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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 Reply in Support of Motion for Partial Judgment on the Pleadings.pdf(81815 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.	)	
	)	
	)	
	)	
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**APPLICANT'S REPLY IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON  
THE PLEADINGS**

In its Opposition to Applicant's Motion for Partial Judgment on The Pleadings ("Opposition"), Opposer argues that (1) "triable issues of fact remain" which preclude judgment on the pleadings; and (2) that Applicant's Motion for Partial Judgment on the Pleadings ("MPJP") is a "spurious attempt to delay the proceedings and avoid Applicant's discovery obligations". Opposition at 1-2. Applicant disagrees and hereby submits its Reply in support of its MPJP.

Initially, Opposer has "buried" in its Opposition papers two improper, surprise "requests": (1) a request that certain requests for admission served on Applicant prior to the filing of this MPJP be admitted; Opposition at 6; and (2) in a short footnote, a request for "leave to amend" its amended complaint "as necessary to proceed on Opposer's second claim of lack of bona fide intent to use". Opposition at 1. Applicant will address the first "request" in detail below. The second request for "leave to amend" is highly improper because Opposer has *already* once amended its complaint in this proceeding on January 17, 2014, to add this same claim, TTABVue Docket # 13,

thereby forcing Applicant to file an amended answer and delaying the proceeding by approximately 6 months. Docket # 16. The filing of a *third* complaint would further delay the proceeding and prejudice the Applicant, and should not be allowed. Moreover, any amendment to Opposer's "lack of bona fide intent" claim would be futile if the Board grants Applicant's MPJP. Specifically, if the Board grants Applicant's MPJP, Opposer would not have standing to pursue its claim of "lack of bona fide intent to use", as Opposer's standing to bring this action is premised entirely on its allegations of priority and likelihood of confusion. Consolidated Notice of Opposition at ¶ 17, 19, 20. If the marks are found to be dissimilar, Opposer would not be damaged in any way and would have no standing to pursue its claim for "lack of bona fide intent to use". No amendment could cure this fatal defect in the complaint. Accordingly, the Board should deny Opposer's informal, surprise "request" for leave to amend its complaint for a *second time* in this same proceeding, which would be both prejudicial and futile. Applicant now turns to the arguments raised in the Opposition papers.

**Opposer's Statements Regarding Discovery Are Incorrect and Irrelevant to this MPJP**

Opposer argues that Applicant's failure to respond to a large package of oppressive and unnecessary discovery requests (over 1,250 requests, including 1193 requests for admission, 15 interrogatories, and 49 requests for production of documents) is "a spurious attempt to delay the proceedings and avoid Applicant's clear discovery obligations". Opposition at 1. To the contrary, the MPJP is designed to expedite the resolution of this proceeding by seeking judgment on the pleadings without the need for costly discovery and a full trial. Judgment on the pleadings would conserve the resources of the parties and the Board, and, in particular, would eliminate the need for Applicant to expend time and resources responding to Opposer's excessive and unnecessary discovery requests. Second, Opposer's arguments concerning Applicant's "discovery obligations"

are irrelevant to this MPJP. Opposer may address any perceived failures to comply with discovery rules by motion to compel after the MPJP is decided and the proceeding is resumed, and after the parties meet and confer to discuss whether such a motion would even be necessary.

Third, Opposer irrelevantly argues that it is of "utmost importance" that Applicant's counsel has filed other motions for judgment on the pleadings during discovery in unrelated proceedings. Opposition at 6. Such motions were entirely appropriate in those particular cases. Each case involved a meritless opposition and the opposer's attempt to overburden the applicant with excessive and unnecessary discovery requests—here, over 1,250 of them—all designed solely to increase defense costs.<sup>1</sup> Here, Applicant's MPJP is appropriate as a means for disposing of Opposer's claims, which would eliminate the need for discovery.

Last, Opposer requests (not by separate motion, but "buried" within its Opposition papers) that "Applicant be ordered to respond to the discovery requests, and that the Requests to Admit be deemed admitted in accordance with Fed. R. Civ. P. 36(a)(3)". Opposition at 6. Opposer's informal, surprise discovery motion buried within in its Opposition brief should be denied.

**Opposer is well aware that the filing of a potentially dispositive motion, such as a motion for judgment on the pleadings, suspends the proceeding with respect to all matters not germane to the motion.** See 37 CFR § 2.127(d). Further, "since the parties are presumed to know that the filing of a potentially dispositive motion will result in a suspension order, the filing of such a motion generally will provide parties with good cause to cease or defer activities unrelated to the briefing of such motion" such as conducting discovery. *Leeds Technologies Limited v. Topaz*

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<sup>1</sup> The Board may note that *Opposer* is the plaintiff in three of these oppositions.

*Communications Ltd.*, 65 USPQ2d 1303, 1305-06 (TTAB 2002)(time for opposer to serve discovery responses reset following decision on opposer's motion for judgment on pleadings).

Because the MPJP is potentially dispositive of this proceeding (and, if granted, would obviate the need for Applicant to undertake the time and expense to respond to over one thousand discovery requests), and because this proceeding was indeed suspended on July 25, 2014; TTABVUE Docket #20; the MPJP provides Applicant with good cause to excuse it from responding to discovery until after the Board's decision on the motion. *See Leeds*, 65 USPQ2d at 1305-06 (TTAB 2002). Accordingly, the requests to admit should not be deemed admitted,<sup>2</sup> and the time for Applicant to respond to discovery should be reset following decision on Applicant's MPJP. *See Leeds*, 65 USPQ2d at 1305-06 (TTAB 2002).

**The MPJP Does Not Raise "Triable Issues of Fact" Because Applicant has Conceded all DuPont Factors Except the Similarity or Dissimilarity of the Marks, a Limited Issue Which the Board May Decide**

Opposer argues that the MPJP raises "triable issues of fact" precluding judgment on the pleadings. Opposition at 1, 7. Specifically, Opposer continues to argue the "fame" of its marks and the "overlap in goods and services directed through the identical trade channels to identical purchasers". *Id* at 11. These arguments are puzzling in light of Applicant's clear concession in its MPJP of all *DuPont* factors with the exception of the similarity or dissimilarity of the marks, which the Board can decide as a matter of law. Opposer misunderstands that Applicant has not disputed the "fame" of Opposer's marks as pleaded in the complaint or the relatedness of the goods

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<sup>2</sup> There are other reasons why the requests to admit should not be deemed admitted. For example, the presentation of the merits of the action will not be subserved by such "automatic" admissions, which Applicant could deny through responses served after decision on the MPJP; and such "automatic" admissions would prejudice Applicant in maintaining its defense on the merits at trial.

or services. Instead, Applicant submits that *even considering all other DuPont factors in Opposer's favor, the dissimilarities between Applicant's mark and Opposer's marks in appearance, sound, meaning, and commercial impression are so great as to avoid a likelihood of confusion.*

The Board has found this first factor to be dispositive in other cases, and should find that the dissimilarities between the marks here also outweighs the other *DuPont* factors. "[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).

Opposer next argues that its assertion of bald legal conclusions that the marks are "likely to cause confusion", "mistate[sic]", "deception", and create consumer perceptions of "sponsorship", and "affiliation", Consolidated Notice of Opposition, ¶¶ 17, 19, 20, are "necessarily deemed admitted". Opposer is incorrect. Opposer misunderstands that "[w]hile 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). Accordingly, Applicant has not admitted that the marks are similar and likely to cause confusion. Rather, Applicant has specifically requested in its MPJP that the Board decide this limited issue by comparing the marks as shown in the pleadings, as the Board has done before in other cases.

Last, Opposer has not disputed Applicant's analysis of the dissimilarity of the marks as set forth in the MPJP. For example, Opposer does not dispute that (1) Applicant's mark features a swirl of wind, but does not include a stadium or soccer ball; (2) that Applicant's STOCKMARKET mark includes the highly distinctive term STOCKMARKET across the front of the design, while Opposer's marks do not; or (3) that none of Opposer's Marks contain similar words, and that RED BULL is completely dissimilar to STOCKMARKET. Inasmuch as Applicant's analysis of these clear differences between the marks is undisputed, there is no "triable issue" regarding the similarity or dissimilarity of the marks. The Board is fully capable of determining the limited issue of the similarity or dissimilarity of the marks without a full trial on the merits. *See, e.g., 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)

Overall, when the marks are compared in their entirety—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). The Board may reach this conclusion solely by comparing the marks in their entireties, and as shown in the pleadings. Accordingly, Opposer's claims of priority and likelihood of confusion should be dismissed as to Ser. Nos. 85/680,816 and 85/969,820.<sup>3</sup>

Date: July 31, 2014

Respectfully submitted,

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<sup>3</sup> The Board may also dismiss Opposer's remaining claim of "lack of bona fide intent to use" for lack of standing, as Opposer has no standing to maintain such claim if there is no likelihood of confusion and thus no damage to Opposer.

**PROOF OF SERVICE**

I hereby certify that a true and complete copy of the foregoing APPLICANT'S **REPLY IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** has been served on Martin R. Greenstein, counsel for Opposer, on July 31, 2014 via First Class U.S. Mail, postage prepaid to:

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/Paulo A. de Almeida  
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