

Cir. 1998). *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982); *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382, 1386 (TTAB 1991); *Marmark Ltd. v. Nutrexp S.A.*, 12 USPQ2d 1843, 1844 (TTAB 1989).

In a Motion to Dismiss, the Board, "must assume that the facts alleged in the petition are true." *Stanspec Co. v. American Chain & Cable Co.*, 531 F.2d 563, 566, 189 U.S.P.Q. 420, 422 (C.C.P.A. 1976). Dismissal of an opposition is appropriate "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Abbott Labs. v. Brennan*, 952 F.2d 1346, 1353, 21 U.S.P.Q.2d 1192, 1198 (Fed.Cir.1991). For the reasons stated herein, Applicant respectfully submits that even if all of the facts alleged in the Notice of Opposition are true and Opposer could prove the same, no relief could be granted by the Board.

I. Statement of Facts

For purposes of this Motion, Applicant is assuming the following facts to be true:

1. On July 31, 2002, Applicant filed an application for TEQUILA CAZADORES REPOSADO and Design ("Applicant's Mark") for alcoholic beverages, namely tequila. This application was assigned Ser. No. 78/149,334, published for opposition and opposed by Opposer.
2. In a related proceeding, Applicant opposed Opposer's applied for mark, CABRITO & Design ("Opposer's Mark") (Opposition No. 91/123,436) based upon fraud in Opposer's application as well as a likelihood of confusion between Applicant's Mark (and related marks) and Opposer's Mark, as used in connection with the respective, overlapping goods and additional related claims.
3. In the related Opposition, Opposer repeatedly questioned Applicant's ownership of a particular cited registration for a mark related to Applicant's Mark (Reg. NO. 1,863,882). This application owned by Opposer states a first use date in 1995.
4. Subject to clarification of the chain of title to Applicant, this Board has granted Applicant's Motion for Summary Judgment in the related opposition.
5. The related opposition is based upon Applicant's ownership of Applicant's Mark and related marks and *use* of the same.

6. The subject application for Applicant's Mark is based upon use. The application states a first use date in 1986.

7. While Applicant may rely upon the registration issued from the application for Applicant's Mark, in part, such registration is not/would not be the sole basis for Applicant's opposition.

II. Standard for Motion to Dismiss

In order to have a claim dismissed under the Federal Rules of Civil Procedure for failure to state a claim, Applicant acknowledges that it, as the moving party, must meet a high standard. The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits of the case. Thus, this Board will construe the allegations of a complaint liberally and the Notice of Opposition will "not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." See *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 102 L.Ed.2d 80 (1957). See also *Stanspec Co. v. American Chain and Cable Co., Inc.*, 531 F.2d 563, 189 USPQ 420 (CCPA 1976). For the reasons stated herein, Applicant respectfully submits that Opposer's Notice of Opposition does not state facts sufficient to be a basis for a claim of relief.

III. Argument

Applicant Has Not Stated Any Statutory Basis for Its Opposition.

In order to prevail in an opposition proceeding, Opposer must put forth an appropriate ground for its opposition. See *Trademark Board Manual of Procedure* §309.03(c). In order to succeed in an opposition, Opposer must also be able to prove the ground(s) pled in the Notice. *Ibid.* See, also *Young v. AGB Corp.*, supra, 1755. This Board recognizes some fifteen or more distinct statutory grounds derived from the Trademark Act that are viable bases for oppositions such as likelihood of confusion, lack of bona fide intention, and deceptiveness. See 15 U.S.C. §1051 et seq. and TBMP §309.03(c). Opposer has neither alleged facts consistent with one of these bases nor alleged facts consistent with any statutory basis.

In a thinly veiled attempt to find any basis for its Notice of Opposition, Opposer now states in its amended Notice that: (1) On information and belief, Opposer has earlier rights in the trademark CABRITO & Design in the United States than can be asserted by Applicant for its trademark TEQUILA CAZADORES REPOSADO ETC. & Design as a result of Opposer's use of its trademark and the filing

date of Opposer's Applicant Serial No. 76/112,825; and (2) If, as alleged by Bacardi & Company Limited in Opposition No. 91/125,436 there is a likelihood of confusion that the use of CABRITO & Design would cause a likelihood of confusion the use of the marks CAZADORES and/or CAZADORES & Design, it follows that the use of Applicant's trademark TEQUILA CAZADORES REPOSADO ETC. & Design would cause confusion with Opposer's trademark CABRITO & Design. Despite these allegations, Opposer has again failed to allege sufficient facts for a likelihood of confusion opposition to proceed. That is, while Opposer makes hypothetical allegations of a likelihood of confusion, it does not make sufficient allegations to provide sufficient grounds for the subject opposition. Specifically, Opposer has not made credible statements about its purported priority. Specifically, the record clearly shows Applicant's priority and Opposer has not made any statements that would tend to negate the facts already of record (i.e., Applicant's stated first use date in 1986 and Opposer's first use date almost ten years later in 1995). Opposer has neither contested Applicant's stated use date nor sought to revise its use date. Rather, Opposer seeks to make a mockery of the opposition proceeding by merely making unsupportable allegations for which it has no reasonable basis.

As this Board has stated, in order to pursue a claim under Section 2(d) of the Act, 15 U.S.C. § 1052(d), "plaintiff must assert, and then prove at trial, that defendant's mark, as applied to its goods or services, so resembles plaintiff's previously used or registered mark or its previously used trade name as to be likely to cause confusion, mistake, or deception." See TBMP 309.03(c). As part of such a claim, plaintiff/Opposer must prove priority, that is "a plaintiff must plead (and later prove) priority of use. In order to properly assert priority, a plaintiff must allege facts showing proprietary rights in its pleaded mark that are prior to defendant's rights in the challenged mark. Such rights may be shown by, for example, ownership of an application with a filing date (or a registration with an underlying application filing date) prior to any date of first use on which defendant can rely; prior trademark or service mark use; or prior use analogous to trademark or service mark use." See TBMP § 309.03(c)A. Opposer has not made the requisite claims.

Applicant Has Not Stated Any Basis for Damages.

Opposer has implied several times in its amended Notice that there is *no* likelihood of confusion between its mark and Applicant's mark. For example, Opposer states "[i]f, as alleged by Bacardi &

Company Limited in Opposition No. 91/125,436 there is a likelihood of confusion” (paragraph 8) and “[i]f, hypothetically, the likelihood of confusion alleged in paragraph 8 exists” (paragraph 9). As this Board will surely appreciate, Opposer has not made any allegations of a likelihood of confusion, but rather refers to Applicant’s allegations of confusion in a related trademark opposition. Since Opposer has not alleged a likelihood of confusion, no damages can arise. Furthermore, if Opposer is entitled to plead likelihood of confusion hypothetically, it still must make a claim for priority or other grounds for why it should prevail in the event confusion is found. While Applicant concedes that these facts need not be proven in a Notice of Opposition, the Board will surely recognize that the statements must be true and based upon reasonable knowledge and belief. Without such a requirement, parties could routinely use Board proceedings to merely harass other parties. (See TBMP 106.02 for a discussion of the implicit statements made upon signature of a paper for filing with the Trademark Office.)

Applicant also notes that Opposer will not, and cannot, be damaged by Applicant’s trademark registration. Rather, Opposer may be damaged (i.e., refused registration of Opposer’s Mark by virtue of the related proceeding) because of the *actual rights* Applicant has that form the basis for the registration of Applicant’s Mark as well as Applicant’s related marks.

No Relief Can Be Granted under Opposer’s Facts.

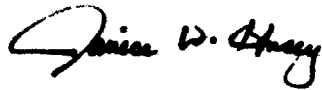
Beyond not alleging a single statutory basis for its opposition, Opposer has not stated a single fact that would give rise to a basis for relief. Since no relief can be granted, dismissal of the opposition is appropriate.

IV. Conclusion

For the reasons discussed above, Applicant, Bacardi & Company Limited respectfully submits that Opposer again has failed to state a claim for which relief can be granted. Therefore, Opposer respectfully requests that its motion be GRANTED, that the subject opposition be dismissed and that its application be processed for registration without further delay.

Respectfully submitted,

Bacardi & Company Limited



Date: September 2, 2004

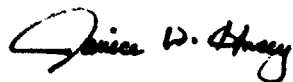
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CERTIFICATE OF SERVICE

On this 2nd day of September 2004, a true and correct copy of the foregoing RENEWED APPLICANT'S MOTION TO DISMISS was sent via first class mail, postage prepaid and addressed as follows:

Jeffrey H. Kaufman, Esquire
OBLON, SPIVAK et al.



1940 Duke Street
Alexandria, Virginia 22314

Janice W. Housey

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

-----x
Tequila Centinela, S.A. de C.V.,

Opposer,

v.

Bacardi & Company Limited
Applicant.
-----x

Opposition No. 91160956

Ser. No. 78/149334

Mark: TEQUILA CAZADORES
and Design

COVER SHEET

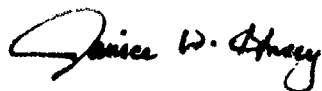
Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202

Madam:

Enclosed for filing in connection with the above-referenced matter, please find the following:

Applicant's Renewed Motion to Dismiss.

Respectfully submitted,



Date: September 2, 2004

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