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**UNITED STATES PATENT AND TRADEMARK OFFICE**
**Trademark Trial and Appeal Board**
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September 15, 2020

Opposition No. 91250374 (**parent**)
Opposition No. 91250592
Opposition No. 91253656

*Constellation Brands U.S. Operations, Inc.*

*v.*

*To Kalon Stock Farm, LLC*

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

This proceeding now comes before the Board for consideration of Applicant's motion (filed April 21, 2020) for summary judgment in Opposition No. 91253656. The motion is fully briefed.

## I. Sua Sponte Consolidation

Inasmuch as the above-captioned proceedings involve the same parties, common questions of law and fact, and the Board is capable of weighing any differences in the pleadings, evidence or defenses for each case, the Board consolidates these proceedings. *See* Fed. R. Civ. P. 42(a); *see also Wise F&I, LLC, et al. v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1105 (TTAB 2016) (sua sponte consolidation due to common questions of law and fact).

The consolidated cases may be presented on the same record and briefs. *See Dating DNA LLC v. Imagini Holdings Ltd.*, 94 USPQ2d 1889, 1893 (TTAB 2010).

The Board file will be maintained in Opposition No. 91250374 as the "parent" case. As a general rule, from this point onward, only one copy of any submission should be filed in the parent case, but that copy should include all proceeding numbers in its caption in ascending order.

Despite being consolidated, each proceeding retains its separate character. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings and a copy of the decision shall be placed in each proceeding filed.

Upon consolidation, the Board will reset dates for the consolidated proceeding, usually by adopting the dates as set forth in the most recently instituted of the cases being consolidated. Dates are reset in these consolidated proceedings below.

## II. Background in Opposition No. 91253656

Applicant seeks to register the mark TO-KALON FARM, in standard characters, for the following:[1]

- International Class 41: Educational and entertainment services, namely, providing, facilities, classes and instruction in the field of equestrian activities, horseback instruction and riding lessons; Educational and entertainment services, namely, horse showing, horse jumping and riding lessons; Arranging and conducting guided horseback expeditions for recreational purposes; Providing horseback riding facilities for recreational purposes; Providing horseback and equestrian lessons and instruction;

[1] Application Serial No. 88361193, filed March 28, 2019. Class 41 was filed pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) and Classes 43 and 44 were filed pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). "FARM" is disclaimed. The listed English translation of "TO KALON" in the mark is the "highest beauty."

Providing facilities for and lessons in the field of horseback riding; Riding academy services, namely, classes in horseback riding; Providing recreational facilities for engaging in equestrian sports; Providing training instruction in the field of equestrian sports; horse training;

- International Class 43: Boarding for horses; providing horse stable facilities; leasing of horse boarding stalls;
- International Class 44: Provision of health care to horses.

On January 24, 2020, Opposer filed a notice of opposition opposing registration of Applicant's involved mark on the sole ground of likelihood of confusion pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). In support of its entitlement to a statutory cause of action and claim, Opposer pleaded prior common law rights and ownership of Registration Nos. 1489619[2] and 1857851[3] for the standard character marks TO KALON and TO KALON VINEYARD, respectively, each for "Wine" in International Class 33.

On January 30, 2020, Applicant filed an answer to the notice of opposition denying the salient allegations therein. On April 21, 2020, Applicant filed a motion titled as one for "summary judgment."

## III. Applicant's Motion for Summary Judgment

By its motion, Applicant argues that Opposer does not have "standing," as Opposer's goods are unrelated to Applicant's services and that there can be no

[2] Registration No. 1489619, issued May 24, 1988, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

[3] Registration No. 1857851, issued October 11, 1994, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a). "VINEYARD" is disclaimed.

likelihood of confusion, because the goods and services are unrelated. 5 TTABVUE.[4] Applicant did not attach any evidence to its motion and bases its arguments solely on the pleadings.

A motion for summary judgment filed without supporting evidence is one made based solely on the pleadings, and where it is filed after the pleadings are closed, is treated as one for judgment on the pleadings. *S & L Acquisition Co. v. Helene Arpels, Inc.*, 9 USPQ2d 1221, 1225 n.9; *see also* 10A Charles Alan Wright and Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 2722 (4th ed. 2020) (summary judgment motion based solely on pleadings is equivalent to motion to dismiss or for judgment on the pleadings). The standard to be applied is the same as that applied to a motion to dismiss under Fed. R. Civ. P. 12(b)(6).[5] *Jackson v. City of Cleveland*, 925 F.3d 793, 806 (6th Cir. 2019) (applying same standard for judgment on pleadings under Fed. R. Civ. P. 12(c) as applied to motion to dismiss under Fed. R. Civ. P. 12(b)(6)). *See also* 5C Wright & Miller, *Fed. Prac. & Proc. Civ.* § 1367 (3d ed. 2020).

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. *Kraft Group LLC v. Harpole*, 90 USPQ2d 1837, 1840 (TTAB 2009). The time for filing a motion to dismiss and for judgment on the pleadings is governed by whether the pleadings have closed and any distinction between them is

[4] Unless otherwise noted, citations to the record indicate TTABVUE entries in Opposition No. 91253656.

[5] In its motion, Applicant also argues that Opposer's claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). 5 TTABVUE 7.

considered "merely semantic." 2 James W. Moore, et al., *Moore's Fed. Prac. Civ.* § 12.38 (2020).

Accordingly, in determining the motion, the Board considers whether Opposer has alleged facts that would, if proved, establish that Opposer has entitlement to a statutory cause of action and that a statutory ground exists for opposition. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000). 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, 663, 129 S. Ct. 1937, 1949 (2009), *quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *See Twombly*, 550 U.S. at 556-557. However, the plausibility standard does not require that a plaintiff set forth detailed factual allegations. *Id.* Rather, a plaintiff need only allege "enough factual matter…to suggest that [a claim is plausible]" and "raise a right to relief above the speculative level." *Totes-Isotoner Corp. v. U.S.*, 594 F.3d 1346, 1354 (Fed. Cir. 2010).

Moreover, it is well established that whether a plaintiff can actually prove its allegations is a matter to be determined at final hearing or upon summary judgment, after the parties have had an opportunity to submit evidence. *See Libertyville Saddle Shop Inc. v. E. Jeffries & Sons, Ltd.*, 22 USPQ2d 1594, 1597 (TTAB 1992) ("A motion to dismiss does not involve a determination of the merits of the case…"). Further, all of the plaintiff's well-pleaded allegations must be accepted as true, and the complaint

must be construed in the light most favorable to the plaintiff. *See Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 1161, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993).

**A. Entitlement to Statutory Cause of Action[6] and Likelihood of Confusion**

To establish entitlement to a statutory cause of action under Section 13 or 14 of the Trademark Act, a plaintiff must demonstrate a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1727 (Fed. Cir. 2012); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

To allege a valid ground of opposition for likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), a plaintiff need only allege that it has priority of use and that defendant's mark so resembles plaintiff's mark as to be likely, when used in connection with the goods or services of the defendant, to cause confusion, or to cause mistake, or to deceive. *See* 15 U.S.C. § 1052(d); *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981).

[6] Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." Mindful of the Supreme Court's direction in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125-26 (2014), we now refer to this inquiry as entitlement to a statutory cause of action. Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable.

Opposer has pleaded ownership of two registrations for allegedly similar marks and that Applicant's mark, when used with the services in the application, is likely to be confused with Opposer's marks. Opposer has therefore sufficiently alleged its entitlement to a statutory cause of action and a claim of likelihood of confusion. *See Ritchie*, 170 F.3d 1092, 50 USPQ2d at 1025.

Applicant's arguments focus on whether Opposer can prove its likelihood of confusion claim, rather than the sufficiency of the pleading. A review of the pleadings is a test of the sufficiency of the pleadings and "does not involve a determination of the merits of the case… ." *Libertyville Saddle Shop Inc.*, 22 USPQ2d at 1597. Whether Opposer is able to establish its claim is a matter for final decision.

In view of the foregoing, Applicant's construed motion for judgment on the pleadings is **denied**.

## IV. Request for Bar Information

It appears that Opposer is represented by an attorney. Effective August 3, 2019, the USPTO amended its rules to require all practitioners qualified under § 11.14(a) to be an active member in good standing and to provide the name of a state in which he or she is an active member in good standing; the date of admission to the bar of the named state; and the bar license number, if one is issued by the named state. 37 C.F.R. § 2.17(b)(3).

Accordingly, Opposer is allowed **thirty days** from the mailing date of this order to provide the information above using the Change of Address form in ESTTA. The

bar information entered on the ESTTA Change of Address form will be masked from the public in TTABVUE.

If Opposer fails to comply with this order, the Board may issue an order to show cause.

## V. Schedule

Proceedings are resumed. Remaining dates in these consolidated proceedings are reset as follows:

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| Initial Disclosures Due in Opposition No. 91253656[7] | **9/25/2020** |
| Expert Disclosures Due | **1/22/2021** |
| Discovery Closes | **2/21/2021** |
| Plaintiff's Pretrial Disclosures Due | **4/7/2021** |
| Plaintiff's 30-day Trial Period Ends | **5/22/2021** |
| Defendant's Pretrial Disclosures Due | **6/6/2021** |
| Defendant's 30-day Trial Period Ends | **7/21/2021** |
| Plaintiff's Rebuttal Disclosures Due | **8/5/2021** |
| Plaintiff's 15-day Rebuttal Period Ends | **9/4/2021** |
| Plaintiff's Opening Brief Due | **11/3/2021** |
| Defendant's Brief Due | **12/3/2021** |
| Plaintiff's Reply Brief Due | **12/18/2021** |
| Request for Oral Hearing (optional) Due | **12/28/2021** |

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the

[7] In its April 21, 2020 filing, Applicant states that it served its initial disclosures in Opposition No. 91253656, but it is not clear if Opposer has served its initial disclosures as the motion was filed prior to the deadline. To the extent either party has not yet served initial disclosures in Opposition No. 91253656, it must do so by the deadline stated above.

manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

**TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS**

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing. **Note:** Parties are strongly encouraged to check the entire document before filing.[8] The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the ESTTA help webpage.

[8] To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.