

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

WINTER

Mailed: August 7, 2013

Opposition No. 91200643

Dille Family Trust

v.

Nowlan Family Trust

Before Kuhlke, Ritchie, and Greenbaum,
Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of applicant's fully briefed motion (filed March 22, 2013) for judgment on the pleadings solely with respect to opposer's standing to bring this proceeding.

For purposes of this order, the Board presumes the parties' familiarity with the pleadings and the arguments submitted with respect to the subject motion.

A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board will take judicial notice. Such a motion will only be granted if the moving party clearly establishes that no material issue of fact remains to be resolved and that it is entitled to

judgment as a matter of law. Fed. R. Civ. P. 12(c); *Baroid Drilling Fluids Inc. v. SunDrilling Products*, 24 USPQ2d 1048 (TTAB 1992). An unresolved material issue of fact may result from an express conflict on a particular point between the parties' respective pleadings or from defendant's pleading of new matter and affirmative defenses in its answer. Thus, a plaintiff may not secure a judgment on the pleadings when the answer raises issues of fact that, if proved, would defeat plaintiff's claim. *Leeds Tech. Ltd. v. Topaz Comm. Ltd.*, 65 USPQ2d 1303 (TTAB 2002).

For purposes of determining a motion for judgment on the pleadings, all well-pleaded factual allegations of the non-moving party must be accepted as true, while those allegations of the moving party which have been denied (or which are taken as denied, pursuant to Federal Rule 8(b)(6)), because no responsive pleading thereto is required or permitted) are deemed false. Conclusions of law are not taken as admitted. All reasonable inferences from the pleadings are drawn in favor of the non-moving party. See *Baroid Drilling*, 24 USPQ2d at 1049. See also 5C Fed. Prac. & Proc. Civ.3d § 1368 (2010).

As an initial matter, the printouts from the USPTO TSDR database submitted with applicant's motion have not been considered in our determination thereof as the materials are matters outside the pleadings. See *Leeds Tech. Ltd. v.*

Topaz Comm. Ltd., 65 USPQ2d 1303, 1305 n.5 (TTAB 2002); *Internet Inc. v. Corp. for Nat'l Research Initiatives*, 38 USPQ2d 1435, 1438 (TTAB 1996) (matters outside the pleadings excluded and motion not converted to one for summary judgment). It is well settled that the Board does not take judicial notice of USPTO records. See *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1293 (TTAB 1986) (Board refused to take judicial notice of petitioner's pleaded and rejected, application for purposes of establishing petitioner standing); and *Wright Line Inc. v. Data Safe Services Corp.*, 229 USPQ 769, 770 n.5 (TTAB 1985) ("Board does not take judicial notice either of applications (or registrations) which reside in the Office, or of papers which may appear therein"). Likewise, all other exhibits submitted by the parties (except the copy of the notice of opposition in this proceeding) are outside of the pleadings and, thus, have been excluded. See Fed. R. Civ. P. 12(d); Trademark Rule 2.116(a).

Turning to the pleadings in this matter, we find that material issues of fact are raised by the express conflict between the parties' pleadings. In particular, in paragraphs 6-15 of the notice of opposition, opposer has set forth proper allegations of its standing and its claims of likelihood of confusion and dilution, which must be accepted as true, and applicant has explicitly or effectively denied,

in full, all of those allegations. In view thereof, at a minimum, applicant's denial of paragraphs 8, 9, 10, 12, and 15, which allegations relate specifically to ownership, priority, and opposer's use of the pleaded mark, are sufficient to raise a genuine issue as to material facts with respect to ownership and priority of the BUCK ROGERS mark. Similarly, applicant's affirmative defenses, in which applicant alleges that applicant is the successor in interest to the creator and first user of the BUCK ROGERS trademark (§7) and that opposer's claims are barred under the doctrines of *res judicata* and collateral estoppel in view of the judgment entered by the Board in Cancellation No. 92051659 (§5), raise issues of material fact which, if proved, may defeat opposer's claim.

Accordingly, applicant's motion for judgment on the pleadings is **denied**.¹

Proceeding Resumed; Trial Dates Reset

This proceeding is resumed. Trial dates are reset as shown in the following schedule:

Discovery Closes	8/28/2013
Plaintiff's Pretrial Disclosures Due	10/12/2013
Plaintiff's 30-day Trial Period Ends	11/26/2013
Defendant's Pretrial Disclosures Due	12/11/2013

¹ We note that treating the motion as one for summary judgment would not have resulted in a different outcome.

Defendant's 30-day Trial Period Ends	1/25/2014
Plaintiff's Rebuttal Disclosures Due	2/9/2014
Plaintiff's 15-day Rebuttal Period Ends	3/11/2014

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. See Trademark Rule 2.125, 37 C.F.R. § 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129, 37 C.F.R. § 2.129.

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