ESTTA Tracking number: **ESTTA469415**

Filing date: **04/26/2012**

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

Proceeding	91204369
Party	Defendant SHASTA BEVERAGES, INC.
Correspondence Address	VICKIE HILDEN SHASTA BEVERAGES, INC. 8100 SW 10TH ST STE 4000 FORT LAUDERDALE, FL 33324-3224 VHILDEN@NATIONALBEVERAGE.COM
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Eliza K. Hall
Filer's e-mail	eliza.hall@klgates.com, trademarks@klgates.com
Signature	/Eliza K. Hall/
Date	04/26/2012
Attachments	Motion and Brief.pdf (11 pages)(248417 bytes) Affidavit.PDF (2 pages)(62647 bytes)

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

SCHUPP COMPANY, INC.	)	
	)	
Opposer,	)	
	)	Opposition No. 91204369
v.	)	
	)	Serial No. 85/480,778
SHASTA BEVERAGES, INC.	)	
	)	
	)	
Applicant.	)	

APPLICANT'S MOTION TO DISMISS

For the reasons set forth in the Memorandum of Law in Support of Applicant's Motion to Dismiss, which is being filed concurrently herewith and is incorporated herein by reference, Applicant Shasta Beverages, Inc. respectfully moves for an Order dismissing the Opposition filed by Opposer Schupp Company, Inc.

Respectfully submitted,

April 26, 2012

Eliza K. Hall, Esq.
James R. Kyper, Esq.
K&L GATES LLP
210 Sixth Ave.
Pittsburgh, PA 15222-2613
(412) 355-6500 (telephone)
(412) 355-6501 (facsimile)

Attorneys for Applicant
Shasta Beverages, Inc.

Certificate of Service

I certify that a copy of the foregoing Motion to Dismiss was served by U.S. first-class mail on April 26, 2012, on the following *pro se* Opposer Schupp Company, Inc.:

A. Mark Schupp, President
Schupp Company, Inc.
401 Pine St.
St. Louis, MO 63102

Eliza Hall

Eliza K. Hall

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

SCHUPP COMPANY, INC.	)	
	)	
Opposer,	)	
	)	Opposition No. 91204369
v.	)	
	)	Serial No. 85/480,778
SHASTA BEVERAGES, INC.	)	
	)	
	)	
Applicant.	)	

MEMORANDUM OF LAW IN SUPPORT OF APPLICANT'S MOTION TO DISMISS

Applicant Shasta Beverages, Inc. ("Applicant" or "Shasta") files this Memorandum of Law in support of its Motion to Dismiss Opposer Schupp Company, Inc.'s ("Opposer or "Schupp") Opposition No. 91204369 ("Opposition").

INTRODUCTION

Opposer's Opposition is founded upon a basic misunderstanding of the rules of service, standing and trademark law. First, Opposer did not serve its Notice of Opposition on Applicant, and because the opposition period expired on March 22, 2012 it is now too late for Opposer to perfect service and the Opposition must therefore be dismissed as a nullity. Second, Schupp fails to state a claim to relief that is plausible on its face and fails to show that it has standing for at least three reasons: (1) The record is devoid of any apparent basis for Opposer's claim that it owns the trademark "FEEL THE FLAVOR" (the "Mark"); (2) Opposer does not even allege, much less set forth supporting facts, that it would be in any way harmed by Applicant's registration of the Mark; and (3) Opposer fails to plead a statutory ground for opposition. Accordingly, the Opposition should be dismissed in its entirety.

FACTUAL BACKGROUND

On November 25, 2011, Applicant filed a trademark application (Serial No. 85/480,778) with the United States Patent and Trademark Office ("PTO") on an intent-to-use basis ("Application") for the Mark "FEEL THE FLAVOR" in International Class 32, for "soft drinks." The Mark was published by the PTO for opposition on February 21, 2012, triggering the thirty-day opposition period.

On or around March 20, 2012, Opposer filed its Opposition through the Trademark Trial and Appeal Board's ("TTAB") electronic filing system ("ESTTA"). The Opposition includes a Certificate of Service electronically signed by the president of Opposer certifying "that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date." Opp. at 1. In fact, Opposer did not serve its Opposition on Applicant—not on or around March 20, 2012, and not at any time since that date.

The basis for opposition is, at best, unclear. Opposer fails to recite any statutory grounds for opposition. Instead, Opposer simply cites the Federal Circuit case of *Torres v. Cantine Torresella S.r.l.Fraud*, 808 F.2d 46 (Fed. Cir. 1986) as its "Grounds for Opposition." In its pleading, Opposer merely alleges that "Opposer created and maintains ownership of this mark as they did not sell or otherwise convey or transfer ownership of the mark to Applicant. Applicant was offered the opportunity to purchase the mark from Opposer but declined to do so.... Opposer is the sole and rightful owner until such time as Applicant compensates Opposer for creation and development of the mark in question." Opp. at 2.

For the reasons discussed below, Opposer has failed to show any grounds for its Opposition or that it has standing to oppose the registration of the Mark. Moreover, its Notice of Opposition was never served on Applicant, and the opposition period has expired so proper

service cannot be made. Accordingly, as a matter of law the Opposition should be dismissed as a nullity or with prejudice.

ARGUMENT

I. The Opposition Must Be Dismissed for Lack of Service

Because Opposer failed to serve its Notice of Opposition on Applicant during the opposition period (or at all), the Opposition must be dismissed as a nullity.

Opposers "must include proof of service on the applicant, or [its] attorney or domestic representative of record" with the notice of opposition, and they must actually "serve the notice of opposition by forwarding a copy thereof to the applicant...." *Schott A.G. v. Scott*, 88 U.S.P.Q.2d 1862, 1862-63 (T.T.A.B. 2008) (citing Trademark Rule 2.101(a)); *see also* 37 C.F.R. 2.101(b) (opposers "must serve a copy of the opposition, including any exhibits, on the attorney of record for the applicant or, if there is no attorney, on the applicant or on the applicant's domestic representative, if one has been appointed, at the correspondence address of record in the Office"). When filing through the TTAB's ESTTA online filing system opposers must "confirm" that they have served the notice on the applicant, but "***[a]ctual forwarding of the service copy... is the responsibility of the filer [opposer]***...." *Schott*, 88 USPQ2d at 1863 n.3 (emphasis added).

Schupp filed through the ESTTA online filing system and evidently, as part of that process, Schupp certified that it had served the notice of opposition on Shasta via overnight courier. *See* Opp. at 1 (Certificate of Service electronically signed by A. Mark Schupp, the president of Opposer). However, that certification was false; to this date, much less during the thirty-day opposition period that began to run on February 21, 2012, Applicant was never served.

See Ex. A (Affidavit of Vickie Hilden-Carcaise). In fact, Applicant only learned of the Opposition when it received a copy of the notice on March 20, 2012 from the TTAB. *See id.*

Where an opposer fails to serve notice of opposition on the applicant within the opposition period, the opposition "must be dismissed as a nullity." *Schott*, 88 USPQ2d at 1864. This is because "[p]roof of service is meaningless in the absence of actual service.... The requirement of the rules is for proof of service, not a promise to make service at some time in the future." *Springfield, Inc. v. XD*, 86 U.S.P.Q.2d 1063, 1064 (TTAB 2008) ("dismiss[ing] as a nullity" an opposition that was filed with proof of service but without actual service on the applicant). Notices of opposition that are filed without actual service on the applicant "should not... receive[] a filing date, and [such] proceeding[s] should not [be] instituted." *Id.*

Moreover, improperly served notices cannot be amended outside the opposition period. *Schott*, 88 USPQ2d at 1864.

Accordingly, the Opposition must be dismissed as a nullity.

II. Motion to Dismiss for Failure to State a Claim for Relief

A motion to dismiss tests the legal sufficiency of a complaint. *See, e.g.*, TTAB Manual of Procedure ("TBMP") §503.02 (3rd Ed. May 2011); *Intellimedia Sports, Inc. v. Intellimedia Corp.*, 43 U.S.P.Q.2d 1203, 1205 (T.T.A.B. 1997). In order for a plaintiff to be entitled to the relief sought, it must (1) have standing to maintain the proceeding, and (2) a valid ground must exist for denying the registration sought. TBMP §503.02. To survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face." *Id.*; *see also Fitzpatrick v. Sony BMG Music Entm't Inc.*, 86 U.S.P.Q.2d 1216, 1218 (citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007)).

In deciding a motion to dismiss, only ***well pleaded*** factual allegations are accepted as true. *Intellimedia Sports, Inc.*, 43 U.S.P.Q.2d at 1205. In other words, "[a]lthough the [pleading] need not provide 'detailed factual allegations,' it must 'amplify a claim with some factual allegations . . . to render the claim *plausible*.'" *Id.* (emphasis in original) (citations omitted). If the petitioner fails to allege facts that would support a cause of action, the motion to dismiss must be granted and the petition dismissed. *See id.*; *see also McDonnell Douglas Corp. v. Nat'l Data Corp.*, 228 U.S.P.Q. 45, 48 (T.T.A.B. 1985) (granting motion to dismiss in part because "[m]ere parroting of the requisite elements without sufficient factual support therefor is insufficient").

A. Opposer's Lack of Standing and Failure to State a Claim

To withstand a motion to dismiss the opposer must "allege such facts as would, if proved, establish that[,]" *inter alia*, he "has standing to maintain the proceeding...." *Carano v. Vina Concha Y Toro S.A.*, 67 U.S.P.Q.2d 1149, 1150 (T.T.A.B. 2003) (citing *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024 (CCPA 1982)). "Any person who believes that he, she or it ***would be damaged by the registration*** of a mark on the Principal Register" has standing to file an opposition. 37 C.F.R. 2.101(b) (emphasis added). However, the "'belief of damage' required... is more than a subjective belief." *Ritchie v. Simpson*, 170 F.3d 1092, 1098 (Fed. Cir. 1999). In other words, to have standing, an opposer "must allege a 'direct and personal stake' in the outcome of the proceeding" and the allegations supporting the opposer's "belief of damage must have a 'reasonable basis in fact.'" TBMP § 303.03 (citing *Ritchie*, 170 F.3d at 1092). Moreover, under the United States Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires a 'showing' that the plaintiff is entitled to relief, 'rather than a blanket assertion' of entitlement to relief." *Closed Loop*

Marketing, Inc. v. Closed Loop Marketing, LLC, 89 U.S.P.Q. 2d 1782, 1784-1785 n.3 (E.D. Cal. 2008) (applying *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007), in a trademark case and noting that *Twombly* "explicitly abrogates" the previous, more liberal pleading standard).

Here, ***Opposer does not even assert that it would or believes it would be damaged by registration of the Mark***, much less make factual allegations supporting such an assertion. *See* Opp. at 1-2. Opposer also nowhere alleges that it has ever used the Mark or any remotely similar or confusing mark, or that it has any intention of doing so. *See id.* Opposer also nowhere asserts any of the other usual bases for standing. *See id.*; *cf.* TBMP § 309.03(b) (noting that standing typically involves allegations that the opposer uses or intends to use a confusingly similar mark; that opposer sells the same or related goods or services and the mark being opposed is generic or descriptive; or that opposer belongs to a "class of potential purchasers it alleges are disparaged or brought into contempt or disrepute by" the applicant's mark).

Rather, instead of even asserting (much less supporting) any trademark-related rights in the Mark, Opposer alleges in conclusory fashion that:

> Opposer created and maintains ownership of this mark as they did not sell or otherwise convey or transfer ownership of the mark to Applicant. Applicant was offered the opportunity to purchase the mark from Opposer but declined to do so.... Opposer is the sole and rightful owner until such time as Applicant compensates Opposer for creation and development of the mark in question.

Opp. at 2. Opposer thus appears to be alleging that Opposer created the Mark "Feel the Flavor" and offered to sell it to Applicant, but Applicant declined to buy it. In short, Opposer's allegations make no attempt to explain why Applicant cannot lawfully use the Mark without paying Opposer. Opposer nowhere alleges that it uses, intends to use or has registered the Mark or any confusingly similar mark, so there is ***no apparent basis for Opposer's claim that it***

"owns" the Mark "Feel the Flavor." Given that defect, Opposer has also failed to meet its burden of showing that it has standing. *See, e.g.*, TBMP § 309.03(b). Simply put, there is no basis for a finding that Opposer owns the Mark or otherwise has standing.

In short, Opposer has not even asserted (much less set forth supporting facts) that it believes it would be damaged by registration of the Mark. Opposer has merely asserted that it owns the Mark "Feel the Flavor," but has failed to set forth any facts that could support that assertion. Moreover, the Opposition is devoid of any apparent basis for standing other than the unsupported assertion that Opposer somehow "maintains ownership" of "Feel the Flavor." Such allegations cannot be said to "'amplify [Opposer's] claim with some factual allegations . . . to render the claim *plausible*.'" *Fitzpatrick*, 86 U.S.P.Q.2d at 1218 (citing *Twombly*, 127 S. Ct. at 1964) (emphasis in original).

B. <u>Opposer's Failure to Allege a Statutory Ground for Opposition</u>

In addition to standing, an opposer must also plead a statutory ground for opposition. TBMP § 309.03(c). In this case, Opposer failed to allege a statutory ground for opposition. Instead, Opposer merely cited the Federal Circuit case of *Torres v. Cantine Torresella S.r.l.Fraud*, 808 F.2d 46 (Fed. Cir. 1986) as its "Grounds for Opposition."

CONCLUSION

For the foregoing reasons, Applicant's Motion to Dismiss should be granted and the Opposition should be dismissed as a nullity or with prejudice.

Respectfully submitted,

April 26, 2012

Eliza K. Hall, Esq.
James R. Kyper, Esq.
K&L GATES LLP
210 Sixth Ave.
Pittsburgh, PA 15222-2613
(412) 355-6500 (telephone)
(412) 355-6501 (facsimile)

Attorneys for Applicant
Shasta Beverages, Inc.

Certificate of Service

I certify that a copy of the foregoing Motion to Dismiss was served by U.S. first-class mail on April 26, 2012, on the following *pro se* Petitioner Schupp Company, Inc.:

A. Mark Schupp, President
Schupp Company, Inc.
401 Pine St.
St. Louis, MO 63102

Eliza K. Hall

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

SCHUPP COMPANY, INC.	)	
	)	
Opposer,	)	
	)	Opposition No. 91204369
v.	)	
	)	
SHASTA BEVERAGES, INC.	)	
	)	
	)	
Applicant.	)	

AFFIDAVIT OF VICKIE HILDEN-CARCAISE, ESQ.

STATE OF FLORIDA)
) ss:
COUNTY OF BROWARD)

I, Vickie Hilden-Carcaise, being duly sworn, depose and say:

1. I am in-house counsel for Shasta Beverages, Inc. ("Shasta" or "Applicant") and the attorney of record in the matter of Trademark Application Serial No. 85/480778.

2. I submit this Affidavit in support of Applicant's Motion to Dismiss.

3. On or about March 20, 2012, I received the Board's March 20, 2012 Order instituting Opposition No. 91204369 via ESTTA.

4. In the Notice of Opposition ("Notice") filed by Schupp Company, Inc. ("Opposer"), Opposer certified that it served a copy of the Notice on Shasta via overnight courier.

5. I did not receive a copy of the Notice which Opposer was required to serve on me directly under Trademark Rule 2.101(b), in any of the ways listed in Trademark Rule 2.119(b) and which Opposer certified had been served on Shasta via overnight

courier.

6. I am personally unaware of any attempts by Opposer to perfect service of process on me or any Shasta representative.

7. I execute this Affidavit under oath and under penalty of perjury under 28 U.S.C. § 1746 in Plantation, Florida on April 25, 2012.

Further affiant sayeth not.

Dated: April 25, 2012

Vickie Hilden-Carcaise

STATE OF FLORIDA)
) ss:
COUNTY OF BROWARD)

The foregoing instrument was acknowledged before me this 25th day of April 2012, by Vickie Hilden-Carcaise, who did take an oath, and who is personally known to me.

NOTARY PUBLIC
STATE OF FLORIDA

My Commission Expires: 7-9-13

LINDA T. CRAWFORD
MY COMMISSION # DD 868065
EXPIRES: July 9, 2013
Bonded Thru Notary Public Underwriters