

ESTTA Tracking number: **ESTTA762897**

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

Proceeding	91228937
Party	Defendant Carl Sanko, Steve McCowan, Dannion Brinkley
Correspondence Address	CARL SANKO 4824 Denaro Dr Las Vegas, NV 89135-2479 carlsanko@aol.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Carl Sanko
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Signature	/Carl Sanko/
Date	08/05/2016
Attachments	Motion to Dismiss for Failure to State a Claim.pdf(155960 bytes)

PRELIMINARY STATEMENT

Quest Nutrition, LLC, (“Opposer”) as set forth in the NOTICE OF OPPOSITION, is the owner of the registered Mark “QUEST” under International Class 005 for the stated use of “Dietary supplement, namely, nutrient-dense, protein-based snack bars” with a registration date of August 26, 2014, a second registration of the same Mark on July 7, 2014, under the same International Class 005 for the stated use of “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”, and a third registration of a similar, but stylized Mark (containing a type of the word “QUEST” but italicized, with a “Q” that is much larger than the other letters, and with the vertical line in the “E” of QUEST removed) on July 7, 2014, under the same International Class 005 for the stated use of “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, protein, non-fat milk, milk protein, or whey protein concentrate”. Carl Sanko (“Applicant”) is a co-Applicant, along with Dannion Brinkley and Steve McCowan (deceased), seeking registration of the Mark CANNAQUEST under the same International Class 005 for the stated use of “Dietary and nutritional supplements containing industrial hemp with a FIRST USE IN COMMERCE on June 10, 2015 and stylized as “CannaQuest”.

Opposer and Applicant are not in competition. Opposer marketing line is in non-hemp supplement and nutrition products. Applicant Opposer marketing line is only

in hemp supplement and nutrition products. Opposer has a website with a dotcom extension (i.e. <http://www.questnutrition.com/>). Applicant has a website with a dotco extension (i.e. <http://www.cannaquest.co/>).

STATEMENT OF FACTS

Opposer states that “Section 2(d) of Lanham Act, 15 U.S.C. SECTION 1052(d) prohibits registration on the principal register of a mark that consists of or comprises a mark which so resembles a mark previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods and/or services of the applicant, to cause confusion, or to cause mistake, or to deceive.” Opposer alleges that 1) the goods identified in the Application are closely related and/or complementary to the goods offered under Opposer’s Marks and, 2) 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. Opposer asks the Trademark Trial and Appeal Board to refuse to register the application under 15 U.S.C. SECTION 1068.

LEGAL ARGUMENT

Opposer has failed to state a claim upon which relief can be granted, to wit a motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint, in this case, the Notice of

Opposition. In order to withstand such a motion, a complaint need only allege such facts as would, if proved, establish that the Opposer is entitled to the relief sought, that is, that (1) the Opposer has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought (in the case of an opposition), or for canceling the subject registration (in the case of a cancellation proceeding). In regard to (1), Applicant does not contest that Opposer has standing to maintain the proceeding. In regard to (2), Applicant contests that to survive a motion to dismiss, a complaint must "state a claim to relief that is plausible on its face" and that Opposer has not done so. In particular, Opposer 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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 555).

Opposer cannot meet the standard for pleading a plausible cause of action for trademark infringement or unfair competition. Nor does such deficient pleading amount to a plausible claim of likelihood of confusion with the public as Opposer does not even mention the public's perception of the Applicant's Mark in relation to the Opposer's Mark, yet courts have determined that the public marketplace is where consideration of matters of confusion must be settled. Opposer has not made any factual statement as to how Applicant's Mark is similar to Opposer's Mark in similarity of the marks in sound, meaning and appearance. Opposer has not made any factual statement as to how Applicant's products are proximate to Opposer's goods. Opposer has not made any factual statement as to how Applicant's marketing and advertising channels are similar to Opposer's. Opposer

has not made any factual statement as to how careful the typical consumer is likely to be before making a purchase in which courts have made to be an important consideration in regard to eliminating confusion in that the typical consumer's care in making a purchase decision is itself a factor in substantially limiting, if not entirely eliminating confusion. Opposer has not made any factual statement as to evidence of actual confusion. Opposer has not made any factual statement Applicant's intent in choosing the mark, but has only baldly alleged that Applicant's intent is to cause confusion, mistake or to deceive.

Motion to dismiss standard

The modern standard for a motion to dismiss under Fed. R. Civ. P. 12(b)(6) is well known:

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. This rule does not require detailed factual allegations, but a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. A trial court considering a Rule 12(b)(6) motion accepts all well-pleaded allegations in the complaint as true, drawing all reasonable inferences in the defendants' favor. To survive dismissal, a complaint must allege a plausible set of facts sufficient 'to raise a right to relief above the speculative level. In other words, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the defendant pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged. Applying the plausibility standard is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Software for Moving, Inc. v. Frid*, 09 CIV 4341 DLC, 2010 WL 2143670 (S.D.N.Y. May 27, 2010) (internal quotations and citations omitted). In particular, the Opposer 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.” (*Ashcroft v. Iqbal*, 556 U.S.662, 678 (2009)).

CONCLUSION

As demonstrated above, Opposer has simply and deficiently provided only a “threadbare recital of the elements of a cause of action supported by mere conclusory statements” rather than by well-pleaded factual matter. Opposer is entitled to no relief under any set of facts that could be proved in support of its claim because Opposer has not set forth any set of plausible, common-sense, non-speculative facts in its Notice of Opposition. For these reasons, the Opposer’s Notice of Opposition lacks merit for failure to sustain a cause of action upon which relief can be granted and/or for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6) and Applicant is entitled to an order dismissing Opposer’s claim and requests such order without leave to amend.

DATED this 5th day of August, 2016.

/Carl Sanko/

Carl Sanko, Applicant

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing
**APPLICANT’S ANSWER, AFFIRMATIVE DEFENSES AND
COUNTERCLAIMS to OPPOSER’S NOTICE OF OPPOSITION** on
the party listed below by mailing said copy on August 5, 2016 via first
class U.S. Mail, postage prepaid to:

Michael Adams

Rutan & Tucker, LLP

611 Anton Boulevard, Suite 1400

Costa Mesa, CA 92626

DATED this 5th day of August, 2016.

/Carl Sanko/

Carl Sanko, Applicant