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

WINTER

Mailed: February 1, 2010

Opposition No. 91187879

Pioneer Family Brands, Inc.

v.

Tropical Snowball, Incorporated

Before Seeherman, Holtzman, and Cataldo, Administrative Trademark Judges.

By the Board:

Tropical Snowball, Incorporated (hereafter "applicant") seeks to register the mark TROPICAL SNOWBALL for various goods in International Class 30, including "shaved ice and shaved ice based desserts combined with fruit, nuts, cereal, candy, cookies, ice cream, and soy based products; frozen yogurt and frozen yogurt desserts combined with nuts, cereal, fruit, candy and shaved ice; and ice cream."[1]

Pioneer Family Brands, Inc. (hereafter "opposer") opposes registration of the applied-for mark on the ground

[1] Application Serial No. 77329997, filed November 15, 2007, based on applicant's alleged *bona fide* intent to use the mark in commerce. The term SNOWBALL has been disclaimed.

of priority and likelihood of confusion. In support of its claim, opposer alleges ownership of trademark registration No. 1359508 for the mark TROPICAL SNO for use with "flavored shaved ice and flavorings for shaved ice" (¶2) and that it has, through its predecessor-in-interest, used its mark since 1983, which is prior to any date on which applicant can rely.

In its answer, applicant admits that opposer is the record owner of U.S. Reg. No. 1359508 for the mark TROPICAL SNO (¶2) and admits that it has not started using the mark TROPICAL SNOWBALL (¶4). Applicant has denied all other allegations set forth in the notice of opposition.

This case now comes up on opposer's fully briefed motion (filed October 8, 2009) for summary judgment on the ground of priority and likelihood of confusion.

Opposer argues that summary judgment should be granted in its favor because there are no genuine issues of material fact concerning the similarity of the marks, the relatedness of the parties' respective goods, and relatedness of trade channels used by the parties (motion, p. 9). Specifically, opposer argues that applicant's mark encompasses opposer's mark in its entirety and that the marks TROPICAL SNO and TROPICAL SNOWBALL are very similar in sight, sound and meaning because they contain the same dominant, first word, "tropical," and both marks evoke the same oxymoron resulting

from a term relating to a hot, humid climate juxtaposed with a term used in connection with weather featuring snow. Additionally, opposer argues that because the terms "sno" and "snow" may be used interchangeably and the term "ball" describes the shape of applicant's intended goods, when the term "ball" is "discounted appropriately, the marks TROPICAL SNO and TROPICAL SNOWBALL become virtually identical" (motion, p. 12).

As to the *du Pont* factor of relatedness of the parties' goods, opposer argues that "the goods associated with applicant's mark are closely related, if not identical, to Pioneer's goods" (motion, p. 13), and that applicant's goods are "at least very 'similar in use and function' to Pioneer's goods" (motion p. 14). Specifically, opposer asserts that both parties' goods can be described as "cold frozen treats or shaved ice desserts containing shaved ice as a primary ingredient combined with flavorings" (motion, p. 14). To illustrate how the goods are related, opposer points out applicant's response to the examining attorney's office action in regard to the subject application, provided during discovery, in which applicant describes its goods as "hav[ing] a base of vanilla ice cream with finely shaved ice in the form of [a] sphere on top of the ice cream with fruit and other delectable toppings on top of and on the side of the dessert" (motion, Exh. D). Opposer also asserts that

the parties' similar goods may be purchased in a similar price range of about five dollars (motion, Exhibits D & H; answer ¶17) and, based thereon, argues that such inexpensive products are likely to be purchased on impulse with the result that confusion as to the source of the parties' goods is likely (motion, pp. 16-17).

In regard to the channels of trade for the involved goods, opposer emphasizes that its products are offered to the general public alongside or in the same vicinity of establishments that sell a variety of frozen confections such as ice cream, frozen yogurt, popsicles, and/or sherbet (motion, p. 15).

To support its motion, opposer has provided the declaration of its President, Donald Griffiths, by which he testifies that opposer is the owner of Trademark Reg. No. 1359508 for TROPICAL SNO for "flavored shaved ice and flavorings for shaved ice" (¶5); that opposer is currently using and has continuously used, through its predecessor-in-interest, the mark TROPICAL SNO in interstate commerce since at least as early as June 1983 (¶5); and that opposer's products are sold nationwide to the general public through a network of dealers and distributors, which sell TROPICAL SNO products through brick and mortar outlets, and through mobile retail outlets such as kiosks, trailers and carts, which are typically located in high foot traffic areas

including stadiums featuring sporting and cultural events, parks, schools, fairs, amusement parks, shopping centers and malls, and the like; and that opposer has expended hundreds of thousands of dollars in the promotion and advertising of its TROPICAL SNO products (¶¶ 6, 7, 8, 10, 11 and 13). Opposer has also provided the declaration of its attorney, J. Abby Barraclough, to support opposer's Exhibit E (printouts on the definition of "ball" from www.merriam-webster.com, http://encarta.msn.com/dictionary, and http://education.yahoo.com).

In opposition, applicant argues that summary judgment is inappropriate because there are facts in this case that are "highly in dispute" (brief, p. 5). Essentially, applicant asserts that whether the parties' goods are similar and will be offered to the same or similar class of purchasers are facts in dispute (brief, pp. 8-9, 11-12); and that whether the marks are similar is in dispute because a reasonable person will not necessarily conclude either that "sno" (in opposer's mark) is a misspelling of "snow" (brief, p. 13) or that "Sno" and "Snowball" are related terms (brief, p. 14). In particular, applicant contends that "SNO" in opposer's mark will be perceived as referring to The Sudbury Neutrino Observatory. In support of its contentions, applicant has provided, *inter alia*, a copy of opposer's admissions that the goods in its registration do not include fresh fruit, ice

cream or smoothies (brief, Exh. B); the declaration of applicant's officer, William Hacket, who testifies regarding the nature of applicant's intended goods and the intended market for its goods (brief, Exh. D, ¶3); and copies of opposer's marketing materials (brief, Exh. H).

In reply, opposer contends that applicant's argument that "SNO" in opposer's mark would be perceived by consumers as the acronym for The Sudbury Neutrino Observatory is "outlandish" (reply, p. 5); that whether the terms "snow" or "snowball" are similar in meaning is not in dispute (reply, p. 5, referencing applicant's definition of "snowball" in its brief, p. 13); and that the purported differences between the parties' goods and how such goods are provided to consumers are insignificant, if not non-existent (reply, p. 7 and Exh. E, which includes applicant's admission no. 27, stating that applicant's goods "are or will be sold to consumers for immediate consumption"). Additionally, opposer argues that none of the alleged distinctions between the parties' channels of trade is set forth in either the involved application or in opposer's registration. Consequently, argues opposer, the alleged differences in channels of trade should not be considered by the Board.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a

matter of law. *See* Fed. R. Civ. P. 56(c). The purpose of summary judgment is one of judicial economy, that is, to save the time and expense of an unnecessary trial. A 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 judgment as a matter of law. Fed. R. Civ. P. 56(c); and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). Additionally, the nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues exist, and the evidentiary record on summary judgment, and all justifiable inferences to be drawn from the undisputed facts, must be viewed in a light most favorable to the nonmoving party. The Board may not resolve issues of material fact; it may only ascertain whether such issues are present. *See 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. 1993); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

Further, when a moving party's motion for summary judgment is supported by evidence sufficient to indicate that there is no genuine issue of material fact and the moving party is entitled to judgment, the burden shifts to the nonmoving party to demonstrate the existence of at least one genuine issue of material fact that requires resolution at

trial. *See Opryland USA,* 970 F.2d at 850, 23 USPQ2d at 1473. *See also Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1739 (TTAB 2001) ("to avoid entry of an adverse judgment, [nonmovant] must present sufficient evidence to show an evidentiary conflict as to one or more material facts in issue").

Before we consider the merits of the motion for summary judgment, we must first consider the question of whether genuine issues exist as to opposer's standing to bring this opposition proceeding. Although not discussed by either party, standing is a threshold issue that must be proven by a plaintiff in every *inter partes* case. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999) and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). The purpose of the standing requirement, which is directed solely to the interest of the plaintiff, is to prevent litigation when there is no real controversy between the parties. *Lipton Industries,* 213 USPQ at 189.

The declaration of opposer's president establishes that opposer owns its pleaded registration for the mark TROPICAL SNO and has used said mark in connection with flavored shaved ice and flavorings for shaved ice through brick and mortar retail outlets and mobile retail outlets since 1983. Additionally, applicant has admitted opposer's ownership of

its pleaded registration, and has essentially treated the registration as of record. We find this evidence of opposer's registration and use of the mark TROPICAL SNO sufficient to establish that opposer has a real interest in the outcome of this proceeding; that is, opposer has a direct and personal stake in preventing the registration of applicant's mark for the identified goods.[2] In view thereof, we find that there is no genuine issue of material fact as to opposer's standing. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 823 F.2d 490, 2 USPQ2d 2021 (Fed. Cir. 1987).

Turning to the merits of the motion for summary judgment, we similarly find that there is no genuine issue of material fact that opposer has priority of use. First, because of the evidence of opposer's registration, namely, opposer's averment of ownership of U.S. Reg. No. 1359508 set forth in the declaration of opposer's president and applicant's admission in its answer of opposer's allegation of ownership of said registration set forth in the notice of opposition, priority is not in issue. *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Moreover, the undisputed evidence of record

[2] We also note that applicant has not challenged opposer's standing to oppose the involved application.

clearly establishes opposer's prior use. Opposer has used its mark in connection with "flavored shaved ice and flavorings for shaved ice" since 1983, which is long prior to the filing date of the involved application, which date, because applicant has admitted that it has not yet begun to use its mark, is the earliest date on which applicant can rely. *See* Trademark Act Section 7(c), 15 U.S.C. § 1057(c); *Zirco Corp. v. American Telephone and Telegraph Co.,* 21 USPQ2d 1542, 1544 (TTAB 1991). We also note that applicant has not disputed opposer's priority.

With regard to the likelihood of confusion under Trademark Section 2(d), 15 U.S.C. § 1052(d), our analysis is based on the consideration of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours and Co.,* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

With respect to the similarity of the marks, we look to

the marks in their entireties as to appearance, sound, connotation and commercial impression. The focus is on the perception and recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *See Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In this case, for the following reasons, there is no genuine issue that the marks TROPICAL SNO and TROPICAL SNOWBALL are substantially similar. We note first that both marks start with the term "TROPICAL." *See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) ("as the first word in the mark and the first word to appear on the label," VEUVE in "VEUVE CLIQUOT" is a "prominent feature" and "also constitutes the 'dominant feature' in the commercial impression created by [opposer's] mark"); and *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). Further, applicant's argument that "SNO" will not necessarily be perceived as a misspelling of "snow" or that it is the acronym for The Sudbury Neutrino Observatory is not sufficient to raise a genuine issue of material fact. In this connection, we take judicial notice that "sno" is a

recognized variant spelling of "snow" in "sno-cone," goods which are the same as or similar to the goods at issue herein.[3] Thus, as used in opposer's mark, the term "SNO" will be understood as "SNOW." Additionally, both marks contain the same incongruity resulting from a term that refers to a hot, humid climate being juxtaposed with a term that suggests a cold climate, *i.e.* "SNO" and "SNOWBALL," respectively. Further, because a snowball is made of snow and applicant's goods will be comprised of shaved ice in the shape of a ball or sphere, the word SNOWBALL in the context of applicant's mark will be viewed as having the same connotation of "snow." In view of the foregoing, the marks are highly similar in appearance, pronunciation and connotation, and evoke essentially the same commercial impression. While there are minor differences in the marks, they are insufficient to raise a genuine issue of material fact as to the similarity of the marks.

Turning to the factor of the similarity of the goods, opposer's goods as identified in its registration comprise "flavored shaved ice and flavorings for shaved ice," and

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[3] *See* Merriam-Webster Online Dictionary. 2010. Merriam-Webster Online. 22 January 2010 <http://www.merriam-webster.com/dictionary/sno-cones>. The Board may take judicial notice of online dictionary definitions where the resource is also available in printed format. *See In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789, 1791 n.3 (TTAB 2002); *see also University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983) (Board may take judicial notice of use of a term in dictionaries).

applicant's goods include "shaved ice and shaved ice based desserts" combined with various toppings. There is no genuine issue that the goods as identified in the application and registration are in part identical. The fact that even one of the products listed in an application is identical to one of opposer's identified products is sufficient to support a finding that there is a likelihood of confusion. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group,* 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any items that come within the identification of goods in the application). Applicant's evidence and arguments about the different nature of its shaved ice and shaved ice based desserts are insufficient to raise a genuine issue of material fact. The question of likelihood of confusion must be determined based on an analysis of the marks as applied to the goods and/or services recited in an applicant's application vis-à-vis the goods and/or services recited in an opposer's registration, rather than what the evidence shows the goods and/or services to be. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Because applicant's identification in its application includes "shaved ice" and opposer uses its mark

for "flavored shaved ice," any specific differences between applicant's "shaved ice" and opposer's products are insufficient to raise a genuine issue of material fact. The *du Pont* factor of the similarity of the goods favors a finding of likelihood of confusion.

In regard to the trade channels for the goods, the identifications in the involved application and opposer's registration include no limitation with respect to channels of trade or classes of purchasers. Thus, we must presume that the parties' goods move in all normal channels of trade for such goods and that they are available to all potential customers. *See Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (2002) ("absent restrictions in the application and registration, goods and services are presumed to travel in the same channels of trade to the same class of purchasers"). Consequently, applicant's evidence and arguments concerning the asserted "upscale" nature of its goods and the specific nature of the channels of trade and classes of consumers to whom it intends to sell its products (high-end retail outlets in upscale locales to high-end customers) are not sufficient to raise a genuine issue of material fact; applicant's identification of goods contains no such restrictions. Moreover, there is no reason why the same consumers who would purchase applicant's "high-end" shaved ice and shaved

ice based desserts would not also encounter opposer's shaved ice in shopping malls, amusement parks and the like. The *du Pont* factor of the similarity of the channels of trade favors a finding of likelihood of confusion.

Similarly, the parties' arguments and evidence regarding the conditions of sale, in particular, the prices of opposer's goods and the goods applicant intends to sell, which vary from approximately $1.50 to $7.00, are insufficient to raise a genuine issue of material fact. The record establishes that shaved ice and shaved ice based desserts are inexpensive items. Further, by their very nature, they are subject to impulse purchase. As noted, the identification of applicant's goods is not restricted in any manner. The goods could be sold in amusement parks or fairs or other venues where they would not be purchased with care. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) ("When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care") (citations omitted). The *du Pont* factor of the conditions of purchase also favors a finding of likelihood of confusion.

The foregoing are the only *du Pont* factors discussed by the parties. In particular, applicant has not asserted a

genuine issue of fact that would apply to any other *du Pont* factor. Accordingly, we treat all other *du Pont* factors as neutral.

In summary, we find that there are no genuine issues of fact that opposer has standing to bring this action; that opposer has prior use of its mark; that the marks are substantially similar; that applicant's goods are in part identical to opposer's goods; that applicant's goods must be presumed to travel in the same trade channels and be sold to the same classes of purchasers as opposer's identical goods; and that the goods are inexpensive and subject to impulse purchase. In view thereof, opposer has met its burden of demonstrating, on motion for summary judgment, that it is entitled to judgment on its pleaded ground of priority and likelihood of confusion.

Accordingly, opposer's motion for summary judgment on its claim of likelihood of confusion under Section 2(d) is granted. Judgment is entered against applicant, the opposition is sustained, and registration to applicant is refused.

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