

ESTTA Tracking number: **ESTTA612467**

Filing date: **06/26/2014**

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

Proceeding	91210282
Party	Defendant Stockmarket Burger, Inc.
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Attachments	Applicant's Motion for Partial Judgment on the Pleadings_STOCKMARKET.pdf(187772 bytes)

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

RED BULL GMBH,)	
)	Opposition No. 91210282 (Parent)
Opposer,)	Serial No. 85/680,816
)	Mark: Bull and swirl/wind design
v.)	
)	Opposition No. 91214537
STOCKMARKET BURGER, INC.,)	Serial No. 85/969,820
)	Mark: STOCKMARKET and
)	bull/swirl/wind design
Applicant.)	
)	
)	
)	

APPLICANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Applicant Stockmarket Burger, Inc. ("Applicant") hereby moves for partial judgment dismissing Opposer's claims of priority and likelihood of confusion against application serial nos. 85/680,816 and 85/969,820 pursuant to Rule 12(c) of the Federal Rules of Civil Procedure on the ground that, as a matter of law, Applicant's "bull and swirl/wind design" and "STOCKMARKET and bull/swirl/wind design" are not confusingly similar in appearance, sound, meaning, or commercial impression to any of the registered or alleged common law marks pleaded by Opposer, Red Bull Gmbh ("Opposer").¹

Statement of Facts

Applicant seeks to register the following two marks ("Applicant's Marks"):

- Bull and swirl/wind design, Serial No. 85/680,816, with the mark depicted as follows:

¹ Opposer's remaining claims of "lack of bona fide intent to use" asserted against each application may also be dismissed for lack of standing in the event the Board dismisses the claims of priority and likelihood of confusion.



(hereinafter, "Applicant's Bull and Swirl/Wind Mark") based on its bona fide intent to use the mark for various goods and services in International Classes 11, 25, 30, 32, 33, and 43²; and

- STOCKMARKET and bull/swirl/wind design, Serial No. 85/680,816, with the mark depicted as follows:



(hereinafter, "the STOCKMARKET Mark") based on its bona fide intent to use the mark for various goods in classes 11, 25, 30, 32, and 33.³

² The specific goods listed in the application are not important for this particular motion and are not recited here.

³ The specific goods listed in the application are not important for this particular motion and are not recited here.

Opposer filed two oppositions⁴ alleging that Applicant's Bull and Swirl/Wind Mark and the STOCKMARKET Mark are likely to cause confusion with its four pleaded registered marks for various goods and services in various classes⁵, all containing bull designs (hereinafter, "Opposer's Marks"):

- Reg. No. 2,946,045 (two charging bulls design)



- Reg. No. 3,051,994 (two charging bulls design)



- Reg. No. 3,561, 283 (RED BULL & bull design)

Red Bull



⁴ Proceeding Nos. 91210282 and 91214537 are now consolidated, with 91210282 as the "parent" case. Opposer filed an Amended Notice of Opposition only in the parent case (91210282), and Applicant filed an Amended Answer. The Amended Notice of Opposition and Amended Answer are the operative pleadings with respect to Proceeding No. 91210282 and Ser. No. 85/680,816.

⁵ Opposer's numerous alleged goods and services are not important for this particular motion and are not recited here. However, Opposer has identified the "relevant" goods and services in ¶¶ 3-6 of each complaint.

and

- Reg. No. 4,031,959 (RED BULL ARENA & bull, area, and soccer ball design)



Opposer also pleaded an unspecified number of "common law" trademarks containing various bull designs, described in the notices of opposition as follows:

Opposer Red Bull is also the owner of various common law rights for the trademarks RED BULL, RED BULL & Two Bulls Logo, Two Bulls Logo and (Single) Bull Logo, and other marks incorporating the word BULL, and/or the design of a bull or bovine animal for various goods and services, all of which are collectively referred to herein as Red Bull's "Red Bull and Bull Logo Marks.

Notice of Opposition, ¶ 7; Amended Notice of Opposition, ¶ 7.

As an initial matter, it is unclear whether Opposer's alleged common-law design marks "RED BULL & Two Bulls Logo" and "Two Bulls Logo" correspond to the designs of pleaded Reg. Nos. 3,561, 283, 3,051,994, and 2,946,045 (shown above), or whether these are different marks that are not shown anywhere in the pleadings. Further, the pleaded common-law mark "(Single) Bull Logo" is not depicted visually anywhere in the pleadings. As a result, Applicant cannot ascertain which mark the "(Single) Bull Logo" mark refers to based on the pleadings.

To the extent the "common law" marks consist of designs which are not shown in the pleadings, the Board should not consider them because the marks are not sufficiently pleaded to give Applicant fair notice of the Opposer's claims. Specifically, and at the very least, the Board should not consider Opposer's claims of priority and likelihood of confusion based on its alleged

"common law" trademark "(Single) Bull Logo" because this design mark is not identified in the pleadings sufficiently to identify the mark as a basis for opposition.

Turning to the merits of this Motion, a simple comparison of the visual features of Applicant's Marks and Opposer's Marks shows that they are utterly dissimilar in appearance, sound, meaning, and commercial impression, which precludes a finding of likelihood of confusion. See *In re E.I. DuPont DeNemours & Co.*, 177 USPQ 563 (CCPA 1973). Even viewing all other DuPont factors in Opposer's favor—and Applicant concedes them for the purposes of this Motion—the dissimilarities between the marks are so great as to avoid likelihood of confusion. To be clear, Applicant concedes, for the purposes of this motion only, that Opposer's Marks are "famous"; that Applicant's goods and services are related to Opposer's pleaded goods and services; that the goods and services travel in the same channels of trade, and that the remaining DuPont factors may be construed in Opposer's favor. Given these concessions, there is no genuine dispute as to any material fact.⁶ The Board may reach the conclusion that confusion is not likely based on a consideration of the dissimilarities 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). Accordingly, Applicant's Motion for Partial Judgment on the Pleadings should be granted, and Opposer's claims of priority and likelihood of confusion should be dismissed with prejudice as to Ser. Nos. 85/680,816 and 85/969,820.

⁶ The Board should not find any genuine dispute of material fact relating to any of the other DuPont factors because Applicant has conceded them. As the other factors may be construed in Opposer's favor, there is no dispute as to these factors. The only issue raised in this Motion is the single factor of the similarity or dissimilarity of the marks, which is dispositive of both oppositions.

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 Fed. R. Civ. P. 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 nonmoving party. *Id.* 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. *Id.*

The Marks Are Dissimilar in Appearance, Sound, Meaning, and Commercial Impression

The Lanham Act prohibits registration of a mark on the Principal Register that would create a likelihood of confusion. 15 U.S.C. § 1052(d). 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).

"[O]ne DuPont factor may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks." See *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); Kellogg Co. v. Pack'em Enterprises, Inc., supra (court affirms Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS); 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).

Here, the marks are completely different in appearance, sound, meaning, and commercial impression, which precludes a finding of likelihood of confusion. See *In re E.I. DuPont DeNemours & Co.*, 177 USPQ 563 (CCPA 1973). Further, Applicant respectfully submits that it has adequately met its burden in establishing the absence of any genuine issues of material fact. The circumstances here are similar to those in *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), in that the single DuPont factor of the dissimilarity of the marks in their entireties substantially outweighs any other relevant factors and is dispositive of the issue of likelihood of confusion. For the purposes of this motion, the Board may even consider the other DuPont factors, such as the relationship between the goods and the alleged fame of Opposer's mark, in Opposer's favor. By Applicant's concession of these other factors, they are not in dispute. Even viewing all other DuPont factors in Opposer's favor, the dissimilarities of the marks is so great as to avoid likelihood of confusion.

1. Appearance

Applicant's Marks and Opposer's Marks are completely different in appearance. Applicant's Bull and Swirl/Wind Mark features a bull emerging from the top of a unique and distinctive "swirl of wind" design. Unlike Applicant's Marks, three of Opposer's Marks feature two bulls charging against each other with a circle in the background, and the fourth mark features a single, charging bull and a stylized depiction of an arena and a soccer ball. None of Opposer's Marks features a "swirl of wind" or similar design, and three of them are immediately distinguishable because they contain two bulls instead of one. Opposer's fourth mark contains other immediately distinguishing features such as the words RED BULL ARENA, a stylized depiction of an arena, and a soccer ball. In short, the marks are highly dissimilar owing to the clear differences between the bulls and the inclusion of other distinguishing words and designs.

Opposer's position is simple: that the marks are similar and likely to cause confusion merely because they all contain "bulls" or "bovine animals". However, the mere fact that the marks share a common element is not enough to show a likelihood of confusion. See *Red Carpet Corp. v. Johnstown Am. Enters.*, 7 USPQ2d 1404 (TTAB 1988) (holding mark consisting of a highly stylized house design for use in connection with real estate property management, and mark consisting of a highly stylized house design for use in connection with real estate brokerage services, not likely to cause confusion); *Ocean Spray Cranberries, Inc. v. Ocean Garden Prods., Inc.*, 223 USPQ 1027 (TTAB 1984) (holding mark consisting of a circle containing three curved lines with rounded ends, for seafood, and mark consisting of a stylized breaking wave within an oval, for various food items including juices and fruits, not likely to cause confusion); see also *Sears, Roebuck & Co. v. Hofman*, 258 F.2d 953, 119 USPQ 137 (C.C.P.A. 1958) (holding marks sharing "a crown surmounted by three feathers" not similar due to other distinguishing features,

including different words).

In the present case, the differences between Applicant's and Opposer's particular bull designs are immediately clear, and the marks also contain distinguishing features such as a swirl of wind, a stadium, and a soccer ball. Notably, Applicant's STOCKMARKET Mark is completely different from Opposer's Marks owing to the inclusion of the highly distinctive term STOCKMARKET across the front of the design. None of Opposer's Marks contain similar words, and the inclusion of STOCKMARKET in Applicant's Mark changes the marks in appearance sufficiently to avoid even the possibility of confusion. Overall, when Applicant's Marks and Opposer's Marks are compared in their entireties—including all of the distinguishing word and design features—the differences in appearance are so great as to avoid a likelihood of confusion. See *Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399, 181 USPQ 272 (C.C.P.A. 1974).

2. Sound

The marks are completely different in sound. The design portions of Applicant's Marks and Opposer's Marks do not have a sound and cannot be found to be similar in this respect. The word portions of the marks—RED BULL, RED BULL ARENA, and STOCKMARKET—are completely different in sound. At the very least, the Board should find that Applicant's STOCKMARKET Mark is not similar in sound to any of Opposer's Marks, which do not contain STOCKMARKET or any similar words. Accordingly, the marks are dissimilar in sound.

3. Meaning

The marks are completely different in meaning. Applicant's Bull and Swirl/Wind design shows a bull emerging from a swirl of wind. The bull is not "charging" like Opposer's bulls. The poses of the bulls are different, and thus the connotations are not the same. Further, Applicant's

STOCKMARKET Mark connotes the stock market, a meaning which is not shared by any of Opposer's Marks. The inclusion of STOCKMARKET thus changes the overall connotations of the marks. Accordingly, when the marks are compared in their entireties, the marks are dissimilar in meaning.

4. Commercial Impression

Applicant's Bull and Swirl/Wind Mark conveys the impression of a bull emerging from the top of a swirl of wind. Three of Opposer's Marks show two bulls charging against each other, which creates a completely different overall impression. Opposer's fourth mark conveys the impression of a single charging bull and a sports arena -- an impression completely dissimilar from Applicant's bull emerging from a swirl of wind. The words RED BULL and RED BULL ARENA also convey a completely different commercial impression from STOCKMARKET, which connotes the stock market and not an arena. Simply stated, Applicant's and Opposer's marks complain completely different words and designs, and they do not share the same commercial impression.

Overall, the marks are dissimilar in appearance, sound, meaning, and create dissimilar commercial impressions. See *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998) (court affirms Board dismissal of opposition based on dissimilarity of the marks CRISTAL and CRYSTAL CREEK); *Kellogg Co. v. Pack'em Enterprises, Inc.*, supra (court affirms Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS); *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) and Sears Mortgage Corp. v. Northeast Savings F.A., 24 USPQ2d 1227 (TTAB 1992) (dissimilarity between the marks APPROVAL PLUS and APPROVALFIRST dispositive) Red Carpet Corp. v. Johnstown Am. Enters., 7 USPQ2d 1404 (TTAB 1988) (holding mark consisting of a highly stylized house design for use in connection with real estate property management, and mark consisting of a highly stylized house design for use in connection with real estate brokerage services, not likely to cause confusion); Ocean Spray Cranberries, Inc. v. Ocean Garden Prods., Inc., 223 USPQ 1027 (TTAB 1984) (holding mark consisting of a circle containing three curved lines with rounded ends, for seafood, and mark consisting of a stylized breaking wave within an oval, for various food items including juices and fruits, not likely to cause confusion); see also Sears, Roebuck & Co. v. Hofman, 258 F.2d 953, 119 USPQ 137 (C.C.P.A. 1958) (holding marks sharing "a crown surmounted by three feathers" not similar due to other distinguishing features, including different words).

In view of the clear differences between the marks, there is no likelihood of confusion as a matter of law. The Board may reach this conclusion solely by comparing the marks in their entirety for dissimilarities in appearance, sound, meaning, and commercial impression. It is beyond dispute that Applicant's and Opposer's marks contain different features. The differences are so great as to preclude a likelihood of confusion under Section 2(d). Accordingly, Opposer's claims of priority and likelihood of confusion should be dismissed as to Ser. Nos. 85/680,816 and 85/969,820.⁷

⁷ The Board may also dismiss Opposer's remaining claims of "lack of bona fide intent to use" for lack of standing, as Opposer has no standing to maintain such claims if there is no likelihood of confusion and thus no damage to Opposer.

Conclusion

Based on the foregoing, Applicant's Motion for Partial Judgment on the Pleadings should be granted, and Opposer's claims of priority and likelihood of confusion should be dismissed with prejudice as to Ser. Nos. 85/680,816 and 85/969,820.

Date: June 26, 2014

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **APPLICANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** has been served on Martin R. Greenstein, counsel for Opposer, on June 26, 2014 via First Class U.S. Mail, postage prepaid to:

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