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TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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Bukrinsky/mbm

October 9, 2020

Opposition No. 91249915

*Justin Vineyards & Winery LLC*

*v.*

*Fort Myers Brewing Company, LLC*

Before Cataldo, Kuczma, and Larkin,  
Administrative Trademark Judges.

By the Board:

This proceeding now comes up for consideration of Opposer's motion (filed June 2, 2020) for summary judgment. The motion is fully briefed.

## **I. Background**

Applicant seeks to register the standard character mark HOPTUSE in Class 32 for "beer." Applicant's application Serial No. 88310535 was filed on February 21, 2019, based upon its assertion of a bona fide intent-to-use pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

On August 1, 2019, Opposer filed a notice of opposition asserting likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), as the sole ground for opposition. In support of its entitlement to bring a statutory cause of action

and claim, Opposer pleaded ownership of Registration No. 2829699, for the standard character mark OBTUSE registered in Class 33 for “wine.”<sup>1</sup>

On May 7, 2020, Opposer moved for leave to amend its notice of opposition to add a claim that when Applicant filed Application Serial No. 88310535, it had no bona fide intention to use the mark in commerce. 6 TTABVUE. The Board granted Opposer’s motion on May 29, 2020. 9 TTABVUE. In its answer to the amended notice of opposition, Applicant denied the salient allegations therein.<sup>2</sup>

On June 2, 2020, Opposer filed a timely motion for summary judgment on its claim of no bona fide intention to use the applied-for mark. 10 TTABVUE.

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<sup>1</sup> The underlying application for registration was filed on May 30, 2003, and the registration issued on April 6, 2004 pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). Opposer alleges November 1994 as both the date of first use and first use in commerce.

<sup>2</sup> Applicant asserted numerous “affirmative defenses” in its answer to the amended notice of opposition. 7 TTABVUE 14. None of the allegations constitute properly pleaded affirmative defenses. Applicant’s first defense is “nothing more” than a restatement of a denial of Opposer’s likelihood of confusion claim. *See Order of Sons of Italy in Am. v. Profumi Fratelli*, 36 USPQ2d 1221, 1223 (TTAB 1995). Applicant’s second affirmative defense appears to argue that Opposer’s claims are subject to statutory damages caps, which are not relevant to inter partes proceedings, because the Board does not award monetary damages or attorneys’ fees. *See Gen. Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1591 (TTAB 2011). Opposer’s assertions of unclean hands, acquiescence, and estoppel are nothing more than bald, conclusory allegations with no factual support and are therefore insufficient to plead the defenses. *See IdeasOne Inc. v. Nationwide Better Health Inc.*, 89 USPQ2d 1952, 1953 (TTAB 2009). Moreover, the equitable defenses of laches and acquiescence are generally unavailable in opposition proceedings. *See Nat’l Cable Television Ass’n Inc. v. Am. Cinema Editors Inc.*, 937 F.2d 1572, 19 USPQ2d 1424, 1432 (Fed. Cir. 1991). Applicant also attempts to reserve the right to assert additional affirmative defenses, which is improper because it does not provide fair notice to the plaintiff. Finally, Applicant has pleaded that Opposer is not likely to be damaged by registration of Applicant’s mark. To the extent Applicant is asserting that Opposer does not have a reasonable belief of harm, this is not an affirmative defense. Rather, a plaintiff’s entitlement to bring a statutory cause of action is an element of Opposer’s claim that must be affirmatively proved. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982); *Blackhorse v. Pro Football Inc.*, 98 USPQ2d 1633, 1637 (TTAB 2011). Accordingly, each of the affirmative defenses is stricken.

## II. Opposer's Motion for Summary Judgment

Opposer moves for summary judgment on its claim that Applicant had no bona fide intent to use the mark at the time it filed its application. We have considered the parties' briefs and materials submitted in connection with the motion, but address the record only to the extent necessary to set forth our analysis and findings, and do not repeat or address all of the parties' arguments or evidence. *Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015). For purposes of this order, we presume the parties' familiarity with the arguments and materials submitted in connection with the subject motion.

### A. Legal Standard

Summary judgment is an appropriate method of disposing of cases in which there is no genuine dispute with respect to any material fact, thus allowing the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(a). A party moving for summary judgment has the burden of demonstrating the absence of any genuine dispute as to a material fact, and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. *See Opryland USA Inc. v. Great Am. Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

Additionally, the evidence of record must be viewed in the light most favorable to the non-moving party, and all justifiable inferences must be drawn from the undisputed facts in favor of the non-moving party. *See Lloyd's Food Prods. Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA*, 23 USPQ2d at 1472. We may not resolve genuine disputes as to material facts and, based thereon, decide the merits of the proceeding. Rather, we may only ascertain whether any material fact is genuinely disputed. *See Lloyd's Food Prods.*, 25 USPQ2d at 2029; *Olde Tyme Foods*, 22 USPQ2d at 1542; *Meyers v. Brooks Shoe Inc.*, 912 F.2d 1459, 16 USPQ2d 1055, 1056 (Fed. Cir. 1990) (“If there is a real dispute about a material fact or factual inference, summary judgment is inappropriate; the factual dispute should be reserved for trial.”).

## **B. Decision**

In order for Opposer to prevail on its motion, it must establish that there is no genuine dispute of material fact that it is entitled to maintain this opposition proceeding, and that Applicant did not have a bona fide intent to use the mark HOPTUSE on beer as of February 21, 2019, the filing date of the involved application.

### **1. Entitlement to Bring a Statutory Cause of Action<sup>3</sup>**

To establish entitlement to bring a statutory cause of action under Section 13 or 14 of the Trademark Act, a plaintiff must demonstrate a real interest in the

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<sup>3</sup> Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of “standing.” Opposer has done so as well. 10 TTABVUE 8. We now refer to this inquiry as entitlement to bring a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal

proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at \*3 (Fed. Cir. 2020); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

Opposer has submitted a copy of its pleaded Registration No. 2829699 obtained from the USPTO's Trademark Status & Document Retrieval (TSDR) electronic database records showing the current status and title of its pleaded registration. *See* Trademark Rule 2.122(d). In view thereof, we find no genuine dispute of material fact that Opposer is entitled to bring a statutory cause of action. *See Australian Therapeutic Supplies*, 2020 USPQ2d 10837 at \*3; *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

## **2. Lack of a Bona Fide Intent**

To prevail on its claim of lack of bona fide intent to use, Opposer must establish that there is no genuine dispute of material fact that Applicant did not have a bona fide intent to use its mark on the goods identified in the application as of the filing date of the application under Section 1(b) of the Trademark Act. Section 1(b) of the Trademark Act provides:

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Circuit interpreting Sections 13 and 14 remain equally applicable. We further note that, in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061 (2014), the Supreme Court stated that the question of whether a party is entitled to bring a statutory cause of action is determined "using traditional tools of statutory interpretation" and is not properly described as a question of "prudential standing." 109 USPQ2d at 2067.

A person who has a bona fide intention, under circumstances showing the good faith of such person, to use a trademark in commerce may request registration of its trademark on the principal register hereby established by paying the prescribed fee and filing in the Patent and Trademark Office an application and a verified statement, in such form as may be prescribed by the Director.

15 U.S.C. § 1051(b).

Generally, the factual question of intent is unsuited to disposition on summary judgment. *See Copeland's Enters., Inc. v. CNV, Inc.*, 945 F.2d 1563, 20 USPQ2d 1295, 1299 (Fed. Cir. 1991). However, the Board has held that the absence of any documentary evidence regarding an applicant's bona fide intention to use a mark in commerce is sufficient to prove that an applicant lacks such intention, unless other facts are presented that adequately explain or outweigh the applicant's failure to provide such documentary evidence. *See Commodore Elecs. Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503, 1507 (TTAB 1993), *cited in Honda Motor Co., Ltd. v. Friedrich Winkelmann*, 90 USPQ2d 1660, 1662 (TTAB 2009). *See also Bos. Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1586 (TTAB 2008).

Opposer, as the moving party, bears the initial burden of demonstrating that Applicant lacked a bona fide intent to use the mark in commerce on beer, such as by demonstrating the absence of any documentary evidence regarding Applicant's bona fide intent. *Commodore*, 26 USPQ2d at 1507. If Opposer carries this burden, the burden shifts to Applicant to come forward with evidence that explains or outweighs the lack of documentary evidence. *Id.* at 1507 n.11. However, Applicant's "mere statement of subjective intention, without more, would be insufficient to establish applicant's bona fide intention to use the mark in commerce." *Lane Ltd. v. Jackson Int'l. Trading Co.*, 33 USPQ2d 1351, 1355 (TTAB 1994). Ultimately, whether

Applicant has a bona fide intention to use the mark in commerce is an objective determination based on the totality of the circumstances. *See M.Z. Berger & Co. v. Swatch AG*, 787 F.3d 1368, 114 USPQ2d 1892, 1898 (Fed. Cir. 2015); *Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2008 (TTAB 2015). The evidentiary bar for showing bona fide intent to use is not high, but more is required than “a mere subjective belief.” On a motion for summary judgment, the objective evidence must indicate that there is a genuine dispute of material fact regarding whether applicant had an intention to use the mark that is “firm” and “demonstrable.” *See M.Z. Berger*, 114 USPQ2d at 1897–98, *Swiss Grill*, 115 USPQ2d at 2008.

Opposer submitted evidence with its opening brief showing that Applicant has no documents or other objective proof that it had a bona fide intent to use the mark HOPTUSE in commerce as of February 19, 2019, the filing date of the involved application. Applicant’s responses to Opposer’s document requests stated that it has no responsive documents regarding trade or marketing channels, target consumers, production, marketing, or sales plans, advertisements, packaging, or labels for goods bearing the involved mark. 10 TTABVUE 33-37. Applicant’s document production contained no documents bearing the involved mark, other than documents related to the filing of the application. 10 TTABVUE 54-98. Applicant confirmed to Opposer that it had produced all documents demonstrating its intent to use the applied-for mark, and that as of April 2020, it had taken no steps to use the mark other than filing the application. 10 TTABVUE 46, 100. This evidence is sufficient to carry Opposer’s initial burden, thereby shifting the burden to Applicant to demonstrate

the existence of a genuine dispute of material fact as to its intention notwithstanding the absence of documentary evidence. *See Commodore*, 26 USPQ2d at 1507.

With its response to Opposer's motion for summary judgment, Applicant submits the June 30, 2020 declaration of one of its co-owners, Robert Whyte, who states that he "came up with 'Hoptuse' as an idea for the name of an IPA-style beer back in 2016." 12 TTABVUE 21. Mr. Whyte explains that in Applicant's industry "it is common practice to await to assign a name to [types of beer] once they are ready to be offered to the public." *Id.* Mr. Whyte further states that Applicant planned to release a beer under the HOPTUSE mark at Applicant's annual Summerfest on June 29, 2020, but was unable to do so due to Florida's Emergency Order suspending on-premises alcohol sales. *Id.* On June 19, 2020, Applicant served supplemental interrogatory responses on Opposer stating that Applicant planned to release HOPTUSE beer on June 29, 2020 at Summerfest. 12 TTABVUE 10.

Mr. Whyte's statement that Applicant "intend[s] to use this name for one of [Applicant's] upcoming IPA-style offerings" is vague as to **when** Applicant had the claimed intent to use the mark, and provides no reasonable basis to infer that Applicant had a firm intent to use the mark **at the time it filed its application**.<sup>4</sup> *M.Z. Berger*, 114 USPQ2d at 1899 (applicant must have a firm intent to use the mark at the time it filed its application); *Res. in Motion Ltd. v. NBOR Corp.*, 92 USPQ2d

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<sup>4</sup> The fact that Applicant is a brewery and has the capacity to brew beer does not, standing alone, establish its intent to use the HOPTUSE mark in connection with beer. *See M.Z. Berger*, 114 USPQ2d at 1899.



1926 (TTAB 2009) (applicant's CEO's testimony that he believed the applied-for mark to be good for future use did not establish bona fide intent to use).

Nor does Mr. Whyte's declaration explain Applicant's lack of documents showing bona fide intent contemporaneous with the filing of its application. Applicant filed its application on February 19, 2019, and restrictions due to COVID-19 did not arise until over a year later, in the spring of 2020. Applicant does not explain why, prior to the time the COVID-19 restrictions arose, it had taken no steps toward using the mark HOPTUSE for beer and generated no documents demonstrating its intent to use the mark. *See A&H Sportswear Co. v. William W. Yedor*, 2019 USPQ2d 111513, \*6 (TTAB 2019) (statement of intent to use mark, unsupported by evidence of any activities undertaken to actually commence such use, insufficient to stave off summary judgment).

Nor does Applicant introduce any documents that corroborate its intention to commence using the HOPTUSE mark in the spring of 2020. Applicant submitted two previously-unproduced pieces of documentary evidence with its opposition brief: a recipe for "Hoptuse New England IPA" and a screen shot of a digital list of "Reminders" that includes the note "Up to's HOPTUS m Sc E." 12 TTABVUE 12-14. The recipe is undated and Applicant does not state when it was created.<sup>5</sup> *Id.* at 12-13. The digital note, which Mr. Whyte describes as a "note on [his] phone to remind [him] to use the name," is dated October 9, 2016, approximately two and a half years

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<sup>5</sup> Mr. Whyte's declaration makes no reference to the recipe and the document is otherwise not authenticated. 12 TTABVUE 19-23.

before the filing date of Applicant's application. *Id.* at 14. Additionally, the note references the mark HOPTUS rather than HOPTUSE, and is on its face incomprehensible. *Id.* Neither document is contemporaneous with the filing of the application and, accordingly, neither demonstrates a bona fide intent to use the mark **at the time** the application was filed.<sup>6</sup> See *M.Z. Berger*, 114 USPQ2d at 1897–98, *A&H Sportswear*, 2019 USPQ2d 111513, at \*6; *Swiss Grill*, 115 USPQ2d at 2008.

Further, Applicant's responses to Opposer's discovery requests, served on April 20, 2020, do not corroborate its statement that it intended to use the HOPTUSE mark in Spring 2020. In those responses, Applicant stated that it had not made any goods bearing the applied-for mark, and had created no promotional materials, containers, or labels for goods bearing the mark. In response to Opposer's interrogatory asking Applicant to "identify all steps you have taken to use the mark in commerce," Applicant identified only the filing of its trademark application. 10 TTABVUE 46, Interrog. No. 10. These responses are at odds with Applicant's stated intention to use the mark in "Spring 2020." The mere act of filing an intent-to-use application is insufficient to establish an applicant's bona fide intention to use its mark in commerce for the identified goods. *Res. in Motion*, 92 USPQ2d at 1931. If Applicant intended to release a beer under the HOPTUSE mark in the spring or even the summer of 2020, it necessarily would have begun preparations to do so prior to April 20, 2020, for example by brewing the beer, creating promotional materials or signage,

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<sup>6</sup> Applicant does not explain why neither document was produced prior to summary judgment.

and obtaining any necessary regulatory approval for its labels. Its failure to do so belies its stated intention to release a beer under the HOPTUSE mark in either Spring 2020 or on June 29, 2020.<sup>7</sup>

Based on the submissions of the parties, we find that Opposer has satisfied its initial burden of showing the absence of any documentary evidence regarding Applicant's bona fide intention to use the mark, and that Applicant has failed to come forward with evidence that would adequately explain or outweigh its failure to provide such documentary evidence. *See M.Z. Berger*, 108 USPQ2d at 1471.

In view of the foregoing, we find that Opposer has met its burden in establishing its entitlement to a statutory cause of action and that there is no genuine dispute of material fact as to Applicant's lack of bona fide intent to use its mark in commerce for beer as of the filing date of the application. Opposer's motion for summary judgment on its claim of lack of bona fide intent to use is **granted**. Judgment is entered against Applicant, the opposition is sustained, and registration of Applicant's mark HOPTUSE in application Serial No. 88310535 is refused.<sup>8</sup>

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<sup>7</sup> Indeed, Mr. Whyte's declaration states that Applicant planned to release its HOPTUSE beer on June 29, 2020, but a mere **three days prior**, on June 26, 2020, the Florida Department of Business and Professional Regulation issued an emergency order suspending on-premises consumption of alcohol and Applicant "had to postpone" its release of its HOPTUSE beer. 12 TTABVUE 21. Applicant has provided no explanation for its lack of documentary evidence supporting its planned use that was purportedly cancelled three days prior to the release date. Nor does Mr. Whyte provide any details regarding the necessary steps taken for the planned release.

<sup>8</sup> In view of our decision on the ground of lack of bona fide intent-to-use, we need not, and do not, consider Opposer's likelihood of confusion claim.