

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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RSC

May 29, 2024

Opposition No. 91290944

Pro-Football LLC

v.

O-Line Entertainment LLC

Rebecca Stempien Coyle, Interlocutory Attorney:

Applicant seeks to register the mark ORIGINAL HOGS (standard characters) for a variety of goods and services in International Classes 25, 35, and 41.¹ Applicant's application was published for opposition in the Trademark Official Gazette on October 17, 2023.

Pro-Football, Inc. and NFL Properties LLC ("NFL Properties") each filed for, and were granted, extensions of time to oppose the application until April 14, 2024. A notice of opposition was filed on April 15, 2024, resulting in the institution of the current opposition proceeding.² The ESTTA cover sheet accompanying the notice of opposition identifies Pro-Football LLC as the plaintiff-opposer.³ However, the

¹ Serial No. 97515385, filed July 22, 2022, based on Applicant's asserted bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

² Because April 14, 2024 was a Sunday, the filing on April 15, 2024 was timely. Trademark Rule 2.196, 37 C.F.R. § 2.196.

³ 1 TTABVUE 1. Record citations are to TTABVUE, the Board's publicly available docket history system. *See, e.g., New Era Cap Co., Inc. v. Pro Era, LLC*, Opp. No. 91216455, 2020

attached pleading identifies both Pro-Football LLC and NFL Properties as plaintiff-opposers.⁴

As an initial matter, the ESTTA cover sheet explains that the identification of Pro-Football Inc. in the extension of time to oppose was a misidentification through mistake.⁵ In particular, Opposer explains Pro-Football Inc. did not exist as a legal entity at the time of the extension because the actual entity is a limited liability, not a corporation, and the correct identification is Pro-Football LLC.⁶ A mistake by misidentification means a mistake in the form of the plaintiff's name or its entity type, but "does not encompass the recitation of a different existing legal entity that is

WL 2853282, at *1 n.1 (TTAB 2020). The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry, if applicable.

As part of an internal Board pilot citation program on possibly broadening acceptable forms of legal citation in Board cases, citations in this order differ from the citation form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 101.03 (2023). This order cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For orders of the Board, this order employs citation to the Westlaw (WL) database. Only precedential decisions are cited. Until further notice, however, practitioners should continue to adhere to the practice set forth in TBMP § 101.03.

Precedential decisions of the Board, and precedential decisions of the Federal Circuit involving Board decisions that issued January 1, 2008, or after may be viewed in TTABVUE by entering the proceeding number, application number, registration number, expungement/reexamination number, mark, party, or correspondent. Many precedential Board decisions that issued from 1996 to 2008 are available online from the TTAB Reading Room by entering the same information. Most TTAB decisions that issued prior to 1996 are not available in USPTO databases.

⁴ *Id.* at 3. Although the caption of the attached pleading identifies NFL Properties Inc., the Board presumes this was a typographical error since the remainder of the notice of opposition, the earlier extensions of time, and Opposer's current motion refer to NFL Properties LLC.

⁵ 1 TTABVUE 1.

⁶ *Id.*

not in privity with the party that should have been named.” *Cass Logistics Inc. v. McKesson Corp.*, Opp. No. 91087549, 1993 WL 236535, at *2 (TTAB 1993); *see also* TBMP § 303.05(c). Inasmuch as Pro-Football Inc. was not a different existing legal entity, the explanation that the misidentification of Pro-Football LLC was a non-substantive mistake is accepted, and the opposition may proceed as filed in the name of Pro-Football LLC (“Opposer”).

On April 16, 2024, the Board issued an order addressing the discrepancy between the number of plaintiff-opposers on ESTTA cover sheet and in the attached pleading. The Board noted a fee was only paid for one plaintiff-opposer and stated the only opposer in the proceeding was Pro-Football LLC.⁷

This proceeding now comes before the Board on Opposer’s April 16, 2024 motion to amend and correct the “cover page” to the notice of opposition to include NFL Properties in the proceeding. The motion is fully briefed.⁸

“Any person who believes that he would be damaged by the registration of a mark upon the principal register ... may, upon payment of the prescribed fee, file an opposition” either prior to the expiration of the thirty-day period from the date of publication of the involved application or prior to the expiration of a granted extension. Section 13(a) of the Trademark Act, 15 U.S.C. § 1063(a); *see also* Trademark Rule 2.101, 37 C.F.R. § 2.101. An otherwise timely opposition must also

⁷ 4 TTABVUE.

⁸ The Board has carefully considered all of the parties’ arguments, presumes the parties’ familiarity with the bases for their filings, and does not recount the facts or arguments here except as necessary to explain this decision. *See Omega SA (Omega AG) (Omega Ltd.) v. Alpha Phi Omega*, Opp. No. 91197504, 2016 WL 1642738, at *2 n. 11 (TTAB 2016).

be accompanied by a fee that is sufficient to fully pay for each named party opposer. Trademark Rule 2.101(d), 37 C.F.R. § 2.101(d). “The filing date of an opposition is the date of electronic receipt in the Office of the notice of opposition, and the required fee.” Trademark Rule 2.101(e), 37 C.F.R. § 2.101(e).

Opposer maintains that although NFL Properties is identified in the submitted notice of opposition, it was not identified on the filed ESTTA cover sheet due to a “system malfunction” which further resulted in a miscalculation of the fees for the notice of opposition. In particular, Opposer asserts that while both itself and NFL Properties were originally identified on the ESTTA cover sheet, the system deleted NFL Properties when the cover sheet was reopened prior to submission to correct a typographical error, and this error was not discovered earlier because the submission was not available to view in TTABVUE until April 16, 2024.⁹ In support of its motion, Opposer cites to Fed. R. Civ. P. 15(a)(2) and Trademark Rule 2.107, but contends it is not seeking to amend “the pleading itself”.¹⁰

While Trademark Rule 2.107(a) generally allows pleadings to be amended in the same manner and extent as in a district court civil action, once the time period for filing an opposition has closed, an opposition may not be amended to add a joint opposer. 37 C.F.R. § 2.107(a); *cf. Drive Trademark Holdings LP v. Inofin*, Opp. No. 91168402, 2007 WL 616039, at *4 (TTAB 2007). Since the time period to file an opposition to the involved application has closed, the current opposition cannot be amended to add NFL Properties. *See PepsiCo, Inc. v. Arriera Foods LLC*, Opp. No.

⁹ 5 TTABVUE.

¹⁰ *Id.* at 2-3.

91269057, 2022 WL 15328405, at *1 (TTAB 2022) (“because the opposition period is closed, [another entity] cannot be added as an opposer.”).

Opposer’s effort to frame its requested relief as merely a correction to the ESTTA cover sheet, and not an amendment to the pleading, is unavailing. The Board views “the ESTTA filing form and any attachments thereto as comprising a single document or paper being filed with the Board.” *PPG Indus., Inc. v. Guardian Indus. Corp.*, Opp. No. 91162329, 2005 WL 608209, at *3 (TTAB 2005). The identity of the plaintiff-opposer is taken from the ESTTA filing form, and “ESTTA does not examine an attached notice of opposition.” *MyMeta Software, Inc. v. Meta Platforms, Inc.*, Opp. No. 91286055, 2024 WL 1794373, at *2 (TTAB 2024) (citations omitted). Accordingly, when the ESTTA cover sheet to a notice of opposition only identifies, and a fee is submitted for only, one plaintiff-opposer, it is the party named on the ESTTA cover sheet that is considered the plaintiff-opposer, regardless of whether additional parties are named in the attached pleading. *PepsiCo, Inc.*, 2022 WL 15328405, at *1; *see also Syngenta Crop Protection Inc. v. Bio-Chek LLC*, Opp. No. 91175091, 2009 WL 691309, at *1 n.2 (TTAB 2009).

Additionally, the applicable rules are clear that an opposition is not timely filed until the appropriate fee has been submitted. Trademark Rule 2.101(d), 2.101(e), 37 C.F.R. §§ 2.101(d), 2.101(e); *see also DFC Expo LLC v. Coyle*, Ser. No. 87086860, 2017 WL 1830810, at *1-2 (TTAB 2017) (submission of the fee is longstanding requirement for a notice of opposition, and failure to pay the fee is a basis for not instituting an opposition proceeding). Because no fee was paid for NFL Properties during the time

period for filing an opposition, its mere inclusion in the attached notice of opposition was not sufficient to constitute a timely opposition by NFL Properties.

Opposer further argues NFL Properties had, originally, been properly identified as a second plaintiff-opposer and its omission was due to a malfunction with the ESTTA filing system. However, as is clear from the exhibit offered in support of Opposer's motion, prior to filing the notice of opposition a party is shown information for each opposer identified on the ESTTA filing form as well as the total fees to be submitted, which itself identifies the number of opposers.¹¹ Accordingly, Opposer had the opportunity prior to submitting the notice of opposition to verify the accuracy of the number of opposers, their names, and the amount of fee to be submitted. Moreover, the timeliness requirement of Section 13(a) of the Act for the filing of an opposition is statutory, and cannot be waived. *See, e.g., The Equine Touch Foundation, Inc. v. Equinology, Inc.*, Can. No. 92050044, 2009 WL 625593, at *1 n. 6 (TTAB 2009); *Yahoo! Inc. v. Loufrani*, Opp. No. 91157129, 2004 WL 1195627, at *1 (TTAB 2004) (citation omitted).

For the foregoing reasons, Opposer's motion to "correct" and add NFL Properties as a plaintiff-opposer is **denied**.

Proceedings are resumed and dates are reset as follows.

Time to Answer	7/8/2024
Deadline for Discovery Conference	8/7/2024
Discovery Opens	8/7/2024
Initial Disclosures Due	9/6/2024
Expert Disclosures Due	1/4/2025

¹¹ *Id.* at 9-11.

Discovery Closes	2/3/2025
Plaintiff's Pretrial Disclosures Due	3/20/2025
Plaintiff's 30-day Trial Period Ends	5/4/2025
Defendant's Pretrial Disclosures Due	5/19/2025
Defendant's 30-day Trial Period Ends	7/3/2025
Plaintiff's Rebuttal Disclosures Due	7/18/2025
Plaintiff's 15-day Rebuttal Period Ends	8/17/2025
Plaintiff's Opening Brief Due	10/16/2025
Defendant's Brief Due	11/15/2025
Plaintiff's Reply Brief Due	11/30/2025
Request for Oral Hearing (optional) Due	12/10/2025

IMPORTANT TRIAL AND BRIEFING INSTRUCTIONS

Generally, the Federal Rules of Evidence generally apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Such briefs should utilize citations to the TTABVUE record created during trial, to facilitate the Board's review of the evidence at final hearing. *See* TBMP § 801.03. Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing. **Note:** Parties are strongly encouraged to check the entire document before filing.¹² The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the [ESTTA help](#) webpage.

¹² To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.