

ESTTA Tracking number: **ESTTA1061112**

Filing date: **06/10/2020**

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

Proceeding	91253656
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Date	06/10/2020
Attachments	Reply to Opposition to MSJ - Opp. No. 91253656.pdf(142686 bytes )

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

<p>Constellation Brands U.S. Operations, Inc.</p> <p style="text-align: center;">Opposer,</p> <p style="text-align: center;">v.</p> <p>To Kalon Stock Farm, LLC,</p> <p style="text-align: center;">Applicant.</p>	<p>Consolidated Opposition No.: 91253656</p> <p>Serial Nos.: 88/361193 (TO-KALON FARM)</p>
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**APPLICANT’S REPLY IN SUPPORT OF APPLICANT’S MOTION FOR SUMMARY  
JUDGMENT/JUDGMENT ON THE PLEADINGS**

Applicant To Kalon Stock Farm, LLC (“Applicant”), by and through its counsel, hereby files this Reply in Support of its Motion for Summary Judgment/Judgment on the Pleadings, pursuant to Federal Rule of Civil Procedure 56, to dismiss the Opposition against Applicant on the grounds that there are no genuine issues to be tried as a matter of law.

**I. Introduction**

Opposer Constellation Brands U.S. Operations, Inc. (“Opposer”) focuses much of its brief on the form of Applicant’s Motion, rather than the substance. First, Opposer alleges that Applicant’s filing is not a Motion for Summary Judgment but rather a Motion for Judgment on the Pleadings. Even if true, this characterization would not be fatal, nor would it preclude judgment on the merits. Second, Opposer argues that Applicant’s Motion is merely a disguised Motion to Dismiss, but this too is a red herring. Applicant properly filed a motion for judgment based on Opposer’s failure to state a claim for which relief can be granted. None of the arguments presented by Opposer change the premise or effect of Applicant’s Motion. Accordingly, Opposer’s focus is misplaced. Whether treated as a motion for summary judgment or motion for judgment on the pleadings, Applicant is entitled to judgment as a matter of law that Opposer has failed to state a claim for likelihood of confusion.

Opposer’s substantive arguments are similarly flawed. Opposer focuses on issues of standing and priority, but fails to even address how likelihood of confusion is found when the actual marks, and the

goods and services are so distinguishable that there is no basis for this Opposition as a matter of law.

Therefore, Opposer fails to identify any triable issues of fact; Applicant is entitled to judgment as a matter of law.

## II. Applicant's Motion is Not a Motion to Dismiss

Opposer argues that while Applicant's motion is titled "Motion for Summary Judgment," it is "a late-filed motion to dismiss under Rule 12(b)(6)." 7 TTABVUE 1. Opposer's argument is a meritless diversion. Applicant's Motion is not a Motion to Dismiss.<sup>1</sup> At a minimum, Applicant's motion may be construed as a motion for judgment on the pleadings. Applicant's motion seeks judgment based on the sufficiency of the claims, and applies the proper standard for adjudicating the motion, which is the same as that of a motion filed pursuant to Fed. R. Civ. P. 12(b)(6). *Biogrand Co., Ltd. v. Sunbio Corp.*, Cancellation No. 9206712, 2019 WL 479309, at \*4 (TTAB 2019) (citing Fed. R. Civ. P. 12(h)(3)). Opposer acknowledges the same in its Reply. 7 TTABVUE 4 ("the motion nevertheless is based on the defense that the petition for cancellation fails to state a claim upon which relief can be granted. Thus, the standard for adjudicating this motion is the same as that set forth in Fed. R. Civ. P. 12(b)(6).") (quoting *Western Worldwide Enters. Grp. Inc. v. Qinqdao Brewery and China Nat'l Cereals, Oils, and Foodstuffs Import and Export Corp.*, 17 U.S.P.Q.2d 1137, 1140 (TTAB 1990)). Moreover, Applicant's motion is not late-filed. As the Board acknowledged in *Western Worldwide*, relied upon by Opposer, a motion to "dismiss" filed well after the filing of the answer may be construed as one for judgment on the pleadings pursuant to 12(h). *Id.* at \*2. Here, the Motion was clearly filed well after the filing of Applicant's answer, and was also filed after Applicant had served its initial disclosures.

Finally, Opposer's arguments relating to the '374 Opposition are completely misplaced and irrelevant to this proceeding. Applicant did not file a Motion to Dismiss in the instant case.<sup>2</sup> Further, *Western Worldwide* is distinguishable. In *Western Worldwide*, the issue was not a likelihood of confusion.

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<sup>1</sup> As Opposer is clearly aware, "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." TBMP 503.02. In order to survive a Motion to Dismiss, a complaint must merely "state a claim to relief that is plausible on its face." TBMP 503.02.

<sup>2</sup> Nor would Applicant have filed a motion identical to that filed in the '374 Opposition when the proceedings involve different marks and different goods and services.

Rather, it was that the registered mark, which had been registered for over 5 years, was geographically descriptive. Here, Applicant is not only seeking judgment based on Opposer's lack of standing (which if it so desired, it would have done via Motion to Dismiss), but also based on Opposer's failure to state a claim for likelihood of confusion. As set forth below, there are no genuine issues of fact as to likelihood of confusion. Thus, the Board should grant judgment in favor of Applicant.

### **III. Motion for Summary Judgment/Motion for Judgment on the Pleadings**

Applicant's Motion goes beyond challenging the standing of Opposer and those items which would be raised in a Motion to Dismiss; it establishes that no genuine issues of fact exist to support Opposer's claims of standing, priority, or likelihood of confusion. Accordingly, the Motion is properly construed as a motion for summary judgment, or alternatively, judgment on the pleadings. TBMP 504.02 (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."); TBMP 528.01 (a motion for summary judgment "is a pretrial device to dispose of cases in which 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'").

Opposer's arguments regarding the title of the Motion are irrelevant. Whether the Motion is treated as a Motion for Summary Judgment or a Motion for Judgment on the Pleadings would not alter the outcome because both motions apply the same standard. In *Mitchell Miller, A Prof'l Corp. dba Miller Law Grp., P.C. v. Michelle Ballard Miller dba Miller Law Grp.*, Opposition No. 91184841, 2010 WL 9597746 (TTAB 2010), the movant filed a motion for reconsideration, claiming that its motion should have been treated as a motion for judgment on the pleadings, rather than a motion for summary judgment. *Id.* at \*1. The Board held that "[w]e see no error in our refusal to treat opposer's motion as one for judgment on the pleadings. A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in the pleadings, supplemented by any facts of which the Board may take judicial notice." *Id.* "When the movant on a motion for judgement on the pleadings calls the Board's attention to matters other than the assertions of fact in the pleadings, and the corresponding admissions or denials, the Board appropriately treats it as a motion for summary judgment." *Id.* Moreover, in *Land O Lakes, Inc. v. Jim*

*Huginin*, 88 U.S.P.Q.2d 1957 (TTAB 2008), the Board held that the result would be the same under the judgment as a matter of law standard or the summary judgment standard. *Id.* at 1957.

As a collateral issue, Opposer argues that Applicant's Motion is "merely an attempt to re-litigate the same issues decided in the '374 Opp. based on effectively the same pleading." 7 TTABVUE 2. However, the '374 Opposition is not analogous; it involves different issues and marks. Further, Applicant's Motion seeks to expedite, not delay, judgment on the merits. Summary judgment motions are designed to quickly dispose of cases where there is no genuine dispute as to any material fact. *Blansett Pharmacal Co. v. Camrick Labs., Inc.*, No. 19,474, 25 U.S.P.Q.2d 1473, at \*3 (TTAB 1992) ("Summary judgment is an efficient and approved procedure for disposing of cases in which there are no genuine issues of material fact in dispute, thereby allowing judgment to be rendered as a matter of law."). Here, the undisputed facts clearly show that there is no likelihood of confusion; therefore, judgment as a matter of law would be a cost-effective and quick resolution of this proceeding. Opposer, on the other hand, wants to prolong this baseless opposition and preclude any further motions for a quick resolution, knowing that there is no likelihood of confusion between the marks.

Further discovery will not procure material issues of fact. There is no evidence that Opposer can provide which would establish that the respective goods and services are related in a viable sense. A cursory review of the goods and services at issue reveal that they are not identical, related, or travel through the same channels of trade. Where the goods and services are so disparate, no amount of evidence can show that they are so related as to result in confusion in the marketplace. *See e.g., Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 221 U.S.P.Q. (BNA) ¶ 151 at \*2 (TTAB 1983) ("No evidence that opposer may adduce at trial in support of its pleadings would be persuasive of a contrary result.").

#### **IV. Applicant is Entitled to a Judgment**

Applicant properly moved for judgment that Opposer failed to state a claim for relief which can be granted, pursuant to Rule 12(c) and Rule 56, and cited the applicable legal standard, which is the same as the standard for adjudication under Rule 12(b)(6). *See* 5 TTABVUE 1, 4, 5; *see also, Great Adirondack Steak & Seafood Cafe, Inc. v. Adirondack Pub & Brewery, Inc.*, Opposition No. 91219162, 2015 WL 9906660, at \*7 (TTAB 2015) ("If, as is the case here, a defendant files a motion for judgment on the

pleadings under Fed. R. Civ. P. 12(c) that is based on the assertion that the complaint fails to state a claim upon which relief can be granted, the standard for adjudicating the motion is the same as that of a motion filed pursuant to Fed. R. Civ. P. 12(b)(6).”) (citing *Western Worldwide*). Even assuming *arguendo* that the Motion should have been captioned differently, the Board regularly converts motions to what it believes is suitable for the case, based on the pleading and facts. *See e.g., Mitchell Miller*, 2010 WL 9597746 at \*1; *Land O' Lakes*, 88 USPQ2d at 1957; *Western Worldwide*, 17 U.S.P.Q.2d at 1140; *Shared, LLC v. SharedSpaceofAtlanta, LLC*, Opposition No. 91228478, 2017 WL 3700376, at \*2 (TTAB 2017); *Biogrand Co.*, 2019 WL 479309, at \*4. The Board also recognizes that if the Motion is construed as a Motion for Judgment on the Pleadings, or a Motion for Summary Judgment, the results would be the same. *See Land O' Lakes*, 88 USPQ2d at 1957 (“we reach the same result under either interpretation”). Thus, Opposer’s argument, based on the form of the pleading, fails.

Next, Opposer argues that judgment is not warranted if the facts that it included in its pleadings are accepted as true. But, this does not change the outcome. Judgment on the pleadings may be granted where—as here—“there is no genuine issue of material fact to be resolved and the moving party is entitled to judgment, on the substantive merits of the controversy, as a matter of law.” TBMP §504.02. Accepting Opposer’s facts as true does not establish standing or any legitimate claims based on priority or likelihood of confusion. Applicant provides “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; 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, in Class 41; boarding of horses; providing horse stable facilities; leasing of horse boarding stalls in Class 43; Provision of health care to horses, in Class 44.” App. Serial No. 88/361193. Opposer provides “wine.” *See* 1 TTABVUE 2, ¶ 7; Reg. Nos. 1489619, 1857851.

The goods and services identified in the Application and Opposer's registrations are clearly unrelated. There is no likelihood of confusion between Applicant's equestrian-related services and Opposer's wine. Applicant has provided ample case law establishing that there is no likelihood of confusion between the marks, thus no genuine triable issues exist. 5 TTABVUE 7-8. Rather than address these cases, Opposer argues that Applicant's cases are inapposite because they were decided on summary judgment. But such rulings are highly relevant to this analysis. On a motion for judgment based on failure to state a claim, the Board considers "whether Applicant/Counterclaim-Plaintiff has alleged such facts as would, if proven at trial or on summary judgment, establish that Applicant/Counterclaim-Plaintiff has standing to petition for the cancellation of the registered mark and that a statutory ground exists for canceling such registration." *See, Great Adirondack*, 2015 WL 9906660 at \*7. Applicant's cases establish that Opposer's petition would not survive summary judgment. Given that Opposer has failed to furnish any triable issues of fact showing the goods are related (because they are not), Applicant is entitled to judgment as a matter of law.

#### **A. Opposer Does Not Have Standing**

Applicant's Motion sets forth relevant case law, applying it to the facts of the instant case, to show the Board that Opposer lacks standing. 5 TTABVUE 4-5. In order to establish standing, Opposer must allege facts which, if proven, would be sufficient to establish (1) that petitioner has standing to maintain the proceedings and (2) there is a valid ground for opposing the application. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); TBMP 504.02. Opposer must also allege facts that if ultimately proven, would establish that Opposer has a "real interest" or a "personal stake" in the proceeding. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-1026 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 213 USPQ 185, 189 (TTAB 1982). More importantly, Opposer's allegations of damage "must have a 'reasonable basis in fact,'" *Ritchie*, 50 USPQ2d at 1027 (quoting *Universal Oil Prod. Co. v. Rexall Drug & Chem. Co.*, 174 USPQ 458, 459-60 (CCPA 1972), "that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949-50 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007))).

Here, Opposer's claims of a reasonable belief of damage, or that it has a real interest or personal stake, are not in fact reasonable. Opposer provides wine. Applicant provides equestrian related services.

Opposer is not and does not provide—and has not expressed any intent to provide—equestrian related services under the applied-for mark. Thus, on its face, there is no plausible explanation as to how or why these goods and services are remotely related. The mere conclusory statements of Opposer are a ruse to try to establish that it has some real interest or personal stake in these proceedings where in fact, it has none. *See* 1 TTABVUE 4, ¶¶ 16, 19; *Ashcroft*, 129 S. Ct. at 1949-50 (“[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” and are not accepted as true). Opposer’s “threadbare recitals” should not be accepted as being true.

In addition, there is no reason for Opposer to believe that Applicant’s mark would somehow prevent Opposer from using its mark on wine or that Applicant’s use would cause any confusion with Opposer’s use. Moreover, Opposer does not make any claims or show any interest in using its mark in connection with equestrian related services. *Robert Doyle v. Al Johnsons Swedish Restaurant & Butik, Inc.*, 101 USPQ2d 1780 (2002). Opposer obviously has no “real interest” in the opposition as the respective goods and services are just not similar, and thus cannot form the basis for damage to Opposer. *See e.g., Ideal Cooler Corp. v. Ideal Dispenser Co.*, 115 U.S.P.Q. 9, 1957 WL 6823 at \*2-3 (TTAB 1957) (“The record shows that the parties are not in competition with each other; they make two distinctly different types of [goods] which are advertised to different industries and are sold through different trade channels to different average purchasers. In view of the foregoing, it is concluded that there is no likelihood of confusion of purchasers, and there is nothing in the record which would support an inference of damage to opposer.”). In fact, Opposer has not adequately alleged any reasonable basis to support its claims of standing. *McDermott v. San Francisco Women’s Motorcycle Contingent*, 81 USPQ2d 1212, 1214 (TTAB 2006), *aff’d* 240 Fed. Appx. 865 (Fed. Cir. 2007) (“The purpose of the standing requirement, which is directed solely to the interest of the plaintiff, is to prevent litigation when there is no real controversy between the parties.”).

#### **B. Opposer Has No Adequate Basis to Assert Priority**

Opposer has alleged that its rights in the pleaded mark are prior to Applicant’s mark and it has priority. But as detailed above, Opposer’s registered marks are for wine, while Applicant’s mark is for equestrian services. Opposer is pleading priority based on a mark that is used for completely different



goods and there is no reasonable basis for Opposer to believe that use of Applicant's mark would cause any confusion in the marketplace.

Opposer's statement that "the focus is simply on whether the plaintiff has rights that predate the defendant's rights being challenged," ignores the fact that a party that seeks redress under Section 2(d) "must show that it had priority and that registration of the mark creates a likelihood of confusion." *Herbko Intern. Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1162 (2002). In addition, Opposer must show that it has priority rights in the mark that produce a likelihood of confusion. *Id.* (citing *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 1320, 209 USPQ 40, 43 (CCPA 1981)). Where the marks are for completely different goods and services and where it is clear that there is no likelihood of confusion between the marks due to the differences between the respective goods and services, Opposer cannot claim priority based on Opposer's registrations. *Tech. Advancement Grp., Inc. v. Tag Online, Inc.*, No. 92028775, 2005 WL 1787253, at \*5 (TTAB 2005) ("A party's rights in a mark are tied to the goods or services with which the mark is used. Thus, a party must show not only that it is the first user of a mark, but that it has made earlier use on goods (or services) with which the defendant's use of its mark is likely to cause confusion. To do otherwise would result in the party obtaining rights in gross."); *Bus. Efficiency AIDS, Inc. v. Acme Visible Records, Inc.*, 164 U.S.P.Q. (BNA) ¶ 87 (TTAB 1969) ("The goods recited in the registration and the goods of the senior party here involved appear to be substantially different and in the absence of any evidence to establish such a relationship between those goods as to constitute a basis for merging the senior party's right arising from the registration and the rights sought by the application, we cannot give any probative effect to the registration with regard to the question of priority.").

### **C. There is No Likelihood of Confusion**

The Board may grant summary judgment or judgment on the pleadings where the goods and services are different. *See Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1372, 1375, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998) ("[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 e.g., Ava Enters. Inc. v. P.A.C. Trading Grp., Inc.*, 86 USPQ2d 1659, 2008 WL 754201 \*2 (2008) (granting Applicant's motion for judgment on the pleadings); *see also, Pure Gold*, 221 USPQ 151 at \*2 ("While it

has been said that the issue of likelihood of confusion is not usually susceptible to disposition by way of summary judgment, it may and should be done when it appears to be a certainty that confusion is not likely.”); *W. B. Roddenbery Co., Inc. v. Allied Old English, Inc.*, 140 U.S.P.Q. (BNA) ¶ 615 (TTAB 1964) (collective cases).

Applicant has already established the basis for finding that there is no likelihood of confusion in its prior filed Motion and will not repeat the same here. *See* 5 TTABVUE 6-9. In opposition, Opposer fails to cite analogous cases establishing that the goods and services at issue should be found to be confusingly similar. The cases cited by Opposer are clearly distinguishable. For instance, in *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000), Opposer fails to note that the case involved a famous mark, which are “accorded more protection precisely because they are more likely to be remembered and associated in the public mind than a weaker mark.” *Id.* (citing *Kenner Parker*, 963 F.2d at 352, 22 USPQ2d at 1455, 56). Unlike *Recot*, Opposer does not own a “famous” mark entitled to enhanced protection and therefore cannot rely on *Recot* to prove that confusion is likely in the instant case. Further, Opposer’s reliance on *In re Shell Oil Co.*, 992 F.2d 1204, 1207 (Fed. Cir. 1993), is misplaced. In *In re Shell Oil*, the court stated that the requisite inquiry is “whether the [goods or] services are sufficiently related that a reasonable consumer would be confused as to the source or sponsorship,” and held that the applicant’s “distributorship services in the field of automotive parts” was related to opposer’s “service station oil change and lubrication services.” *Id.* at 1207. In contrast, here, the goods and services—equestrian services and wine—are completely unrelated, do not travel through the same channels of trade, are not used as complimentary products, are not closely related in industry practice, are not impulse items sold in the same channels of trade, and are not services into which Opposer has expanded. *See Savin Corp. v. Savin Grp.*, 68 USPQ2d 1893, 1894 (S.D.N.Y. 2003) (distinguishing cases); *cf. In Re Davey Prod. Pty Ltd.*, 92 U.S.P.Q.2d 1198 (TTAB 2009) (finding relatedness when applicant’s goods were an “essential component and/or replacement part” for registrant’s goods).

Other than a mere conclusory statement that Applicant is somehow a sponsor for or sponsored by The Vineyard House, which is a completely separate entity and not a party to this opposition, there is no viable relationship between the respective goods and services. Contrary to Opposer’s arguments, the

dissimilarity of the goods and services of the respective parties alone is dispositive of a Section 2(d) claim, even where the parties' marks overlap. *Pure Gold*, 221 USPQ 151 at \*2. This is true even if genuine issues of fact remain outstanding. *See e.g., id.* ("Although there are genuine issues of fact, we do not find them to be material facts. Even if the Board were to resolve these issues in favor of opposer, the Board would still find that there would be no likelihood of confusion, given the difference in the goods involved here."). Thus, even if the Board found the marks similar, a summary judgment finding that there is no likelihood of confusion is appropriate. *Id.* at \*2-3.

### **CONCLUSION**

Based on the above and Applicant's prior filed Motion, there is no genuine issue of material fact and Applicant is entitled to a judgment as a matter of law.

WHEREFORE, Applicant respectfully requests that the Board grant Applicant's Motion.

Date: June 10, 2020

Respectfully Submitted.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **APPLICANT'S REPLY IN SUPPORT OF APPLICANT'S MOTION FOR SUMMARY JUDGMENT/JUDGMENT ON THE PLEADINGS** was served by email on this 10<sup>th</sup> day of June, 2020, upon Opposer at the following addresses of record:

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