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

Proceeding	91268316
Party	Defendant BISON PRODUCTS, LLC
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Attachments	2021-04-13_REDBULL_MTD.pdf(526422 bytes)

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

Red Bull GmbH,

Opposer,

v.

Bison Products, LLC,

Applicant.

Opposition No. 91268316

Marks: **BISON**

Serial. Nos.: 90081512,
90081540, 90081580, 90081586

Trademark Trial and Appeal Board
Commissioner for Trademarks
Post Office Box No. 1451
Alexandria VA 22313
Filed via ESTTA

APPLICANT'S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), Applicant respectfully files this brief in support of its Motion to Dismiss Opposer's notice of opposition filed on March 23, 2021. In support of its Motion, Applicant states the following:

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BRIEF BACKGROUND

Opposer seeks to oppose the registration of Applicant's BISON marks on the grounds of alleged likelihood of confusion, dilution by blurring, dilution by tarnishment, and false suggestion of connection based on Opposer's alleged rights in *common law* with respect to its alleged RED BULL word and design marks in connection with "energy drinks, beverages, sports drinks, soft drinks, carbonated beverages, and various other products and services related or complementary thereto." 1 TTABVue 1-4. To be clear, Opposer is not relying on any of its federal trademark registrations with respect to this proceeding. As such, Opposer cannot be afforded the presumption of validity, nor ownership, nor exclusive right to use the cited RED BULL marks in connection with the cited goods in this proceeding. *See* 15 U.S.C. § 1115.

STANDARD OF LAW

In order to withstand a motion to dismiss for failure to state a claim, a plaintiff need only allege such facts as would, if proved, establish that (1) the plaintiff has standing to maintain the proceedings, and (2) a valid ground exists for opposing the mark. *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007). Fed. R. Civ. P. 8(a)(2) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The Rule does not require detailed factual allegations, but requires more than labels, conclusions, formulaic recitations of the elements of a cause of action, and naked assertions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Indeed, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

A. Opposer has failed to sufficiently plead priority with respect to its alleged rights in common law.

Priority is an element of likelihood of confusion. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1047 (TTAB 2014). Since Opposer is not relying on any federal registration in this proceeding, Opposer bears the burden of establishing rights in its cited marks that are prior to that of Applicant's rights. See *Christian Broadcasting Network Inc. v. ABS-CBN International*, 84 USPQ2d 1560, 1565 (TTAB 2007).

Opposer has not sufficiently pleaded the month/day/year nor the month/year for which it is relying on with respect to priority. In fact, the only specific date that Opposer cites in its Opposition with respect to its sales in the United States is the year "2020."¹ Accordingly, when only a year is provided, the date presumed for at least the purposes of examination is the *last day* of the year. TMEP § 903.06. In this case, since Opposer has only pleaded the year 2020, the earliest date it can rely on with respect to prior use is December 31, 2020, which is clearly after Applicant's filing date of July 29, 2020 for all of the opposed applications. Opposer simply cannot prevail on its likelihood of confusion and related claims because it has clearly failed to establish priority.

In the alternative, to further confuse matters, Opposer alleges in its Opposition that it's been allegedly using its mark "long before the filing date of the Applications, or any claimed use date therein." 11 TTABVUE 9 at ¶ 7. Opposer has failed to plead and establish what this "long before" date is with respect to priority. Here, the words "long before" cannot operate as an effective first use date. Neither Applicant nor this Board can ascertain what this "long before" date is for purposes of establishing and determining Opposer's alleged date of first use. For example, is

¹ 11 TTABVUE 10 at ¶ 10

“long before” considered to be three-hours prior to Applicant’s filing? two-days prior? or 50-years prior?

Moreover, without providing Applicant with fair notice of what this “long before” date is, Opposer has deprived Applicant from the ability to plead certain affirmative defenses (if applicable) with respect to Opposer’s alleged prior use, including but not limited to, non-use, abandonment, fraud, estoppel, and un-clean hands, among others. For example, abandonment under Section 45 of the Act states that “[n]onuse for 3 consecutive years shall be prima facie evidence of abandonment.” Here, Applicant would not even be able to plead such a defense (if applicable) because it simply does not have have fair notice of what specific date or in which calendar year Opposer is even relying on with respect to its claim of priority under common law.

Accordingly, 1) Opposer’s first use date of Dec. 31, 2020 is after Applicant’s filing date of July 29, 2020, thus, Opposer has failed to sufficiently plead priority, or in the alternative, 2) Opposer has failed to sufficiently plead and provide fair notice to Applicant as to an operative or effective date of first use to establish priority with respects to all of its cited RED BULL marks under common law.

B. Opposer’s grounds with respect to “various other products and services related or complementary thereto” are indefinite and ambiguous.

Opposer has failed to state a claim for relief that is plausible on its face. Specifically, with respect to all the cited RED BULL marks and all of its grounds for its Opposition, Opposer cites the following alleged goods as its basis on the ESTTA cover sheet and ¶ 4 of its Opposition, namely:²

² 1 TTABVUE 1-14; 1 TTABVUE 8

energy drinks, beverages, sports drinks, soft drinks, carbonated beverages, *and various other products and services related or complementary thereto* (emphasis added)

Here, Applicant simply cannot reasonably ascertain, respond, nor defend itself against Opposer's Opposition based on these alleged indefinite and ambiguous identification of goods with respect to "various other products and services." *See* TMEP 1402.07(b), 1402.03(a). Applicant has failed to provide fair notice to Opposer as what exactly are these "various other products and services" that are allegedly similar to Applicant's identified goods in its applications. For example, do these "various products and services" that are "related or complementary" to beverages pertain to vehicle cup holders, outdoor patio dining tables, pizza delivery services, exercise equipment, refrigerators, or paper napkins?

Here, Applicant's submits that the goods identified by Opposer pertaining to drinks and beverages are simply too broad and ubiquitous that expand across multiple industries unrelated to each other. Specifically, there are potentially hundreds—if not thousands—of "products and services" that may be "related or complementary" to drinks and beverages. Here, Opposer's cited goods are not some delineated electrical or mechanical apparatus in a particular industry whereby "related or complementary" products can be reasonably ascertained.

Under any objective interpretation, one simply cannot reasonably ascertain all of the various products and services related or complementary to the ubiquitous goods of drinks and beverages. Accordingly, Opposer's complaint utterly fails to plead sufficient factual matter to state a claim for relief that is plausible on its face.

CONCLUSION

APPLICANT'S MOTION TO DISMISS

Opposer had wide latitude to rely on any of its federal registrations as its basis for this Opposition, but it intentionally and deliberately chose not to do so and instead relied on its alleged common law rights. In fact, Opposer's counsel of record, Mrs. Tiffani Otey, made that intention to rely on Opposer's alleged common law rights crystal clear in an email to Applicant's counsel on February 3, 2020 prior to filing this Opposition, as shown below (annotated):

From: Otey, Tiffani <TOtey@kilpatricktownsend.com>
Sent: Wednesday, February 3, 2021 5:46 PM
To: Sam Sokhansanj <sam@attorneysam.com>
Cc: Lord, Ty <tlord@kilpatricktownsend.com>; Minervino, Camden <CMinervino@kilpatricktownsend.com>; Teilhaber, Kris <KTeilhaber@kilpatricktownsend.com>
Subject: RE: U.S. App. Nos. 90/081512; 90/081,540; 90/081,580; 90/081,586

Mr. Sokhansanj:

Thank you for getting back to me so quickly. For the purposes of any potential opposition, our client would be relying on its common law rights in its RED BULL family of marks, which include, but are not limited to, the two logo marks shown below. These marks, and other marks within the family of marks, are registered under multiple trademark registrations for various goods and services, including but not limited to soft drinks and energy drinks. Red Bull need not rely on any particular registration for the purposes of its objection to, or opposition of, your client's trademark applications. However, two examples of Red Bull's registrations are Reg. Nos. 3838170 and 3197810.



We look forward to hearing back from you soon about whether your client is willing to resolve this matter without the need for proceeding before the TTAB.

Sincerely,

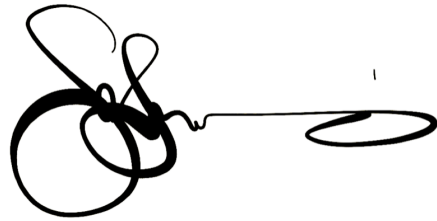
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Moreover, should the Board adopt December 31, 2020 as Opposer's date of first use in common law with respect to this proceeding, then granting Opposer leave to amend its complaint would be futile, because Opposer simply cannot rely on December 31, 2020 to establish priority with respect to all of its grounds for opposition.

In sum, Opposer has failed to state a claim for which relief can be granted and Applicant respectfully requests the Board to grant Applicant's Motion to Dismiss Opposer's notice of Opposition *with prejudice*.

Respectfully Submitted,

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a horizontal line and a small loop at the end.

Dated: April 13, 2021

Sam Sokhansanj
ATTORNEY FOR APPLICANT
JD, BSME, MSBioE, MSEE
Texas Bar # 24060633
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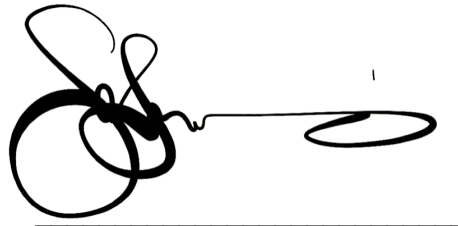
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION TO DISMISS was served upon the following attorney of record by e-mail on April 13, 2021:

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4048156500

Respectfully Submitted,

Dated: April 13, 2021

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a horizontal line and a small loop at the end.

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