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

Proceeding	91204861
Party	Defendant Jean Pierre Biane
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Attachments	Applicant's Reply in Support of Motion for Judgment on the Pleadings_ANDALE.pdf(75252 bytes)

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

RED BULL GMBH,)	
)	
Opposer,)	Opposition No.: 91-204,861
)	Serial No. 79/108,168
v.)	Mark: ANDALE! ENERGY DRINK
)	(& Design)
)	
JEAN PIERRE BIANE, and)	Opposition No.: 91-210,860
ANDALE ENERGY DRINK CO., LLC)	Serial Nos. 85/646,316, 85/646,359
)	Marks:
)	ANDALE! & Design (Ser. No. 85/646,316)
Applicants.)	ANDALE! & Design (Ser. No. 85/646,359)
)	

**APPLICANT'S REPLY IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON
THE PLEADINGS**

Opposer misses the point of Applicant's Motion for Partial Judgment on the Pleadings ("MJP"). While all well-pleaded factual allegations of the non-moving party are accepted as true, **Conclusions of law are not taken as admitted.** Baroid Drilling Fluids Inc. v. SunDrilling Products, 24 USPQ2d 1048 (TTAB 1992). Whether a mark is likely to cause confusion under Section 2(d) is a question of law. Sweats Fashions, Inc. v. Pannill Knitting Co., 833 F.2d 1560, 1565, 4 U.S.P.Q.2d 1793, 1797 (Fed. Cir. 1987); Monarch Marking Systems, Inc. v. Elan Systems, Inc., 39 U.S.P.Q.2d 1035 (TTAB 1996); Blansett Parmacal Co. Inc. v. Carmic Laboratories, Inc. 25 U.S.P.Q.2d 1473, 1476 (TTAB 1992); Blue Cross and Blue Shield Ass'n v. Harvard Community Health Plan, Inc., 17 U.S.P.Q. 1075 (TTAB 1990).

Here, the allegations in Paragraphs 15, 17, and 18 of the Notice of Opposition, (and as recited in Opposer's Opposition Brief, page 4), that

Applicant's Opposed Marks so resemble Opposer's Red Bull Graphics Mark as to be likely, when applied to the goods of Appln. No. 85/646,316 and 85/646, 359, respectively, to cause confusion,

mistake or deception among purchasers, users, and the public, thereby damaging Red Bull

and

Simultaneous use of Applicant's Opposed Marks on the goods set forth in Appln. Nos. 85/646,316 and 85/646,359, respectively, and the Red Bull Grphics[sic] Mark on its goods and related services as set forth above is likely to cause confusion, misstate[sic] or deception among purchasers, users, and the public, thereby damaging Red Bull

and

Use by Applicant of Applicant's Opposed Marks on the goods set forth in Appln. Nos. 85/646,316 and 85/646,359, respectively, is likely to lead the midstake[sic] belief that Applicant's products are sponsored by, affiliated with, approved by or otherwise emanate from Opposer Red Bull, thereby damaging Red Bull

are bald legal conclusions of likelihood of confusion which may not be taken as admitted. As set forth in the MJP, the Board may reach the opposite conclusion—that confusion is not likely—based on a consideration of the dissimilarity of the marks alone. See *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991) (single du Pont factor of dissimilarity of marks outweighed all others such that other factors, even if decided in nonmovant's favor, would not be material because they would not change the result; court affirms Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS); *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998) (court affirms Board dismissal of opposition based on dissimilarity of the marks CRISTAL and CRYSTAL CREEK); *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989)(court affirms Board dismissal of opposition based on dissimilarity of the marks PECAN SANDIES and PECAN SHORTEES). See also *Missiontrek Ltd. Co. v. Onfolio, Inc.*, 80

USPQ2d 1381 (TTAB 2005) (dissimilarity of the marks ONFOLIO and design and CARTAGIO dispositive); Sears Mortgage Corp. v. Northeast Savings F.A., 24 USPQ2d 1227 (TTAB 1992) (dissimilarity between the marks APPROVAL PLUS and APPROVALFIRST dispositive). Further, the marks are so dissimilar as to preclude a finding of false suggestion of a connection under Section 2(a).

Opposer forcefully argues that "all material factual allegations are in dispute" despite Applicant's clear concession of all DuPont factors except the similarity or dissimilarity of the marks, which the Board can decide based on a cursory review of the pleadings. For example, Opposer continues to argue the "fame" and "renown" of its mark and the similarity of the goods. Opposer's Opposition Brief at 8. Applicant concedes these facts for the purposes of this motion. Applicant concedes all DuPont factors except for the similarity or dissimilarity of the marks and the issue of likelihood of confusion. Thus, there are no facts in dispute. Even assuming all of the other DuPont factors weigh in Opposer's favor, the marks are so utterly dissimilar that confusion is impossible.

Opposer's allegation that "Applicant's website, www.andaleenergy.com, directly references and makes a play on Opposer's famous name and marks", Notice of Opposition at ¶ 13, is irrelevant to the issues in this proceeding. The Board may not consider the alleged contents of Applicant's website and should focus its analysis on the similarity or dissimilarity of marks as shown in the opposed application and pleaded registration (i.e., as shown in the pleadings). In addition, Opposer's allegations that Applicant's "rectangular flag design of Appln. No. 85,646,359 is a highly stylized version of the rectangular flag design of Appln. No. 85/646,316" and "both [of Applicant's opposed] marks are intended to and do give the same commercial impression", Notice of Opposition at ¶ 12, are likewise irrelevant. The issue is not whether Applicant's opposed marks

are similar to one another. The issue is whether Applicant's opposed mark of Ser. No. 85/646,359 is likely to cause confusion (or create a false suggestion of a connection with) Opposer's pleaded mark.

Even if the foregoing allegations regarding Applicant's "website" and the comparison of Applicant's own marks to each other are taken to be true, these facts do not establish a claim of likelihood of confusion which is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) ("Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence [to support plaintiff's claims]"). There is nothing appearing on Applicant's website could detract from the clear differences between the marks as shown in the pleadings. As set forth in the MJP, Applicant's mark features a soccer player kicking a ball and the word ANDALE!, which is completely different from Opposer's mark in appearance, sound, meaning, and commercial impression. Nor could a comparison of Applicant's own marks to each other give rise to a plausible claim that Applicant's mark of Ser. No. 85/646,359 is likely to cause confusion with Opposer's mark. This argument does not even make logical sense. Accordingly, Opposer's claim of likelihood of confusion is not even plausible and must be dismissed. See *Ashcroft v. Iqbal*, 129 S. Ct. at 1950.

Last, Opposer argues that the MJP does not "discuss the claim of likelihood of confusion". Opposer's Opposition Brief at 6. This is false. Applicant clearly argues in its MJP that "the differences between the marks are also so great as to preclude a finding of false suggestion of a connection under Section 2(a)." MJP at 7. Opposer's argument appears to be based on its

misunderstanding that a claim of false suggestion of a connection does not "[deal] with similarities between the marks". Opposer's Opposition Brief at 6.

A claim of false suggestion indeed "deals with similarities between the marks". As set forth in *University of Notre Dam du Lac v. J.C. Gourmet Foods Imports Co., Inc.*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) aff'g 213 USPQ 594 (TTAB 1982), a plaintiff asserting a claim of a false suggestion of a connection must demonstrate—at a minimum, and among other things—that the defendant's mark is the same or a close approximation of plaintiff's previously used name or identity. See also *In re MC MC S.r.l.*, 88 USPQ2d 1378, 1379 (TTAB 2008); *In re White*, 80 USPQ2d 1654, 1658 (TTAB 2006); *In re Wielinski*, 49 USPQ2d 1754, 1757 (TTAB 1998); *In re Sloppy Joe's Int'l Inc.*, 43 USPQ2d 1350, 1353 (TTAB 1997).

Here, if the marks are not similar, Opposer could not possibly establish that Applicant's mark is the "same" or a "close approximation" of Opposer's mark. Given the high standard of similarity required for such a claim, and in light of the clear differences between the marks in this case, Opposer cannot establish even the first element of a false suggestion of a connection claim. Inasmuch as the claim is not plausible as to the first element, it must be dismissed. See *Ashcroft v. Iqbal*, 129 S. Ct. at 1950. Simply stated, if the Board finds that the marks are not similar and that confusion is not likely, the Board can easily reach the conclusion that Applicant's mark is not the "same" as or a "close approximation" of Opposer's mark, and it may dismiss the false suggestion of a connection claim on this basis.

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Conclusion

Accordingly, Applicant's Motion for Partial Judgment on the Pleadings should be granted, and the opposition should be dismissed in its entirety and with prejudice as to Ser. No. 85/646,359.

Respectfully submitted,

Date: April 20, 2014

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PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **REPLY IN SUPPORT OF APPLICANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** has been served on Martin R. Greenstein, counsel for Opposer, on April 20, 2014 via First Class U.S. Mail, postage prepaid to:

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