

## **UNITED STATES: No Whining Over Failure to Properly Plead Fraud in Wine Case**

In *E. & J. Gallo Winery v. Quala S.A.*, Opposition No. 91186763, (November 7, 2009) [not precedential], the U.S. Patent and Trademark Office's Trademark Trial and Appeal Board ("TTAB") denied the motion of E. & J. Gallo Winery to amend its notice of opposition to add a claim of fraud. The TTAB held Gallo's proposed fraud claim was deficiently pleaded under Federal Rule of Civil Procedure 9(b).

Applicant Quala S.A. filed an application for the mark FRUITIÑO (Stylized) for use with "beers; mineral and aerated waters and other non-alcoholic drinks, namely, carbonated beverages; fruit drinks and fruit juices; syrups and other preparations for making beverages, namely fruit beverages." Gallo owned a registration for the mark FRUTEZIA for "wine." Gallo filed an opposition against Quala's application on the basis that the mark FRUITIÑO (Stylized) was confusingly similar to Gallo's FRUTEZIA mark.

Two motions were before the TTAB: (1) Quala's motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) on the basis that there was no likelihood of confusion because the marks are not similar in appearance, meaning or sound; and (2) Gallo's motion to amend its notice of opposition to include a fraud claim. The TTAB found that there was a genuine issue of material fact as to the similarity of the parties' marks and thus denied Quala's motion for judgment on the pleadings.

The TTAB then turned to Gallo's motion to amend its pleading to add a fraud claim. Gallo based its claim on the fact that Quala had not responded to any discovery requests, part of which sought to test the veracity of the declaration signed in the application. Thus, Gallo argued that there was no evidence that Quala had a bona fide intent to use the mark on any of the goods listed in the application.

Because Gallo sought to add a fraud allegation to its opposition, the TTAB noted that to satisfy Federal Rule of Civil Procedure 9(b), the circumstances and underlying facts relating to a fraud claim must be stated with sufficient particularity and must be specific and detailed. On the other hand, the conditions relating to state of mind may be averred generally.

The TTAB noted that Gallo failed to set forth, with sufficient particularity, the underlying facts upon which the fraud claim was based. The TTAB also noted that Gallo's amended Notice of Opposition did not include any claim that there was intent by Quala to deceive, or that Quala knowingly made inaccurate or misleading statements. Because of these deficiencies in the proposed amended pleading, the TTAB held that Gallo's claim of fraud in its amended pleading was insufficient.

The TTAB thus denied Gallo's motion to amend its notice of opposition. However, it denied the motion without prejudice to refile if Gallo actually discovered providing a basis for a fraud claim. Prompted by language in the TTAB's Nov. 7, 2009 decision, Gallo filed a new motion on January 5, 2010, in which it amended its pleadings to add a claim of lack of bona fide intention to use rather than amending its pleadings to include a sufficiently pleaded fraud claim. Stay tuned . . . .

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