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

Proceeding	91186494
Party	Plaintiff Kraft Foods Global Brands LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

KRAFT FOODS GLOBAL BRANDS LLC, Opposer, v. ANTHONY BROWN, Applicant.	In re Application Serial No. 77/355,857 Opposition No. 91186494

OPPOSER'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

On April 1, 2009, Applicant Anthony Brown ("Applicant") filed Applicant's Reply in Support of Its Motion for Summary Judgment ("Applicant's Response"). Although entitled a reply, Applicant's Response also addressed Opposer's Cross-Motion for Summary Judgment. Accordingly, pursuant to Federal Rules of Civil Procedure 15 and 56 and TBMP §§ 502.02(b), 507, and 528, Opposer Kraft Foods Global Brands LLC ("Opposer") hereby replies in support of its Cross-Motion for Summary Judgment ("Cross-Motion") on the basis of a likelihood of confusion.[1] Opposer also responds to Applicant's motion to strike Opposer's Cross-Motion.[2]

I. OPPOSER IS ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THAT APPLICANT'S KOOL MARK IS LIKELY TO CAUSE CONFUSION WITH OPPOSER'S KOOL-AID MARKS.

A. Applicant Failed to Meet His Burden of Demonstrating a Material Issue of Fact and Summary Judgment in Opposer's Favor is Appropriate.

The purpose of summary judgment is judicial economy, that is, to save the time and

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1 Opposer reserves the right to reply to any subsequent opposition papers filed by Applicant.

2 Applicant argues that the Cross-Motion exceeds the 25 page limit set forth in Trademark Rule 2.127 and therefore "should be striked [sic] accordingly." Applicant's Response at 1. Trademark Rule 2.127(a), 37 C.F.R. § 2.127, clearly states that "[e]xhibits submitted in support of or in opposition to a motion shall not be deemed to be part of the brief for purposes of determining the length of the brief." Although the Cross-Motion and exhibits collectively exceed 100 pages, the brief was only 25 pages in length. Accordingly, Opposer respectfully requests that the Board deny Applicant's unfounded motion to strike.

expense of a useless trial where no genuine issues of material fact remain. *Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 739 F.2d 624, 626 (Fed. Cir. 1984). When, as here, the moving party supports its motion with evidence, the non-moving party must come forward with admissible evidence to create a genuine issue of material fact. The non-moving party may not rest on mere denials or conclusory assertions. Fed. R. Civ. P. 56(e). Here, Applicant has proffered virtually no evidence and relies on pure speculation, rather than presenting evidence creating questions of fact with respect to material issues. Therefore, Opposer's Cross-Motion for Summary Judgment should be granted.

B. Opposer is Entitled to Summary Judgment on the Ground that There Is a Likelihood of Confusion Between the Parties' Marks.

1. Applicant Expressly or Implicitly Concedes that Many of the Likelihood of Confusion Factors Favor Opposer.

In his Response, Applicant concedes many of the elements necessary for Opposer to prevail on its Cross-Motion. As an initial matter, Applicant offers no evidence or argument in response to Opposer's evidence that it owns valid registrations for the KOOL-AID Marks and that Opposer's marks have priority over Applicant's KOOL application.

Applicant also fails to present any evidence or argument in its favor on many of the likelihood of confusion factors. First, portions of Applicant's argument appear to be premised on Opposer's "extensive marketing and resulting fame," which thereby concedes the strength of the KOOL-AID Marks. Applicant's Response at 3. Applicant also confirms, as he must, that his KOOL mark adopts the first portion of the KOOL-AID Marks. Applicant's Response at 2. Applicant also concedes that both parties' marks will be used for very similar goods, *i.e.*, beverages. *Id.* Moreover, Applicant does not deny that where, as here, there are no restrictions in the application and registrations, the Board must assume that the parties' similar goods will travel in the same channels of trade to the same class of purchasers. *See Hewlett-Packard Co. v.*

Packard Press Inc., 281 F.3d 1261, 1268 (Fed. Cir. 2002) (citing *CBS, Inc. v. Morrow*, 708 F.2d 1579, 1581 (Fed. Cir. 1983)). In addition, although Applicant argues that his products are relatively expensive and consumers of his products will exercise greater care in making purchases, his argument actually confirms the opposite. Applicant states that his product would sell for approximately $0.99, which is a relatively inexpensive product by any reasonable measure. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1376 (Fed. Cir. 2005) (characterizing sparkling wines usually sold for under $10 as inexpensive); *Haviland & Co. v. Johann Haviland China Corp.*, 269 F. Supp. 928 (S.D.N.Y. 1967) (characterizing chinaware sets sold at $79.95 to $99.95 per set as inexpensive).

In sum, Applicant concedes Opposer's ownership of the KOOL-AID Marks and priority. Applicant also concedes the following factors, all of which suggest a likelihood of confusion: (1) the strength of the KOOL-AID Marks; (2) Applicant's mark is composed entirely of the first segment of the KOOL-AID Marks; (3) the similarity of the products, *i.e.*, beverages; and (4) the shared consumers and trade channels. Based on these concessions alone, the Board can reasonably conclude that Opposer is entitled to summary judgment based on the likelihood of confusion test set forth in *In re E. I. DuPont DeNemours & Co.*, 177 U.S.P.Q. 563 (CCPA 1973).

2. Applicant's Speculation About How the Marks May Be Used in Commerce is Irrelevant.

In its Cross-Motion, Opposer cited Board precedent for the proposition that the first part of a mark is most likely to be remembered by purchasers and to be the dominant portion of the mark. Cross-Motion at 14 (citing *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 U.S.P.Q.2d 1895, 1897 (TTAB 1988)). Applicant does not argue that the Board's precedent on this point is

incorrect and does not deny that its KOOL mark incorporates the first portion of Opposer's KOOL-AID Marks.[3]

In an effort to avoid an analysis of the similarity of the KOOL and KOOL-AID Marks by themselves, Applicant continues to conduct his similarity analysis based on speculation about how the KOOL-AID Marks are used in commerce. Applicant perseveres with this argument even though Opposer's Cross-Motion cited binding precedent for the proposition that the Board must consider the parties' marks as they are shown on the respective application and registrations – not as they are actually used by the parties. Cross-Motion at 15-16 (citing *CBS,* 708 F.2d at 1581).

Based upon Applicant's fundamental misunderstanding of the applicable standard, Applicant ignores that: (1) Opposer pleaded several registrations, including a registration for a standard character KOOL-AID mark; and (2) none of the pleaded marks includes the KOOL-AID Man character. For all of the reasons set forth in Opposer's Cross-Motion, the similarity of KOOL and the KOOL-AID Marks, including the standard character KOOL-AID mark, strongly favor a finding of a likelihood of confusion.

3. Applicant's Citation to Registrations Containing "KOOL" are Irrelevant.

Finally, Applicant argues that there is no likelihood of confusion as a result of what he calls "extensive third party use" of "Kool". Applicant's Response at 4. In support of this argument, Applicant cites only two third-party registrations – one abandoned and the other covering goods unrelated to the beverage products in this opposition.

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[3] Applicant appears to argue that the "KOOL" portion of the KOOL-AID Marks is not the dominant portion of the Marks because they are "the same font size." Applicant's Response at 3. Not surprisingly, Applicant fails to cite any authority for this proposition. The first portion of a mark is frequently the dominant portion even if it is not stylized. *See, e.g., Palm Bay Imports,* 396 F.3d at 1372 (with respect to standard character mark VEUVE CLIQUOT, court finding VEUVE portion of the mark to be the "'prominent feature' as the first word in the mark" and also the dominant feature in the commercial impression of the mark) (citation omitted).

Applicant's faulty proposition relies upon *Sun Banks of Florida Inc. v. Sun Federal Savings and Loan Associates*, 651 F. 2d 311 (5th Cir. 1981), a case where the court found that use of the mark SUN by over 4400 businesses in Florida (the parties' common market), including a significant number of similar financial institutions, constituted extensive third-party use of the word SUN such that there would be no likelihood of confusion between the marks SUN BANKS and SUN FEDERAL. Clearly, there is no meaningful comparison between the facts of *Sun Banks* and the instant proceeding. This case is further distinguished by the fact that the common element of the parties' marks, SUN, did not possess the high level of fame and strength possessed by the KOOL-AID Marks.

Applicant also suggests that the KOOL-AID Marks have been weakened by third-party use of KOOL outside of the beverage product industry. Applicant's Resp. at 4. However, it is well established that third-party registrations, by themselves, are entitled to little weight on the issue of likelihood of confusion. *See, e.g., In re Chica*, 84 U.S.P.Q.2D (BNA) 1845, 2007 TTAB LEXIS 77, at *11-12 (2007) ("[A]n applicant does not overcome a likelihood of confusion refusal by pointing to other registrations and arguing that they are as similar to the cited registration as applicant's mark."). Even the case that Applicant cites to support his argument (*i.e., Sports Auth., Inc. v. Abercrombie & Fitch, Inc.*, 965 F. Supp. 925 (E.D. Mich. 1997)), clearly states that "[t]he Sixth Circuit has recently clarified that third-party use of the mark must be in a relevant market or industry in order to weaken the mark under the likelihood of confusion test." *Id.* at 937. Applicant's argument appears to erroneously rely upon a portion of the opinion specifically concerning dilution instead of the pertinent section concerning likelihood of confusion. In any event, Applicant's reiteration of third-party registrations containing KOOL is

of no probative value in this matter and in no way justifies the registration of the confusingly similar KOOL mark.

II. CONCLUSION

Considering the undisputed material facts of this Opposition, Applicant's KOOL mark is likely to cause confusion with Opposer's KOOL-AID Marks. Recognizing the futility of opposing the Cross-Motion on the merits, Applicant attempts to distract the Board with irrelevant facts and unsupportable arguments. For the reasons above and in its initial motion, Opposer respectfully requests that the Board grant its Cross-Motion for Summary Judgment, resulting in Opposer's opposition to Application Serial No. 77/355,857 being sustained and registration of the application refused.

Respectfully submitted,

Dated: April 21, 2009

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CERTIFICATE OF SERVICE

I do hereby certify that on April 21, 2009, I caused a copy of the foregoing Opposer's Reply in Support of Cross-Motion for Summary Judgment to be served by first-class mail upon the following:

Mr. Anthony Brown
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Natalie A. Ward