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

Proceeding	91179090
Party	Defendant SIMPLYWELL, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In The Matter of Application Serial No. 77/090,694
Published in the *Official Gazette* on August 7, 2007

ELGO, INC.,)	
)	Opposition No. 91179090
)	
v.)	
)	
SIMPLYWELL LLC,)	
)	
Applicant.)	
)	

**APPLICANT’S BRIEF IN OPPOSITION TO
OPPOSER’S MOTION FOR SUMMARY JUDGMENT AND APPLICANT’S BRIEF IN
SUPPORT OF ITS MOTION TO STRIKE**

TO: Elgo, Inc. by and through its attorney Cynthia R. Moore, Moore Patents, 794 Los Robles Avenue, Palo Alto, CA 94306.

I. FACTS

A. Applicant’s Opposition to Opposer’s Statement of Facts

In its brief in support of its motion for summary judgment, Opposer provides 35 statements of fact that it labels as “Opposer’s Statement of Uncontroverted Material Facts” (“Statements”). In contrast, there exists a genuine issue as to several material facts in the Statements, including Nos. 5, 14-18, 21, and 26.

In statement no. 5, Opposer asserts that the brochure submitted as a specimen of use with Applicant’s application “is clearly directed at individual smokers.” In contrast, the intended users of Applicant’s services are individual employees of companies that are subscribers to

SimplyWell's Integrated Health Solutions program. (Opposer's Mot. Summ. J. Ex. 11 , Nos. 1, 8; Demman Aff. ¶¶ 2-6)¹. Applicant does not offer its services directly to the general public; rather, services are offered through member employer subscribers. (Opposer's Mot. Summ. J. Ex. 11, Nos. 8, 14; Demman Aff. ¶¶ 6, 8).

In statement no. 26, Opposer states that it is the owner of U.S. Trademark Application No. 78/085,086 for the trademark, SIMPLYQUIT. (Statements, ¶ 26.) Opposer's Application File indicates that Opposer was not and is not the owner of such application. (Opposer's Application File; Notice of Opposition, ¶ 4) Instead, Opposer's Application File indicates that an individual named Ely Gold is the owner. (Opposer's Application File.) Opposer's Application File contains no assignment of the application from Ely Gold to Opposer.

B. Applicant's Supplemental Statement of Facts

Applicant has been offering its corporate customers the SIMPLYQUIT smoking cessation program in connection with SimplyWell's Integrated Health Solutions continuously since as early as September 2006. (Opposer's Mot. Summ. J. Ex. 11 , No. 14.) Applicant's services are marketed directly through sales representatives or account managers on a nationwide basis. (Opposer's Mot. Summ. J. Ex. 11, No. 12; Demman Aff. ¶¶ 2-4). Applicant is unaware of any instances of actual confusion between Opposer's SIMPLYQUIT-branded simulated cigarette and SimplyWell's SIMPLYQUIT-branded counseling services. (Demman Aff. ¶ 10).

II. ARGUMENT

A. Introduction

"The Federal Rules of Civil Procedure generally apply to proceedings before the Trademark Trial and Appeal Board." Opryland USA Inc. v. The Great Am. Music Show, Inc.,

¹ A copy of the Demman Affidavit is attached hereto as Exhibit A.

23 U.S.P.Q.2d 1471, 970 F.2d 847, 850 (citing 37 C.F.R. § 2.116(a) and stating that non-movant is not required to present its entire case in response to a motion for summary judgment). Thus on motion for summary judgment the Board must first ascertain whether there is a genuine issue as to any material fact. Opryland USA Inc., 970 F.2d at 850 (citing Fed.R.Civ.P. 56(c)).

“[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” Id. at 255 (internal citations omitted). See Olde Tyme Foods, Inc. v. Roundy’s, Inc., 961 F.2d 200, 205 (“The Board failed to view the evidence in a light most favorable to [the non-moving party] and to draw all reasonable inferences in its favor. A reasonable fact finder could have found for [the non-moving party] on a number of DuPont factors.”).

B. Applicant’s services and Opposer’s goods are dissimilar

Stated simply, Opposer offers for sale a simulated cigarette to individuals that want to stop smoking. The simulated cigarette is intended to replace the smoker’s oral addiction to cigarettes. See Opposer’s Exhibit 5. In sharp contrast, Applicant offers personalized counseling services to employee/participants of Applicant’s corporate clients. Applicant’s services are offered through an eight step counseling program by which a counselor is appointed to the employee/participant. There are no actual goods or products offered by Applicant under the SIMPLYQUIT mark. See Demman Aff. ¶ 8.

It is well settled that “where goods and services are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are

identical, confusion is not likely.” TMEP §1207.01(a)(i). See also Shen Manuf. Co. v. Ritz Hotel. Ltd., 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related); Slimmery International Inc. v. Stauffer-Meiji, Inc., 6 USPQ2d 1671 (E.D. MO. 1987) (SKINNY DIP for ice cream milk bars is not confusingly similar to SKINNY DIPPERS for chocolate sauce and cracker sticks, in part because the two products were not in the same product class).

In the present case, Applicant is offering highly personalized counseling services solely to participants enrolled in one of Applicant’s comprehensive integrated health solutions. In contrast, Opposer sells simulated plastic cigarettes to the public via the Internet. The parties respective goods and services can be found in different international classes, further highlighting the difference between Opposer’s goods and Applicant’s services.

Moreover, the cases cited by Opposer in support of its argument are clearly distinguishable. Each case cited by Opposer reflects a clear relationship between the goods and services at issue in the case. For example, In re H. J. Seiler Co., 289 F.2d 674, 129 USPQ 347 (C.C.P.A. 1961) involved catering services and meat, clearly complementary goods and services. Similarly, In re Hyper Shoppes Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) involved a general merchandise store and furniture. It is easy to conceive of a general merchandise store selling furniture.

In this case, Applicant does not sell any goods or products. Instead, Applicant offers counseling services and these services are only offered to employees of companies that sign up to receive Applicant’s integrated health solution services. Opposer, on the other hand, sells simulated plastic cigarettes to the general public. At a minimum, there exists a genuine

issue of material fact as to whether the dissimilarity between the goods and services prevents any likelihood of confusion – and accordingly Opposer’s motion is due to be denied.

C. Applicant’s services and Opposer’s goods are rendered and sold through distinct channels of trade and marketed to different customers

Stated plainly, if the goods of one seller are sold to one class of buyers in a different marketing context than the goods or services of another seller, the likelihood that a single source of buyers will be confused is lower than if both parties sell through the same channel of distribution. See McCarthy at §24:51.

In the present case, Applicant’s target customers are comprised of companies that offer health insurance benefits to their employees. See Demman Aff. ¶ 9. Opposer, on the other hand, offers its simulated plastic cigarettes to a starkly different group of consumers: smokers who are looking to purchase a product that might assist with smoking cessation. The circumstances in this case are analogous to cases in which one seller offers its goods to commercial buyers, while the other seller offers its goods at the retail level. See Trade Publications, Inc. v. Big Bear of North Carolina, Inc., 191 USPQ 477 (M.D.N.C. 1976) (FOOD WORLD trade journal would be unknown to consumers shopping at FOOD WORLD grocery store); Local Trademarks, Inc. v. Handy Boys, Inc., 16 USPQ2d 1156 (TTAB 1990) (applicant’s LITTLE PLUMBER liquid drain opener sold to consumers will not likely cause confusion with Opposer’s LITTLE PLUMBER advertising agency services for professional plumbing contractors because the goods and services are sold through different channels).

In this case, Opposer suggests that one of its consumers, an individual who might order Opposer’s simulated plastic cigarette product through the Internet or through a late night television advertisement, is the same as a corporate benefits administrator analyzing Applicant’s sophisticated health solutions. Stated differently, Opposer’s intended purchasers pick up the

phone and order Opposer's product or purchase the product directly from an internet site. In contrast, Applicant's service is only one service among a suite of health benefit services that are presented to a benefits administrator through a corporate sales representative.

Simply put, there is no overlap at all between Applicant's purchasers and Opposer's purchasers. In fact, Applicant's purchasers may not even be smokers; instead, he or she is making a purchasing decision on behalf of a company in order to assist certain company employees who are smokers. Accordingly, the difference in the respective channels of trade is sufficiently different that there is simply no likelihood of confusion. At a minimum, there is a genuine issue of material fact as to whether a likelihood of confusion exists.

D. There have been no instances of actual confusion

The Court in In re: E.I. DuPont DeNemours & Co., 476 F.2d 1357, 177 U.S.P.Q. 563 (CCPA 1973), stated that one of the factors in the likelihood of confusion analysis was the nature and extent of any actual confusion. Courts also consider the length of time during and the conditions under which there has been concurrent use without evidence of actual confusion. Id. That length of time and those conditions are important in weighing the actual confusion factor and determining whether opportunity even existed for actual confusion. In this case, the parties' marks have co-existed in the marketplace since September 2006. (Opposer's Mot. Summ. J. Ex. 11, No. 14.) Opposer markets its goods, and Applicant markets its services on a nationwide basis. (Opposer's Mot. Summ. J. Ex. 11, No. 12; Demman Aff. ¶¶ 2-4). While the geographic extent of the use of the parties' marks overlap, there have been instances of actual confusion in this case. (Demman Aff. ¶10). This factor weighs in favor of Applicant.

E. The Board should strike Applicant's Exhibit 8 and the statements allegedly supported by Exhibit 8

Exhibit 8 attached to Opposer's Brief in Support of its Motion for Summary Judgment contains several printouts of Web pages allegedly from the Web site found at <http://www.simplyquit.com>. Exhibit 7 is a declaration signed by Opposer's attorney, Cynthia Moore, in which Moore declares that she printed those Web pages when accessing the Web site archive "The Wayback Machine" at the Web site, archive.org." Moore declares that she saved and printed out a record of Opposer's [simplyquit.com](http://www.simplyquit.com) Web site activities from "The Wayback Machine," which Moore declares demonstrates the continuous use of...the mark SIMPLYQUIT in the sale and marketing of Opposer's simulated cigarettes and smoking cessation program." These Web pages allegedly are attached as the Exhibit 8.

In Raccioppi v. Apogee, Inc., 47 U.S.P.Q.2d 1368 (TTAB 1998), the Board was clear that the element of self-authentication cannot be presumed to be capable of being satisfied by information obtained and printed out from the Internet. See also TBMP ¶ 528.05(e). The Board said that such materials could be introduced on a motion for summary judgment, but only by way of an affidavit or declaration of a person who can clearly and properly authenticate and identify the materials, including identifying the nature, source and date of the materials." Id. In Paris Glove of Canada, Ltd. v. SBC Sporto Corp., No. 92044132 (TTAB Aug. 22, 2007), the Board discussed Novak v. Tucows, Inc., No. 06-CV-1909, 2007 WL 922306, at *5 (E.D.N.Y. March 26, 2007), in which even a declaration was found to be insufficient to authenticate Internet printouts, including exhibits from the Internet Archive and its "Wayback Machine" feature because the declarant lacked the requisite personal knowledge to establish that the documents were what he 'proclaimed them to be.'"

As in Novak, Moore offers no testimony or sworn statements by any principal or employee of Opposer attesting to the authenticity of the Web pages found at Exhibit 8. There is no evidence that the Web pages included in Exhibit 8 were indeed Web pages of the site found at <http://www.simplyquit.com> at the times stated in the declaration. Furthermore, Moore offers no sworn statements that she has personal knowledge of how the site at <http://www.simplyquit.com> appeared on the dates listed in her declaration. Therefore, in the absence of any authentication of Opposer's Internet printouts, "combined with the lack of any assertion that such printouts fall under a viable exception to the hearsay rule," the Board should strike Exhibit 8 to Opposer's Motion for Summary Judgment.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board deny Opposer's Motion for Summary Judgment. Applicant further moves the Board to strike Exhibit 8 from the record.

DATED this 9th day of June, 2008.

Respectfully submitted,

SIMPLYWELL LLC, Applicant

By: /s/ Christopher M. Bikus/
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ATTORNEYS FOR APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND APPLICANT'S BRIEF IN SUPPORT OF ITS MOTION TO STRIKE** was served on this 9th day of June, 2008, by sending the same, via first class mail, postage prepaid to:

Cynthia R. Moore
Moore Patents
794 Los Robles Avenue
Palo Alto, CA 94306
Tel: (650) 565-8185

/s/ Christopher M. Bikus/ _____
Christopher M. Bikus

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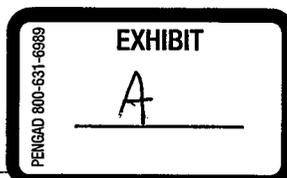
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Applicant.)	
_____)	

AFFIDAVIT OF MICHAEL DEMMAN

I, Michael Demman, being first duly sworn do hereby state and depose as follows:

1. My name is Michael Demman and I am the Chief Executive Officer of SimplyWell LLC. ("SimplyWell").
2. SimplyWell offers companies throughout the country a range of comprehensive integrated health solutions for employees.
3. SimplyWell's targeted purchasers/customers are comprised of companies throughout the country that are interested in using SimplyWell's integrated health solutions to reduce health care costs.
4. SimplyWell's services are offered to corporate clients directly through sales representatives and account managers. SimplyWell's services are not sold through the internet or through retail establishments.
5. SimplyWell's SimplyQuit service is offered as a smoking cessation counseling service to participants of SimplyWell's corporate customers.



6. SimplyWell only offers its services to companies that sign up to receive SimplyWell's integrated health solution programs. SimplyWell does not sell any goods, nor does SimplyWell offer services directly to the general public.

7. SimplyWell's SimplyQuit counseling service is comprised of an eight step counseling program through which participants work directly with individually designated counselors to achieve an end to tobacco addiction.

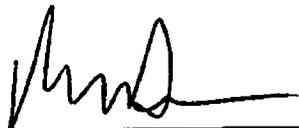
8. Participants who sign up to receive the SimplyQuit counseling service are not required to purchase any goods whatsoever.

9. While the SimplyQuit counseling service is ultimately utilized by employee/participants, SimplyWell offers this service along with a range of other health-based solutions to companies that offer health insurance to their employees.

10. I am not aware of any instances of confusion between Elgo's SimplyQuit simulated cigarette and SimplyWell's SimplyQuit counseling services.

* * *

I declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true, and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code, and that such willful false statements may jeopardize the validity of the patent under examination.



Michael Demman

6-9-08

Date