

ESTTA Tracking number: **ESTTA413254**

Filing date: **06/07/2011**

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

Proceeding	91199109
Party	Plaintiff Calpis Co., Ltd.
Correspondence Address	DONNA A TOBIN BAKER AND HOSTETLER LLP 45 ROCKEFELLER PLAZA NEW YORK, NY 10111 UNITED STATES rhorowitz@bakerlaw.com,dtobin@bakerlaw.com,ejoyce@bakerlaw.com,trademarks@bakerlaw.com,jlozada@bakerlaw.com
Submission	Other Motions/Papers
Filer's Name	Donna A. Tobin
Filer's e-mail	dtobin@bakerlaw.com,rhorowitz@bakerlaw.com,ejoyce@bakerlaw.com,jlozada@bakerlaw.com,trademarks@bakerlaw.com
Signature	/Donna A. Tobin/
Date	06/07/2011
Attachments	ConsolOpp91199109motion.pdf (55 pages)(1296690 bytes)

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

CALPIS CO., LTD.)	
)	
Opposer,)	
)	
v.)	Consolidated
)	Opposition Nos. 91199109 and
)	91199111
)	
CALICO JACK'S L.L.C)	
)	
Applicant.)	

**OPPOSER'S MOTION AND SUPPORTING MEMORANDUM FOR AN ORDER
DIRECTING THAT FED. R. CIV. P. RULE 8(b)(6) APPLIES TO APPLICANT'S
AMENDED ANSWERS**

Opposer CALPIS CO. LTD. ("Calpis") hereby submits its Motion and Supporting Memorandum for an Order Directing That Fed. R. Civ. P. Rule 8(b)(6) applies to Applicant's Amended Answers in these consolidated opposition proceedings and that all allegations in the Notices of Opposition which have not been specifically denied or responded to by Applicant shall be deemed admitted

The Board's selective application of certain provisions of Rule 8(b) and its failure to apply all provisions of Rule 8(b) equally will cause undue burden to Opposer and to the Board itself, will prejudice Opposer, considerably slow down these proceedings, is contrary to the Federal Rules, the Trademark Rules (37 C.F.R. § 2.116(a)) and the Board's own determination in this case and is against public policy.

A. BACKGROUND

Opposer instituted these proceedings on March 23, 2001 by filing Notices of Opposition against Applicant's registration of CALICO, designated Opposition No. 91199109 (the '109 Opposition") and CALICO JACK'S and design, designated Opposition 91199111 (the '111 Opposition"). Opposer, in both Notices of Opposition, alleges likelihood of confusion pursuant to § 2(d) of the Trademark Law, 15 U.S.C. § 1052 (d), deception and false suggestion of origin pursuant to § 2(a) of the Trademark Law, 15 U.S.C. § 1052 (a) and fraud. On March 28, 2011, Opposer filed Amended Notices of Opposition in both proceedings in which it again asserted the same three claims.

On April 10, 2011, Applicant filed "Answers" in both opposition proceedings, which were comprised of printouts from the Trademark Electronic Search System ("TESS") of the U.S. Patent and Trademark Office website for the respective marks with the word "Denial" written on the top of each. On April 14, 2011, the Board, in the '109 Opposition, appropriately notified Applicant that its "Answer" was deficient, advising that Applicant was required to respond to each of the 24 paragraphs in the Amended Notice of Opposition filed by Opposer. In its order of April 14, attached hereto as Exhibit A, the Interlocutory Attorney specifically stated that the "Answer" *"does not comply with Fed. R. Civ. P. 8(b), which is made applicable to this proceeding by Trademark Rule 2.116(a)." (emphasis added) (Exhibit A, pp. 1-2).* The Order, which made clear that a responsive pleading was required for all allegations in the Notices of Opposition,

included partial text from Fed. R. Civ. P. Rule 8(b)¹ corresponding to Rule 8(b) (1) – (5). The Order completely omitted any reference to the substance of Fed. R. Civ. P. Rule 8(b)(6) which provides as follows:

(6) Effect of Failing to Deny. 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. (Emphasis added).

In response to the Order finding the Answer in the '109 Opposition not in compliance with Fed. R. Civ. P. Rule 8(b), on April 19, 2011 Applicant filed an amended Answer to the Amended Notice of Opposition in both opposition proceedings. The amended Answer in both opposition proceedings responded to each of the numbered paragraphs of the claims in the respective Amended Notices of Opposition but failed to respond in any way to the first eleven (11) paragraphs of factual allegations made therein. The amended Answers filed in the '109 and '111 oppositions are attached hereto as Exhibits B and C respectively.

In an Order dated April 25, 2011 (attached hereto as Exhibit D), the Board consolidated both proceedings, stating that “[i]n each answer, applicant failed to answer the first eleven enumerated paragraphs of opposer’s amended notice of opposition. To expedite matters, the Board construes applicant’s answer, in each proceeding, as a general denial of paragraphs 1 through 11, inclusive.” (Exhibit D, pp. 2-3). In a subsequent telephone conference with the Interlocutory Attorney, Applicant submitted that the Board’s Order of April 25, 2011 providing that the allegations not responded to in Applicant’s amended Answers were deemed denied is contrary to the Federal Rules

¹ Opposer notes that while the Order of Exhibit A purports to quote Fed. R. Civ. P. 8(b) in part, the language does not properly quote the current version of Rule 8(b). (Exhibit A, p.2).

of Civil Procedure. The Interlocutory Attorney determined that no modification of the Board's Order of April 25, 2010 was necessary.

The Board's April 14, 2011 Order is directly contrary to Fed. R. Civ. P. 8(b)(6) which, as the Order itself makes clear, applies to this proceeding in its entirety. Rule 8(b)(6) provides that an allegation which is not denied is deemed admitted. The applicability of 8(b)(6) is echoed by §311.02(a) of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §311.02(a) which provides that an "answer that fails to deny a portion of an allegation may be deemed admitted as to that portion," citing Fed. R. Civ. P. Rule 8(d).²

Opposer respectfully moves this Board for an Order directing that the whole of Fed. R. Civ. P. Rule 8(b), including Rule 8(b)(6), be applied to this proceeding as required by Rule 2.116(a) of the Trademark Rules and that all allegations not specifically denied or responded to by Applicant be deemed admitted.

B. ARGUMENT

The Board's Order that the allegations of paragraphs 1 – 11 of the Notices of Opposition herein will be deemed denied because Applicant failed to respond to them at all will cause an undue burden to Opposer, who will be required to submit proof of every single allegation made in those paragraphs, such as the existence of its own registrations and the filing date and content of the applications at issue here. Such an evidentiary burden will likely require the submission of additional evidence, the taking of additional depositions and the submission of additional notices of reliance to prove the basic facts alleged in paragraphs 1 – 11 of the Notices of Opposition. Such a

² The language of Fed. R. Civ P. Rule 8(d) was moved to 8(b) in a revision of the Federal Rules in 2008.

requirement will also likely cause additional burden to the Board, who will be required to evaluate such evidence and make evidentiary rulings related thereto. While the stated objective of the Board's Order of April 25th was to "expedite matters" it will have exactly the opposite effect.

Additionally, the Board's Order is prejudicial to Opposer, who is entitled to rely on the uniform application of the Federal Rules to these proceedings. Likewise, public policy requires that the Federal Rules be applied consistently such that parties may have reasonable expectations regarding the procedures to be applied in Board proceedings.

The Board's Order of April 25, 2011 is also directly contrary to Fed. R. Civ. P. Rule 8(b)(6), which the Board itself, in its Order, made clear applies herein, pursuant to Trademark Rule 37 C.F.R. 2.116(a). The Board cannot selectively pick and choose which sections of Rule 8(b) apply and which do not. Indeed, TBMP §311.02(a) specifically permits the Board to deem all allegations which are not denied to be admitted. It is crystal clear that Rule 8(b) in its entirety applies to this proceeding, including Rule 8(b)(6), and that Rule 8(b)(6) requires that all allegations not denied or responded to shall be deemed admitted.

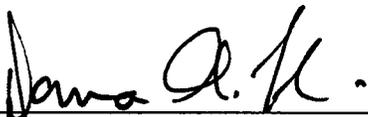
CONCLUSION

Based upon the forgoing, Opposer respectfully submits that its Motion for an Order Directing That Fed. R. Civ. P. Rule 8(b)(6) applies to Applicant's Amended Answers in these consolidated opposition proceedings should be granted in its entirety and that all allegations in the Notices of Opposition which have not been specifically

denied or responded to by Applicant shall be deemed admitted.

Dated: June 7, 2011

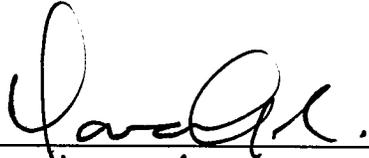
BAKER & HOSTETLER LLP

By: 
Robert B.G. Horowitz
Donna A. Tobin
45 Rockefeller Plaza
New York, New York 10111
(212) 589-4200
Attorneys for Opposer
Calpis Co., Ltd.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion was served on June 7, 2011 by first class mail, postage prepaid, in an envelope addressed to Applicant as follows:

Calico Jack's LLC
Attn: Sidney J. Martin
19 Autumn Lane
Carriere, MS 39426-7070



DONNA A. TOBIN

EXHIBIT A

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

VW

Mailed: April 14, 2011

Opposition No. 91199109

Calpis Co., Ltd.

v.

Calico Jack's LLC

Jennifer Krisp, Interlocutory Attorney:

Applicant filed a communication on April 10, 2011.¹ Although applicant calls its filing an "answer," by selecting that submission category in the ESTTA online filing system, a reading of this informal "answer" reveals, that it is pages from the Trademark Electronic Search System (TESS) system. The filing does not comply with Fed. R. Civ. P. 8(b), which is made applicable this proceeding by Trademark Rule 2.116(a).

Fed. R. Civ. P. 8(b) provides, in part:

¹ Applicant's communication does not indicate proof of service of a copy of same on counsel for opposer, as required by Trademark Rule 2.119 (more fully explained later in this order). To expedite this matter, a copy of said communication is forwarded herewith to counsel for opposer. Strict compliance with Trademark Rule 2.119 is required in all further papers filed with the Board, and the Board may decline to consider any future motion or paper filed by applicant that does not include proof of service, as required.

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.

The notice of opposition filed by opposer herein consists of 24 paragraphs setting forth the basis of opposer's claim of damage. In accordance with Fed. R. Civ. P. 8(b), applicant must answer the notice of opposition by admitting or denying the allegations contained in each paragraph. If applicant is without sufficient knowledge or information on which to form a belief as to the truth of any one of the allegations, it should so state and this will have the effect of a denial.

In view of the foregoing, applicant is allowed until May 23, 2011 in which to file an answer herein which complies with Fed. R. Civ. P. 8(b).

As noted earlier in this order, Trademark Rules 2.119(a) and (b) require that every paper filed in the Patent and Trademark Office in a proceeding before the Board must be served upon the attorney for the other party, or on the party

Opposition No. 91199109

if there is no attorney, and proof of such service must be made before the paper will be considered by the Board.

Consequently, copies of all papers which applicant may subsequently file in this proceeding, including its answer to the notice of opposition, must be accompanied by a signed statement indicating the date and manner in which such service was made. The statement, whether attached to or appearing on the paper when filed, will be accepted as prima facie proof of service.

It should also be noted that while Patent and Trademark Rule 11.14 permits any person to represent itself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition proceeding to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney.

It is recommended that applicant obtain a copy of the latest edition of Title 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice. These rules may be viewed at the USPTO's trademarks page:

<http://www.uspto.gov/main/trademarks.htm>. The Board's main webpage

[\(http://www.uspto.gov/web/offices/dcom/ttab/\)](http://www.uspto.gov/web/offices/dcom/ttab/) includes information on amendments to the Trademark Rules applicable to Board proceedings, on Alternative Dispute Resolution (ADR),

Opposition No. 91199109

Frequently Asked Questions about Board proceedings, and a web link to the Board's manual of procedure (the TBMP).

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.

Conferencing, disclosure, discovery and trial dates are reset as follows:

Time to Answer	5/23/2011
Deadline for Discovery Conference	6/22/2011
Discovery Opens	6/22/2011
Initial Disclosures Due	7/22/2011
Expert Disclosures Due	11/19/2011
Discovery Closes	12/19/2011
Plaintiff's Pretrial Disclosures	2/2/2012
Plaintiff's 30-day Trial Period Ends	3/18/2012
Defendant's Pretrial Disclosures	4/2/2012
Defendant's 30-day Trial Period Ends	5/17/2012
Plaintiff's Rebuttal Disclosures	6/1/2012
Plaintiff's 15-day Rebuttal Period Ends	7/1/2012

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing after briefing is not required but will be scheduled upon request of any party, as provided by Trademark Rule 2.129.

EXHIBIT B

ESTTA Tracking number: **ESTTA404296**

Filing date: **04/18/2011**

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

Proceeding	91199109
Party	Defendant Calico Jack's LLC
Correspondence Address	CALICO JACKS LLC 19 AUTUMN LANE CARRIERE, MS 39426-7070 UNITED STATES calicoenergy@yahoo.com
Submission	Answer
Filer's Name	/Sidney J. Martin III/
Filer's e-mail	calicoenergy@yahoo.com
Signature	/Sidney J. Martin III/
Date	04/18/2011
Attachments	calico final word document pdf.pdf (17 pages)(430906 bytes)

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

CALPICO CO., LTD.

Opposer,

VS.

CALICO JACK'S L.L.C.

Defendants,

OPPOSITION NO. 91199109

TRADEMARK NO. 85077274

DATE: 18 APRIL 2011

ANSWER

Count 1 Likelihood of confusion – Section 2(d) of the Lanham Act

1. Applicant's use of the CALICO design and mark is likely to cause confusion, or to cause mistake, or to deceive, in view of Opposer's long prior use of the arbitrary and distinctive CALPICO family of marks in association with the sale, distribution and advertising of identical and similar types of goods.

DENY

2. By reason of Opposer's use of the CALPICO family of marks from a date long prior to Applicant's use of its application to register, a confusingly similar trademark in connection with the same or related goods, Opposer has rights superior to any rights of applicant.

DENY

3. The registration of Applicant's CALICO design and mark on the Principal register will interfere with Opposer's enjoyment of its rights in its CALPICO family of marks, to the substantial detriment of Opposer, pursuant to Section 2(d) of the Lanham Act, 15 U.S.C. Section 1052 (d).

DENY

Count II Deception/ False Suggestion of Origin – Section 2 (a) of the Lanham Act

3. Applicant's CALICO design and mark so closely resembles Opposer's CALPICO Family of marks that it is likely to cause desorption in violation of Section 2(a) of the Lanham Act, 15 U.S.C. Section 1052(a) in that Applicant's mark misdescribes the nature of origin of the goods, and this is likely to materially alter purchasers decision to acquire Applicant's goods.

DENY

5. Applicant's CALICO design and mark so closely resembles Opposer's CALPICO family of marks that it falsely suggests a connection with Opposer in violation of Section 2(a) of the Lanham Act, because Opposer's CALPICO family of marks points uniquely to Opposer and purchasers will assume that the goods sold under Applicant's CALICO design and mark are connected or affiliated with Opposer.

DENY

6. Applicant's registration of the CALICO design and mark will damage Opposer within the meaning of Section 2(a) of the Lanham Act, 15 U.S.C. Section 1052 (a).

DENY

Count III Fraud

7. Upon information and belief, Applicant fraudulently misrepresented that its CALICO design and mark was in use in commerce when it filed the '274 application under oath pursuant to Title 18 U.S.C. 1001. The specimen submitted by applicant to support its allegation of use is clearly fabricated – a paper label apparently taped or glued to a can—is obviously not a commercially used label, and thus is false.

DENY

8. Upon information and belief, the specimen relied on to support Applicant's alleged use indicates that the product on which it is used contains alcohol. However, Applicant's goods, as described in the '274 application do not contain alcohol. Thus, the specimen label submitted is false and was not actually used in connection with the goods in the application.

DENY

9. Upon information and belief, said false statement was made, and specimen submitted, by an authorized agent of Applicant with the knowledge and belief that such statement and specimen were false.

DENY

10. Upon information and belief, said false statement was made, and specimen submitted, with the intent to induce authorized agents of the United States Patent and Trademark Office to grant a registration on the '274 application to Applicant.

DENY

11. Upon information and belief, the United States Trademark Office relied on this false statement and specimen in approving the application for registration and but for these false statements, the application would not have been approved for publication.

DENY

12. For the forgoing reasons, Opposer will suffer considerable harm to its CALPICO family of marks if the '274 application is permitted to mature to registration.

DENY

WHEREFORE, Defendant submits a plea of denial for all 3 counts and to each individual accusation to each individual paragraph above and hereby states that the company CALICO JACK'S L.L.C., and marks "CALICO" along with "CALICO JACKS" trademarks or products of trade does not have anything to do with CALPICO or CALPICO's family of trademarks and denies any and all accusations.

DATE: 18 APRIL 2011

Respectfully Submitted,
CALICO JACK'S LLC.

By: 
Sidney J. Martin III
19 Autumn Lane
Carrier, Ms. 39426
(504)355-9639 (tel)

CERTIFICATE OF SERVICE

I Hearby certify that on the 18th day of APRIL, 2011 a true copy of ANSWER to the NOTICE OF OPPOSITION was served on applicant via U.S. first class mail, postage prepaid to:

BAKER & HOSTETLER LLP
45 Rockafeller Plaza
New York, New York 10111
(212) 589-4200 (tel)



Sidney J. Martin III

EXHIBIT A



Trademarks > Trademark Electronic Search System (TESS)

TESS was last updated on Sat Apr 16 04:05:45 EDT 2011

TESS HOME	NEW USER	STRUCTURED	FREE FORM	BROWSE Dict	SEARCH OG	BOTTOM	HELP	PREV LIST	CURR LIST
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ASSIGN Status

TDR

TTAB Status

(Use the "Back" button of the

Internet Browser to return to TESS)



Word Mark CALICO

Goods and Services IC 032. US 045 046 048. G & S: Energy drinks; Fruit drinks and fruit juices; Fruit flavored soft drinks; Fruit-based soft drinks flavored with tea; Guarana drinks; Isotonic drinks; Pop; Powders used in the preparation of isotonic sports drinks and sports beverages; Soft drinks; Sports drinks; Sports drinks, namely, energy drinks; Syrups for making soft drinks. FIRST USE: 20100120. FIRST USE IN COMMERCE: 20100120

Mark Drawing (3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS

Code

Design 02.11.10 - Bones, human; Human skeletons, parts of skeletons, bones, skulls; Skulls, human
Search Code 23.01.01 - Epees; Foils; Rapiers; Sabers; Swords

Serial Number 85077274

Filing Date July 2, 2010

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition November 23, 2010

Owner (APPLICANT) Calico Jack's llc. LIMITED LIABILITY COMPANY MISSISSIPPI 19 Autumn lane
carriere MISSISSIPPI 39426

Description of Mark Color is not claimed as a feature of the mark. The mark consists of a skull with two swords
crossed beneath and the words "Calico".

Type of Mark TRADEMARK

Register PRINCIPAL

Live/Dead Indicator LIVE

TESS HOME	NEW USER	STRUCTURED	FREE FORM	BROWSE DICT	SEARCH OG	TOP	HELP	PREV LIST	CURR LIST
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EXHIBIT B



Trademarks > Trademark Electronic Search System (TESS)

TESS was last updated on Sat Apr 16 04:05:45 EDT 2011

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(Use the "Back" button of the Internet Browser to return to TESS)

Typed Drawing

Word Mark CALPICO SODA

Goods and Services IC 032. US 045 046 048. G & S: soft drinks, fruit juices, [vegetable juice beverages]. FIRST USE: 19960300. FIRST USE IN COMMERCE: 19960300

Mark Drawing Code (1) TYPED DRAWING

Serial Number 78267041

Filing Date June 25, 2003

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition May 25, 2004

Registration Number 2874702

Registration Date August 17, 2004

Owner (REGISTRANT) CALPIS CO., LTD. JOINT STOCK COMPANY JAPAN 4-1, Ebisu-Minami 2-chome, Shibuya-ku, Tokyo JAPAN

Attorney of Record David Toren

Prior Registrations 1000780;1774588

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SODA" APART FROM THE MARK AS SHOWN

Type of Mark TRADEMARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR).

Live/Dead Indicator LIVE

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EXHIBIT C



Trademarks > Trademark Electronic Search System (TESS)

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Typed Drawing

Word Mark **CALPICO WATER**

Goods and Services IC 032. US 045 046 048. G & S: Soft drinks. FIRST USE: 19920400. FIRST USE IN COMMERCE: 19920400

Mark Drawing Code (1) TYPED DRAWING

Serial Number 78266179

Filing Date June 24, 2003

Current Filing Basis 1A

Original Filing Basis 1A

**Published for
Opposition** July 20, 2004

Registration Number 2893343

Registration Date October 12, 2004

Owner (REGISTRANT) Calpis Co., Ltd. CORPORATION JAPAN 20-3, 2-chome, Ebisu-Nishi,
Shibuya-ku Tokyo JAPAN

Attorney of Record Edmund J. Sease

Prior Registrations 1000780

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "WATER" APART FROM
THE MARK AS SHOWN

Type of Mark TRADEMARK

Register PRINCIPAL

Live/Dead Indicator LIVE

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EXHIBIT D



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THE TRADE MARK ELECTRONIC SEARCH SYSTEM (TESS) IS A SEARCH AND RETRIEVAL SYSTEM OPERATED BY THE UNITED STATES PATENT AND TRADEMARK OFFICE.

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TARR Status	ASSIGN Status	TDR	TTAB Status
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(Use the "Back" button of the Internet Browser to return to TESS)

Typed Drawing

Word Mark	CALPICO
Goods and Services	IC 032. US 045. G & S: CONCENTRATES FOR MAKING SOFT DRINKS IC 029 032. US 046. G & S: FERMENTED MILK, FERMENTED MILK BEVERAGE, FRUIT JUICE [, YOGURT, CREAM AND BUTTER]
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	72386926
Filing Date	March 22, 1971

Current Filing Basis 44E

Original Filing Basis 44E

Registration Number 1000780

Registration Date December 31, 1974

Owner (REGISTRANT) CALPIS FOOD INDUSTRY CO., LTD., THE CORPORATION JAPAN 20-3, 2-CHOME, EBISU-NISHI SHIBUYA-KU, TOKYO JAPAN

(LAST LISTED OWNER) CALPIS CO., LTD. CORPORATION JAPAN 4-1, 2-CHOME, EBISU-MINAMI, SHIBUYA-KU TOKYO JAPAN

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record ROBERT B.G. HOROWITZ, ESQ.

Type of Mark TRADEMARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20050222.

Renewal 3RD RENEWAL 20050222

Live/Dead Indicator LIVE

TESS HOME	NEW USER	STRUCTURED	FREE FORM	BROWSE DICT	SEARCH OG	TOP	HELP	PREV LIST	CURR LIST
NEXT LIST	FIRST DOC	PREV DOC	NEXT DOC	LAST DOC					

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EXHIBIT C

ESTTA Tracking number: **ESTTA404301**

Filing date: **04/18/2011**

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

Proceeding	91199111
Party	Defendant Calico Jack's LLC.
Correspondence Address	CALICO JACK'S LLC. CALICO JACK'S LLC. 19 AUTUMN LN CARRIERE, MS 39426-7070 UNITED STATES calicoenergy@yahoo.com
Submission	Answer
Filer's Name	/Sidney J. Martin III/
Filer's e-mail	calicoenergy@yahoo.com
Signature	/Sidney J. Martin III/
Date	04/18/2011
Attachments	calico jacks final word document pdf.pdf (17 pages)(394851 bytes)

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

CALPICO CO., LTD.

Opposer,

VS.

CALICO JACK'S L.L.C.

Defendants,

OPPOSITION NO. 91199111

TRADEMARK NO. 85121744

DATE: 18 APRIL 2011

ANSWER

Count 1 Likelihood of confusion – Section 2(d) of the Lanham Act

1. Applicant's use of the CALICO JACK'S mark is likely to cause confusion, or to cause mistake, or to deceive, in view of Opposer's long prior use of the arbitrary and distinctive CALPICO family of marks in association with the sale, distribution and advertising of identical and similar types of goods.

DENY

2. By reason of Opposer's use of the CALPICO family of marks from a date long prior to Applicant's use of its application to register, a confusingly similar trademark in connection with the same or related goods, Opposer has rights superior to any rights of applicant.

DENY

3. The registration of Applicant's CALICO JACK'S mark on the Principal register will interfere with Opposer's enjoyment of its rights in its CALPICO family of marks, to the substantial detriment of Opposer, pursuant to Section 2(d) of the Lanham Act, 15 U.S.C. Section 1052 (d).

DENY

Count II Deception/ False Suggestion of Origin – Section 2 (a) of the Lanham Act

3. Applicant's CALICO JACK'S mark so closely resembles Opposer's CALPICO Family of marks that it is likely to cause deception in violation of Section 2(a) of the Lanham Act, 15 U.S.C. Section 1052(a) in that Applicant's mark misdescribes the nature of origin of the goods, and this is likely to materially alter purchasers decision to acquire Applicant's goods.

DENY

5. Applicant's CALICO JACK'S mark so closely resembles Opposer's CALPICO family of marks that it falsely suggests a connection with Opposer in violation of Section 2(a) of the Lanham Act, because Opposer's CALPICO family of marks points uniquely to Opposer and purchasers will assume that the goods sold under Applicant's CALICO JACK'S mark are connected or affiliated with Opposer.

DENY

6. Applicant's registration of the CALICO JACK'S mark will damage Opposer within the meaning of Section 2(a) of the Lanham Act, 15 U.S.C. Section 1052 (a).

DENY

Count III Fraud

7. Upon information and belief, Applicant fraudulently misrepresented that its CALICO JACK'S mark was in use in commerce when it filed the '274 application under oath pursuant to Title 18 U.S.C. 1001. The specimen submitted by applicant to support its allegation of use is clearly fabricated – a paper label apparently taped or glued to a can—is obviously not a commercially used label, and thus is false.

DENY

8. Upon information and belief, the specimen relied on to support Applicant's alleged use indicates that the product on which it is used contains alcohol. However, Applicant's goods, as described in the '274 application do not contain alcohol. Thus, the specimen label submitted is false and was not actually used in connection with the goods in the application.

DENY

9. Upon information and belief, said false statement was made, and specimen submitted, by an authorized agent of Applicant with the knowledge and belief that such statement and specimen were false.

DENY

10. Upon information and belief, said false statement was made, and specimen submitted, with the intent to induce authorized agents of the United States Patent and Trademark Office to grant a registration on the '274 application to Applicant.

DENY

11. Upon information and belief, the United States Trademark Office relied on this false statement and specimen in approving the application for registration and but for these false statements, the application would not have been approved for publication.

DENY

12. For the forgoing reasons, Opposer will suffer considerable harm to its CALPICO family of marks if the '274 application is permitted to mature to registration.

DENY

WHEREFORE, Defendant submits a plea of denial for all 3 counts and to each individual accusation to each individual paragraph above and hereby states that the company CALICO JACK'S L.L.C., and marks "CALICO" along with "CALICO JACKS" trademarks or products of trade does not have anything to do with CALPICO or CALPICO's family of trademarks and denies any and all accusations.

DATE: 18 APRIL 2011

Respectfully Submitted,
CALICO JACK'S LLC.

By: 
Sidney J. Martin III
19 Autumn Lane
Carrier, Ms. 39426
(504)355-9639 (tel)

CERTIFICATE OF SERVICE

I Hearby certify that on the 18th day of APRIL, 2011 a true copy of ANSWER to the NOTICE OF OPPOSITION was served on applicant via U.S. first class mail, postage prepaid to:

BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, New York 10111
(212) 589-4200 (tel)

A handwritten signature in black ink, appearing to read "Sidney J. Martin III", written in a cursive style.

Sidney J. Martin III

EXHIBIT A



Trademarks > Trademark Electronic Search System (TESS)

UNITED STATES PATENT AND TRADEMARK OFFICE :: TRADEMARK ELECTRONIC SEARCH SYSTEM :: TRADEMARK SEARCH :: TESS HOME

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Start List At: OR Jump to record: **Record 1 out of 10**

TARR Status ASSIGN Status TDR TTAB Status (Use the "Back" button of the Internet Browser to return to TESS)

CALICO JACK'S

Word Mark CALICO JACK'S

Goods and Services IC 032. US 045 046 048. G & S: Colas; Concentrates, syrups or powders used in the preparation of soft drinks; Energy drinks; Fruit drinks and juices; Guarana drinks; Isotonic drinks; Isotonic non-alcoholic drinks; Non-alcoholic cocktails; Powders used in the preparation of isotonic sports drinks and sports beverages; Sports drinks; Syrups for making non-alcoholic beverages. FIRST USE: 20100120. FIRST USE IN COMMERCE: 20100120

Standard Characters

Claimed

Mark Drawing Code (4) STANDARD CHARACTER MARK

Serial Number 85121744

Filing Date September 2, 2010

Current Filing Basis 1A

Original Filing Basis 1A

Published for Opposition November 23, 2010

Owner (APPLICANT) Calico Jack's LLC. LIMITED LIABILITY COMPANY MISSISSIPPI 19 Autumn Lane carriere MISSISSIPPI 39426

Type of Mark TRADEMARK

Register PRINCIPAL

Live/Dead Indicator LIVE

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EXHIBIT B



Trademarks > Trademark Electronic Search System (TESS)

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Typed Drawing

Word Mark	CALPICO SODA
Goods and Services	IC 032. US 045 046 048. G & S: soft drinks, fruit juices, [vegetable juice beverages]. FIRST USE: 19960300. FIRST USE IN COMMERCE: 19960300
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	78267041
Filing Date	June 25, 2003
Current Filing Basis	1A

Original Filing Basis 1A

Published for Opposition May 25, 2004

Registration Number 2874702

Registration Date August 17, 2004

Owner (REGISTRANT) CALPIS CO., LTD. JOINT STOCK COMPANY JAPAN 4-1, Ebisu-Minami 2-chome, Shibuya-ku, Tokyo JAPAN

Attorney of Record David Toren

Prior Registrations 1000780;1774588

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "SODA" APART FROM THE MARK AS SHOWN

Type of Mark TRADEMARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR).

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EXHIBIT C



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Typed Drawing

Word Mark	CALPICO WATER
Goods and Services	IC 032. US 045 046 048. G & S: Soft drinks. FIRST USE: 19920400. FIRST USE IN COMMERCE: 19920400
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	78266179
Filing Date	June 24, 2003
Current Filing Basis	1A

Original Filing Basis 1A

Published for Opposition July 20, 2004

Registration Number 2893343

Registration Date October 12, 2004

Owner (REGISTRANT) Calpis Co., Ltd. CORPORATION JAPAN 20-3, 2-chome, Ebisu-Nishi, Shibuya-ku Tokyo JAPAN

Attorney of Record Edmund J. Sease

Prior Registrations 1000780

Disclaimer NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "WATER" APART FROM THE MARK AS SHOWN

Type of Mark TRADEMARK

Register PRINCIPAL

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EXHIBIT D



Trademarks > Trademark Electronic Search System (TESS)

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TARR Status ASSIGN Status TDR TTAB Status (Use the "Back" button of the Internet Browser to return to TESS)

Typed Drawing

Word Mark	CALPICO
Goods and Services	IC 032. US 045. G & S: CONCENTRATES FOR MAKING SOFT DRINKS IC 029 032. US 046. G & S: FERMENTED MILK, FERMENTED MILK BEVERAGE, FRUIT JUICE [, YOGURT, CREAM AND BUTTER]
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	72386926
Filing Date	March 22, 1971

Current Filing Basis 44E

Original Filing Basis 44E

Registration Number 1000780

Registration Date December 31, 1974

Owner (REGISTRANT) CALPIS FOOD INDUSTRY CO., LTD., THE CORPORATION JAPAN 20-3, 2-CHOME, EBISU-NISHI SHIBUYA-KU, TOKYO JAPAN

(LAST LISTED OWNER) CALPIS CO., LTD. CORPORATION JAPAN 4-1, 2-CHOME, EBISU-MINAMI, SHIBUYA-KU TOKYO JAPAN

Assignment Recorded ASSIGNMENT RECORDED

Attorney of Record ROBERT B.G. HOROWITZ, ESQ.

Type of Mark TRADEMARK

Register PRINCIPAL

Affidavit Text SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20050222.

Renewal 3RD RENEWAL 20050222

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EXHIBIT D

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: April 25, 2011

Opposition No. 91199109 (parent)

Opposition No. 91199111

Calpis Co., Ltd.

v.

Calico Jack's LLC

Jennifer Krisp, Interlocutory Attorney:

The Board has reviewed the record in the two above-captioned opposition proceedings. Consolidation of proceedings is discretionary with the Board, and may be ordered upon motion granted by the Board, or upon stipulation of the parties approved by the Board, or upon the Board's own initiative. See Fed. R. Civ. P. 42(a); see also TBMP § 511 (2d ed. rev. 2004).

Upon its own initiative, the Board has determined that, inasmuch as they involve the same parties and common questions of law and issues of fact, consolidation of these proceedings is appropriate. Accordingly, Opposition Nos. 91199109 and 91199111 are hereby consolidated.

The consolidated cases may be presented on the same record and briefs. See TBMP § 511 (2d ed. rev. 2004); see

also *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989); *Hilson Research Inc. v. Society for Human Resource Management*, 26 USPQ2d 1423 (TTAB 1993).

The Board proceeding file will be maintained in **Opposition No. 91199109, designated as the "parent" case.** From this point on, the parties are to file a single copy of all motions and papers **in the parent case only**. All motions and papers filed **must caption both of the consolidated oppositions, listing and identifying the parent opposition first (see caption herein above)**.

Despite being consolidated, each proceeding retains its separate character. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings, and a copy of the decision shall be filed in each proceeding.

Schedule

In both opposition proceedings, applicant filed its answer to the amended notice of opposition on April 18, 2011. In each answer, applicant failed to answer the first eleven enumerated paragraphs of opposer's amended notice of opposition. To expedite matters, the Board construes applicant's answer, in each proceeding, as a general denial

of paragraphs 1 through 11, inclusive. See TBMP § 311.02(a) (2d ed. rev. 2004).¹

With this construction applied to each answer, said answers are hereby accepted as applicant's pleadings in these consolidated proceedings.

Inasmuch as the pleadings are now closed, conferencing, disclosure, discovery and trial dates are hereby reset for these consolidated proceedings in accordance with the schedule that is presently set forth in Opposition No. 91199111. Said schedule is repeated here, for the parties' convenience:

Deadline for Discovery Conference ²	6/8/2011
Discovery Opens	6/8/2011
Initial Disclosures Due	7/8/2011
Expert Disclosures Due	11/5/2011
Discovery Closes	12/5/2011
Plaintiff's Pretrial Disclosures	1/19/2012
Plaintiff's 30-day Trial Period Ends	3/4/2012
Defendant's Pretrial Disclosures	3/19/2012

¹ The Board reiterates its guidance, set forth in the order issued on April 14, 2011 in Opposition No. 91199109, that applicant consider securing legal representation. Throughout all stages of an inter partes proceeding, the Board requires of all parties their compliance with the Trademark Rules of Practice and, where applicable, the Federal Rules of Civil Procedure, whether or not they are represented by counsel. See *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, n.2 (TTAB 2006).

² In the event that either party, or both parties, elect to request the participation of a Board attorney in the required discovery and settlement conference, the assigned interlocutory attorney may be reached at 571-272-9183 in order to facilitate the scheduling thereof. If the participation of a Board attorney is requested, the parties should first confer so as to determine a day and time, or possible times, during which they are both available for said conference.

Defendant's 30-day Trial Period Ends	5/3/2012
Plaintiff's Rebuttal Disclosures	5/18/2012
Plaintiff's 15-day Rebuttal Period Ends	6/17/2012

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.