

TTAB

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

A.V. BRANDS, INC., (by assignment)

Petitioner,

vs.

SPIRITS INTERNATIONAL, N.V.,

Respondent.

73617598

Cancellation No. 92043340

Registration No. 1,487,042

Mark: RUSSKAYA

OPPOSITION TO SPI'S MOTION TO STRIKE

Petitioner, A.V. Brands, Inc. ("A.V. Brands") hereby responds to SPI International, N.V.'s ("SPI") Motion to Strike the Aitken Declaration.

I. BACKGROUND:

1. On May 19, 2004, Petitioner A. V. Imports, Inc. ("A.V. Imports") the predecessor in interest to A.V. Brands, Inc. ("A.V. Brands") filed its petition to cancel respondent's U.S. Trademark Registration No. 1,487,042 for the mark RUSSKAYA on the grounds of abandonment.

2. In its petition, A.V. Brands relied upon its trademark application, U.S. No. 76/573,600 for RUSSKAYA which was filed on January 30, 2004 ("the RUSSKAYA Application").

3. In its answer filed on September 22, 2004, SPI denied the abandonment allegations. It did not raise an alleged lack of standing as a defense.

06-26-2008

4. After discovery was completed and various motion practices were concluded, the Board set the testimony period which was subsequently reset by consent as follows:

30-day testimony period for party
in the position of plaintiff to close: December 19, 2006

30 day testimony period for party
In the position of defendant to close: February 17, 2007

15 day rebuttal testimony to close: April 3, 2007.

5. In December of 2006 A.V. Imports proceeded to introduce its evidence during its testimony period and included its U.S. Application No. 76/573,600 in its Notice of Reliance.

6. On April 26, 2007, the Board granted SPI's unopposed motion to suspend the testimony period pending the completion of foreign testimony upon written questions.

7. On October 3, 2007 the Board reset the testimony period which closed the rebuttal testimony on December 17, 2007. A.V. Imports presented no rebuttal testimony.

8. In the fall of 2007 A.V. Imports, transferred substantially all of its assets to A.V. Brands, Inc., including substantially all of its trademarks and trademark applications for alcoholic beverages and the goodwill associated with the business. This transfer included the RUSSKAYA Application. (See Aitken Declaration and Supporting exhibits)

9. On January 15, 2008 A.V. Brands filed a motion to change correspondence address in this proceeding and substituted A.V. Brands as the petitioner for A. V. Imports, Inc.

10. The assignment of the RUSSKAYA application from A.V. Imports to A.V. Brands was duly recorded in the records of the Patent and Trademark Office on February 15, 2008 at Reel 3720, Frame 0197.

11. SPI was advised of the change in ownership of the RUSSKAYA application on or about January 15, 2008 in connection with A.V. Brands' Motion to substitute A.V. Brands.

12. SPI did not timely move to amend its answer to alleged a lack of standing nor did it timely move to reopen discovery to explore any issue relating to the transfer of the RUSSKAYA application when it was notified of the change of ownership of the RUSSKAYA application.

13. In its Trial Brief and in other pleadings filed in this proceedings A.V. Brands clearly identified that it was the successor to A.V. Imports by way of an assignment.

14. On May 15, 2008, for the first time, in its Trial brief SPI argued that A.V. Brands, the substituted party did not have standing.

15. In response to SPI's contention, A.V. Brands responded that it was incumbent upon SPI to file an appropriate motion to raise the standing defense. Moreover, as reflected by the Aitken Declaration, the defense had no merit because the transfer of the RUSSKAYA application from A.V. Imports to A.V. Brand was effective.

II. ARGUMENT

In its brief in reply to SPI's Trial Brief, A. V. Brands included for the benefit of the Board the Aitken Declaration that *inter alia* demonstrated that the transfer of the RUSSKAYA application from A.V. Imports to A.V Brand's was effective. A. V. Brands

agrees that the Aitken declaration and supporting exhibits were not made of record during the testimony period and therefore are not appropriate to rely upon. However, in the event that the Board somehow permits the substance of SPI's argument, the declaration should be considered because it further demonstrates that SPI's argument has no merit.

In summary, contrary to SPI's argument that A. V. Brands had an obligation to enter additional evidence relating to standing in its rebuttal period, there was no reason to enter evidence relating to the transfer during the testimony period nor was there an actual opportunity. It is submitted that SPI has waived its standing defense by failing to oppose the motion to substitute parties filed by A.V. Brands on January 15, 2008, and by failing to timely move to reopen the testimony period.

A. There was no reason to submit further evidence relating to the transfer of the RUSSKAYA application from A.V. Imports to A.V. Brands during the testimony period.

In its pleadings, A.V. Brands plead and demonstrated that it had standing in its case in chief by its reference to its RUSSKAYA trademark application.¹ SPI did not at any time assert lack of standing as a defense. Notwithstanding the absence of such a

¹ To establish standing, a petitioner must show that it has a "real interest" in the outcome of the proceeding; that is, that it has a direct and personal stake in the outcome of the opposition. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999); *Jewelers Vigilance Committee, Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987) ("it is in the pleading stage of the opposition proceeding that the opposer must plead facts sufficient only to show a personal interest in the outcome of the case beyond that of the general public.").

defense, A.V. Imports submitted its RUSSKAYA application in its testimony period and standing was affirmatively proved. See TMEP 309.03(b). In January 2008 in the first pleading filed after the change in ownership of the application, A.V. Brands moved to substitute Petitioner pursuant to TMEP 512.01 in view of the change in ownership of the application. That motion was not opposed by plaintiff. Moreover, in these circumstances it is appropriate for the Board to take judicial notice of the change in ownership of an application. See TMEP 704.03 "... when the status of a registration changes between the time it was made of record and the time the case is decided, the Board, in deciding the case, will take judicial notice of, and rely upon, the current status of the registration as shown by the records of the office." See also *Royal Hawaiian Perfumes, Ltd. v. Diamond Head Products of Hawaii, Inc.*, 204 USPQ 144(TTAB 1979), *Time Warner Entertainment Co. v. Jones*, 65 USPQ 1650 (TTAB 2002) (Review of Office automated records subsequent to the filing of status and title copy of registration revealed that Section 8 and 15 affidavits had been accepted and acknowledged).

A.V. Brands followed the prescribed procedures set forth in the TMEP Section 512.01 when the change of ownership occurred during a proceeding. See *Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433 n. 1(TTAB 2007). SPI's standing argument based upon the change in ownership should be rejected.

B. The evidence relating to the assignment of the RUSSKAYA application and business assets from A.V. Imports to A.V. Brands is not in the nature of rebuttal.

SPI's suggestion that the evidence should have been submitted during the rebuttal period is also misplaced. Not only is there a complete lack of any authority to suggest

that A.V. Brands had an affirmative obligation to further supplement the record to somehow demonstrate that it had continuous standing during the rebuttal period, evidence relating to the transfer is not in the nature of rebuttal.

While the transfer was effected before Petitioner's rebuttal testimony period, information relating to the transfer of the assets from A.V. Imports to A.V. Brands was not in the nature of rebuttal to any of the evidence submitted by SPI. Had A.V. Brands attempted to submit documents relevant to the assignment in the rebuttal period as suggested by SPI, the evidence would not have been admissible and subject to objection because it is not in the nature of rebuttal to any testimony or evidence presented by SPI.

A.V. Brands timely notified the Board and SPI of the change in ownership and followed the procedures set forth in the TMEP. There is no specific rule or regulation that governs the disclosure of the transfer of an application after the opening testimony period has been concluded. A.V. Brands properly moved to substitute in its first pleading that was filed with the Board subsequent to the transfer.

C. SPI has Waived its Standing Defense.

When it learned of the change in ownership of the application, SPI could have (1) opposed A.V. Brands' motion to substitute, (2) timely moved to amend its Answer to raise a standing defense and/or, (3) moved to reopen discovery and these proceedings in view of the changes in circumstances. It did none of these things. When evidence became available only after the close of testimony periods, the proper procedure is to move to reopen the testimony period to introduce the "newly discovered evidence."

Tektronics, 187 U.S.P.Q. 589 n,1. SPI has not made such a motion.

SPI made a tactical decision to wait more than five months after the motion to raise the standing issue in its Trial Brief – at a point when the proceedings had been concluded.

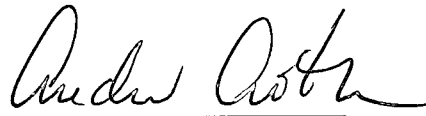
III. CONCLUSION

In summary, A.V. Brands agrees that the declaration was not properly entered into evidence in the trial proceeding. However, to the extent that the Board is willing to entertain SPI's belatedly raised standing argument, treats the argument as an indirect request to belatedly challenge the substitution of parties, or otherwise permits this collateral standing attack, the Aitken Declaration should be duly considered. It demonstrates that SPI's position entirely lacks merit.

Wherefore, SPI's motion to strike should be denied.

Dated: June 26, 2008

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused the original of the foregoing OPPOSITION TO SPI'S MOTION TO STRIKE to be served by first-class mail, postage pre-paid, on Respondent at the following address on June 26, 2008:

Lisa Pearson
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31 West 52nd Street
14th Floor
New York, NY 10019



Andrew C. Aitken

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NOTICE OF APPEARANCE

Please enter the appearance of the following attorney and firm as additional counsel in this proceeding for Petitioner, A.V. Brands, Inc., and direct all further correspondence regarding this proceeding to the undersigned.

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Dated: June 26, 2008

Respectfully submitted,



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Attorney for Petitioner

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Lisa Pearson
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31 West 52nd Street
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