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

Proceeding	91217792
Party	Plaintiff Andale Energy Drink Co., LLC
Correspondence Address	PAULO A DE ALMEIDA PATEL & ALMEIDA PC 16830 VENTURA BLVD, SUITE 360 ENCINO, CA 91436 UNITED STATES Paulo@PatelAlmeida.com
Submission	Reply in Support of Motion
Filer's Name	Paulo A. de Almeida
Filer's e-mail	Paulo@PatelAlmeida.com
Signature	/Paulo A. de Almeida/
Date	01/16/2015
Attachments	REPLY in Support of Opposer's Motion to Dismiss Applicant's Counterclaim for Likelihood of Confusion.pdf(91313 bytes )

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

Andale Energy Drink Co., LLC,	)	
	)	
Opposer,	)	Opposition No. 91217792
	)	Serial No. 85/891,919
v.	)	Mark: DALÉ
	)	
ACP IP, LLC,	)	
	)	
Applicant.	)	
	)	
	)	
	)	

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**REPLY IN SUPPORT OF MOTION TO DISMISS APPLICANT'S FIRST**

**COUNTERCLAIM FOR LIKELIHOOD OF CONFUSION**

Opposer, Andale Energy Drink Co., LLC ("Opposer") hereby submits its Reply in support of its Motion to Dismiss Applicant, ACP IP, LLC's ("Applicant") first counterclaim for "likelihood of confusion" on the ground that the allegations stated therein do not state a plausible claim for relief.

**Applicant's Counterclaim for Priority and Likelihood of Confusion is Implausible and**

**Cannot Proceed under *Twombly/Iqbal***

In its Opposition Brief, Applicant applies the wrong pleading standard to measure the sufficiency of its counterclaim for "priority and likelihood of confusion", incorrectly explaining that "[c]onsistent with these liberal pleading requirements, a motion to dismiss must be denied 'unless it appears **beyond doubt** that the plaintiff can prove no set of facts in support of his claim

which would entitle him to relief",<sup>1</sup> citing *Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 1160, 26 U.S.P.D.2d 1038 (Fed. Cir. 1993). Applicant applies the old pleading standard, which has been replaced by the heightened, rigorous pleading standard required by the Supreme Court in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

It is now well settled that in order to survive a motion to dismiss, Applicant must "state a claim to relief that is plausible on its face". TMBP § 503.02 (emphasis added); *Ashcroft, supra* ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss"); *Bell Atl. Corp., supra* ("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]"). Applying the correct, heightened pleading standard required by *Twombly/Iqbal*, Applicant's counterclaim for priority and likelihood of confusion is implausible because the underlying allegations in ¶¶ 3, 4, 6, and 8—even if assumed to be true—cannot establish any trademark rights in DALÉ for energy drinks or related goods *as a matter of law*.

Specifically, Applicant argues that its counterclaim is sufficient even though it is based solely on allegations that "DALÉ" is a "prominent lyric" in the music of an unrelated third party, "Armando Perez p/k/a Pitbull", and that Applicant (but not Mr. Perez) has used DALÉ for musical recordings, live performances, apparel, and as "tagline" for advertising the beverages and automobiles of unrelated third parties since 2004. Counterclaims, ¶¶ 3-4. However, even assuming the truth of these allegations, the mere fact that "Armando Perez p/k/a Pitbull" (*who is*

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<sup>1</sup> Applicant's opposition to Opposer's Motion to Dismiss ("Opposition to Motion to Dismiss"), 2-3

*not even a party to this proceeding*) has uttered the word DALÉ to promote his music and in advertising for the apparel of others, and as a "tagline" for advertising the beverages and automobiles of *unrelated third parties* simply cannot create trademark rights in DALÉ for energy drinks or related beverages for Applicant. To be clear, **Applicant has not alleged that it has ever used DALÉ for energy drinks or related foods or beverages, and therefore Applicant cannot prove at trial that it owns any trademark rights in DALÉ for energy drinks or related foods or beverages.** Simply put, Applicant's mere allegations that it advertised the music of "Pitbull", who sometimes utters the word DALÉ in songs and in commercials promoting the various products of others, could not possibly establish trademark rights in DALÉ for energy drinks or related beverages for Applicant as a matter of law. Inasmuch as it will be *impossible* for Applicant to prove priority of use of DALÉ for energy drinks or related goods based on these allegations, the claim falls far short of alleging a "plausible claim for relief" as required under *Twombly/Iqbal*. Accordingly, the counterclaim for priority and likelihood of confusion must be dismissed because the allegations fail to state a plausible claim for relief.

Applicant mischaracterizes Opposer's Motion as one "asking the Board to prematurely determine the substance of [Applicant's] Counterclaims".<sup>2</sup> However, the purpose of Opposer's Motion is not to challenge the truth of the allegations. Rather, ***even assuming the truth of the allegations, the Board should dismiss the counterclaim because the allegations of use of DALÉ as a song lyric and for advertisements of the various goods of others cannot establish prior use of DALÉ as a trademark for energy drinks or related goods as a matter of law.*** The parties and the Board should not be burdened with discovery and trial on a counterclaim that is not

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(emphasis in original).

plausible and does not satisfy the heightened pleading standard of *Twombly/Iqbal*. Accordingly, Applicant's counterclaim for priority and likelihood of confusion should be dismissed because the allegations do not state a plausible claim for relief.

### **CONCLUSION**

Based on the foregoing, Opposer respectfully requests that its Motion to Dismiss Applicant's First Counterclaim be granted, and that the counterclaim be dismissed with prejudice and given no further consideration.

Respectfully submitted,

Date: January 16, 2015

By:     /Paulo A. de Almeida/      
Paulo A. de Almeida  
Alex D. Patel  
Patel & Almeida, P.C.  
16830 Ventura Blvd., Suite 360  
Encino, CA 91436  
(818) 380-1900  
Attorneys for Opposer,  
Andale Energy Drink, LLC

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<sup>2</sup> Opposition to Motion to Dismiss, at 5-6.

**PROOF OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS APPLICANT'S FIRST COUNTERCLAIM** has been served on Jaime Rich Vining, the listed Correspondent for Applicant, on January 16, 2015, via First Class U.S. Mail, postage prepaid to:

Jaime Rich Vining  
Friedland Vining, P.A.  
1500 San Remo Ave., Suite 200  
Coral Gables, FLORIDA 33146

/Paulo A. de Almeida/  
Paulo A. de Almeida