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

Proceeding	91215114
Party	Defendant Stillhouse Vineyards, LLC
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Submission	Motion to Dismiss - Rule 12(b)
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

SHIRLEY PLANTATION, LLC and UPPER SHIRLEY VINEYARDS, LLC, Opposers, v. STILLHOUSE VINEYARDS, LLC (dba PHILIP CARTER WINERY), Applicant.	Opposition No.: 91215114 Application No: 85/947,562 Mark: Shirley Plantation

MOTION TO DISMISS

Applicant Stillhouse Vineyards, LLC (dba Philip Carter Winery) ("Applicant" or "Philip Carter") moves the Board to dismiss, with prejudice, the Notice of Opposition ("Notice") filed by Shirley Plantation, LLC ("Shirley") and Upper Shirley Vineyards, LLC ("Upper Shirley") (collectively "Opposers") pursuant to the Trademark Trial and Appeal Board's Manual of Procedure ("TBMP") 503 et seq. and Fed. R. Civ. P. 12(b)(6) for failing to state a claim upon which relief can be granted. In support of this motion, Applicant states as follows:

Opposers Lack Standing

This Notice of Opposition must be dismissed because both Opposers lack standing to file. Philip Carter has filed for protection for the mark Shirley Plantation in Class 033, namely for the production of grape wine, red wine, rose wine, table wines, white wine, wine, and wines. Neither Opposer has alleged, nor is able to allege, that they produced or sold wine at the time Philip Carter's mark was filed. Further, neither

Opposer has alleged, nor is able to allege, that they hold a license from either the Virginia Department of Alcoholic Beverage Control ("VA ABC") or the Alcohol and Tobacco Tax and Trade Bureau ("TTB") to allow legal production or sale of wine. Accordingly, neither Opposer is able to allege a reasonable belief that Philip Carter's mark will damage their interests.

Argument

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. *See Adv. Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 U.S.P.Q.2d 1038, 1041 (Fed. Cir. 1993). Under Rule 12(b)(6), dismissal is appropriate if a complaint fails to "state a claim upon which relief can be granted". *See* Fed. R. Civ. P. 12(b)(6). Therefore, dismissal is appropriate where Opposers' claims do not contain all facts necessary to show entitlement to relief.

Rule 8 of the Federal Rules of Civil Procedure requires that a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Without requiring at least facial plausibility, "claim[s] would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.* at 561. Such a minimal pleading standard would render meaningless a court's "power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* at 558 (quoting *Assoc. Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983)).

To withstand a motion to dismiss for failure to state a claim upon which relief can be granted, Opposers must allege such facts that would, if proven, establish that they

have standing to maintain the proceeding. *Young v. AGB Corp.*, 152 F.3d 1377, 47 U.S.P.Q.2d 1752, 1754 (Fed. Cir. 1998). Here, neither Opposer can satisfy the standing requirement.

Neither Opposer has standing to maintain the notice of opposition because neither Opposer's interest in doing so is reasonable. Proper standing requires that an Opposer's belief that it will be (or is being) damaged by the registration is reasonable and reflects a real interest in the case. *Ritcher v. Simpson*, 170 F.3d 1092, 50 U.S.P.Q.2d 1023 (Fed. Cir. 1999); *see also Jewelers Vigilance Comm. Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 U.S.P.Q.2d 2021 (Fed. Cir. 1987); *and Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 U.S.P.Q. 185 (C.C.P.A. 1982). In other words, the Opposer must have a personal interest in the outcome of the proceeding and must have a reasonable basis for a belief of damage. *See, e.g., Univ. Oil Prod. Co. v. Rexall Drug & Chem. Co.*, 463 F.2d 1122, 1123, 174 U.S.P.Q. 458, 459 (C.C.P.A. 1972).

Here, there is nothing to indicate that Upper Shirley has a reasonable belief that it is being or will be damaged or that it has a valid interest in opposing Philip Carter's registration. Upper Shirley has not alleged and cannot allege ownership of any Shirley Plantation mark or any similar mark in any class of goods. Further, Upper Shirley has not alleged and cannot allege that they have ever produced wine, nor can they allege that they hold the necessary licenses to legally produce or sell any goods within Class 033. Upper Shirley has merely alleged that in the future they plan to produce wine under an entirely different name and that, subsequent to Philip Carter's application, they have filed an intent to use application for a different mark. Under the facts as pled, it is impossible

to imagine any manner in which Upper Shirley could reasonably believe Philip Carter's mark could damage them.

Further, Shirley has not alleged anything that would constitute a reasonable belief that they will be damaged by Philip Carter's registration. Shirley has registered the Shirley Plantation mark in two classes, Class 035 for Retail Gift Shop Services, and Class 041 for Museum Services including guided and unguided historical tours on site. Shirley has not alleged that they are currently in the business of producing or selling wine or that they hold the necessary licenses to legally do either. Shirley has merely alleged that the Plantation itself produced wine over three centuries ago. In fact, Shirley goes into great detail listing all of the agricultural and other business activities they have currently and plan to engage in. Not one of these activities is related to the production of wine. Shirley seeks to expand its trademark protections into other classes of goods for which it has no basis for registration, but a trademark owner's protection is limited to use in the classes for which it has registered. *Mishawaka Rubber & Woolen Mfg. Co. v. SS Kresge Co.*, 119 F.2d 316, 325, 49 U.S.P.Q. 419 (6th Cir., 1941). As Shirley does nothing and plans to do nothing related to the production of wine, it is not reasonable to claim that the registration of the Shirley Plantation mark for wine would bring harm to Shirley.

It is clear that neither Upper Shirley nor Shirley has a reasonable belief that Philip Carter's mark will cause them harm. Shirley has not pled that it has ever produced wine or that it intends to produce wine. Upper Shirley has not pled that it owns any similar marks to Philip Carter's nor has it pled that it produced wine at the time of Philip Carter's application. As such, neither plaintiff has standing to file this Notice and as such, the Notice must be dismissed.

Conclusion

We respectfully request that the Board dismiss the Opposers' Notice of Opposition against Philip Carter with prejudice, with no further opportunity to amend, because Opposers lack standing and have therefore failed to state a claim upon which relief can be granted as required pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

Philip Carter Winery
By Counsel

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CERTIFCATE OF ELECTRONIC TRANSMISSION

The undersigned hereby certifies that on this 4th day of April 2014, the foregoing *Motion to Dismiss* was deposited with the United States Patent and Trademark Office, Trademark Trial and Appeal Board via electronic filing through their website at http:/estta.uspto.gov/.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of April 2014, the foregoing *Motion to Dismiss* was served upon Opposers by delivering a true and correct copy of same to counsel for Opposers via first class mail, return receipt requested, as follows:

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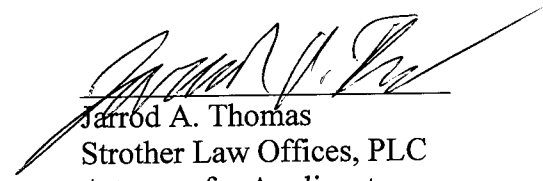

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