

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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General Contact Number: 571-272-8500

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Mailed: September 29, 2015

Opposition No. 91220585 (Parent Case)
Opposition No. 91220640

Union Craft Brewing Company, LLC
dba Union Craft Brewing Company

v.

Tower Brew Co., LLC
dba Sactown Union Brewery

By the Board:

CONSOLIDATION

The Board notes the motion to consolidate filed on July 3, 2015. Upon review of the above-captioned proceedings, the Board finds that they involve the same parties, and involve the same or similar issues of law and fact. Consequently, consolidation is appropriate. *See* Fed. R. Civ. P. 42(a); *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154 (TTAB 1991); and *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382 (TTAB 1991). The motion to consolidate is granted.

Accordingly, Opposition Nos. 91220585 and 91220640 are hereby consolidated and may be presented on the same record and briefs. The Board file will be maintained in Opposition No. 91220585 as the “parent case.” Only a single copy of all future filings shall be filed in the parent case Opposition No. 91220585,

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and each motion or paper shall caption both consolidated proceedings, identifying parent case Opposition No. 91220585 first (see the caption above).

Consolidated cases do not lose their separate identity because of consolidation. Each proceeding retains its separate character and requires the filing of separate pleadings and entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings. A copy of the decision shall be entered into in each proceeding file.

The parties should promptly inform the Board of any other Board proceedings or related cases within the meaning of Fed. R. Civ. P. 42, so that the Board can consider whether further consolidation is appropriate.

OPPOSITION NO. 91220585 – MOTION TO DISMISS COUNTERCLAIM

Opposition No. 91220585 involves Application Serial No. 86358183, filed by Tower Brew Co., LLC (“Tower”) on August 5, 2014, based on Trademark Act Section 1(b), to register the mark SACTOWN UNION BREWERY and design shown below (SACTOWN and BREWERY disclaimed), for “beer” in International Class 32.



In a notice of opposition filed by Union Craft Brewing Company, LLC, dba Union Craft Brewing Company (“Union”), Union opposes registration on the ground of priority and likelihood of confusion pursuant to Trademark Act Section 2(d). Union,

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and pleads ownership of Registration No. 4410239, registered on October 1, 2013 for the mark UNION CRAFT BREWING (standard characters; CRAFT BREWING disclaimed), for “beers” in International Class 32.

Tower filed an answer to the notice of opposition, as well as a counterclaim to cancel Union’s pleaded Registration No. 4410239.

In lieu of filing an answer to the counterclaim, Union filed a motion to dismiss it for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6). Opposition No. 91220585 is now before the Board for consideration of Union’s motion to dismiss the counterclaim. The motion is fully briefed.

Analysis

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 the allegations set forth in a pleading. To survive a motion to dismiss under Fed. R. Civ. P 12(b)(6), a plaintiff need only allege sufficient factual content that, if proved, would establish that 1) the plaintiff has standing to maintain the proceeding¹, and 2) a valid ground exists for opposing or cancelling the mark. *See Doyle v. Al Johnson’s Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012), *citing Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998). *See also* TBMP § 503.02 (2015). Specifically, a complaint “must contain sufficient factual matter, accepted as true,

¹ Tower’s standing with respect to the counterclaim is inherent in his position as defendant in the opposition proceeding. *See* TBMP §§ 309.03(b) and 313.03 (2015), and cases cited therein.

to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In particular, the claimant must allege well-pleaded factual matter and more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” to state a claim plausible on its face. *Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555).

The Board has thoroughly reviewed the record, but for efficiency does not restate each of the parties’ arguments.

In its counterclaim pleading, Tower alleges, in pertinent part, the following:

On information and belief, Opposer had not made use of the mark UNION CRAFT BREWING in commerce as of the January 9, 2013 filing date for the Application Serial No. 85819370 based on the lack of a U.S. Treasury Tax and Trade Bureau (TTB) certificate label approval which is required when shipping alcohol across state lines.

Accordingly, the registration is void for nonuse and must be cancelled.

The counterclaim, and in particular the allegations set forth above, are lacking in precision and clarity. As the Board construes these allegations, Tower alleges that Union did not use its registered mark in commerce as of the filing date of the underlying application filing date, and in setting forth the factual basis for this assertion it references a regulation “which is required when shipping alcohol across state lines.” However, inasmuch as, and to the extent that, Tower predicates its allegation of such nonuse on lack of compliance with a regulation, it does not definitively and unambiguously define the specific regulation(s) and provision(s) with which it alleges that Union did not comply or was not in compliance. The

counterclaim pleading contains minimal factual elements, and such elements furthermore are intertwined to the point that the allegations lack clarity as to their factual basis. These deficiencies render the counterclaim unclear and indefinite. More to the point, Tower's allegations fail to place Union on fair and sufficient notice of the factual basis for seeking cancellation of the pleaded registration, such as facts pertaining to a court's determination of unlawful use by Union. *See* TBMP § 309.03(a)(2) (2015). *See also Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538(TTAB 2007) (elements of each claim should be stated concisely and directly, and include enough detail to give the defendant fair notice).

In adjudicating a motion to dismiss, the Board's determination is based on whether the counterclaim pleading itself is sufficient on its face. Nonetheless, to the extent that Tower seeks to provide further information in its brief in defense of the motion, the Board notes for completeness that Tower's arguments therein only serve to proliferate the lack of clarity in the pleading. Specifically, while Tower alleges in the counterclaim that Union had not used its mark in commerce as of the underlying application filing date, it repeatedly states in its brief that it alleges in its counterclaim that Union "did not use the UNION CRAFT BREWING mark on beer in interstate commerce as of the date of first use listed" on the registration (Tower's brief, p. 2), and "did not use the mark in interstate commerce by the date of first use listed within the registration" (Tower's brief, p. 3). Inasmuch as Tower does not allege in the counterclaim a lack of use as of the date of first use asserted

by Union, the explanation it provides in its brief only serves to confuse matters and to underscore the lack of adequate notice provided to Union.

Based on this record, Tower's counterclaim fails to state a claim upon which relief may be granted is granted. *See* Fed. R. Civ. P. 12(b)(6); TBMP § 503 (2015). In view of these findings, Union's motion to dismiss the counterclaim is hereby granted.

Leave to replead

Upon granting a motion to dismiss, the Board may exercise its discretion to allow the plaintiff an opportunity to file an amended pleading, as appropriate. *See* TBMP § 503.03 (2015). Inasmuch as the Board finds it appropriate to do so in this case, Tower is allowed until thirty (30) days from the mailing date of this order to file an amended counterclaim in Opposition No. 91220585 which sufficiently sets forth at least one ground for cancellation of Registration No. 4410239, failing which the counterclaim will be dismissed.

Union is allowed until thirty (30) days from the date of service of the amended counterclaim to file its answer thereto.

Tower shall note that in Board proceedings, Fed. R. Civ. P. 11 (applicable by operation of Trademark Rule 2.116(a)), and U.S. Patent and Trademark Office Rule 11.18, require that all pleadings and papers be made in good faith and with evidentiary support. Specifically, all grounds for relief and allegations in support thereof must have a basis in law or fact, and must not be filed for any improper purpose. *See* Fed. R. Civ. P. 2.116(a); TBMP §§ 318, 502.07 and 527.02 (2015).

Furthermore, the Board is an administrative tribunal whose jurisdiction is limited to determining the right to register a mark. This jurisdiction does not include causes of action to determine the right to use, or questions of infringement, unfair competition or antitrust statute violations. See TBMP § 102.01 (2015).

SCHEDULE

Proceedings are resumed in Opposition No. 91220585, and are resumed in these now consolidated proceedings. Dates are reset as indicated below:²

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|---|--------------------|
| Deadline for Required Discovery Conference | December 30, 2015 |
| Discovery Opens | December 30, 2015 |
| Initial Disclosures Due | January 29, 2016 |
| Expert Disclosures Due | May 28, 2016 |
| Discovery Closes | June 27, 2016 |
| Plaintiff's Pretrial Disclosures | August 11, 2016 |
| 30-day testimony period for plaintiff's testimony to close | September 25, 2016 |
| Defendant/Counterclaim Plaintiff's Pretrial Disclosures | October 10, 2016 |
| 30-day testimony period for defendant and plaintiff in the counterclaim to close | November 24, 2016 |
| Counterclaim Defendant's and Plaintiff's Rebuttal Disclosures Due | December 9, 2016 |
| 30-day testimony period for defendant in the counterclaim and rebuttal testimony for plaintiff to close | January 23, 2017 |
| Counterclaim Plaintiff's Rebuttal Disclosures Due | February 7, 2017 |

² In the event that Tower does not file an amended counterclaim, the Board will issue an order with a revised discovery and trial schedule that does not include dates for a counterclaim.

If the parties file any motion to suspend or extend dates in this proceeding, the motion must set forth an appropriate proposed new schedule.

15-day rebuttal period for plaintiff in the counterclaim
to close March 9, 2017

BRIEFS SHALL BE DUE AS FOLLOWS:

Brief for plaintiff due May 8, 2017

Brief for defendant and plaintiff in the counterclaim
due June 7, 2017

Brief for defendant in the counterclaim and reply brief,
if any, for plaintiff due July 7, 2017

Reply brief, if any, for plaintiff in the counterclaim due July 22, 2017

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 2.125. Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129