

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451  
General Contact Number: 571-272-8500

BUO

Mailed: December 5, 2017

Opposition No. 91228937

*Quest Nutrition, LLC*

*v.*

*Carl Sanko and Dannion Brinkley*

**By the Trademark Trial and Appeal Board:**

In its prior order, the Board required Applicants to show cause why default judgment should not be entered against them for failure to file and serve a properly executed answer; and directed Applicants to produce evidence that one or more of the joint applicants has deceased. Applicants were allowed time to file an answer that is signed by all living joint applicants. 12 TTABVUE. Applicants' response indicates that joint applicant Steve McCowan is deceased. 13 TTABVUE 57 and 61. Applicants also filed an answer signed by both remaining joint applicants. *Id.* at 2-8.

In view of the foregoing, Applicants' default is **SET ASIDE**, and Applicants' answer to the notice of opposition is noted and accepted as Applicant's operative pleading in this matter.

Accordingly, inasmuch as the record indicates that Applicants intend to set forth a meritorious defense to the allegations, that any prejudice to Opposer is minimal,

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and that Applicants have not acted in bad faith or for the purpose of delay, the motion to set aside the default is **GRANTED**.<sup>1</sup>

***Motion to Dismiss***

Embedded within its response to the Board's show cause order, Applicants renewed their previously filed motion to dismiss, now signed by both joint applicants.<sup>2</sup> 13 TTABVUE 10-16. Inasmuch as the renewed motion is identical to the prior-filed motion, and in the interest of judicial economy, rather than requiring a renewed response from Opposer, the Board will now consider the motion and Opposer's previously-filed response in opposition to the motion. 8 TTABVUE.

The Board has considered the parties' submissions and presumes the parties' familiarity with the arguments made therein. The parties' arguments will not be summarized herein except as necessary to explain the Board's decision.

To withstand a motion to dismiss for failure to state a claim upon which relief can be granted, a plaintiff need only allege sufficient factual content that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the registration. *Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*,

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<sup>1</sup> Applicants are again encouraged to seek counsel. If Applicants later retain counsel, an appearance should promptly be filed with the Board, indicating the new correspondence information for the retained counsel. In the meantime, Applicants should review the "Pro Se Information" provided in the Board's October 13, 2016 order. 10 TTABVUE 2-5.

<sup>2</sup> In general, all motions should be filed separately, or at least be captioned separately, to ensure they receive attention. A party should not embed a motion in another filing. See *Melwani v. Allegiance Corp.*, 97 USPQ2d 1537, 1541 (TTAB 2010); and *Sinclair Oil Corp. v. Kendrick*, 85 USPQ2d 1032, 1033 n.3 (TTAB 2007).

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101 USPQ2d 1780 (TTAB 2012) (citing *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998)); *Order of Sons of Italy in Am. v. Profumi Fratelli Nostra AG*, 36 USPQ2d 1221, 1222 (TTAB 1995); and TBMP § 503.02 (June 2017). Specifically, a complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In particular, the claimant must allege well-pleaded factual matter and more than “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Iqbal*, 556 U.S. 662 (citing *Twombly*, 550 U.S. at 555).

However, the plaintiff is not under a burden to prove its case in its notice of opposition or petition to cancel. *Enbridge, Inc. v. Excelerate Energy Ltd. P’ship*, 92 USPQ2d 1537, 1543 n.10 (TTAB 2009).

**A. Standing**

Opposer alleges ownership of Registration Nos. 4591303<sup>3</sup> and 4768690<sup>4</sup> for the standard character mark QUEST, and Registration No. 4939775<sup>5</sup> for the following

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<sup>3</sup> Issued August 26, 2014, from an application filed June 20, 2013, for “dietary supplement, namely, nutrient-dense, protein-based snack bars,” in International Class 9, and “Shirataki based dried and wet noodles,” in Class 30.

<sup>4</sup> Issued July 7, 2015, from an application filed November 23, 2014, for “powdered nutritional supplement drink mix containing one or more of the following ingredients, soy, oat oil, creatine, soy oil, dextrose, protein, non-fat milk, milk protein, or whey protein concentrate,” in International Class 5, “vegetable and potato based chips and snacks; protein based, nutrition dense snack bars, namely, high protein nut-based snack bars and high protein whey-based snack bars,” in Class 29, and “grain based chips and snacks; chocolates and chocolate based ready to eat candies and snacks; high protein, low carbohydrate cereal-based and chocolate-based bars and snacks,” in Class 30.

<sup>5</sup> Issued April 19, 2016, from an application filed July 9, 2015, for “dietary supplement, namely, nutrient-dense, protein-based snack bars; Powdered nutritional supplement drink mix containing one or more of the following ingredients, soy, oat oil, creatine, soy oil, dextrose,

mark in stylized format:



1 TTABVUE 5, ¶ 7. The allegation of Opposer’s ownership of these pleaded registrations is sufficient to plead Opposer’s standing to bring this opposition against application Serial No. 86667606 for the mark CANNAQUEST in standard character format, for “dietary and nutritional supplements containing industrial hemp,” in International Class 5. See *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). Moreover, Opposer’s submission of copies of the records of its pleaded registrations retrieved from the Trademark Status and Document Retrieval database (“TSDR”), showing the current status and title of the registrations establishes Opposer’s standing to bring this action. 1 TTABVUE 9-19.

- *Priority*

As previously noted, Opposer attached copies of the records of its pleaded registrations from the TSDR database showing current status and title of its pleaded registrations. By properly making its pleaded registrations of record, Opposer has removed Section 2(d) priority as an issue in this proceeding as to the pleaded

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protein, non-fat milk, milk protein, or whey protein concentrate,” in International Class 5, “vegetable and potato based chips and snacks which contain protein; protein based, nutrition dense snack bars, namely, high protein nut-based snack bars and high protein whey-based snack bars,” in Class 29, and “grain based chips and snacks; chocolates and chocolate based ready to eat candies and snacks; high protein, low carbohydrate cereal-based and chocolate-based bars and snacks,” in Class 30.

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registered marks and the goods covered by those registrations. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

- *Likelihood of Confusion*

Paragraphs 14-16 of the notice of opposition allege sufficient facts that if proven would entitle Opposer to the relief it seeks under Trademark Act Section 2(d). That is, Opposer has alleged the similarity of the applied-for mark with its registered and previously used marks and the relatedness of the goods and services covered by those marks.<sup>6</sup> 1 TTABVUE 6. Opposer concludes, “Applicant’s Mark so resembles Opposer’s Marks, as to be likely, when used in connection with Applicant’s goods, to cause confusion, to cause mistake, or to deceive.” *Id.*, ¶ 15.

Applicants’ arguments for dismissal do not overcome these findings. Indeed, Applicants attempt to argue the merits of the case. *See, e.g.*, 13 TTABVUE 11-12 (“Opposer and Applicant are not in competition...”). Additionally, contrary to Applicants’ contentions that Opposer fails to “make factual statement[s]” regarding the similarity of the marks and relatedness of the goods, *id.* at 13-14, the Board has found such statements to have been sufficiently made in the notice of opposition.

Accordingly, Applicants’ motion to dismiss the notice of opposition for failure to state a claim upon which relief may be granted is **DENIED**. The connotation of the

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<sup>6</sup> To state a claim of likelihood of confusion under Trademark Act Section 2(d), Opposer must merely allege facts from which it may be inferred that Applicants’ applied-for mark so resembles Opposer’s previously used or registered marks that it is likely that a potential consumer would be confused or mistaken or deceived as to the source of the parties’ goods and services. *See* 15 U.S.C. § 1052(d); *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also* TMEP § 1207.01.

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marks, and all other relevant *DuPont*<sup>7</sup> factors will be decided at trial or upon the filing of a dispositive motion. “[W]hether or not [Opposer] can prove the allegation[s] ... is a matter to be determined after the introduction of evidence at trial (or in connection with a proper motion for summary judgment).” *Flatley v. Trump*, 11 USPQ2d 1284, 1286 (TTAB 1989).

***Schedule***

The proceeding is **RESUMED**. As previously stated, Applicants’ answer is noted and accepted, and is now Applicants’ operative pleading in this matter. The remaining conferencing, disclosure, discovery, and trial dates are reset as follows:

Deadline for Discovery Conference	December 24, 2017
Discovery Opens	December 24, 2017
Initial Disclosures Due	January 23, 2018
Expert Disclosures Due	May 23, 2018
Discovery Closes	June 22, 2018
Plaintiff’s Pretrial Disclosures Due	August 6, 2018
Plaintiff’s 30-day Trial Period Ends	September 20, 2018
Defendant’s Pretrial Disclosures Due	October 5, 2018
Defendant’s 30-day Trial Period Ends	November 19, 2018
Plaintiff’s Rebuttal Disclosures Due	December 4, 2018
Plaintiff’s 15-day Rebuttal Period Ends	January 3, 2019
<b>BRIEFS SHALL BE DUE AS FOLLOWS:</b>	
Plaintiff’s Main Brief Due	March 4, 2019
Defendant’s Main Brief Due	April 3, 2019
Plaintiff’s Reply Brief Due	April 18, 2019

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of taking of testimony. Trademark Rule 2.125.

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<sup>7</sup> *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

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Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.