

ESTTA Tracking number: **ESTTA509167**

Filing date: **12/05/2012**

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

| | |
|------------------------|---|
| Proceeding | 91206966 |
| Party | Plaintiff ArmadaCorp Capital LLC |
| Correspondence Address | MARSHA G GENTER JACOBSON HOLMAN PLLC 400 SEVENTH STREET NW, 6TH FLOOR WASHINGTON, DC 20004 UNITED STATES trademark@jhip.com, mgentner@jhip.com |
| Submission | Opposition/Response to Motion |
| Filer's Name | Marsha G. Gentner |
| Filer's e-mail | trademark@jhip.com,mgentner@jhip.com |
| Signature | /Marsha G. Gentner/ |
| Date | 12/05/2012 |
| Attachments | Resp to Mn for Judgment.pdf (8 pages)(150474 bytes) |

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

ARMADACORP CAPITAL, LLC)
)
 Opposer,)
)
 v.) Opposition No. 91206966
)
 ARMADA HEALTH CARE, LLC)
)
 Applicant.)

**OPPOSER’S RESPONSE IN OPPOSITION TO
MOTION FOR JUDGMENT ON THE PLEADINGS**

Opposer, ArmadaCorp Capital, LLC (“ArmadaCorp”), by and through its undersigned counsel, hereby submits the following response in opposition to the Motion for Judgment on the pleadings.

I. APPLICABLE LEGAL STANDARD

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. For purposes of the motion, 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. *Baroid Drilling Fluids Inc. v. SunDrilling Products*, 24 USPQ2d 1048 (TTAB 1992). All reasonable inferences from the pleadings are drawn in favor of the non-moving party. *Id.* Further, a judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment on the substantive merits of the controversy, as a matter of law.

Kraft Group LLC v. Harpole, 90 USPQ2d 1837, 1840 (TTAB 2009). *Accord The Scotch Whiskey Ass’n v. U.S. Distilled Prods. Co.*, 13 USPQ2d 1711, 1713 n.1 (TTAB 1989). *See also* TBMP §504.02 (citing, *inter alia*, *Baroid Drilling, supra*): “A party may not obtain a judgment

on the pleadings if the nonmoving party’s pleading raises issues of fact, which, if proved, would establish the nonmoving party’s entitlement to judgment.”

Further, as respects a likelihood of confusion claim, all doubts must be resolved against the newcomer (Applicant), who has both the opportunity and the obligation to avoid confusion with existing marks. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265 (Fed. Cir. 2002).

II. THE MOTION FOR JUDGMENT “IS CLEARLY NOT WELL TAKEN”

As Applicant acknowledges, ArmadaCorp has pleaded and relies on registrations (nos. 3,042,271; 3.341.346; and 3,589,038) for its ARMADA, ArmadaCare and ArmadaHealth marks, respectively, to support Opposer’s §2d opposition claim of likelihood of confusion. *See* Notice of Opposition, ¶3. Opposer’s pleadings, however, are not limited solely to its registrations. ArmadaCorp’s pleadings – which must be taken as true – also allege:

Opposer provides **business**, consulting, **management** and administration services in the fields of employee benefits, human resources, workmen’s compensation, insurance casualty coverage, risk management, health care, health and productivity, as well as related services, including the administration of **pharmacy** benefit plans (the “Armada Services”). [Notice of Opposition, ¶1 (emphasis added)] [¹]

Since prior to the date of first use alleged in the application opposed herein, Armada has, and is now, engaged in providing services, in commerce in the United States, under and in connection with the trade name and trademark **ARMADA**, as well as other formatives of that name and mark, including ArmadaCare, ArmadaHealth, ArmadaBenefits, ArmadaAdministrators, ArmadaHR, and ArmadaCasualty (collectively, “**ARMADA** Marks”). Armada continuously has used said Opposer’s **ARMADA** Marks in commerce in connection with Armada’s services, to identify and designate same, and to distinguish those services, and Opposer’s business, from those of others. [Notice of Opposition, ¶2]

¹ The services set forth in the opposed application are “arranging and conducting **business** conferences: and “educational services, namely, conducting conferences in the field of **pharmaceuticals**.”

On information and belief, the services set forth in the application opposed herein include, and/or are similar and/or related to, the services in connection with which Armada uses Opposer's **ARMADA** Marks, and on information and belief, the services set forth in the opposed application are and/or will be sold through the same and/or similar channels of trade, and/or to the same general class of purchasers, in and to which Armada's services are marketed and/or sold. [Notice of Opposition, ¶7]

These are allegations of fact. *See On-Line Careline, Inc. v. America Online, Inc.*, 229 F.3d 1080, 1084 (Fed. Cir. 2000) (likelihood of confusion is a question of law, based on underlying factual determinations; Court applied substantial evidence test – i.e. standard for questions of fact – to determination of the similarity or dissimilarity of services); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d at 1265; *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1326 (Fed. Cir. 2000). Applicant has denied, and premised its Motion on the denial of, these allegations of fact. *See* Applicant's Answer, ¶¶1, 2, 6 and 10. Therefore, Applicant's "motion is clearly not well taken." *The Scotch Whiskey Ass'n v. U.S. Distilled Prods. Co.*, 13 USPQ2d at 1713 n.1.

Indeed, all of Applicant's assertions regarding the purported differences between the respective services at issue (and channels of trade, and alleged sophistication of customers) are nothing more than unsubstantiated allegations of fact.² These are not "facts" with a "high degree of indisputability" of which the Board properly may take judicial notice. *See Boswell v. Mavety Media Group Ltd.*, 52 USPQ2d 1600, 1605 (TTAB 1999) (pleadings and allegations which are arguments and speculation are not appropriate matter for judicial notice).

² In any event, whether or not ArmadaCorp's services include, or are the same as, the services in the opposed application is not the controlling inquiry. "Thus, even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods." *Recot, Inc. v. M.C. Becton*, 214 F.3d at 1329. *See also On-Line Careline, Inc. v. America Online, Inc.*, 229 F.3d at 1086.

To the extent required to dispel any notion that judicial notice may be taken of the allegations of Applicant Armada **Health Care**, LLC regarding the purported dissimilarity of the parties respective services, trade channels and/or customers, the attached Exhibit A is submitted.³ This is an apparent press release for Applicant’s 2012 conference which states (emphasis added): “Armada [i.e. Applicant] offers pharmacy providers, manufacturers, **health plans** and wholesale distributors a total channel **management** solution through customized **patient programs, prescription-data-management services**, online platforms and unique purchasing agreements on specialty pharmacy products.” The press release further refers to the “Armada Summit” as one of the top “**healthcare** conferences” and goes on to state of Applicant’s ApproveRx product (emphasis added): “Thousands of **healthcare professionals** use ApproveRx to quickly locate and submit prior authorization forms for virtually all **drugs and insurance plans.**” In other words, Applicant’s press release about its “Armada Specialty Pharmacy Summit” indicates that Applicant provides the very same services as ArmadaCorp’s pleaded services.

Evidence that *other* companies sell both the opposed services and the services of the opposer is extremely pertinent to whether such services would be related in the minds of the consuming public as to the source of those services. *See Recot, Inc. v. M.C. Becton*, 214 F.3d at 1329-30. It is particularly pertinent when such evidence involves the Applicant. Thus, any assertion by Applicant that the respective services, customers, channels of trade, etc., of the

³ To be absolutely clear: Opposer does not provide Exhibit A to convert the Motion for Judgment on the Pleadings to one for summary judgment. Such a Motion for summary judgment may not be filed at this time, as Applicant has not served Initial Disclosures yet. *See* 37 C.F.R. §2.127(e)(1). (The parties have not even had an Initial Discovery Conference; the response of Applicant’s counsel to Opposer’s request to schedule same was to advise the undersigned of the filing of the present Motion.) Again, Opposer presents this Exhibit *only* for the very limited purpose of showing that Applicant’s allegations in this regard are just that – allegations – which are not “highly indisputable” and do not qualify for judicial notice.

parties are different as a matter of law, or that Applicant's allegations in this regard are indisputable and/or are not in genuine dispute, is untenable.

III. THE MARKS ARE SIMILAR IN APPEARANCE, SOUND, CONNOTATION AND COMMERCIAL IMPRESSION

The opposed mark of applicant Armada Health Care, LLC is ARMADA SPECIALTY PHARAMACY SUMMIT. However, the wording "SPECIALTY PHARMACY SUMMIT" is descriptive and disclaimed. Therefore, the word "ARMADA" is the dominant and distinguishing element of the opposed mark. *See Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d at 1266. This is identical to Opposer's pleaded mark, ARMADA.

Further, ArmadaCorp also has pleaded the following marks: ArmadaCare, ArmadaHealth, ArmadaBenefits, ArmadaAdministrators, ArmadaHR, and ArmadaCasualty. Thus, the inclusion of the descriptive/generic terminology "specialty pharmacy summit" after the word "ARMADA" serves to increase, rather than decrease, the similarity in overall commercial impression. *Id.* Certainly, Opposer's Armada marks, and the opposed mark, cannot be held to be so dissimilar as to negate likelihood of confusion as a matter of law.⁴

III. CONCLUSION

The opposed mark and ArmadaCorp's pleaded marks patently are sufficiently similar to support a finding of likelihood of confusion – at least in conjunction with other pertinent factors of *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973). Further, Opposer has pleaded that the services set forth in the opposed application "include, and/or are similar

⁴ Applicant's allegations regarding "use" of Armada by others, and/or the purported knowledge of Applicant's customers and those of Opposer ArmadaCorp (Applicant's Motion for Judgment on the Pleadings, pp. 4-5) are nothing more than bare allegations, completely unsupported by any evidence. More to the point, in the context of this Motion for judgment on the pleadings, such allegations must be treated as false. *Kraft Group LLC v. Harpole*, 90 USPQ2d at 1840; *Baroid Drilling Fluids Inc. v. SunDrilling Products*, 24 USPQ2d at 1049; *The Scotch Whiskey Ass'n v. U.S. Distilled Prods. Co.*, 13 USPQ2d at 1714; TBMP §504.02.

and/or related to, the services in connection with which [ArmadaCorp] uses Opposer's" pleaded marks, and that "the services set forth in the opposed application are and/or will be sold through the same and/or similar channels of trade, and/or to the same general class of purchasers, in and to which [ArmadaCorp's] services are marketed and/or sold." Notice of Opposition, ¶7. In the context of the present motion, these allegations must be taken as true. Applicant's Motion for Judgment on the Pleadings, however, is premised on precisely the opposite (factual) allegations that the respective services, channels of trade and customers of the parties are different and unrelated. As such, Applicant's Motion "is clearly not well taken." *The Scotch Whiskey Ass'n v. U.S. Distilled Prods. Co.*, 13 USPQ2d at 1713 n.1. Accordingly, the Motion for Judgment on the Pleadings should be denied.

Respectfully submitted,

ARMADACORP CAPITAL, LLC

Date: December 5, 2012

By: /Marsha G. Gentner/
Marsha G. Gentner
JACOBSON HOLMAN PLLC
400 Seventh Street, N.W.
Washington, D.C. 20004
(202) 638-6666
mgentner@jhip.com

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2012, the foregoing Opposer's Response in Opposition to Motion for Judgment on the Pleadings was served on Applicant, by mailing same first class and postage prepaid, to the following:

David Orlin
Windels, Marx, Lane & Mittendorf, LLP
156 W. 56th Street
New York, New York 10019-3800

 /Marsha G. Gentner/

EXHIBIT A

Armada Showcases New Technology at 2012 Specialty Pharmacy Summit

FLORHAM PARK- May 10, 2012 Armada Health Care (Armada), the nation's largest specialty pharmacy group purchasing and channel management organization, showcased the enhanced versions of its on-line therapy management software, "ReachRx OTM" along with its prior authorization service, "ApproveRx" at the recent 2012 Armada Specialty Pharmacy Summit. These proprietary technology platforms are considered "best in class" in the industry. They are designed to help pharmacies save time and increase profitability while also providing improved patient care. "The manufacturers I work with and our members have embraced these new programs," said Anthony Davino, Vice President of Manufacturer Relations for Armada. "We utilize cutting-edge technology to develop and deliver the most comprehensive manufacturer contract portfolio of specialty products available in the industry."

ReachRx OTM set an industry standard upon its release in 2010 and quickly became a highly valued resource for Armada's Specialty Pharmacy members. Some highlights of the recent ReachRx OTM enhancements include: customized protocols for more than two dozen disease states, additional reports on specific patient data assessments, more extensive prescription compliance programs and new access to limited distribution programs.

ApproveRx helps practitioners streamline the prescription payment submission method via a web based platform that organizes the entire process. ApproveRx has increased its library to more than 10,000 of the most current third party prior authorization forms for drugs requiring an approval code for payment. Pharmacies and physician offices can use the ApproveRx.com website to choose and submit third party prior authorization forms in a fraction of the time it currently takes. The result, the time to fill and bill a prescription can be significantly decreased.

Both programs were well received at the 2012 Armada Specialty Pharmacy Summit which was held at the Wynn, Las Vegas on April 30 - May 4. The annual Armada conference has developed into the nation's largest gathering of specialty pharmacy stakeholders. In 2012, more than 1,600 attendees from 450 related healthcare companies, including 100 exhibitors were represented at the Summit. The annual Armada Summit is considered one of the top 5 national healthcare conferences in the U.S. pharmaceutical industry.

For more information, please contact Darcey Brennan, Vice President Marketing at Armada Health Care (973)-564-8004.

About Armada: Armada Health Care, LLC (Armada) is the industry's largest specialty pharmacy group purchasing and contracting organization. Armada provides comprehensive and cost effective access to the nation's \$100 billion specialty pharmacy industry. Armada offers pharmacy providers, manufacturers, health plans and wholesale distributors a total channel management solution through customized patient programs, prescription-data-management services, online platforms and unique purchasing agreements on specialty pharmacy products. Armada also organizes and hosts the nation's largest annual conference for Specialty Pharmacy providers and stakeholders. For more information about Armada, please visit www.armadahealthcare.com

About ReachRx OTM: An online therapy management tool which is designed to support pharmacies in the management of their specialty patient's drug therapy. The system allows for the capture and reporting of specific data points as required for certain Armada sponsored manufacturer programs. ReachRx OTM will trigger certain tasks which will drop into a pharmacy's queue at various points in a patient's therapy. The program is an excellent tool to assist the pharmacy in effectively treating patients suffering from chronic disease states. For more information about ReachRx OTM, please visit www.armadahealthcare.com

About ApproveRx: A free online platform that streamlines the prior authorization process for pharmacies and prescribers. Thousands of healthcare professionals use ApproveRx to quickly locate and submit prior authorization forms for virtually all drugs and insurance plans. Forms can be pre-populated via an address book and faxed directly to prescribers or payers from a computer. ApproveRx can also be integrated into most current pharmacy workflow systems. For more information about ApproveRx, please visit www.appoverx.com