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

Proceeding	91154680
Party	Plaintiff American Flange & Manufacturing Co., Inc ,
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IN THE UNITED STATES DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

AMERICAN FLANGE &)	
MANUFACTURING CO. INC.,)	Opposition Nos.: 91153479
)	91154680
)	
Opposer,)	For Serial Nos.: 75/869,942
)	75/869,343
v.)	
)	
RIEKE CORPORATION,)	
)	
Applicant.)	

OPPOSER'S REPLY BRIEF

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I. INTRODUCTION

In its brief in opposition in these consolidated proceedings, Applicant, Rieke Corporation, makes numerous arguments as to why its two applications (the “Subject Applications”) to register the configuration of drum closure plugs (the “Subject Marks”) should be granted. These arguments suffer from several defects, the sum of which establish that the oppositions filed by Opposer, American Flange & Manufacturing Co., Inc., should be sustained.

- *First*, Applicant throughout its brief attempts misleadingly to re-cast its Subject Marks as something they are not. Applicant refers to its Marks as comprising a drum closure having a head with six longer sides and six shorter sides, with rounded corners.

However, the Marks as claimed in the Subject Applications do not describe such a feature.

Through Applicant’s misleading description, it tries to focus on the allegedly ornamental nature of the “rounded corners,” ignoring the voluminous evidence concerning the functionality of the core hexagonal shape, which comprise the Marks as claimed.

- *Second*, Applicant attempts to misdirect the Board’s attention with respect to the competitive hexagonal plugs made and sold by Allen Stevens, referring to alleged evidence that is *not in the record* to imply that the plugs sold by Allen Stevens were either made by Applicant or at least authorized for sale by Applicant. This argument ignores the weight of the evidence that Allen Stevens itself made the plugs in question. Moreover, as Applicant has introduced no evidence concerning any control it would have exercised over Allen Stevens under this alleged license arrangement (and the Allen Stevens catalogs in evidence show no such control), Applicant’s theory invites the Board to find that it abandoned its rights in the Marks.

- *Third*, Applicant points to survey evidence as supporting its claim of secondary meaning. However, Applicant ignores the key finding from that survey, namely, that

fewer than twenty percent of the respondents to the survey believed that there was a sole source for the plugs in the configurations Applicant claims as its trade dress. This is not a sufficient level to establish secondary meaning, and thus is an over-arching justification to sustain these oppositions, in addition to all the evidence of functionality.

II. DISCUSSION

A. Applicant Has Misleadingly Described Its Mark

Throughout its brief, in an attempt to avoid the clear aspects of functionality imparted by the hexagon shape of its closure, Applicant has described its mark as comprising the design for a drum closure plug with a head or lip that “incorporates six flat sides of roughly equal length and six shorter sides of roughly equal length that are slightly rounded.” (*E.g.*, App. Br. at 6.) This statement, however, while it might accurately describe the specific plug shown in the drawing for the application, does not agree with the statements describing the mark as claimed that are of record in the two applications for the Subject Marks. In the ‘343 Application, the description includes the phrase “a substantially hexagonal base,” while in the ‘942 Application, the hexagonal base is not even mentioned, but rather merely the shape of the grip. In neither case does the description refer to a twelve-sided base, or to a hexagonal base “with rounded corners.”

Section 1202.02(d) of the TMEP requires that, in an application for trade dress protection in the configuration of a product, a description of the mark be provided. That description should set forth “exactly what aspects of the product shape are being claimed as a mark.” 1 J.T. MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 7:94. The description should be “direct and clear” so that it does not “fail to give adequate notice to competitors, the

trade and the general public of the precise nature of applicant's claim of rights." *In re Sandberg & Sikorski Diamond Corp.*, 42 U.S.P.Q.2d 1544, 1549-50 (Simms, Admin. J., concurring).

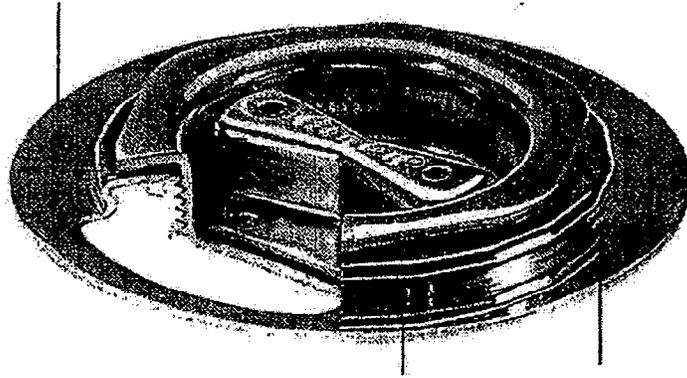
Tested against these standards, Applicant's attempt to recast its Marks as protecting a particular configuration of hexagon incorporating six longer sides and six shorter sides with rounded corners must fail. In the '343 Application, Applicant has claimed a "substantially hexagonal base." This would include not only the particular configuration shown by Applicant in its drawings, but any "substantially" hexagonal base, including one that had no rounded corners or other shorter sides. In the '942 Application, no mention is made at all of the hexagonal base in the description. This raises the issue of whether Applicant is entitled to claim the hexagonal base at all in that Application.¹ At the very least, however, Applicant cannot unilaterally restrict the scope of its Mark in order to rely on the asserted non-functionality of the "rounded corners" when the descriptions of the Subject Marks contain no such restrictions.

With the Marks properly construed to cover a "substantially hexagonal base," rather than a base having the additional features cited by Applicant, all of Applicant's arguments concerning the alleged lack of functionality of, for example, the "rounded corners" can be disregarded as space-filling irrelevancy. Instead, the functionality of the hexagonal head must be evaluated without regard to anything other than the "substantially hexagonal" shape. Under that standard, the evidence discussed in Opposer's Main Brief overwhelmingly demonstrates that the hexagonal head is functional. Applicant's own materials have for years touted – and continue to tout – the hexagonal head as a functional feature. (Exh. H at 1296, 1301, 1368-72.) As noted in Opposer's Main Brief, Applicant has even used a cartoon to show how a hex wrench can be used to tighten a Rieke hex head plug:



To avoid this clear evidence, Applicant attempts to cloud the issues regarding the use of the products in reconditioning. Applicant argues that the underlying reason for the difference in performance between its closure configuration and Opposer's configuration is a leakage path created by the burning of a gasket, and not because of the performance of the plug itself. What Applicant fails to state is that the reason its configuration overcomes this deficiency is because it has a plug with a head that overlaps the drum stock:

¹ Given Applicant's efforts to cloud the scope of its Marks and the lack of clarity in the descriptions in the Subject Applications, Opposer requests that the Board delineate specifically the scope of Applicant's Marks in its decision, including whether or not Applicant is entitled to claim the hexagonal base in the '942 Application.



Applicant argues that the head need not have any particular shape, but this again ignores all the evidence of record that the hexagonal shape is the one shape that provides the function of being able to be opened with a wrench, as it itself has long advertised. Applicant's weak protestations regarding the suitability of certain wrenches available in selected catalogs do nothing to avoid the clear *de jure* functionality of the hexagon shape.

Similarly, the butterfly grip is functional, as shown by the evidence discussed in Opposer's Main Brief. Applicant attempts to distract attention from the evidence of record that its own sales personnel touted the functional advantage of the *particular shape* of this grip. (See Exh. K. at 58.) Applicant tries to argue that a grip can be any shape so long as it can be grasped by an available tool (Appl. Br. at 19), but the point of the butterfly grip is the added functionality of providing a shape that can be grasped by a gloved hand. (*Id.*) No other shape suitable for this particular purpose has been introduced of record, and indeed the butterfly or "dog bone" is the superior and most functional shape.

Applicant makes two other arguments regarding functionality that are worthy of brief refutation. First, Applicant refers to Opposer's former registrations for aspects of the configuration of components of its own closure system. (Appl. Br. at 10.) Of course, the mere fact that Opposer at one time claimed protection for aspects of its own system is completely

irrelevant to evaluating the functionality of Applicant's configuration here. It is worth noting, however, that Opposer's feature of an octagonal flange pressed into a drum stock does not enjoy the functionality of being able to be turned with a wrench, unlike Applicant's hexagonal head, which sits above the drum stock and which Applicant touts for this functional advantage. Second, Applicant argues that the federal and European specifications are irrelevant. Opposer discussed the relevance of this evidence in its Main Brief. It suffices to note again here that Applicant failed to cite these references to the trademark examiner during prosecution, supporting Opposer's fraud argument.

B. There Is No Evidence That The Allen Stevens Plugs Were Made Or Authorized By Applicant

Applicant contends that the Allen Stevens plugs, which were sold for a period of nearly thirty years, should not be held against it because those plugs were in fact made by Applicant and sold by Allen Stevens with Applicant's consent. The record compels the conclusion, however, that Applicant's contention is untrue and based on unreliable evidence, that Allen Stevens did manufacture these plugs, and that there was no authorization from Applicant.

The testimony of Mr. St. Germaine was clear that Allen Stevens did not merely sell, but also manufactured, hex head plugs. (*E.g.*, Exh. DD at 22.) Mr. St. Germaine was able to produce an agitator assembly made by Allen Stevens that had a hexagonal head. (*See* Exh. DD-2.) The International Trade Commission in a 1977 official report found formally as a fact that Allen Stevens was *producing* (not merely selling) hexagonal head plugs. The Allen Stevens catalogs entered into evidence (Exhs. DD-6, -7) contain no statement or implication that the plugs shown for sale are made by any party other than Allen Stevens. Indeed, page AF00050 of exhibit DD-6 states explicitly that Allen Stevens manufactures hex head (Type II) plugs.

Against all this evidence, Applicant can present only the speculations of its witness Mr. Baughman. Although Mr. Baughman purported to testify from his personal knowledge, it was apparent that his testimony was based on hearsay and second-hand information. (E.g., Exh. AA at 98-99: “I was informed by our salesman in that area that [Allen Stevens] was a customer of ours”; “I’ve never seen a plug that I could say came through Allen Stevens’ hands at any point.”) Most tellingly, Applicant has not provided any corroborating evidence to Mr. Baughman’s testimony for its claim that Applicant had authorized Allen Stevens’ manufacture or sale of hex head plugs, such as via a license or distribution agreement.

In fact, the catalogs that are in evidence belie any argument that Allen Stevens was selling Applicant’s plugs. There is no language anywhere stating that the hex head plugs were made by Applicant, or that Allen Stevens’ offering of the plugs was with Applicant’s consent. Applicant speculates through Mr. Baughman’s testimony that the Allen Stevens plugs were being delivered from Applicant’s plant in Auburn, Indiana because of the language “Frt. allowed to Auburn, Ind. when total order exceeds \$250” appearing in the earliest catalog in the record. (See Exh. AA-23 at AF00195.) This speculation ignores the more likely explanation that Allen Stevens would only charge its customers who were closer to Auburn the shipping charge that would have been incurred had the customer ordered from Applicant instead of Allen Stevens. And even if in 1969, the date of the catalog in question, Applicant was supplying plugs to Allen Stevens, the fact that similar language does not appear in the later catalogs supports the finding that Allen Stevens was itself making the plugs at those times.

Given the convincing evidence that Allen Stevens itself manufactured the hex head plugs that it sold, Applicant’s argument that it nonetheless authorized those sales raises a more fundamental question: if Applicant authorized these sales, yet can point to no evidence of

record detailing its relationship with Allen Stevens, such as a license or distribution agreement with terms whereby Applicant exercised a right of quality control over the Allen Stevens products, then Applicant has arguably *abandoned* its rights in the Subject Marks, and the Board should sustain these oppositions on that ground as well.

C. Applicant's Survey Evidence
Proves A Lack Of Secondary Meaning

Applicant points to a survey that it commissioned as evidence that its Marks have secondary meaning. To the contrary, the results of the survey as reported by Applicant's expert Mark Traylor (but not as discussed by Applicant) establish definitively that Applicant's Marks *do not serve* as an indicator of source.

Consumer surveys and testimony are the only direct evidence of secondary meaning. *E.g., Boston Beer Co. v. Slesar Bros. Brewing Co.*, 9 F.3d 175 (1st Cir. 1993). In order for Applicant's Marks to have secondary meaning and serve as an indicator of source, a substantial percentage of consumers in the relevant market must associate the mark with a single source. It is not necessary that the consumers associate the mark correctly with Applicant, but a significant portion of them must believe that the mark comes from just one source, even if they are not aware as to who that source is.

In this case, as Applicant itself suggests, Mr. Traylor undertook to interview consumers in each of the major market segments that Applicant sells to – drum makers, drum fillers and reconditioners. (Exh. BB-9 at 2.) He ended up with a sample size of 128. Of those 128 respondents, only 24, or *19 percent*, believed that the hex head plug was made by just a single company. (Ex. BB-9 at 3.) In other words, over eighty percent of the respondents either believed that the hex head plug is made by more than one company, or simply did not know. A twenty-percent level of recognition is well within the range of survey results in previous cases in

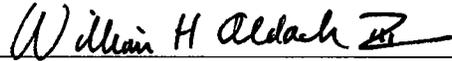
which it was found that the mark in question did not enjoy secondary meaning. *See, e.g., Zippo Mfg. Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 689, 137 USPQ 413, 428-29 (S.D.N.Y. 1963) (25 percent not sufficient to establish secondary meaning as to slim-lighter configuration); *Roselux Chem. Co. v. Parsons Ammonia Co.*, 299 F.2d 855, 862, 132 USPQ 627, 633 (C.C.P.A. 1962) (10 percent insufficient).

Applicant's own commissioned survey evidence is entitled to more weight than the several self-selected declarations it provided as part of the *ex parte* prosecution record in the Subject Applications. The fact is that fewer than twenty percent of the respondents to Applicant's survey were able to state that only one company is the source of plugs having the configuration of Applicant's Marks, despite Applicant's use of the configuration for over sixty years, and despite the evidence of the sales Applicant has made of plugs embodying the Marks. The inescapable conclusion is that, on top of all the evidence submitted showing the functionality of the claimed features of the Marks, these Marks lack secondary meaning, and the Board should sustain these oppositions for that reason.

III. CONCLUSION

For all the foregoing, reasons, Opposer, American Flange and Manufacturing Co., Inc., respectfully requests that the Board sustain these Consolidated Oppositions and deny registration to both of the Subject Applications.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, William H. Oldach III, hereby certify that a true and correct copy of the foregoing Opposer's Reply Brief was served via first-class mail, postage prepaid, this 11th day of April, 2005, on the following:

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