

This Opinion is Not a  
Precedent of the TTAB

Mailed: February 24, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*West Indies Trading Company LLC*

*v.*

*Nicole Averette*  
—

Opposition No. 91220931  
—

Steven Savola for West Indies Trading Company LLC.

Nicole Averette, *pro se*.  
—

Before Wolfson, Heasley and Larkin,  
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Nicole Averette (“Applicant”) seeks to register the mark NIKKI VS NICOLE (in standard characters) on the Principal Register for “Dresses; Shirts; Shorts; Swimwear” in International Class 25.<sup>1</sup>

West Indies Trading Company LLC (“Opposer”) opposes registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), asserting likelihood of

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<sup>1</sup> Application Serial No. 86366087, filed August 13, 2014, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s allegations of first use and use in commerce on January 1, 2013.

confusion based on its alleged common law use of the mark NIKKI BEACH for “clothing, sun care products and related merchandise that have included fragrances,” Notice of Opposition ¶ 1, 1 TTABVUE 6, and based on six registrations for marks containing the wording NIKKI BEACH alleged in the Notice of Opposition and described on the ESTTA filing cover sheet<sup>2</sup> to the Notice of Opposition. They are described below.

Reg. No. 3031488 for the mark NIKKI BEACH for “restaurant and bar services,” which Opposer alleges is owned by Penrod Management Group, Inc..

Reg. No. 3814785 for the mark NIKKI BEACH for “bar soaps, bath soaps, cosmetic soaps, body cream soaps, cream soaps, hand soaps, liquid soaps, perfumed soaps, skin soaps; perfumery, essential oils, cosmetics, hair lotions,” which Opposer alleges is owned by Nikki Beach Beauty SA for Penrod Management International LLC.



Reg. No. 4183499 for the mark  (“NIKKI BEACH HOTELS & RESORTS and tepee Design”) for, *inter alia*, “administrative hotel management” and “hotel services.”

Reg. No. 4312500 for the mark NIKKI BEACH LIFESTYLE for “Bathing suits; Beach cover-ups; Beachwear; Footwear; Head wear; Shirts; Skirts and dresses; Slacks; Sweat suits; T-shirts (in International Class 25); Retail store services featuring clothing and accessories” (in International Class 35), which is mentioned only on the cover sheet to the Notice of Opposition.

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<sup>2</sup> Opposer filed its notice of opposition via the Board’s electronic filing system, known as ESTTA (Electronic System for Trademark Trials and Appeals).

Reg. No. 3379386 for the mark NIKKI BEACH and tepee Design, which Opposer alleges is owned by related company Penrod Management International LLC; and

Reg. No. 3447603 (incorrectly referred to in the Notice of Opposition as 34476603) for the tepee Design mark, which Opposer alleges it owns.

As an additional ground for opposition, Opposer asserts that “the ‘Nikki Beach’ mark has become famous” and that “the granting of a trademark to Applicant” would dilute the distinctive quality of the “Nikki Beach” mark under Trademark Act Section 43(c), 15. U.S.C. § 1125(c). Notice of Opposition ¶¶ 17-18, 1 TTABVUE 8. Opposer also selected “Section 2(a) deceptiveness” on the ESTTA cover sheet as a ground for opposition, but the claim was not supported by allegations in the notice of opposition that accompanied the cover sheet,<sup>3</sup> nor did Opposer pursue the claim in its brief. *See Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1426 n.3 (TTAB 2013) (claim not argued in brief is considered waived). The reference to the deceptiveness claim in the ESTTA cover sheet will be given no further consideration.

Applicant filed an Answer wherein she partially admitted Opposer’s allegations regarding the pleaded marks but denied Opposer’s allegations regarding its claims of dilution and likelihood of confusion. Neither party submitted any evidence or took testimony during their trial period. Only Opposer filed a brief in the case.

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<sup>3</sup> Although the content of the ESTTA cover sheet is read in conjunction with the notice of opposition as an integral component, *PPG Indus. Inc. v. Guardian Indus. Corp.*, 73 USPQ2d 1926, 1928 (TTAB 2005), the mere mention of a ground on the cover sheet is insufficient to constitute a claim. *Embarcadero Technologies Inc. v. RStudio Inc.*, 105 USPQ2d 1825, 1827 n.2 (TTAB 2013) (internal citation omitted).

A brief history of the proceeding is instructive. The Opposition was filed on March 5, 2015, and Applicant's Answer was timely submitted. On August 2, 2016, the Board issued an order to Opposer to show cause why the Board should not treat its failure to file a brief as a concession of the case and enter judgment dismissing the Notice of Opposition with prejudice. Opposer responded to the show cause order by showing that it had not lost interest in the case, and concurrently filed a motion to reopen its time to file a brief on the case. The Board discharged the show cause order and granted Opposer's motion to reopen as conceded. Opposer's testimony period was not reopened. Opposer thereafter filed its brief; Applicant did not file a brief.

#### I. Record

The record in this case consists of the pleadings and the file of the involved application. Trademark Rule 2.122(b)(1), 37 C.F.R. § 2.122(b). The six pleaded registrations are not of record and there is no other evidence or testimony of record in this case.

Opposer could have made the pleaded registrations of record in several ways to carry its burden of showing title of the registrations in Opposer and their current status. For instance, Opposer could have attached to its notice of opposition a status and title copy of the registrations prepared by the Office (or a current copy of information from the Office's electronic database records showing current status and title). Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1). Opposer could also have introduced the registrations by appropriate identification and introduction during the taking of testimony or by filing a notice of reliance accompanied by a status and title copy of each registration prepared by the Office (or a current copy of information from

the Office's electronic database records showing current status and title). Trademark Rule 2.122(d)(2), 37 C.F.R. § 2.122(d)(2) (registrations owned by plaintiff); Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e) (registrations owned by third parties). However, because Opposer did not attach appropriate copies or information to its notice of opposition, or file any evidence or adduce any testimony regarding the pleaded registrations during its testimony period, Opposer has failed to make the pleaded registrations of record.<sup>4</sup>

Opposer did attach *to its brief* copies of registration particulars downloaded from the TSDR database for two of the pleaded registrations, Reg. Nos. 3031488 and 4312500. These copies are inadmissible. Although they would have been admissible by one of the means outlined above, their submission during the briefing period is untimely. Accordingly, we have not considered them.

## II. Opposer's Standing

Standing is a threshold issue that must be proven by the plaintiff in every *inter partes* case. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), *cert. denied*, 135 S. Ct. 1401 (2015); *John W. Carson Found. v. Toilets.com Inc.*, 94 USPQ2d 1942, 1945 (TTAB 2010). As the plaintiff in this proceeding, Opposer has the burden of establishing that it has standing and a ground upon which relief may be granted.

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<sup>4</sup> The fact that the registrations were enumerated on the ESTTA cover sheet and recited in the notice of opposition does not make them of record. *Melwani v. Allegiance Corp.*, 97 USPQ2d 1537 (TTAB 2010) (pleaded registrations not of record where registration numbers were inputted in the ESTTA protocol but copies of registrations were not attached as exhibits).

As discussed above, there is no record evidence that shows Opposer's standing or priority. While the notice of opposition pleads Opposer's use of the mark NIKKI BEACH and registration of six "Nikki-derivative" marks, Opposer submitted no evidence regarding its alleged common law use and no admissible evidence regarding the registrations. Accordingly, there is no record evidence that establishes that Opposer owns or uses any "Nikki Beach" marks.

In the alternative, however, we may look to any admissions in Applicant's Answer, 4 TTABVUE, for this purpose. Applicant has made the following pertinent admissions:

- In ¶ 1 of the notice of opposition, 1 TTABVUE 6, Opposer alleges: "Petitioner, West Indies Trading Company, LLC is part of the 'Nikki Beach' worldwide group that operates beach clubs, restaurants and hotels. Specifically West Indies Trading company sells 'Nikki Beach' trademarked clothing, sun care products and related merchandise that have included fragrances."
  - In response, Applicant states: "Applicant admits that West Indies Trading Company LLC is part of 'Nikki Beach' as stated in paragraph 1."
- In ¶ 2 of the notice of opposition, 1 TTABVUE 6, Opposer alleges: "Penrod Management Group, Inc., owns the trademark "Nikki Beach" under registration number 3031488."
  - In response, Applicant states: "Applicant admits that Penrod Management Group, Inc., is shown as the owners [sic] of the Reg. No. 3031488 in the records of the U.S. Patent and Trade [sic] Office."
- In ¶ 9, 1 TTABVUE 7, Opposer alleges: "West Indies Trading Company, LLC has applied for the trademark 'Nikki Beach Lifestyle' in Class 25 under serial number 85692318."
  - In response, Applicant states: "Applicant admits to allegations in paragraph 9."

- In ¶ 14, 1 TTABVUE 8, Opposer alleges: “The Applicant seeks registration of the similar mark used by Petitioner [sic] for which it owns a valid federal trademark registration and for services similar to that of Petitioner. The Petitioner has created and earned an enormous amount of goodwill for the ‘Nikki Beach’ brand and trademark in excess of ten (10) years.”
  - In response, Applicant states: “Applicant admits ‘NIKKI BEACH’ is a valid federal trademark. Applicant is without knowledge or information sufficient to form a belief as to the remaining [sic] of paragraph 14 therefore denies.”
- In ¶ 16, 1 TTABVUE 8, Opposer alleges: “‘Nikki Beach’ has developed into a lifestyle brand, which includes food and beverage, entertainment, music, clothing, sun care products, fragrances and hospitality lodging.”
  - In response, Applicant states: “Applicant admits to Nikki Beach products, hospitality lodging, beverage, fragrances and clothing. Applicant is without knowledge or information sufficient to form a belief to the remaining [sic] in paragraph 16 therefore denies.”

Applicant admits that Opposer applied to register the mark NIKKI BEACH LIFESTYLE, and is part of a “Nikki Beach” brand that involves hospitality lodging, beverage, fragrances and clothing. Based on these admissions, we find that Opposer has shown that it has a “real interest” in the proceedings and a “reasonable” basis for its belief of damage. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *see also Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987).

### III. Ownership and Priority

On the other hand, these admissions are insufficient to prove Opposer’s claim of ownership of the marks NIKKI BEACH (as shown in Reg. No. 3031488 and Reg. No. 3814785), or NIKKI BEACH LIFESTYLE. Applicant’s stated admission in ¶ 2, that

Penrod Management Group, Inc. is the owner of the NIKKI BEACH mark under Reg. No. 3031488, and its stated admission in ¶ 11, that “Nikki Beach Beauty SA for Penrod Management International, LLC” owns Reg. No. 3814785, directly contradict Opposer’s claim of ownership of that mark. Further, Applicant’s stated admission in ¶ 9 regarding the NIKKI BEACH LIFESTYLE trademark application at best only acknowledges that Applicant applied to register the mark, but makes no admission regarding its current title or status. It is not an admission as to validity, ownership or exclusive right to use the mark; it is not even an admission that the application matured into a registration. *See Demon Int’l LC v. Lynch*, 86 USPQ2d 1058, 1060 (TTAB 2008) (“while applicant’s answer ‘does not dispute the filing’ of opposer’s application, this statement cannot be considered to be an admission of opposer’s ownership of a subsequently issued registration and validity of such registration”); *Hewlett-Packard Co. v. Olympus Corp.*, 931 F2d 1551, 18 USPQ2d 1710, 1713 (Fed. Cir. 1991) (finding admission that pleaded registrations “originally issued” to the opposer insufficient to establish current title absent admission that mark was valid and subsisting and in full force and effect).

Regarding the remaining registrations, for the marks NIKKI BEACH and tepee Design (Reg. No. 3379386), tepee Design (Reg. No. 34476603), and NIKKI BEACH HOTELS & RESORTS and tepee Design (Reg. No. 4183499), Applicant’s admissions do not prove that these marks are owned by Opposer:

- In response to the allegations of ¶ ¶ 4 and 6, 4 TTABVUE 7, Applicant “admits that the name ‘Nikki Beach’ was registered with tepee logo by related company Penrod Management International, LLC under registration number 3379386.”

- In response to the allegations of ¶ 10, 4 TTABVUE 7, Applicant “admits ‘Nikki Beach Hotel and Resorts is shown in the USPTO reg. no. 4183499 in classes 35 (restaurant management) and 43 (cafes and restaurants).” The admission does not establish that Opposer owns the registration.

To the extent that these statements may be construed as admissions of ownership, they are directed to unrelated entities and do not benefit Opposer. Further, in response to the allegation of ¶ 7, 4 TTABVUE 7, while Applicant admits that “West Indies Trading Company, LLC has the tepee logo for the ‘Nikki Beach’ trademark registered for clothing under number 34476603 [sic, 3447603],” Applicant’s admission as to Opposer’s ownership of this registration does not suffice to show its current status. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1042 (TTAB 2014) (“The fact that applicant admitted in her answer that opposer owned the registrations does not suffice to show their current status.”). And even if it did, the registration has been cancelled.

Accordingly, Opposer cannot rely on the pleaded registrations. As for Opposer’s allegations of use of the mark NIKKI BEACH, Applicant denies ¶ 12, wherein Opposer alleges: “By virtue of extensive advertising, marketing, promotions and sales of its goods and services under the “Nikki Beach” brand, its name and marks have become well and favorably known to the public globally and have developed as valuable symbols of Petitioner’s [sic] business and goodwill appurtenant thereto.” Similarly, Applicant denies the allegations in ¶ 15 that “Petitioner [sic] has clothing shops at all ‘Nikki Beach’ locations selling garments, clothing, hats and beach wear under the name ‘Nikki Beach’.” Thus, even if we find by operation of Fed. R. Civ. P.

8(b)(6)<sup>5</sup> that Applicant has admitted the allegation in ¶ 1: “Specifically West Indies Trading Company sells ‘Nikki Beach’ trademarked clothing, sun care products and related merchandise that have included fragrances,” and even if we read these admissions in conjunction with Applicant’s statement in ¶ 16 that it “admits to ‘Nikki Beach’ products, hospitality lodging, beverage, fragrances and clothing,” none of these statements proves that Opposer commenced using its mark on any goods or services prior to August 13, 2014, the filing date of Applicant’s application and Applicant’s constructive use date. Trademark Act Section 7(c), 15 U.S.C. § 1057(c); *Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1119 (TTAB 2009) (applicant may rely without further proof upon the filing date of its application as a “constructive use” date for purposes of priority). Accordingly, these admissions do not prove Opposer’s claim of prior use of any of the pleaded marks.

“The purpose of pleadings is to apprise a party by fair notice of the case it has to meet, and the Federal Rules of Civil Procedure reject the approach that pleading is a game of skill.” *Tiffany and Co.* 173 USPQ at 8 (citing *Am. Novawood Corp. v. United States Plywood-Champion Papers, Inc.*, 426 F.2d 823, 165 USPQ 613, 616 (CCPA 1970). Taking together Applicant’s specific denials in ¶¶ 12 and 15, and her further denials of Opposer’s general allegations in ¶¶ 17-21 of a likelihood of confusion, dilution, and a belief that it would be damaged by registration of Applicant’s mark, 4

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<sup>5</sup> Fed. R. Civ. P. 8(b)(6) *Effect of Failing to Deny* provides: “An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.”

TTABVUE 4, we find that Applicant's Answer was sufficient to put Opposer on notice that its claims were being challenged and that Opposer would be required to prove its case, including ownership of at least one of the pleaded marks. Opposer, however, did not prove its case. While Opposer has shown its standing to pursue a claim based on Applicant's admission that Opposer "is part of the 'Nikki Beach' worldwide group," Opposer has not proven its ownership of any relevant pleaded registration or prior use of any relevant pleaded mark. Accordingly, Opposer cannot prevail on either its Section 2(d) claim of likelihood of confusion or its Section 43(c) claim of dilution.

***Decision:*** The opposition is dismissed.