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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 BBK Tobacco & Foods LLP,

No. CV-19-05216-PHX-MTL

10 Plaintiff,

ORDER

11 v.

12 Central Coast Agriculture Incorporated, et
13 al.,

14 Defendants.

15 This action involves a trademark dispute between Plaintiff BBK Tobacco &
16 Foods, LLP (“BBK”) and Defendant Central Coast Agriculture Incorporated (“CCA”).
17 Before the Court are numerous motions filed by the parties, including cross motions for
18 summary judgment (Docs. 203, 218, 293), and motions to exclude expert testimony
19 (Docs. 298, 302, 304, 305, 306, 307, 308, 311, 314, 317, 433). The motions are fully
20 briefed, oral argument was held on June 16, 2022. (Doc. 416.) The Court rules as follows.

21 **I. BACKGROUND**

22 BBK manufactures, distributes, and sells smoking-related products bearing its
23 trademarked “RAW” branding.¹ BBK’s RAW branded products include cigarette rolling
24 papers; smoking accessories; merchandise such as hats, t-shirts, and hoodies; and
25 information services regarding these and other products.² BBK has sold RAW branded

26 ¹ BBK’s marks include: “RAW,” “RAW ORGANIC,” “RAW ARTESANO,”
27 “SUPERNATURAL RAW,” “RAW CONNOISSEUR,” and “RAW BLACK.”

28 ² BBK maintains multiple internet domains incorporating the RAW designation, including
www.rawthentic.com, www.rawsmoke.com, and www.rawfoundation.com. It also uses
the Instagram handles @rawkandroll and @rawlife247.com and the Facebook page
entitled “RAW Rolling Paper.”

1 products for almost two decades and such products are now sold in retail locations in all
2 50 states.

3 CCA's predecessors were formed around 2008, when Thomas Martin and Khalid
4 Al-Naser began growing and trading cannabis with cannabis patients under California's
5 Compassionate Use Act. In 2012, Martin developed a process for using carbon dioxide
6 to extract cannabis-infused oil to use in making medical cannabis concentrates. At that
7 time, most cannabis concentrate brands were using a high-heat extraction process that
8 "cooked" their concentrates. Thus, Martin's process, by comparison, yielded "raw"
9 concentrate. In late 2013, Martin and Al-Naser began delivering packaged, finished
10 cannabis concentrates branded "RawCo2" to collectives.³ Shortly thereafter, Al-Naser's
11 nonprofit, GSS, began selling RawCo2 to California dispensaries. GSS also sold
12 concentrate products branded "Raw Hashish," "RawSin," and "Raw Gold." In 2014,
13 Martin and Al-Naser, along with some third-party dispensaries, began marketing their
14 concentrate products on social media. Then, in or around November 2014, Martin began
15 using the term "Raw Gardener" to delineate his products and he and Al-Naser began
16 referring to their social media followers as the "RawTribe."

17 Approximately two years later, around October 2016, CCA was formed and
18 acquired GSS's assets, including the rights to the RawCo2, Raw Hashish, RawSin, and
19 Raw Gold brands.⁴ Upon CCA's formation, Martin transitioned from using "Raw
20 Gardener" to "Raw Garden" to identify his products. In March 2016, CCA sold its first
21 Raw Garden branded concentrate products.⁵ CCA now markets and sells its cannabis
22 products exclusively under the Raw Garden brand and exclusively through California-
23 licensed dispensaries and mobile delivery services.

24 BBK and CCA (or its predecessors) have in the past attended many of the same

25 _____
26 ³ BBK asserts that RawCo2 was an extraction process, not a product. (*See* Doc. 246 at 8
n.2; Doc. 229-5).

27 ⁴ BBK claims that CCA did not acquire GSS's assets and accordingly is not a legal
successor to GSS. (Doc. 246 at 8; Doc. 229-3 at 3.)

28 ⁵ BBK again objects to CCA's assertion. It contends that, prior to 2018, CCA provided
only "consulting services" to a few collectives. (Doc. 246 at 9.) The undisputed evidence,
however, supports CCA's position. (Doc. 230-10; Doc. 238-1.)

1 trade shows and competitions, including the “Chalice Cup”⁶ festivals in California. At
2 the 2016 Chalice Cup, BBK representatives visited CCA’s Raw Garden booth and spoke
3 with CCA employees who were promoting the Raw Garden brand. One BBK
4 representative, Michael D’Aquiusto, “traded some [of BBK’s] RAW [rolling] papers for
5 two hats with the ‘Raw Garden’ name on them.” (Doc. 203 at 12.) D’Aquiusto gave his
6 business card to CCA’s representatives and discussed a potential partnership through
7 which Raw Garden cannabis could be packaged using RAW cones. Another BBK
8 representative, Rodney Peters, later posted an image of a Raw Garden-branded hat
9 alongside RAW rolling papers, cannabis, and a RAW tray to an Instagram account used to
10 advertise BBK products. A screenshot of the Instagram post was later sent to BBK’s
11 general counsel, Brendan Mahoney.

12 BBK claims CCA has infringed its RAW trademarks by producing, using,
13 advertising, distributing, selling, and offering to sell its products under the Raw Garden
14 brand. BBK initiated the instant action on September 18, 2019. BBK’s Amended
15 Complaint (the operative complaint) alleges seven claims: trademark infringement, false
16 designation of origin, and anti-cybersquatting under the Lanham Act; trademark
17 infringement and unfair competition under Arizona’s common law; a petition to void
18 several trademark applications due to a lack of bona fide intent to use the relevant
19 trademark in commerce in violation of the Lanham Act; and false advertising under the
20 Lanham Act. (Doc. 60 at 40–47.) On May 4, 2021, the Court granted CCA’s motion to
21 dismiss the false advertising claim but declined to dismiss the petition to void CCA’s
22 trademark applications for a lack of bona fide intent to use. (Doc. 151.) CCA now moves
23 for summary judgment on BBK’s infringement, false designation of origin, anti-
24 cybersquatting, and unfair competition claims. (Doc. 203.)

25 In addition to contesting the merits of BBK’s claims, CCA raises a number of
26 affirmative defenses, including laches, waiver, estoppel, acquiescence, statute of
27 limitations, and unclean hands. (Doc. 169 at 24–25.) CCA also alleges two counterclaims:

28 ⁶ Chalice Cup was a cannabis festival held annually in southern California. (Doc. 203-17
at 8; Doc. 203-26 at 5.)

1 a petition to cancel several BBK trademark registrations for fraud on the United States
2 Patent and Trademark Office (“PTO”), and a petition to cancel the same registrations for
3 unlawful use. (Doc. 169 at 57–59.)

4 In its cross-motion for summary judgment (Doc. 293), BBK seeks summary
5 judgment on all of CCA’s affirmative defenses, each of CCA’s counterclaims, and its
6 petition to void CCA’s trademark applications for a lack of bona fide intent to use. The
7 parties have also filed numerous motions to exclude each other’s expert witnesses.

8 **II. LEGAL STANDARDS**

9 **A. *Daubert***

10 A party offering expert testimony must establish that the testimony satisfies Rule
11 702 of the Federal Rules of Evidence. Rule 702 provides:

12 A witness who is qualified as an expert by knowledge, skill,
13 experience, training, or education may testify in the form of an
14 opinion or otherwise if:

15 (a) the expert’s scientific, technical, or other specialized
16 knowledge will help the trier of fact to understand the evidence
17 or to determine a fact in issue;

18 (b) the testimony is based on sufficient facts or data;

19 (c) the testimony is the product of reliable principles and
20 methods; and

21 (d) the expert has reliably applied the principles and methods
22 to the facts of the case.

23 Fed. R. Evid. 702.

24 As gatekeepers, trial judges make a preliminary assessment as to whether expert
25 testimony is admissible. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 597
26 (1993). Specifically, “the trial judge must ensure that any and all scientific testimony or
27 evidence admitted is not only relevant, but reliable.” *Id.* at 589. To meet the requirements
28 of Rule 702, an expert must be qualified, the expert’s opinion must be reliable in that it
is based on sufficient facts or data and is the product of reliable principles and methods,
and the expert’s testimony must fit the case such that the expert’s opinion is relevant. *Id.*

1 at 589–95.

2 The Rule 702 inquiry is “flexible.” *Id.* at 594. The focus “must be solely on
3 principles and methodology, not on the conclusions that they generate.” *Id.* at 595.
4 Because the requirements of Rule 702 are conditions for determining whether expert
5 testimony is admissible, a party offering expert testimony must show by a preponderance
6 of the evidence that the expert’s testimony satisfies Rule 702. Fed. R. Evid. 104(a); *see*
7 *also Lust v. Merrell Dow Pharms. Inc.*, 89 F.3d 594, 598 (9th Cir. 1996).

8 **B. Summary Judgment**

9 Summary judgment is appropriate when the evidence, viewed in the light most
10 favorable to the non-moving party, demonstrates “that there is no genuine dispute as to
11 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ.
12 P. 56(a). A genuine issue of material fact exists when “the evidence is such that a
13 reasonable jury could return a verdict for the nonmoving party,” and material facts are
14 those “that might affect the outcome of the suit under the governing law.” *Anderson v.*
15 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At the summary judgment stage, “[t]he
16 evidence of the non-movant is to be believed, and all justifiable inferences are to be
17 drawn in his favor.” *Id.* at 255 (citations omitted); *see also Jesinger v. Nev. Fed. Credit*
18 *Union*, 24 F.3d 1127, 1131 (9th Cir. 1994) (holding that the court determines whether
19 there is a genuine issue for trial but does not weigh the evidence or determine the truth
20 of matters asserted).

21 Where, as here, the “parties submit cross-motions for summary judgment, each
22 motion must be considered on its own merits.” *Fair Hous. Council of Riverside Cnty. v.*
23 *Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (citations and internal quotations
24 omitted). The summary judgment standard operates differently depending on whether
25 the moving or non-moving party has the burden of proof. *See Celotex Corp. v. Catrett*,
26 477 U.S. 317, 322–23 (1986). When the movant bears the burden of proof on a claim at
27 trial, the movant “must establish beyond controversy every essential element” of the
28 claim based on the undisputed material facts to be entitled to summary judgment. *S. Cal.*

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