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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

78544603

GDH/gdh

Mailed: May 6, 2008

Opposition No. **91171425**
Opposition No. **91171426**

PPC Marketing Ltd.

v.

Michael Foods of Delaware, Inc.[1]

Before Quinn, Hohein and Hairston, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Michael Foods of Delaware, Inc. is the owner of applications to register on the Principal Register in standard character form the marks "ALL WHITES PLUS"[2] and "BETTER 'N EGGS PLUS" for, in each instance, "processed egg products for human consumption, namely refrigerated, frozen and pre-cooked eggs."[3]

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[1] In view of the certificate of merger and change of name recorded against the applications involved herein at reel 3690, frame 0786, on January 7, 2008, the caption of this proceeding has been amended to set forth that applicant, while formerly named Michael Foods, Inc., is currently named Michael Foods of Delaware, Inc.

[2] Ser. No. 78544603, filed on January 10, 2005, based on an allegation of a bona fide intention to use the mark in commerce. The words "ALL WHITES" are disclaimed.

[3] Ser. No. 78544603, filed on January 10, 2005, based on an allegation of a bona fide intention to use the mark in commerce. The word "EGGS" is disclaimed.

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PPC Marketing Ltd. has opposed such applications on the ground that it is the owner of registrations on the Principal Register for the marks "EGGS PLUS" in standard character form[4] and "EGGS PLUS" and design, without additional wording as shown below,[5]

and with additional wording as reproduced below,[6]

for, in each instance, "eggs containing essential fatty acids and natural antioxidants and which are a good source for vitamin E"; that opposer's first use of such marks "was as early as 1997, if not earlier, and has been continuous since that time," while applicant has not used either its "ALL WHITES PLUS" or "BETTER 'N

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[4] Reg. No. 2,164,616, issued on June 9, 1998, which sets forth a date of first use anywhere of January 3, 1997 and a date of first use in commerce of February 1, 1997; combined affidavit §§8 and 15. The word "EGGS" is disclaimed.

[5] Reg. No. 2,975,706, issued on July 26, 2005, which sets forth a date of first use anywhere of January 3, 1997 and a date of first use in commerce of February 1, 1997. The lining is a feature of the mark and does not indicate color.

[6] Reg. No. 2,401,500, issued on November 7, 2000, which sets forth a date of first use anywhere of January 3, 1997 and a date of first use in commerce of February 1, 1997; canceled §8. The lining is a feature of the mark and does not indicate color.

EGGS PLUS" marks; that opposer's marks "are inherently distinctive and famous or in the alternative, they have acquired distinctiveness and fame prior to any date of first use of "Applicant's Marks"; and that each of applicant's marks "so resembles Opposer's EGGS PLUS [marks] ... such [that it] is likely to cause confusion, mistake or to deceive members of the general public by creating the erroneous impression that Applicant's goods originate with or are associated with Opposer."

Applicant, in answering the oppositions, has denied the salient allegations thereof and, in connection with Opposition No. 91171426, which the Board subsequently consolidated with Opposition No. 91171425, has counterclaimed for cancellation of each of opposer's pleaded registrations on the nominal bases of abandonment and fraud and, with respect to Reg. No. 2,975,706, on the additional basis of mere descriptiveness. Opposer, in answer to the counterclaim, has denied the salient allegations thereof.

This case now comes up on applicant's motion, filed on November 3, 2006, for summary judgment in its favor solely with respect to dismissal in each proceeding of opposer's claim of priority of use and likelihood of confusion.[7] Opposer has timely submitted a brief and evidence in opposition thereto.

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[7] Although applicant filed a separate motion in connection with each proceeding, in view of the subsequent consolidation of the oppositions by the Board in an order issued on November 7, 2006, such motions are being treated as a single motion applicable to the consolidated case.

As a general proposition, summary judgment is an appropriate method of disposing of cases or claims in which there are no genuine issues of material fact in dispute, thereby allowing the proceeding or grounds to be resolved as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact and that it is entitled to a judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The evidence with respect thereto, however, must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. In considering the propriety of summary judgment, the Board may not resolve issues of material fact against the non-moving party; it may only ascertain whether such issues are present. A genuine dispute with respect to a material fact exists if sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. See, e.g., Lloyd's Food Products Inc. v. Eli's Inc., 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); Opryland USA Inc. v. Great American Music Show Inc., 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); and Olde Tyme Foods, Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

Applicant, solely for purposes of summary judgment dismissing each of opposer's claims of priority of use and likelihood of confusion, has essentially conceded that,

notwithstanding its counterclaim, opposer's pleaded registrations are valid, subsisting and owned by opposer so that priority is not in issue[8] and that, as to likelihood of confusion, all relevant *du Pont* factors[9] are in favor of opposer except for the factor of the similarity or dissimilarity of the marks at issue. With respect to such factor, applicant argues that opposer's "EGG PLUS" marks "are so highly suggestive that they are weak marks" which are entitled to only a narrow scope of protection which does not include either of applicant's marks. In particular, applicant contends that because its "ALL WHITES PLUS" mark and opposer's "EGGS PLUS" marks " share only the term PLUS," which applicant asserts is highly suggestive, the marks at issue are so "dissimilar in their entireties as to appearance, sound, connotation and commercial impression such that ... there is no likelihood of confusion that the ALL WHITES PLUS mark, when used on or in connection with the [applicant's] ... goods, will cause confusion, or will cause mistake, or will deceive." Similarly, because applicant's "BETTER 'N EGGS PLUS" mark and opposer's "EGGS PLUS' marks have in common only the generic term "EGGS" and the highly suggestive term "PLUS," applicant maintains that the respective marks are likewise so "dissimilar in their entireties

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[8] See, e.g., King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

[9] See In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

as to appearance, sound, connotation and commercial impression such that ... there is no likelihood of confusion that the BETTER 'N EGGS PLUS mark, when used on or in connection with the [applicant's] ... goods, will cause confusion, or will cause mistake, or will deceive."

Applicant, in support of its contentions, has submitted the affidavit of one of its attorneys who, as to the asserted weakness of "PLUS"-formative marks for egg-related products, notes that "the U.S.P.T.O.'s TARR database" shows that a third party filed an "application to register EGG BEATERS PLUS for 'cholesterol-free egg substitutes'" which received a notice of allowance after no opposition was filed thereto; that another third-party filed an "application to register YOLKS PLUS for 'liquid egg products, namely liquid whole eggs, liquid yolks" which likewise received a notice of allowance after no opposition thereto was filed; and that still another third party filed an "application to register OMEGA PLUS for 'eggs'" which, unlike the ultimate abandonment of the other two referenced applications for failure to file statements of use (as shown by the TARR-server copies thereof), subsequently matured into a registration. No evidence was submitted, however, that the mark which matured into a registration was ever in use in the marketplace, such as to have had a possible impact on consumers learning to differentiate among "PLUS"-formative marks by the additional matter therein.

Opposer, in response, maintains that applicant is not entitled to summary judgment dismissing the oppositions. In support of its position, opposer has submitted as evidence the declaration of Joe A. Ylitalo, who as "Corporate Counsel for Pilgrim's Pride Corporation," states on the basis of his asserted personal knowledge that, among other things, "Pilgrim's Pride is the largest supplier of poultry products in the United States," with annual sales of "chicken and egg products ... exceeding $5 billion"; that "Pilgrim's Pride was one of the first companies to introduce branded shell eggs when it launched its EGGS PLUS products in January 1997"; that "Pilgrim's Pride typically invests more than $100,000 per year in the promotion of its EGGS PLUS product, and ... has invested more than $1,200,000 in advertising and marketing of its EGGS PLUS product since 2001"; and that, "[s]ince 2001, Pilgrim's Pride has enjoyed annual revenues from its EGGS PLUS product of more than $800,000 per year, with sales revenue totaling more than $5.5 million." Such evidence, opposer insists, demonstrates that there is a genuine issue of material fact as to the strength of its "EGGS PLUS" marks which precludes the entry of summary judgment in applicant's favor.

We find that not only has applicant failed to demonstrate the absence of a genuine issue of material fact as to the asserted weakness of opposer's marks and their commercial impression, but in light of the evidence made of record by

opposer, it is clear that a genuine issue of material fact exists, at a minimum, with respect to the strength and commercial impression of opposer's marks. Applicant, in particular, has failed to demonstrate that "PLUS"-formative marks for egg products are in such common or widespread use that consumers have learned to distinguish among such marks by differences in any additional matter therein.

Moreover, as to opposer's showing in response, while it is curious that the declarant fails to state what relationship, if any, exists between Pilgrim's Pride Corporation and opposer (and opposer's brief is likewise notably silent as to such), we nonetheless note that since, pursuant to Trademark Rule 2.122(b), opposer's pleaded registrations are considered to be of record in view of applicant's counterclaim for cancellation thereof and applicant has in effect conceded opposer's ownership thereof for purposes of summary judgment, it appears from the information with respect to, for instance, Reg. No. 2,975,706 for the mark "EGGS PLUS" and design (without additional wording) that opposer is composed of Pilgrim's Pride Corporation as a general partner and PPC of Delaware Business Trust as a limited partner. In light of such privity between Pilgrim's Pride Corporation and opposer, it is clear that the use of opposer's "EGGS PLUS" marks by Pilgrim's Pride Corporation, as set forth in the declaration furnished by opposer, is sufficient to show that a genuine issue of material fact exists with respect to, at a minimum, the

strength or weakness of opposer's marks and their commercial impressions, such that confusion could be likely to occur from contemporaneous use by applicant of its marks in connection with its goods.

Thus, drawing inferences with respect thereto in favor of opposer as the non-moving party, it is apparent that, given the structural similarities between applicant's "ALL WHITES PLUS" and "BETTER 'N EGGS PLUS" marks, on the one hand, and opposer's "EGGS PLUS" marks, on the other, consumers familiar with opposer's marks could for instance reasonably conclude, in light of the ordinary meaning of the terms "ALL WHITES" and "BETTER 'N" (which is clearly short for "BETTER THAN") in applicant's marks, that the goods offered under applicant's marks are expanded product lines or extensions of opposer's "EGGS PLUS" products, notwithstanding the suggestiveness inherent in the term "PLUS" and the genericness of the word "EGGS." In view thereof, applicant's motion for summary judgment is accordingly denied.[10] Fed. R. Civ. P. 56(c).[11]

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[10] It is pointed out that the decision herein on summary judgment is interlocutory in nature and that, consequently, the time for seeking judicial review thereof shall expire two months form the date on which a final order is entered in this case. Any appeal prior to that time is premature. See, e.g., Copelands' Enterprises, Inc. v. CMV, Inc., 887 F.2d 1065, 12 USPQ2d 1562, 1565 (Fed. Cir. 1989).

[11] The parties should note that the evidence submitted in support of and in opposition to applicant's motion for summary judgment is of record only for consideration of such motion. To be considered at final hearing, any such evidence must be properly introduced into evidence during the assigned trial period for the submitting party. See, e.g., Levi Strauss & Co. v. R. Josephs Sportswear, Inc., 28 USPQ2d 1464, 1465 n.2 (TTAB 1993); Pet, Inc. v. Bassetti, 219 USPQ

Proceedings herein are resumed and trial dates, including the close of the discovery period, are reset as follows:

THE PERIOD FOR DISCOVERY TO CLOSE:	9/8/2008
Thirty (30) day testimony period for plaintiff in the opposition to close:	12/7/2008
Thirty (30) day testimony period for defendant in the opposition and as plaintiff in the counterclaim to close:	2/5/2009
Thirty (30) day testimony period for defendant in the counterclaim and its rebuttal testimony as plaintiff in the opposition to close:	4/6/2009
Fifteen (15) day rebuttal testimony period for plaintiff in the counterclaim to close:	5/21/2009
Briefs shall be due as follows: Brief for plaintiff in the opposition shall be due:	7/20/2009
Brief for defendant in the opposition and as plaintiff in the counterclaim shall be due:	8/19/2009
Brief for defendant in the counterclaim and its reply brief (if any) as plaintiff in the opposition shall be due:	9/18/2009
Reply brief (if any) for plaintiff in the counterclaim	

911, 913 n.4 (TTAB 1983); and American Meat Institute v. Horace W. Longacre, Inc., 211 USPQ 712, 716 n.2 (TTAB 1981).

shall be due: 10/3/2009

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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