. (#17 Pet'r Tr. Br. at 5-6.) Petitioner filed its Petition to Cancel on April 2, 2014, asserting that Cristy's trademark registration for BEACH PIZZA should be canceled because it is both generic and merely descriptive (while lacking secondary meaning) and because Cristy's procured the trademark through fraud. (#1 Pet'r Pet. to Cancel ¶¶ 1-6.) Remarkably, however, Petitioner's owner and attorney of record had themselves sought a registration for the mark NEW ENGLAND BEACH STYLE PIZZA, which they later abandoned. (TESS Serial No. 86212085.)⁹

However, Respondent does not acknowledge that Petitioner is a competitor or has engaged in its asserted business activities, and neither party introduced any testimony or evidence regarding Petitioner's asserted trademark application. The Board does not take judicial notice of applications or registrations; they must be proved by competent evidence. *See, e.g., In re Johnathan Drew Inc.*, 97 USPQ2d 1640, 1644 n. 11 (TTAB 2011) (stating that "the Board's well-established practice is not to take judicial notice of registrations that reside in the USPTO"); *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1293 (TTAB 1986) ("[W]e do not take judicial notice of application and registration files that reside in the Patent and Trademark Office on the basis of their mere identification in briefs, pleadings and evidentiary submissions.").¹⁰ Furthermore, the asserted application

⁹ 18 TTABVUE 8.

¹⁰ In *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681 (Fed Cir. 2010), the Court of Appeals for the Federal Circuit exercised its discretion to take judicial notice of a third party's registration. However, the Board's well-established practice is not to take

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was not properly made of record and, in any event, is alleged to have been abandoned. *Cf. L'Oréal S.A. v. Marcon*, 102 USPQ2d 1434, 1436 n.6 (TTAB 2012); *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1192 n.6, 1193-94 nn.8 & 9 (TTAB 2007). Thus, none of Respondent's statements in its brief, either individually or as a whole, support Petitioner's assertion of its standing. Petitioner does not address standing in its reply brief.

In addition, as noted above, we have no testimony from either party in this case. We must therefore examine the remaining evidence submitted by Petitioner under notice of reliance to ascertain whether Petitioner has proven its standing to bring the instant cancellation against Respondent's registered mark BEACH PIZZA for "pizza."

Exhibits 1-4 to Petitioner's notice of reliance consist of the file of Respondent's involved registration. These exhibits make no mention of Petitioner, any trademark registration or application owned by Petitioner, or its asserted business activities.

Exhibit 5, a Boston Globe article, discusses the activities of a third party, Tripoli Bakery, but makes no mention of Petitioner. Nor does Petitioner allege that it is in privity with or otherwise related to Tripoli Bakery such that the activities of the latter would inure to Petitioner's benefit.

Exhibit 6 consists of screenshots from Respondent's Facebook webpage and makes no mention of Petitioner.

judicial notice of Office records. *See Trademark Board Manual of Procedure (TBMP) § 1208.02 (2015) and authorities cited therein.*

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Exhibit 8 consists of Respondent's answers to Petitioner's interrogatories and requests for production. Petitioner's request for production of documents No. 2 requested "All documents relating to actual confusion between you or any of your products and services, and Petitioner or any of its products or services."¹¹ Respondent's answer consisted of objections to the request, and did not acknowledge any of Petitioner's asserted business activities and did not indicate that any such documents exist. None of the remaining discovery requests address Petitioner's asserted business activities, and none of Respondent's answers admit or otherwise provide evidence regarding such activities.

Exhibits 10 and 11 consist of printouts from the Internet website Yelp and include reviews of Respondent and third party Tripoli Pizza. These exhibits make no mention of Petitioner or its asserted business activities.

Exhibit 12 is a document submitted by Respondent regarding its Business Entity Summary retrieved from the Commonwealth of Massachusetts Corporations Division Business Entity Corporate database. This document makes no mention of Petitioner.

Additionally, even if we consider Petitioner's evidence excluded above, none of it supports Petitioner's allegations regarding its standing. Exhibit 7 is a mostly illegible copy of an article from The Andovers. To the extent its content may be discerned, the article discusses third party Tripoli Bakery and makes no mention of Petitioner. With regard to excluded Exhibit 9, in its notice of reliance, Petitioner states as follows:

¹¹ 10 TTABVUE 76. The reference to Exhibit 8 appears to be a typographical error.

9. Petitioner relies on testimony from Marco Ribeiro, past employee of Registrant and current employee of Petitioner, and submits a copy as Exhibit 8.¹²

However, Mr. Ribeiro's statement only discusses his past employment with Respondent, and makes no mention of any of Petitioner's asserted business activities.

Finally, none of the evidence submitted by Respondent with its notice of reliance discusses Petitioner or any of its asserted business activities.

We note in addition that even if any of the printed publications made of record by Petitioner discussed its business activities, such evidence would not be admissible for the truth of the matters asserted therein. *See Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1117 n.7 (TTAB 2009) (printed publications made of record by notice of reliance are admissible and probative only for what they show on their face, not for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters). *See also 7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1717 n.2 (TTAB 2007) (materials made of record by notice of reliance under Trademark Rule 2.122(e) not admissible for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters); *Midwest Plastic Fabricators Inc. v. Underwriters Laboratories Inc.*, 12 USPQ2d 1267, 1270 n.5 (TTAB 1989) (annual report in evidence only for what it showed on its face), *aff'd*, 906 F.2d 1568, 15 USPQ2d 1359 (Fed. Cir. 1990). The rule against hearsay mandates that an out-of-court statement cannot be offered as evidence of the truth of the matter asserted in that statement. Insofar as none of

¹² 9 TTABVUE 3.

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the exceptions to the hearsay rule apply, we would not consider such submissions to prove the truth of any matter stated therein.

The record is utterly devoid of any evidence concerning the nature of Petitioner's commercial activities and its interest in Respondent's registered BEACH PIZZA mark. "Proof of standing in a Board proceeding is a low threshold." *Syngenta*, 90 USPQ2d at 1118. Petitioner could have submitted testimony or competent documentary evidence as to its asserted need to use the term "beach pizza" and nature of its business activities to establish its standing. *See, e.g., Panda Travel Inc. v. Resort Option Enterprises Inc.*, 94 USPQ2d 1789, 1793 (TTAB 2009) (testimony that opposer has used the mark PANDA TRAVEL continuously since June 1981 to identify its travel agency services sufficient to prove standing to bring Section 2(d) claim); *Automedx Inc. v. Artivent Corp.*, 95 USPQ2d 1976, 1978 (TTAB 2010) (testimony that opposer has been manufacturing and selling portable ventilators sufficient to prove standing to bring 2(d) claim). Petitioner neglected to do so. Thus, on the record before us, Petitioner has failed to establish a "real interest" and "reasonable belief in damage."

Accordingly, the cancellation proceeding is dismissed for Petitioner's lack of standing. *See, e.g., Lumiere Productions, Inc. v. International Telephone and Telegraph Corp.*, 227 USPQ 892, 893 (TTAB 1985).