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

Proceeding	91177192
Party	Defendant Martanna LLC
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Attachments	Motion by Martanna Regarding Nautica's Reply Brief.pdf (7 pages)(163263 bytes)

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

NAUTICA APPAREL, INC.,)	
)	
Opposer,)	Opposition No. 91177192
)	
v.)	Mark: GET NAUTI
)	
MARTANNA L.C.,)	Serial No. 78610037
)	
Applicant.)	Filed: April 15, 2005

**APPLICANT MARTANNA L.C.'S MOTION TO STRIKE OR DISREGARD A
PORTION OF OPPOSER'S REPLY BRIEF OR, IF CONSIDERED, ALSO TO
CONSIDER APPLICANT'S RESPONSE
AND MEMORANDUM IN SUPPORT THEREOF**

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Nautica Apparel, Inc. (hereinafter “Opposer” or “Nautica”) filed a reply brief in the above-referenced proceeding on July 14, 2009 (“Nautica Reply Brief”). The Board’s manual of procedure provides that “If a plaintiff files a reply brief, the brief must be confined to rebutting the defendant’s main brief.”¹ Notwithstanding this express requirement, at pages 5 and 6 of its Reply Brief, Nautica included an argument that does not rebut any portion of the main brief filed by Applicant, Martanna, L.C. (hereinafter “Martanna”). Rather, this portion of Nautica’s Case Brief, entitled “Prior Board Decisions Concerning Opposer” (the “New Material”), constitutes new material and argument. As such, it should be stricken by the Board. Alternatively, if the Board determines that it is not appropriate to strike the New Material, it should nevertheless be disregarded. If for any reason the Board may decide to consider the New Material, in the interest of justice and fairness, Martanna’s response to the New Material as contained herein also should be considered by the Board.

Under the heading “Prior Board Decisions Concerning Opposer” at page 5 of its Reply Brief, Nautica states that “[r]eference is made to Nautica’s 24th Notice of Reliance”² However, Martanna’s Case Brief made no reference to the contents of this Notice of Reliance, except to identify this document as part of the description of the record that is a required element of its brief.³ Nautica then proceeds to present two lengthy quotes from Board decisions that were included in its 24th Notice of Reliance, claiming that they “respond directly to statements made by Applicant in its Brief.”⁴ Nautica, however, does not, nor could it, identify any statements in Martanna’s Case Brief to which it claims the quoted passages are responsive as there are none. It

¹ Trademark Trial and Appeal Board Manual of Procedure at 801.03 (*emphasis added*).

² Nautica Reply Brief at 5.

³ Applicant’s Brief on the Case (June 24, 2009) (“Martanna Case Brief”) at 4 ; *see* 37 C.F.R. §2.128(b).

⁴ Nautica Reply Brief at 5.

is very clear that this portion of Nautica's Reply Brief does not "reply" to any portion of Martanna's Case Brief and has been gratuitously included as a briefing maneuver in an attempt to buttress Nautica's weak legal position relative to the facts, circumstances and law applicable to this case.

Nautica concedes that the decisions from which it quotes are non-precedential in the instant proceeding.⁵ Accordingly, they should not be considered by the Board. Nautica nonetheless claims that the decisions are instructive. We respectfully submit, however, that they are not instructive since they are distinguishable in several significant respects. Accordingly, to the extent the Board may consider the cases, they should not lend any credence to the Opposition.

For example, in one of the decisions, *Nautica Apparel, Inc. v. Kevin Crain* ("Crain"), Opp. No. 91113893 (2001) (unreported), the applicant's mark was NAUTI BODY. The Board identified similarities between NAUTI BODY and NAUTICA that do not exist when comparing GET NAUTI and NAUTICA. In particular, the Board noted that both marks in the *Crain* case "begin with the same five letters 'NAUTI.'" In contrast, as Martanna pointed out in its Case Brief,

[i]n 46 of the 47 marks cited by Opposer, as indicated above, the mark consists of either solely the word NAUTICA or a combination of words or a compound word beginning with the word NAUTICA. This factor fundamentally distinguishes the appearance of these marks from Martanna's GET NAUTI Mark since Martanna's mark neither begins with nor incorporates the word NAUTICA. Martanna's GET NAUTI Mark also has a significantly different appearance than the remaining one-word Mark of Opposer, NAUTEX. In fact, none of Nautica's Marks begin with either GET, the letter G, or any combination of letters other than NAUTICA (or in one case NAUTEX). See Presto Products, Inc. v. Nice-Pak Products, Inc., 1988 TTAB LEXIS 60, at *8, 9 USPQ2d 1895

⁵ *Id.*

(T.T.A.B. 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.”).⁶

Moreover, because the *Crain* applicant’s mark began with the letters N-A-U-T-I, the Board found that that mark,

at first glance, suggests a connection with the word “nautical” and then requires the potential purchaser to reevaluate the word in light of the incongruous word “body.” Only then would many prospective purchasers appreciate the meaning that applicant is suggesting.⁷

In contrast, a “first glance” at Applicant’s Mark GET NAUTI clearly would not require the same type of interpretation. Rather, the fact that Martanna’s Mark begins with the word GET immediately alerts the potential purchaser that the mark is a short, imperative sentence akin to “get happy!” Consequently, GET followed by NAUTI would be understood to mean “get naughty!” as Martanna intended. By the same token, it is nearly impossible to imagine a potential purchaser understanding Applicant’s Mark to mean “get nautical!”

Despite finding that certain similarities in sound, appearance and commercial impression existed between NAUTI BODY and NAUTICA, the Board in *Crain* concluded that “[w]hen we analyze the issue of likelihood of confusion under the du Pont factors, it is apparent that this is a close case.”⁸ The Board stated that a “significant factor” weighing against a finding of likelihood of confusion was “Applicant’s argument that his mark would have a different meaning than opposer’s,” that is, that in the applicant ’s mark, NAUTI means “naughty”.⁹

It is axiomatic that the Board determines likelihood of confusion based upon the particular facts of each case. To the extent that the Board may review the *Crain* decision as part

⁶ Martanna Case Brief at 11-12.

⁷ *Crain* at 14.

⁸ *Id.* at 15-16.

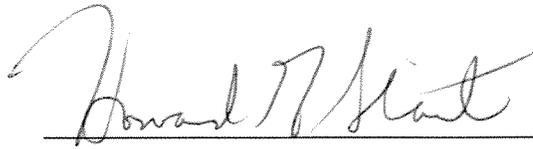
⁹ *Id.* at 16.

of its analysis of the instant case, we urge the Board to take into account the significant factual differences between the marks at issue in *Crain* and the marks at issue in this Opposition. In contrast to Nautica's assertion in its Reply Brief, *Crain* and the other decision cited in that brief, *Nautica Apparel, Inc. v. Brian Carlucci* ("*Carlucci*"), Opp. No. 91165909 (2007) (unreported), are not contrary to the arguments that Martanna raised in its Case Brief.¹⁰ Rather, these decisions serve to highlight the differences between Martanna's Mark GET NAUTI and NAUTICA are greater and more substantial than the differences between the applicants' marks in the earlier decisions and NAUTICA. Accordingly, these decisions in fact support a determination in this case that Martanna's Mark has not "approach[ed] the well-known trademark of a competitor,"¹¹ and that registration of GET NAUTI should not be refused based on a likelihood of confusion with NAUTICA.

WHEREFORE, for the foregoing reasons, Applicant Martanna L.C. respectfully requests that the Board strike or disregard the portion of Nautica's Reply Brief presented under the heading "Prior Board Decisions Concerning Opposer" at pages 5-6 of that brief. To the extent the Board may decide to consider such New Material, the Board should also consider Martanna's response herein.

¹⁰ In addition, any supposed "instructive" value of *Carlucci* to the instant proceeding is diminished by the fact that a key issue in the Board's analysis of the meaning and commercial impression of the challenged mark (NAUTIGIRL) was the conflicting arguments that the applicant made on this point in its application prosecution and in the opposition proceeding. *Carlucci* at 28. In the instant proceeding, however, Martanna has consistently maintained that the pronunciation and meaning of its mark is "get naughty." See, e.g., Martanna Case Brief at 13-14.

¹¹ See, e.g., *Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc.*, 889 F.2d 1070, 1074, 12 USPQ2d 1901 (1989).



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CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of July, 2009, a true and correct copy of Applicant Martanna L.C.'s Motion to Strike or Disregard a Portion of Opposer's Reply Brief or, if Considered, Also to Consider Applicant's Response was served, via overnight courier upon:

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