

This Opinion is not a
Precedent of the TTAB

Mailed: August 16, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Bibiji Inderjit Kaur Puri
v.
Olé Mexican Foods, Inc.

—
Opposition No. 91218292
—

Michael A. Long, The Soni Law Firm,
for Bibiji Inderjit Kaur Puri.

Paul S. Owens, Paul Owens & Associates,
for Olé Mexican Foods, Inc.

—
Before Kuczma, Goodman and English,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Olé Mexican Foods, Inc. (“Applicant”) filed applications to register the marks YOGULÉ (standard characters) and YOGOLÉ (standard characters) both for “Yogurt-based beverages” in International Class 29.¹

¹ Both applications, Serial Nos. 86200208 and 86200152, were filed on February 21, 2014 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on a bona fide intention to use the mark in commerce.

Bibiji Inderjit Kaur Puri (“Opposer”), an individual, has opposed registration of Applicant’s marks on the grounds of likelihood of confusion, 15 U.S.C. § 1052(d), and dilution, 15 U.S.C. §1125(c).² Opposer pleads ownership of Registration No. 1980514 and alleges ownership and use of the “YOGI mark.”³ Opposer alleges that her interests in the “YOGI mark” include “the market for food and beverages” and that “Opposer by and through its [sic] licensees continues to use and expand uses of Opposer’s mark in the U.S. ... [T]he mark is now also used in connection with Bath and Beauty products and spices.”⁴ Opposer did not attach a status and title copy of her pleaded registration to her first amended notice of opposition.

² 13 TTABVUE. The original notice of opposition was dismissed after Applicant’s motion to dismiss was granted as conceded. 5 TTABVUE. Opposer filed a motion to set aside judgment which the Board granted, and later filed the first amended notice of opposition. 7 TTABVUE; 12 TTABVUE; 13 TTABVUE.

³ First Amended Notice of Opposition, ¶ 1, 13 TTABVUE. Opposer also alleged ownership of Registration No. 3435101. In denying summary judgment, the Board noted the cancellation of Registration No. 3435101 and stated “this cancelled registration no longer provides a basis for Opposer’s claims.” 23 TTABVUE 2. In her brief, Opposer states that Registration No. 3435101 has been “abandoned,” and she acknowledges in her reply brief that the registration is cancelled. 43 TTABVUE 3; 46 TTABVUE 4.

⁴ ¶¶ 5, 13, First Amended Notice of Opposition, 13 TTABVUE 3. In the order denying Applicant’s motion for summary judgment, the Board construed the amended notice of opposition as providing fair notice of Opposer’s claim of ownership of Registration No. 1980514 and use of the YOGI mark in connection with “food and beverages” and “bath and beauty products and spices.” 23 TTABVUE 4. Opposer asserts a family of marks in her brief, but a family of marks has not been pleaded. 43 TTABVUE 4. Therefore, whether Opposer owns a family of marks will not be considered. *Wise F&I, LLC v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1107 (TTAB 2016) (“A plaintiff must plead ownership of a family of marks in its complaint in order to rely on the marks as a family as a basis for sustaining the opposition at trial...”).

In its answer, Applicant admitted paragraphs 2 and 3 of the first amended notice of opposition related to the filing of its two involved applications.⁵ Applicant denied or effectively denied all other allegations.⁶

Opposer and Applicant filed trial briefs, and Opposer filed a reply brief.⁷

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b)(1), the file of the involved applications.

Opposer submitted the following testimony and evidence:

1) plain copies of registrations for YOGI and YOGI composite marks: YOGI TEA⁸, YOGI BOTANICALS and design⁹, YOGIBOTANICALS¹⁰, LITTLE YOGIS¹¹, YOGI¹² and YOGI NUT¹³ (Exhibits A-D, AA, and one unmarked exhibit);

⁵ Answer ¶¶ 2, 3, 14 TTABVUE.

⁶ *Id.* at ¶¶ 1, 4-18. Applicant listed affirmative defenses in ¶¶ 19-24 of the Answer, 14 TTABVUE. Paragraph 19 alleges the defense of “failure to state a claim.” This defense was not pursued at trial and is deemed waived. *See Alcatraz Media Inc. v. Chesapeake Marine Tours Inc.*, 107 USPQ2d 1750, 1753 n.6 (TTAB 2013), *aff’d mem.*, 565 F. App’x 900 (Fed. Cir. 2014). Paragraph 20 is not a true affirmative defense but an amplification of the denial of likelihood of confusion. Paragraphs 21-22 allege abandonment and non-ownership of the “Yogi mark.” These defenses were not pursued at trial and are deemed waived. Paragraph 23 alleges that Opposer is not the owner of the pleaded registration, which is an improper collateral attack on the registration as no counterclaim was filed. Paragraph 24 alleges that Opposer’s pleaded Registration No. 3435101 was cancelled on January 2, 2015 for failure to file a Section 8 affidavit of use. *See* n.3.

⁷ Opposer filed a motion to reopen her time to file her trial brief 57 days before the brief was due. 41 TTABVUE. Before the motion was considered, Opposer filed her brief. 43 TTABVUE. The brief was two days late, but the Board exercised its discretion and accepted the brief. 44 TTABVUE.

⁸ Exhibit A, Registration No. 1980514, 38 TTABVUE 11.

⁹ Exhibit B, Registration No. 3595461, 38 TTABVUE 12.

¹⁰ Exhibit C, Registration No. 3595462, 38 TTABVUE 13.

¹¹ Exhibit D, Registration No. 4412548, 38 TTABVUE 14.

¹² Exhibit AA, Registration No. 3607292, 38 TTABVUE 262.

¹³ Unmarked exhibit, Registration No. 4961890, 38 TTABVUE 21.

- 2) portions of four trademark application files, two filed by Golden Temple of Oregon LLC for YOGI¹⁴; one filed by Inderjit Kaur Puri for YOGI¹⁵, and one filed by Inderjit K. Puri¹⁶ for YOGI¹⁷ (Exhibits E, G-I) ¹⁸;
- 3) webpage printouts from Amazon.com for Yogi Bath and Beauty products (Exhibits J-M)¹⁹;
- 4) webpage printout for Yogi Bath and Beauty products (Exhibit N)²⁰;
- 5) webpage printouts from yogibathandbeauty.com website (Exhibits O-P, R-X);²¹
- 6) Twitter page for Yogi Beauty (Exhibit Q)²²;
- 7) website article, Dunn, Kelly Krishna, *An Interview With Vinie Kaur: Founder Of Yogi Bath & Beauty*, sfyogamagazine.com (Exhibit Y)²³; and
- 8) Copies of certain filings in Opposition Nos. 91233346, 91218386, 91218092, 91217832, 91216675, 91215650, 91216677, and orders showing disposition in plaintiff's favor (Exhibit Z)²⁴;
- 9) Declaration of Michael A. Long, ("Long declaration"), counsel for Opposer dated February 27, 2019.²⁵

¹⁴ Exhibit E, Serial No. 77636305, filed December 18, 2008 and Exhibit G, Serial No. 77889992, filed December 9, 2009. 38 TTABVUE 15-20, 22-24.

¹⁵ Exhibit H, Serial No. 85920241, filed May 1, 2013.

¹⁶ Exhibit I, Serial No. 86137651, filed December 6, 2013.

¹⁷ As Applicant has pointed out, the lettered exhibits for these applications do not correlate to the references by exhibit letter in the notice of reliance. 38 TTABVUE 3-4, 15-38. We refer to the exhibits as actually lettered. There is no marked Exhibit F.

¹⁸ The complete file histories have not been provided nor has the current status and title of the applications been provided.

¹⁹ 38 TTABVUE 39-51.

²⁰ This exhibit has no URL or date. 38 TTABVUE 52.

²¹ 38 TTABVUE 53-54, 57-63.

²² 38 TTABVUE 55-56.

²³ 38 TTABVUE 64.

²⁴ 38 TTABVUE 71-261. Six of the proceedings identify Inderjit K. Puri as plaintiff and one proceeding identifies Bibiji Inderjit K. Puri as plaintiff.

²⁵ Filed with the Opposer's brief on the case. 43 TTABVUE 21-22.

Applicant submitted the following evidence:

- 1) First notice of reliance on dictionary definitions;²⁶ and
- 2) Second notice of reliance on third-party registrations.²⁷

II. Evidentiary Objections

Opposer lodged objections to Applicant's evidence in her reply brief. Objections raised for the first time in a reply brief are untimely because they effectively foreclose the adverse party from responding to the objections. *Grote Indus., Inc. v. Truck-Lite Co., LLC*, 126 USPQ2d 1197, 1199 (TTAB 2018) (citations omitted). Therefore, we deem Opposer's objections to Applicant's evidence waived.

Applicant has lodged objections to all of Opposer's testimony and evidence. Because of the number and nature of the evidentiary objections, a discussion of the proffered evidence is necessary.

A. Timeliness of Opposer's Notice of Reliance

Applicant has objected to Opposer's notice of reliance as untimely filed. Opposer argues that she "substantially complied" with the Trademark Rules by filing combined pretrial disclosures and a notice of reliance, and that Applicant had the benefit of having her evidence for a longer period.

As last reset, Opposer's 30-day testimony period was set to close on September 14, 2018.²⁸ The start of Opposer's testimony period was August 15, 2018 but on August

²⁶ 39 TTABVUE 2-28.

²⁷ 40 TTABVUE 2-36.

²⁸ 37 TTABVUE.

1, 2018, Opposer filed combined pretrial disclosures and a notice of reliance.²⁹ Opposer's notice of reliance was untimely as it was filed prior to the start of her testimony period.

However, an alleged procedural defect in a notice of reliance must be raised promptly, preferably by a motion to strike, to allow the offending party a chance to cure the defect. See TRADEMARK BOARD MANUAL OF PROCEDURE ("TBMP") § 707.02(b) (2019) and authorities cited in that section. The timeliness of Opposer's notice of reliance is a procedural issue. *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1264 (TTAB 2003). Because Opposer would have been able to cure her premature filing of the notice of reliance, we find that Applicant waived its objection by failing to raise it promptly. *Id.* Therefore, we do not exclude the notice of reliance on this basis.

Applicant also has objected to Exhibits E-I on the basis that Opposer has not identified their relevance. However, this too is a procedural objection that has been waived, and we do not exclude these exhibits on this basis. *See, e.g., Corporacion Habanos SA v. Guantanamera Cigars Co.*, 102 USPQ2d 1085, 1093 (TTAB 2012).

B. Opposer's counsel's declaration

Applicant has objected to the Long declaration as untimely, as it was not filed during Opposer's testimony period but attached to Opposer's brief.

Evidence submitted outside of the trial periods—including evidence attached to briefs—is untimely, and will not be considered. *See* TBMP § 704.05(b); *Life Zone Inc.*

²⁹ 38 TTABVUE. Opposer's pretrial disclosures were due on July 31, 2018. 37 TTABVUE.

v. Middleman Grp., Inc., 87 USPQ2d 1953, 1955 (TTAB 2008). Therefore, we give no consideration to the Long declaration.

C. Exhibit Attached to Reply Brief

Opposer has sought to correct the record by submitting with her reply brief what she states is an “inadvertently omitted” exhibit, marked as “Exhibit F,” a portion of application Serial No. 86137651. To the extent that Opposer seeks to submit evidence into the record after her trial period, this evidence is untimely and will not be considered. But in any event, this exhibit was already submitted with Opposer’s combined notice of reliance and marked as Exhibit I.

D. Plain copies of Registrations, Exhibits A-D, AA, and an unmarked exhibit

Opposer submitted photocopies of six registration certificates, stating in the notice of reliance that her ownership interest is either as an owner, or 50% co-owner, or that the registration is being held for her benefit, an acknowledgement that some of these registrations do not list Opposer as owner.³⁰ Opposer did not submit any testimony or other evidence to support these statements.³¹ Applicant has objected to four of the

³⁰ 38 TTABVUE 11-14, 21, 262. The notice of reliance also includes a plain copy of a registration for YOGI NUT owned by Yogi Botanicals International Corporation, unmarked as an exhibit. The notice of reliance mentions YOGI NUT as being submitted as an application file, Serial No. 77784202, and marked as Exhibit E (38 TTABVUE 3), but no portion of the application file was submitted as Exhibit E. *See* n.14. Although Applicant did not lodge a specific objection, we consider that Applicant made a general objection to this unmarked exhibit. In its brief, Applicant states that it “objects to each and every item of evidence attached to Opposer’s Notice of Reliance.”⁴⁵ TTABVUE 10.

³¹ In her reply brief, Opposer included a hyperlink to the Office’s electronic database regarding one of these registrations, which as discussed later, does not make the registration of record.

six registrations (B-D and AA) as unpleaded, as well as failing to show status and title, pointing out that Exhibits C and AA do not list ownership in Opposer.³² Applicant also points out that Exhibit A, the plain copy of the sole pleaded registration, Registration No. 1980514, is not a status and title copy and does not list Opposer as the owner.³³

We agree with Applicant that the registrations shown in Exhibits B-D, and AA submitted under notice of reliance are unpleaded, and as plain copies, do not show status and title. We also find the plain copy of the unmarked exhibit, the registration for YOGI NUT, unpleaded and lacking status and title information. Accordingly, Opposer cannot rely on these registrations as a basis for standing or priority in this case. *See FUJIFILM SonoSite, Inc. v. Sonoscape Co., Ltd.*, 111 USPQ2d 1234, 1235-36 (TTAB 2014); *see also Wet Seal Inc. v. FD Mgmt. Inc.*, 82 USPQ2d 1629, 1634 (TTAB 2007) (“Because applicant was not otherwise given fair notice of opposer’s reliance on this registration, and moreover applicant has objected to this evidence in its brief, we have given no consideration to this unpleaded registration.”).

As to Opposer’s pleaded registration, there is no testimony or other evidence that establishes Opposer’s interest in this registration. To make a party’s pleaded registration of record under a notice of reliance, the party must submit a copy prepared by the USPTO showing current status and title information of the

³² Applicant’s objection to the introduction of evidence related to Opposer’s unpleaded registrations obviates the need to determine whether the issue has been tried by implied consent. *Long John Silver’s Inc. v. Lou Scharf Inc.*, 213 USPQ 263, 266 n.6 (TTAB 1982).

³³ 38 TTABVUE 11.

registration or a printout from the electronic database records of the USPTO showing the current status and title of the registration.³⁴ See Trademark Rule 2.122(d)(2), 37 C.F.R. § 2.122(d)(2), and TBMP § 704.03(b)(1)(A) (“The registration copies ‘prepared and issued by the United States Patent and Trademark Office showing both the current status of and current title to the registration,’ as contemplated by 37 C.F.R. § 2.122(d), are printed copies of the registration on which the Office has entered the information it has in its records, at the time it prepares and issues the status and title copies, about the current status and title of the registration.”). Opposer’s submitted photocopy of her pleaded registration is not a copy “prepared and issued by the Office showing both the current status of and current title to the registration,” Trademark Rule 2.122(d)(2), and there is no submitted testimony as to the registration’s title or its validity. In her reply brief, Opposer has provided a website link to the USPTO’s Trademark Status and Document Retrieval database (TSDR) for her pleaded registration and a separate website link to the Trademark Assignment Recordation Branch database for purposes of showing that Opposer is “the record owner.”³⁵ Opposer argues that the “foregoing links constitute Internet materials consistent with subsection (e)(2) of Trademark Rule 2.122 [37 CFR 2.122] and are

³⁴ If the USPTO’s electronic database records do not reflect the current owner of the registration, a copy of information from the Trademark Assignment Recordation Branch database demonstrating an assignment to the current owner of the registration also should be submitted. TBMP § 704.03(b)(1)(A).

³⁵ 46 TTABVUE 9.

official records of the United States Patent & Trademark Office easily capable of verification as to its accuracy and not reasonably in dispute.”³⁶

Although Opposer argues in her reply brief that the Board cannot “ignore [Office] records in assessing priority of Applicant’s marks relative to other registrations, ... as well as pending applications,” and that she need not bring to our attention “records that are manifestly before the Board,” the Board does not take judicial notice of registrations that reside in the Office.³⁷ *Corporate Fitness Programs Inc. v. Weider Health and Fitness Inc.*, 2 USPQ2d 1682, 1684 (TTAB 1987). As to the hyperlinks to TSDR and the Trademark Assignment Recordation Branch database, aside from the fact that this is an untimely attempt to submit evidence into the record after trial, a hyperlink to the TSDR database and the Trademark Assignment Recordation Branch database is insufficient to make this information of record. *See TV Azteca, S.A.B. de C.V. v. Martin*, 128 USPQ2d 1786, 1790 n.14 (TTAB 2018) (providing an Internet link to an article is insufficient to make the article of record; “[t]he Board does not accept Internet links as a substitute for submission of a copy of the resulting page.”). Therefore we do not consider Opposer’s pleaded registration to be of record.³⁸

³⁶ 46 TTABVUE 8.

³⁷ 46 TTABVUE 9.

³⁸ We note that it is not necessary for an opposer to be the registrant or exclusive owner of the mark on which it relies to have standing to contest the issuance of a registration to an applicant. An opposer only need show that it “would probably be damaged by the registration.” *James, Pond and Clark, Inc. v. R. H. Baker and Co.* 128 USPQ 262, 264 (TTAB 1961) (citing *Bellbrook Dairies, Inc. v. Hawthorn-Mellody Farms Dairy, Inc.*, 117 USPQ 213 (CCPA, 1958) and *Wilson v. Delaunay*, 114 USPQ 339 (CCPA, 1957)).

On the other hand, if Opposer is not the sole owner of the mark, the registration would not form a basis for priority as title would not reside solely in Opposer. *See* TBMP § 704.03(b)(1)(B) (“[T]he § 7(b) presumptions accorded to a registration on the Principal

E. Opposer's unpleaded application files, Exhibits E, G-I

In her notice of reliance, Opposer has submitted portions of four application files for purposes of showing Opposer's ownership in these applications, stating that she is the owner, or that she is the 50% co-owner, or that the application is being held for her benefit.³⁹ Opposer did not submit any testimony or other evidence to support these statements nor did she include information from the USPTO's electronic database records showing current status and title of these applications.

Applicant objects to this evidence on the basis that these application file excerpts are unauthenticated. However, portions of application files are self-authenticating as official records under Trademark Rule 2.122(e)(1) 37 C.F.R. § 2.122(e)(1). *See* TBMP § 704.07 ("The term "official records" as used in 37 C.F.R. § 2.122(e)(1) refers not to a party's company business records, but rather to the records of public offices or agencies, or records kept in the performance of duty by a public officer.")

Register accrue only to the benefit of the owner of the registration, and hence come into play only when the registration is made of record by its owner."); *cf. In re Tong Yang Cement Corp.*, 19 USPQ2d 1689, 1690-91 (TTAB 1991) (application found void on the basis that corporation that filed it never owned the mark; the mark was owned by a joint venture of which corporation was a member); *Maybelline Company v. Matney*, 194 USPQ 438, 440 (TTAB 1977) (Opposer could not rely on a pleaded registration where it failed to prove that pleaded registration was still existing or that the title presently resides in Opposer). As to some of the registrations submitted with the notice of reliance, Opposer has stated that she is not the sole owner, but is 50% co-owner, or that the registrations are being held for her benefit. 38 TTABVUE 2-3.

³⁹ In the notice of reliance, Opposer refers to exhibits E, F, G, H and I as trademark applications but also states that she is providing "a true and correct copy of said registration." 38 TTABVUE 3-4.

Applicant also has lodged objections to this evidence on the basis that these applications are unpleaded, and lack information regarding status and title of each application.⁴⁰

We agree that these applications are unpleaded, and Opposer cannot rely on them as a basis for standing or priority in this case. *Cf. FUJIFILM*, 111 USPQ2d at 1235-36; *Harry Winston, Inc. v. Bruce Winston Gem Corp.*, 111 USPQ2d 1419, 1424 n.14 (TTAB 2014) (opposer may not rely on registrations that were unpleaded; the underlying applications were unpleaded in the notice of opposition, and opposer did not assert that the pleadings should be amended). Accordingly, we have not considered these application records.⁴¹

F. Printouts of Internet webpages, Exhibit J-Y

Opposer identifies the relevance of Exhibits J-Y, as “printouts of various webpages that show ‘bona fide use’ and, in some cases, offers of sale of the Yogi mark in association ‘with the applied-for goods by and through [Opposer’s] licensee.’”⁴²

⁴⁰ See n.32.

⁴¹ We note that even if these applications had been pleaded and later tried, this evidence is flawed. There is no testimony or other evidence showing current status and title of the applications. *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1039-40 (TTAB 2018) (Opposer had to file a copy of its pleaded pending application showing the current status and title under its notice of reliance during its assigned testimony period in order for Opposer’s pleaded pending application to be received in evidence and made part of the record). In her reply brief, Opposer included links to the TSDR database for the trademark applications marked as Exhibits E, G, and H for purposes of showing that Opposer is “the record owner.” 46 TTABVUE 10-11. However, as already indicated, aside from being untimely, the hyperlinks incorporated into the reply brief do not make the status and title of these applications of record.

⁴² 38 TTABVUE 4.

Applicant has objected to these exhibits on the basis of hearsay, arguing that they are “inadmissible to show use of the Yogi mark.”⁴³

No witness testimony has been offered regarding these exhibits, and their contents are hearsay to the extent that they are offered to prove the truth of the matters asserted therein. *See 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). Thus, these website printouts are admissible only for what they show on their face, i.e. that the information was available to the public at the time they were accessed on the webpage but not as evidence of the truth of the statements on the webpage.

Applicant also has objected to these exhibits saying that even on their face they do not show any connection to Opposer at all, and that Opposer has not submitted any admissible evidence about use of the YOGI mark by licensees. However, these objections go to weight, not admissibility.

We have accorded Exhibits J-M and O-Y whatever probative value they merit. In view of Applicant’s general objection to admissibility of all of the evidence submitted under Opposer’s notice of reliance, we have excluded Exhibit N, which is unauthenticated, lacking both a URL and date. *Calypso Technology Inc. v. Calypso Capital Management LP*, 100 USPQ2d 1213, 1218 (TTAB 2011) (Internet printouts not considered due to either lack of publication date or lack of URL).

⁴³ 45 TTABVUE 13-14.

G. Copies of decisions in prior oppositions involving Opposer and third parties, Exhibit Z

Opposer provides the relevance of Exhibit Z as “Bibiji by and through her counsel of record successfully obtained the Board’s decision sustaining numerous oppositions affecting her interest as an owner of the Yogi marks”⁴⁴ and states in her brief that this exhibit relates to her “program of enforcement to protect her rights.”⁴⁵

Applicant objects to Exhibit Z “in its entirety on the ground that it is entirely inadmissible to prove any point at issue in this Opposition,” and irrelevant as those oppositions involved different marks and different parties.⁴⁶ Applicant submits “there is no admissible evidence at Exhibit Z that Opposer is the ‘owner’ of the ‘Yogi marks,’” also noting that the oppositions were decided by default or abandonment of the application by the defendants in those proceedings.⁴⁷

These filings are official records of the Office under Trademark Rule 2.122(e)(1), and are admissible. Applicant’s other objections go to the weight of this evidence. But we find these exhibits are relevant to show Opposer’s efforts to police her mark, and we have considered these exhibits for whatever probative value they may have.

H. Evidentiary Material from Summary Judgment

Applicant has objected to Opposer’s references in her trial brief to evidentiary material submitted by Applicant on summary judgment (at 19 TTABVUE). The

⁴⁴ 38 TTABVUE 7.

⁴⁵ 43 TTABVUE 14.

⁴⁶ 45 TTABVUE 14.

⁴⁷ 45 TTABVUE 14-15.

objection is sustained. The parties have not stipulated to consideration of this evidence at trial, and this evidence was not submitted during Opposer's trial period. Therefore, we do not consider it. *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1464 n.2 (TTAB 1993).

I. Allegations in First Amended Notice of Opposition

Although Applicant denied or effectively denied the allegations in the first amended notice of opposition, Opposer argues that "Applicant's prior motion for summary judgment failed to dispute or deny the following facts alleged by Opposer [in her amended notice of opposition] and therefore the following facts remain unrefuted."⁴⁸

Applicant has objected to these references in Opposer's trial brief because allegations made in the first amended notice of opposition have not been established by competent evidence.

The objection is sustained. Statements made in pleadings cannot be considered as evidence on behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony. TBMP § 704.06(a). *See Times Mirror Magazines, Inc. v. Sutcliffe*, 205 USPQ 656, 662 (TTAB 1979). Applicant has not admitted these allegations, and because no evidence has been offered in support of the allegations, "this record must be deemed to be silent on this subject."
Id.

⁴⁸ 46 TTABVUE 24.

J. Conclusion as to Opposer's Submitted or Referenced Evidence

In view of the foregoing, we only consider Exhibits J-M, O-Y (website printouts regarding Yogi Bath and Beauty products, article relating to Yogi Bath and Beauty, and Twitter page for Yogi Beauty), and Exhibit Z (official records of opposition proceedings involving Opposer and third parties) submitted with Opposer's notice of reliance to be of record.

There is an absence of record evidence concerning Opposer's use of the "YOGI mark," and Opposer's pleaded Registration No. 1980514 is not of record. The Internet evidence does not establish Opposer's use of the "YOGI mark" in connection with bath and beauty products because there is no testimony or other evidence showing that this use inures to Opposer's benefit.

As to the seven prior Board decisions with Opposer as party plaintiff, Opposer submits that the "repeated adjudications" in these decisions "confirm[] ... her standing in each of the referenced oppositions" and constitutes res judicata and collateral estoppel as to her standing in this Board proceeding.⁴⁹ However, Applicant was not a party to any of these oppositions, and Opposer may not rely on them for any claim preclusive or issue preclusive effect in this case. Contrary to Opposer's statement in the notice of reliance, these decisions submitted by notice of reliance cannot stand as evidence of Opposer's ownership of her pleaded registration or her use of any "YOGI mark" and may not be relied upon as proof of any facts established by those records for purposes of standing.

⁴⁹ 43 TTABVUE 6; 46 TTABVE 9.

III. Opposer's Burden

To prevail in this opposition proceeding, Opposer must establish (1) her standing to oppose and (2) at least one statutory ground of opposition to registration of Applicant's mark. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Saul Zaentz Co. v. Bumb*, 95 USPQ2d 1723, 1726 (TTAB 2010). Opposer bears her burden of proof by a preponderance of the evidence.

IV. Standing

Standing is a threshold issue that must be proven by the plaintiff in every inter partes case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). A plaintiff must demonstrate that he or she possesses a "real interest" in a proceeding beyond that of a mere intermeddler, and "a reasonable basis for his [or her] belief of damage." *See Empresa Cubana del Tabaco*, 111 USPQ2d at 1062 (citing *Ritchie v. Simpson*, 170 F.3d 1902, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999)). A "real interest" is a "direct and personal stake" in the outcome of the proceeding. *Ritchie*, 50 USPQ2d at 1026.

In this case, Opposer has not introduced any admissible evidence regarding her ownership of a registration for the "YOGI mark" nor her alleged use of the "YOGI mark." As such, Opposer has failed to introduce sufficient evidence of her standing to bring this proceeding. Additionally, as noted above, Applicant has denied or effectively denied all of the salient allegations of the notice of opposition in its answer, and thus, there are no admissions in Applicant's answer regarding Opposer's standing.

Our conclusion that Opposer has failed to establish her standing is a sufficient basis, by itself, to dismiss the proceeding. Nonetheless, for completeness, we will consider whether Opposer has established by a preponderance of the evidence Opposer's allegation of priority in connection with her likelihood of confusion claim and whether she has established by a preponderance of the evidence her dilution claim.

V. Priority

As discussed above, Opposer submitted no acceptable evidence to establish the status and title of her pleaded registration and submitted no testimony or other evidence sufficient to establish her alleged use of the "YOGI mark" in connection with "food and beverages" and "Bath and Beauty products and spices." Additionally, Applicant has not admitted Opposer's priority in its answer. Accordingly, Opposer has failed to establish priority in this case and cannot prevail on her likelihood of confusion claim.

VI. Dilution Claim

As to Opposer's dilution claim, one of the requirements for finding dilution is that the plaintiff's mark must be famous. *See* 15 U.S.C. § 1125(c) of the Trademark Act. Opposer cannot prevail on her dilution claim because the evidence of record (Exhibits J-M, O-Z) is insufficient to prove that the "Yogi mark" is famous for purposes of

dilution or that the mark became famous prior to the filing date of Applicant's applications.⁵⁰

VII. Conclusion

Opposer has failed to establish by a preponderance of the evidence her standing. Opposer also has failed to establish by a preponderance of the evidence her priority in connection with her likelihood of confusion claim and to prove by a preponderance of the evidence her dilution claim.

Decision: The opposition is dismissed.

⁵⁰ Opposer relies on unproven allegations in her first amended notice of opposition, all of the evidence in the notice of reliance, some of which has been excluded as discussed, and the excluded Long declaration. Applicant has not admitted in its answer that the "Yogi mark" is famous.