

This opinion is not a
precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Nike, Inc.
v.
Blue Ribbon Team

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Opposition No. 91269520
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Michael J. Harris, Michael Kientzle, Kathleen Duffy Lichtenstein, of Arnold & Porter Kaye Scholer LLP,
for Nike, Inc.

Luke Santangelo, of Santangelo Law Offices, P.C.,
for Blue Ribbon Team.

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Before Lykos, English, and Casagrande,
Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

On December 16, 2019, Applicant Blue Ribbon Team filed an intent-to-use

application to register the mark  on the Principal Register. The application identifies “[o]n-line retail store services,” in International Class 35,

featuring dozens of categories of goods, “sporting equipment and accessories excluding footwear and clothing” among them.¹

Nike, Inc. (“Opposer”) opposes registration. In its Amended Notice of Opposition,² which is the operative pleading, Opposer alleges that it owns: (1) common law trademark rights in the mark BLUE RIBBON SPORTS that pre-date Applicant’s filing date, and (2) a pending application to register BLUE RIBBON SPORTS for, inter alia, “retail store services and on-line retail store services” featuring several types of goods, including “sporting goods and equipment.”³ The Amended Notice of Opposition alleges that Applicant’s prior-filed application was cited against Opposer as a potential bar to registration under Section 2(d) the Trademark Act, 15 U.S.C. § 1052(d).⁴

Opposer’s Amended Notice of Opposition asserts two claims: (1) priority and likelihood of confusion under Section 2(d); and (2) that, at the time Applicant filed its application, it lacked a “bona fide intention ... to use [the] trademark in commerce,”

¹ Application Serial No. 88728977 was filed under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intent to use the mark in commerce. An appendix at the end of this opinion lists the entire identification of services. Applicant describes the mark as follows: “The mark consists of a large ‘B’ with the three words ‘BLUE’, ‘RIBBON’, and ‘TEAM’ adjacent to the ‘B.’” Color is not claimed as a feature of the mark.

² See 15 TTABVUE 28-37. References to the briefs, other filings in the case, and the record cite the Board’s TTABVUE docket system. The number preceding “TTABVUE” is the docket number assigned to the cited filing in TTABVUE and any number immediately following “TTABVUE” identifies the specific page(s) to which we refer.

³ See *id.* at 29-31.

⁴ See *id.* at 31.

as statutorily required by Section 1(b) of the Act.⁵ Applicant denied the salient allegations in the Amended Notice.⁶ The parties filed trial briefs,⁷ and Opposer filed a rebuttal brief.⁸

For the reasons explained below, we sustain the opposition on the ground that, at the time it filed its application, Applicant lacked a bona fide intent to use its mark in commerce for the identified services. We do not reach the Section 2(d) claim.

I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant's challenged application.

During its trial period, Opposer submitted the following evidence directed to its Section 1(b) claim:

- A First Notice of Reliance attaching, inter alia, the current file for Nike's pending application to register the mark BLUE RIBBON SPORTS;⁹

⁵ See *id.* at 33-35.

⁶ See 22 TTABVUE (Answer to Amended Notice). Applicant's Answer to the Amended Notice expressly addressed only the newly-added claim and allegations under Section 1(b). It incorporated by reference "all prior answers" in its Answer to the original Notice of Opposition (which is at 4 TTABVUE). In addition to denials of allegations, the original Answer contained several lengthy assertions of affirmative defenses (some of which were simply elaborations on denials in the Answer), but Applicant pursued none of them at trial, thus forfeiting them. See, e.g., *Keystone Consol. Indus., Inc. v. Franklin Invest. Corp.*, No. 92066927, 2024 WL 3771168, at *2 (TTAB 2024).

⁷ See 85 TTABVUE (Opposer's brief); 86 TTABVUE (Applicant's brief). Applicant's brief attached evidence in the form of certain discovery requests it had served on Opposer and Opposer's responses. "The Board will not consider evidence and other evidentiary materials attached to the briefs unless they were properly made of record during the time assigned for taking testimony." *Hole In 1 Drinks, Inc. v. Lajtay*, No. 92065860, 2020 WL 859853, at *2 (TTAB 2020) (citations omitted). Applicant could have submitted this sort of evidence by notice of reliance, but did not. We therefore do not consider this evidence, but note that, in any event, it does not have to do with the Section 1(b) claim.

⁸ See 87 TTABVUE.

⁹ See 46 TTABVUE (attachment NOR1-1 is the file for the application).

- A Third Notice of Reliance on excerpts from the transcript of the discovery deposition (with exhibits) of Applicant's founder Charles Kraus;¹⁰ and
- A Fourth Notice of Reliance attaching Applicant's responses to Opposer's written discovery requests.¹¹

During its trial period, Applicant submitted a single Notice of Reliance¹² on excerpts from the transcript of the discovery deposition of its founder Charles Kraus, Applicant's supplemental interrogatory responses,¹³ and the Wikipedia page for "Virtual Business."¹⁴ Applicant also submitted Mr. Kraus's declaration.¹⁵

II. Opposer is statutorily entitled to pursue this opposition proceeding

Before we resolve any evidentiary or substantive issues remaining for trial, we need to make sure the relevant statutes authorizing us to resolve registration-related disputes entitle these parties to ask us to do so. An opposer under Section 13 of the Trademark Act, 15 U.S.C. § 1063, must demonstrate: (i) an interest falling within the zone of interests protected by the opposition statute; and (ii) proximate causation.

¹⁰ See 48 TTABVUE. Opposer later alerted the Board that ESTTA uploaded Opposer's second and third notices of reliance and exhibits out of order. See 53 TTABVUE. The Board thereafter amended the TTABVUE notations corresponding to these filings to reflect how they should have been numbered.

¹¹ See 52 TTABVUE.

¹² See 80 TTABVUE.

¹³ Applicant should not have submitted its own interrogatory answers. Trademark Rule 2.120(k)(5) provides that generally only the inquiring party may submit interrogatory answers as evidence. Beyond that, Opposer had already submitted them as part of its Fourth Notice of Reliance. See 52 TTABVUE.

¹⁴ Applicant's submission of the challenged application file was unnecessary because, as we mentioned above, it's automatically of record in an opposition proceeding. See 37 C.F.R. § 2.122(b)(1).

¹⁵ See 81 TTABVUE 7-12.

Corcamore, LLC v. SFM, LLC, 978 F.3d 1298, 1303 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 120-37 (2014)); *id.* at 1305 (applying *Lexmark* to inter partes TTAB cases). Demonstrating a real interest in opposing registration of a mark satisfies the zone-of-interests requirement, and demonstrating a reasonable belief in damage by the registration or continued registration of a mark establishes proximate causation. *Id.* at 1305-06.

Opposer alleges that the USPTO cited Applicant's prior-pending application as a potential bar, under Section 2(d), to registration of Opposer's BLUE RIBBON SPORTS mark. At trial, Opposer submitted the entire file of its application proving these allegations. Accordingly, Opposer has established a plausible ground for asserting a Section 2(d) claim against Applicant's B BLUE RIBBON TEAM composite mark for the identified services. *See, e.g., Nationstar Mortgage LLC v. Ahmad*, No. 91177036, 2014 WL 6480655, at *2 (TTAB 2014) ("Applicant's application for his NATIONSTAR mark has been cited as a potential bar to the registration of the marks in opposer's applications, as shown by the copies of opposer's applications placed in the record. This is sufficient to demonstrate that opposer has a real interest in this proceeding.") (citations omitted). Once a plaintiff has shown entitlement to a statutory cause of action on one ground, it has the right to assert any other ground in an opposition, which in this case includes Opposer's claim that Applicant lacked a bona fide intent to use the applied for mark in commerce as of the application filing date. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1377 (Fed.

Cir. 2012); *Poly-Am., L.P. v. Ill. Tool Works Inc.*, No. 92056833, 2017 WL 4687981, at *4 (TTAB 2017), *aff'd*, ECF No. 119, No. 3:18-cv-00443-C (N.D. Tex. Sept. 26, 2019).

III. Evidentiary Objections

Applicant's trial brief almost exclusively consists of objections to testimony and several pieces of evidence that Opposer offered at trial in support of Opposer's Section 2(d) claim, primarily concerning the breadth of goods Opposer offered under its asserted mark and when. Applicant objects on the ground that the subject testimony and trial exhibits offered by Opposer were not previously disclosed by Opposer either in Opposer's Rule 26 disclosures or in Opposer's responses to discovery requests encompassing them.¹⁶ Applicant previously raised these objections to the Board, requesting exclusion of the identified testimony and evidence, first in "Applicant's Objection To Opposer's Pretrial Disclosure,"¹⁷ and then again in "Applicant's Notice Of Continued Objections To Opposer's Evidence" after Opposer introduced the subject testimony and exhibits during its trial period.¹⁸

None of these objections, however, concern Opposer's claim that Applicant lacked a bona fide intent to use its mark at the time it filed its application (which concerns what Applicant did or did not do, not what Opposer has sold).¹⁹ Because we resolve

¹⁶ See 86 TTABVUE 7-19.

¹⁷ See 40 TTABVUE.

¹⁸ See 81 TTABVUE.

¹⁹ The specific submissions to which Applicant objects are listed at 86 TTABVUE 16 and 19.

this opposition solely on the basis of the Section 1(b) claim and do not reach the Section 2(d) claim, we need not address any of these objections.²⁰

IV. Analysis of Opposer’s Section 1(b) Claim

A. Legal Standard

We first consider Opposer’s claim that Applicant lacked a bona fide intent to use in commerce its applied-for mark for the identified goods and services at the time it filed its application. Trademark Act Section 1(b) provides that “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” 15 U.S.C. § 1051(b). “Because a bona fide intent to use the mark in commerce is a statutory requirement of a valid intent-to-use trademark application under Section 1(b), the lack of such intent is a basis on which” such an application may be challenged. *M.Z. Berger & Co. v. Swatch AG*, 787 F.3d 1368, 1375 (Fed. Cir. 2015).

Opposer must demonstrate, by a preponderance of the evidence, that Applicant lacked a bona fide intent to use the mark in commerce on the goods identified in the involved application when the application was filed. *See, e.g., SawStop, LLC v. Felder KG*, No. 91255905, 2025 WL 2400134, at *16 (TTAB 2025).

Because this sort of claim requires a plaintiff to prove a negative, we permit an opposer to make out a facie case by showing the absence of any documentary evidence

²⁰ In determining that Opposer was statutorily entitled to oppose, we did rely on attachment NOR1-1 in Opposer’s First Notice of Reliance (46 TTABVUE). Applicant’s objections to Opposer’s First Notice, however, concern only other attachments to that submission. To the extent Applicant’s objections concern Applicant’s responses to Opposer’s discovery requests, we overrule them.

regarding Applicant's intent to use the mark. *See, e.g., id.* If Opposer satisfies this initial burden, Applicant is required to bring forth rebuttal evidence showing its bona fide intent to use its mark in U.S. commerce in connection with the identified goods or services. *See id.*

“[W]hether an applicant ha[s] a ‘bona fide intent’ to use the mark in commerce at the time of the application requires objective evidence of intent.” *M.Z. Berger*, 787 F.3d at 1375; *see also id.* at 1379 (“an objective inquiry based on the totality of the circumstances”). A “mere subjective belief” is insufficient. *See id.* at 1375. The evidence must show that the applicant's intent to use the mark for the identified goods or services was “firm” and “demonstrable.” *See id.* at 1375, 1376. If, on the other hand, the circumstances show only an intent “to reserve a right in a mark,” that is insufficient. *Id.* at 1375.

B. Whether Opposer has made out a prima facie case of lack of bona fide intent

Opposer points to Applicant's lack of documentary evidence and to the Fed. R. Civ. P. 30(b)(6) discovery deposition testimony of Charles Kraus²¹ to demonstrate that Applicant lacked a bona fide intent to use the mark in commerce when it filed the application.²² Specifically, Opposer points to Applicant's failure to produce any documents or things responsive to requests, under Fed. R. Civ. P. 34, to produce the following categories of documents:

²¹ Mr. Kraus testified that he is Applicant's founder and its sole managing member. 48 TTABVUE 81.

²² *See* 85 TTABVUE 25-29.

- “All documents relating to the Applicant’s business plan(s) to use the Mark for the Identified Services”;²³
- “All documents relating to Applicant’s business operating plan(s) for the Identified Services offered under the Applicant’s Mark”;²⁴
- “All documents relating to all Agreements to supply the Identified Services offered under Applicant’s Mark”;²⁵
- “All documents relating to all Agreements to supply the goods that are included in the Identified Services after the introductory phrase ‘Online retail store services featuring . . .’ offered under Applicant’s Mark”;²⁶
- “All documents evidencing Applicant’s physical locations where Applicant offers the Identified Services offered under Applicant’s Mark”;²⁷
- “All documents evidencing Applicant’s physical locations where Applicant intends to offer the Identified Services offered under Applicant’s Mark”;²⁸
- “All documents relating to Applicant’s sales revenue for all goods or services offered under Applicant’s Mark”;²⁹ and
- “All documents relating to Applicant’s advertising costs associated with promoting the goods or services offered under Applicant’s Mark.”³⁰

See, e.g., Honda Motor Co. v. Winkelmann, No. 91170552, 2009 WL 962810, at *2 (TTAB 2009) (“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 as required by Section 1(b) of the

²³ 52 TTABVUE 69.

²⁴ *Id.*

²⁵ *Id.* at 70.

²⁶ *Id.*

²⁷ *Id.* 70-71.

²⁸ *Id.* at 71.

²⁹ *Id.*

³⁰ *Id.*

Trademark Act, unless other facts are presented which adequately explain or outweigh applicant's failure to provide such documentary evidence.") (citation omitted).

Opposer also points to Applicant's deposition testimony (through Mr. Kraus, its Rule 30(b)(6) designee) about what Applicant stated, in its Supplemental Response to Interrogatory 3, was Mr. Kraus's plans to "implement[] his business in three, sequenced phases: establishment of the business entity, clearance of the trademarks at the national level, and institution of use of those trademarks in publicly launching the business."³¹ As to the third phase, Applicant's interrogatory responses indicated that this contemplates:

a retail venture that is streamlined from the perspective of ultimately having third party sourcing and fulfillment much as the current Amazon and other online retailers have developed. Such third parties can and likely will handle product identification, implementing marketing systems, warehousing, shipping, customer service, and even sales on the Applicant's behalf.³²

Opposer highlights, however, that Applicant not only has no documents reflecting that Applicant has ever taken any such steps, but also that Applicant has not, to date, done anything to accomplish, or even plan, any of these steps:

Q. ... [T]he response states that "The Applicant's founder and sole managing member has planned a streamlined retail venture ultimately utilizing third party sourcing and fulfillment." Do you see that?

A. Yes.

³¹ See 52 TTABVUE 29.

³² See *id.*

Q. I think it's fair to say that you don't have any documents that – that describe or layout that business plan; right? This is part of your nimble approach to business activities?

A. Yes, I have no documents.³³

Opposer notes that Applicant also testified:

Q. Has Blue Ribbon Team, LLC, ever attempted to engage or retain a third party to provide sourcing or fulfillment services for an online retail store?

A. No.

Q. Has Blue Ribbon Team, LLC, ever attempted to engage or retain a third party to provide product identification services for an online retail store?

A. No.

Q. Has Blue Ribbon Team, LLC, ever attempted to engage or retain a third party to provide marketing for an online retail store?

A. No.

Q. Has Blue Ribbon Team, LLC, ever attempted to engage or retain a third party to implement marketing systems for an online retail store?

A. No.

Q. Has Blue Ribbon Team, LLC, ever attempted to engage or retain a third party to provide warehousing?

A. No.

Q. Has Blue Ribbon Team, LLC, ever attempted to engage or retain a third party to provide shipping services?

A. No.

Q. Has Blue Ribbon Team, LLC, ever attempted to engage or retain a third party to provide customer service?

A. No.

³³ See 48 TTABVUE 83.

Q. ... Has Blue Ribbon Team, LLC, ever attempted to engage or retain a third party to help with sales for an online retail store?

A. No³⁴

Because experience in the relevant field can be relevant to a determination of bona fide intent, *see, e.g., L'Oreal S.A. v. Marcon*, No. 91184456, 2012 WL 1267956, at *12 (TTAB 2012), Opposer further preemptively highlights that all of Mr. Kraus's prior business experience is unrelated to the online retail services identified in the application.³⁵ Opposer cites Mr. Kraus's deposition testimony, where he detailed working for many years at a pizza parlor, culminating in being its general manager, owned a Tex-Mex food franchise location and a drive-through barbecue restaurant, and owns a commercial building that he leases to a retail paint store.³⁶

The closest experience Mr. Kraus has had to the identified services is his having been involved in purchasing and then re-selling textbooks online for several months.³⁷ Mr. Kraus characterized this experience as "limited."³⁸ It involved Mr. Kraus purchasing books from "major book sellers that were online," who would ship the books to Mr. Kraus's home, where he would inspect their condition and then try to re-sell them online for a profit, shipping them himself to the buyer.³⁹ While he may

³⁴ *See id.* at 44-45 (objection omitted).

³⁵ *See* 85 TTABVUE 47.

³⁶ *See* 48 TTABVUE 28-31.

³⁷ *See id.* at 36-39.

³⁸ *See id.* at 36.

³⁹ *See id.* at 38.

have interacted with potential buyers individually via a third-party software platform, he did not create an online retail store through which to conduct this venture.⁴⁰ Mr. Kraus characterized it as “not as valuable a venture as it was cracked up to be.”⁴¹ This simplistic means of buying and re-selling books is very different from how Applicant describes the contemplated online retail store services identified in the application,⁴² and we find it to have little relevancy as to whether Applicant intended to use the applied-for mark for the identified services when it filed the application.

Applicant’s failure to produce any documentation concerning the proposed online retail store venture, its admitted failure to take any steps to set up the business, and Mr. Kraus’s nearly-total lack of experience in that field establishes a prima facie case—at minimum—that Applicant lacked a bona fide intent to use its mark in commerce at the time it filed its application. *See, e.g., SawStop*, 2025 WL 2400134, at *16.

C. Whether Applicant has rebutted Opposer’s prima facie case of lack of bona fide intent

We now turn to whether Applicant has rebutted Opposer’s prima facie case.

As mentioned, the bulk of Applicant’s trial brief is directed to objections to evidence Opposer submitted in support of the Section 2(d) claim. Applicant’s only argument directed to the Section 1(b) claim appears to be that it is waiting to take

⁴⁰ *See id.* at 39.

⁴¹ *See id.* at 38.

⁴² *See* 52 TTABVUE 29 (Applicant’s interrogatory response stating how he envisions his online retail store services).

any steps toward setting up its business, or even develop a written plan, until after this proceeding is over.⁴³ It argues that this is “the responsible thing” and “the right thing” because it does not want to start the planned online retail business and then become embroiled in a “protracted trademark infringement battle.”⁴⁴

We see it differently. What the record in this case reveals that Applicant is doing is to attempt “to reserve a right in the mark” first, *see M.Z. Berger*, 787 F.3d at 1376, and **then** plan its business. As Opposer aptly puts it, this is “the sort of cart-before-the-horse approach to trademark registration that Section 1(b) forbids.”⁴⁵ In short, Applicant has failed to rebut Opposer’s prima facie case that Applicant lacked a bona fide intent to use its mark in commerce for the identified services at the time it filed this application.⁴⁶

Decision: We sustain the opposition to registration of Application Serial No. 88728977 on the ground that Applicant lacked a bona fide intent to use the mark for the identified services at the time Applicant filed the application. Because registration must be refused on this basis, we do not need to decide Opposer’s alternative claim under Section 2(d). *See, e.g., CBC Mortgage Agency v. TMRR, LLC*, No. 92076723, 2022 WL 3444028, at *14 n.22 (TTAB 2022); *Wonderbread 5 v. Gilles*,

⁴³ *See* 86 TTABVUE 18-19.

⁴⁴ *See id.*

⁴⁵ 85 TTABVUE 48.

⁴⁶ Though Applicant’s brief does not mention it, we note that the record contains Applicant’s Articles of Incorporation. *See* Opposer’s First Notice of Reliance, 48 TTABVUE 128-30. This document, however, does not say anything about the nature of Applicant’s business.

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No. 92052150, 2015 WL 4380986, at *14 (TTAB 2015); *Spirits Int'l, B.V. v. S.S. Taris Zeytin Ve Zeytinyagi Tarim Satis Kooperatifleri Birliđi*, No. 91163779, 2011 WL 2909909, at *4 (TTAB 2011).

APPENDIX

Full identification of services in Application Serial No. 88728977

On-line retail store services featuring skin care preparations, skin care products, skin care accessories, make-up, make-up preparations, make-up products, make-up accessories, flashlights, household cleaning items, household cleaning preparations not including fabric softeners or laundry detergents, hand tools, new and used books not including comic books, kitchen items and accessories, electric slow cookers, cookers, coffee cups and mugs, glass, kitchen, and ceramic wares, drinking glasses, tumblers, kitchen utensils, household utensils, cooking utensils, outdoor recreation equipment and accessories excluding footwear and clothing, camping equipment and accessories excluding footwear and clothing, hiking equipments [sic] and accessories excluding footwear and clothing, survivalist gear excluding footwear and clothing, survival equipment excluding footwear and clothing, outdoor survival equipment excluding footwear and clothing, self-sustainability products, toys, collectibles, collectible trading cards, collectible coins, collectible toy figures, personal electronic devices, consumer electronics, electronics accessories, electronic devices, wedding products, wedding books, wedding albums, wedding garters, wedding decorations, wedding table decorations not including gift baskets, sporting equipment and accessories excluding footwear and clothing, athletic equipment and accessories excluding footwear and clothing, golf equipment and accessories excluding footwear and clothing, home décor, home decorative items, smoking accessories and devices not including cigars, Christmas items not including gift baskets, Christmas decorations, Christmas ornaments, Christmas lighting items, Christmas wrapping products, birthday items not including gift baskets, birthday decorations, birthday ornaments, birthday lighting items, birthday wrapping products