UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

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Mailed: April 23, 2004

Opposition No. **91158276**
Opposition No. **91158552**
Opposition No. **91158568**
Opposition No. **91158696**
Opposition No. **91158816**
Opposition No. **91158978**
Opposition No. **91158980**
Opposition No. **91158981**
Opposition No. **91159360**

North Atlantic Operating Company, Inc., North Atlantic Trading Company, Inc. and National Tobacco Company, L.P

v.

DRL Enterprises, Inc.

Before Simms, Bucher and Rogers, Administrative Trademark Judges.

By the Board:

Applicant, DRL Enterprises, Inc., filed nine trademark applications for the marks "1.0," "1.25," "1.5," "2.0," "1 point 0," "1 point 25," and "1 point 5" for cigarettes and cigarette rolling papers.[1] Each application has been opposed by three companies, as set forth in the caption to this order, on the grounds that the marks are merely descriptive or generic (Count I) or deceptively

misdescriptive (Count II). In two of the cases, (opposition nos. 91158276 and 91158568), the complaints contain a third count alleging that applicant committed fraud in its attempt to procure registrations of the involved marks by misrepresenting its rights to those marks (there is no Count III in the other oppositions).

In lieu of filing answers in this consolidated case,[2] applicant has filed combined motions to dismiss or for a more definite statement of Count II in the complaints in opposition no. 91158276 and 91158568 but only a motion for a more definite statement of Count II in the other cases (with the exception of opposition no. 91159360, which was suspended prior to the running of the time within which applicant's answer was due).[3] Also, applicant has filed combined motions to dismiss or for a more definite statement of Count III in the two cases that contain a Count III.

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[1] Trademark application serial nos. 76296942; 76296931; 76369872; 76296945; 78157851; 76296926; 76296941; 76296943; and 76292944.

[2] The cases were consolidated on February 11, 2004.

[3] Applicant has not moved to dismiss Count I, or asked for a more definite statement with respect to Count I, in any complaint. In opposition no. 91158276, opposer cross-moves for default judgment against applicant, contending that applicant is in default for its failure to have timely filed an answer to Count I. Applicant filed a response to opposer's cross-motion. Inasmuch as we do not require a motion to dismiss to be directed to all of the claims in a complaint, the motion is denied. See TBMP § 503.01 (2d ed. June 2003)(filing motion to dismiss tolls applicant's time to respond to complaint).

Opposer has filed responses to applicant's combined motions and motions for a more definite statement in each case (with the exception that no response was filed in opposition no. 91158552 to applicant's motion for a more definite statement.[4]) In opposition nos. 91158276 and 91158816, applicant filed a reply brief.

A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint. See TMBP §503.02 (2d ed. June 2003). A motion for a more definite statement, on the other hand, is appropriate only in those cases where the pleading states a claim upon which relief can be granted, but is so vague or ambiguous that the movant cannot make a responsive pleading in good faith or without prejudice to itself. See TMBP §505.01 (2d ed. June 2003). In deciding a motion to dismiss, the Board must accept all of a plaintiff’s well-pleaded allegations as true, construe the notice of opposition liberally and in the light most favorable to plaintiff, and only dismiss the opposition for insufficiency if it appears certain that there is no set of facts, which,

[4] We have exercised our discretion to consider applicant's motion on its merits and have not treated the motion as conceded in that case. Opposer’s counsel also orally advised the Board that counsel inadvertently made a typographical error in the proceeding number on opposer’s surreply in opposition no. 91158276, and that the filing was intended to be opposer's response to applicant's motion for a more definite statement in opposition no. 91158552.

if proven to be true, would support plaintiff's claim. See Fed. R. Civ. P. 8(f). Likewise, the Board will grant a motion for a more definite statement only if the movant is unable to frame a responsive pleading without additional information from the non-moving party that it needs to make its responsive pleading.

Having carefully reviewed the pleadings in each of the consolidated cases, and the arguments and evidence presented by the parties, we find that none of the pleadings is so vague or ambiguous that it fails to state a claim upon which relief may be granted or requires additional details to augment the pleading, with respect to either Count II (misdescriptiveness) or Count III (fraud). In the cases where the goods of the applications are cigarettes, the complaints allege that when the mark is used for cigarettes that are rolled "in a paper of a particular size," the mark is deceptively misdescriptive. In the two cases where the goods are cigarette rolling papers, the complaints allege that the involved mark "falsely indicates and deceptively misdescribes the significant ingredient(s), product formulation, nature, quality(ies), characteristic(s), effect(s) and/or other feature(s) of the specific goods." Even in these two cases, as in the others, Count I alleges that the mark is a merely descriptive size designation, and Count II and Count III "repeat and reallege" the allegations in Count I.

With respect to Count III, which appears in opposition nos. 91158276 and 91158568 only, opposer sufficiently alleges that applicant falsely stated to the Office that it had exclusive rights to the designations it was attempting to register, despite its alleged knowledge that such exclusive rights did not exist. The two applications in question are for "cigarette rolling papers." Coupled with opposer's assertions, in other parts of its complaints, that the designations are merely descriptive, possibly generic, or deceptively misdescriptive because they are size designations, it becomes apparent that opposer is alleging that applicant knowingly withheld information from the Office in an attempt to procure registrations. The fraud count is brought into clearer focus by paragraphs in Count I wherein opposer alleges an exchange took place between applicant's predecessor and the examining attorney in charge of the prosecution of one of applicant's other applications, over the examiner's alleged refusal of an allegedly-similar numerical designation.

In view of the above, we find the allegations in Counts II and III of the notices of opposition do not fail to state causes of action upon which relief can be granted and moreover are sufficiently definite to enable applicant to frame its answer thereto.

Accordingly, applicant's combined motions to dismiss and for a more definite statement in Opposition Nos. 91158276 and 91158568, and applicant's motions for a more definite statement in the remaining oppositions, are hereby denied.

Applicant is allowed until THIRTY DAYS from the mailing date of this order to file its answer to each of the notices of opposition. These cases are otherwise treated as consolidated and may otherwise be presented on the same records and briefs.

Trial dates, including the closing date for discovery, are reset as indicated below.

DISCOVERY PERIOD TO CLOSE:	**August 1, 2004**
30-day testimony period for party in the position of plaintiff to close:	**October 30, 2004**
30-day testimony period for party in the position of the defendant to close:	**December 29, 2004**
15-day rebuttal period for party in the position of the plaintiff to close:	**February 12, 2005**

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.l25.

Briefs shall be filed in accordance with Trademark Rule 2.l28(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

New Developments at the Trademark Trial and Appeal Board

- Files of TTAB proceedings can now be examined using TTAB Vue, accessible at http://ttabvue.uspto.gov. After entering the 8-digit proceeding number, click on any entry in the prosecution history to view that paper in PDF format. Papers filed prior to January 2003 may not have been scanned. Unscanned papers remain available for public access at the TTAB. For further information on file access, call the TTAB at (703) 308-9330.

- Parties should also be aware of recent changes in the rules affecting trademark matters, including the rules of practice before the TTAB. *See* Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act, 68 Fed. R. 55,748 (September 26, 2003) (effective November 2, 2003) (www.uspto.gov/web/offices/com/sol/notices/68fr55748.pdf); Reorganization of Correspondence and Other Provisions, 68 Fed. Reg. 48,286 (August 13, 2003) (effective September 12, 2003) (www.uspto.gov/web/offices/com/sol/notices/68fr48286.pdf).

- The second edition (June 2003) of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) has been posted on the USPTO web site at www.uspto.gov/web/offices/dcom/ttab/tbmp/.