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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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McCorkle Nurseries, Inc.  
v.  
Helen Yoest dba Tiger Lily's

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Opposition No. 91191035  
to application Serial No. 77135434  
filed on March 20, 2007; and  
Counterclaim to cancel Registration No. 3133589

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Maria V. Hardison of Tassan & Hardison for McCorkle  
Nurseries, Inc.

Alyssa Ann Finamore of Dowell & Dowell, P.C. for Helen  
Yoest dba Tiger Lily's

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Before Mermelstein, Lykos and Kuczma, Administrative  
Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

On March 20, 2007, Helen Yoest dba Tiger Lily's  
("applicant") filed a use-based application for the mark  
"GARDENING WITH CONFIDENCE," in standard character form,<sup>1</sup>  
for services ultimately identified as "Providing a website  
featuring information in the field of gardening" in Class  
44.

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<sup>1</sup> Application Serial No. 77135434, alleging January 1, 2006 as  
the date of first use anywhere and in commerce. Applicant

McCorkle Nurseries, Inc. ("opposer") filed a notice of opposition against the registration of applicant's mark on the grounds of priority of use and likelihood of confusion pursuant to § 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d). Specifically, opposer alleged that applicant's mark GARDENING WITH CONFIDENCE for "providing a website featuring information in the field of gardening" is likely to cause confusion with opposer's previously used and registered mark GARDENER'S CONFIDENCE, in standard character form, for "live plants, trees and flowers" in Class 31.<sup>2</sup>

Applicant denied the salient allegations in the notice of opposition, and counterclaimed to cancel opposer's pleaded registration for GARDENER'S CONFIDENCE based on applicant's alleged prior use of the mark GARDENING WITH CONFIDENCE for "gardening related services." Opposer denied the essential allegations in applicant's counterclaim to cancel opposer's registration.

This matter comes up on opposer's motion to reset the trial schedule and reopen the testimony periods for the parties (filed March 7, 2011). This motion seeks to reopen time

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disclaimed the exclusive right to use GARDENING apart from the mark as shown.

<sup>2</sup> Registration No. 3133589, filed December 21, 2004, issued August 22, 2006, alleging January 21, 2005 as the date of first use anywhere and June 8, 2005 as the date of first use in commerce. Opposer disclaimed the exclusive right to use GARDENER'S apart from the mark as shown.

beginning with opposer's pretrial disclosures. Applicant contests the motion.

Procedural Background

This matter was instituted on July 15, 2009, based on a notice of opposition filed July 14, 2009. The Board issued a standard trial order upon institution, setting out the time to answer, as well as discovery, disclosure and trial dates. Applicant timely filed her answer including affirmative defenses and "Compulsory Counterclaim" to cancel opposer's pleaded Registration No. 3133589 on August 24, 2009. The Board issued an order on August 27, 2009, instituting the counterclaim and resetting the schedule in view thereof. Pursuant to the revised schedule, opposer timely filed an answer to the counterclaim on September 23, 2009, followed by an amended answer to the counterclaim filed on September 24, 2009.

Under the reset schedule, all testimony closed on January 4, 2011, and opposer's brief was due March 5, 2011.<sup>3</sup> On March 7, 2011, opposer filed the instant motion to reopen requesting that the trial schedule be reset beginning with the time to serve its pretrial disclosures and the testimony periods.

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<sup>3</sup> March 5, 2011, fell on a Saturday, therefore, opposer's brief could have been timely filed as late as Monday, March 7, 2011. Trademark Rule 2.196.

Opposer's Motion and Applicant's Response

In support of its motion, opposer states that it failed to take any action because it was under the belief that the proceeding was suspended and that resetting the schedule poses "little danger of prejudice to applicant [because] [a]pplicant would be afforded the same ability to take advantage of its testimony period as well" and that any resulting delay "is not considerable given the length of time that the proceeding has been pending." Opposer's Motion, p. 1. Opposer further offers that applicant "appears to have no interest in pursuing this matter" as she failed to respond to opposer's discovery requests.

In response, applicant notes that aside from serving her with discovery requests on March 15, 2010,<sup>4</sup> opposer has failed to take any other action in this proceeding, including serving its initial disclosures, and that the situation giving rise to the instant motion is the result of opposer's own lack of diligence. To support her position, applicant argues that she has had no communication from opposer since being served with discovery nearly a year prior to the filing of the instant motion. Applicant also argues the insufficiency of opposer's motion in that opposer fails to substantiate or otherwise detail the circumstances surrounding its belief that the matter was suspended. Finally, applicant contends that she will be

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<sup>4</sup> Discovery closed on April 24, 2010.

"severely prejudiced" if testimony is reopened as applicant will incur additional costs and further delay in the resolution of this matter.

Determination on Opposer's Motion to Reopen

In order to reopen its now-expired time for submitting testimony or other evidence, opposer must establish that its failure to timely introduce evidence was the result of "excusable neglect." See Fed. R. Civ. P. 6(b)(1)(B). See also *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1852 (TTAB 2000). As the Board stated in *Baron Philippe*:

In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), the Supreme Court set forth four factors to be considered in determining excusable neglect. Those factors are: (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and, (4) whether the moving party has acted in good faith. In subsequent applications of this test by the Circuit Courts of Appeal, several courts have stated that the third factor may be considered the most important factor in a particular case. See *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 at n. 7 (TTAB 1997).

*Id.*, at 1852.

As to the first factor, prejudice to the nonmovant must be more than the mere inconvenience and delay caused by the movant's failure to take timely action, and more than the

nonmovant's loss of any tactical advantage which it otherwise would enjoy as a result of the movant's delay or omission. Rather, the first factor contemplates prejudice to the nonmovant's ability to litigate the case due to, for example, the loss or unavailability of evidence or witnesses which otherwise would have been available to the nonmovant. *Pumpkin Ltd.*, 43 USPQ2d at 1587. Applicant's contention that she will be "severely prejudiced" if testimony is reopened because applicant will incur additional costs and further delay in the resolution of this matter does not amount to the "prejudice" addressed by this factor. Applicant has not shown that it will suffer any harm other than incurring costs that she would have otherwise incurred in defending the opposition proceeding had opposer observed the discovery and trial schedule. Accordingly, applicant has not claimed any recognizable prejudice, and this factor weighs in favor of opposer.

As to the second factor, granting opposer's motion to reopen would result in a significant delay in this proceeding. Opposer seeks reopening of its trial dates, beginning with pretrial disclosures. Under the current schedule, opposer's pretrial disclosures were due June 8, 2010. Thus, granting opposer's motion would set this case back by well more than a year, a significant delay. Such delay negatively impacts the Board's ability to provide a

speedy and efficient resolution of disputes, not only in this case but in other cases before it. Accordingly, this factor does not favor opposer.

Looking to the third factor, i.e., the reason for the delay, opposer's mistaken belief that the proceeding was suspended is a circumstance that is entirely within opposer's reasonable control. Opposer obviously knew that the matter was not suspended when it served its discovery requests approximately five weeks prior to the close of discovery. It should have known that the proceeding was not suspended because the parties were not engaged in settlement discussions, neither party filed a motion to suspend these proceedings, and the Board in fact never suspended this case.

A party moving to reopen testimony and trial dates must set forth with particularity the detailed facts upon which its excusable neglect claim is based; mere conclusory statements are insufficient. *Gaylord Entertainment Co. v. Calvin Gilmore Productions Inc.*, 59 USPQ2d 1369, 1372 (TTAB). See also, TBMP § 509.01(b)(1). Here, opposer does not indicate why it believed that the case was suspended, or when and how it became aware of its mistake.

As there is no indication that the parties were engaged in any type of communication that could reasonably warrant a suspension of proceedings and as Opposer has not put forth

any evidence, let alone any explanation, of the basis for its mistaken belief, this factor weighs heavily against a finding of excusable neglect. *See, Gaylord* 59 USPQ2d at 1372; *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858 (TTAB 1998).

Finally, based on the slim record and the lack of explanatory information from opposer, we are unable to determine whether opposer acted in good faith or bad faith. Giving opposer the benefit of any doubt, we deem the fourth factor to be neutral.

The four factors for determining excusable neglect do not carry equal weight. *See, FirstHealth of the Carolinas Inc. v. CareFirst of Maryland Inc.*, 479 F.3d 825, 81 USPQ2d 1919 (Fed. Cir. 2007) (finding of no excusable neglect affirmed based on second and third factors, with third weighted heavily in the analysis). The Board has observed on several occasions that courts have stated that the third factor may be considered the most important factor in a particular case. *See, Pumpkin*, 43 USPQ at 1586 at n. 7.

Weighing all the factors, we find that the third factor, the reason for the delay, taken together with the second factor, the length and impact of the delay, weigh heavily against a finding of excusable neglect and therefore deny opposer's motion to reopen its pretrial disclosure and testimony periods.



Inasmuch as opposer's motion to reopen was filed on the last day for filing its brief on the merits, we construe its motion to also include a request for an extension of time to submit its brief. Under Fed. R. Civ. P. 6(b)(1)(A),<sup>5</sup> a motion to extend time must set forth with particularity the facts said to constitute good cause for the requested extension; mere conclusory allegations lacking in factual detail are not sufficient. *Luemme, Inc. v. D.B. Plus Inc.*, 53 USPQ2d 1758, 1760-1761 (TTAB 1999); *HGK Indus., Inc. v. Perma-Pipe, Inc.*, 49 USPQ2d 1156, 1158 (TTAB 1998) (motion to reopen denied because the movant failed to provide detailed factual information in support of the requested relief). Due to the lack of explanation offered by opposer in support of its motion, there is no showing of good cause and opposer's motion to reopen is denied in its entirety.

Had opposer's motion to reopen been granted, then applicant's time to submit evidence and testimony, as well as her brief as defendant in the opposition and plaintiff in the counterclaim, would also have been reset. However, applicant has neither submitted any evidence during her testimony period,<sup>6</sup> nor sought to reopen the periods for

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<sup>5</sup> Rule 6(b) is applicable to Board proceedings. 37 C.F.R. § 2.116(a).

<sup>6</sup> The failure of the party in the position of defendant to submit testimony or other evidence is usually of no consequence if the party in the position of plaintiff has not done so. It is the plaintiff who bears the burden of proof, and if the plaintiff has no evidence to support its case, the defendant has nothing to

submitting her testimony and brief in either the opposition, or in the counterclaim (in which she is in the position of plaintiff). Where a motion to reopen the testimony and briefing periods has been denied and there is no need to receive applicant's brief, the Board may proceed to render a decision on the merits. *See, Vital Pharm., Inc. v. Kronholm*, 99 USPQ2d 1708, 1711 (TTAB 2011). In view of the procedural posture of this proceeding, the case is in condition for a final decision and accordingly, we proceed to address the merits as follows.

The Record

By rule, the record includes applicant's application file, the file of opposer's registration which is the subject of applicant's counterclaim for cancellation, and the pleadings. Trademark Rule 2.122(b), 37 CFR § 2.122(b); *Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1896 (TTAB 2006) (opposer's registration of record by virtue of applicant's counterclaim to cancel it). Because no testimony or evidence was submitted by either party during their respective testimony periods, the record is limited to

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rebut. However, as will be seen, opposer in this case does have evidence on which it may rely. Accordingly, applicant acted at her own peril in failing to submit evidence on her own behalf.

the foregoing application and registration files. Neither party has filed any briefs.<sup>7</sup>

Counterclaim

We first address the counterclaim for cancellation of opposer's Registration No. 3133589 as applicant's success on her counterclaim would result in the dismissal of the opposition proceeding.

Applicant's Standing to Bring the Counterclaim

Applicant's position as the defendant in the opposition proceeding gives her a personal stake in the outcome of the proceeding, and therefore, she has standing to bring a counterclaim seeking to cancel opposer's pleaded Registration. *Space Base Inc. v. Stadis Corp.*, 17 USPQ2d 1216, 1220 (TTAB 1990); *Alberto-Culver Co. v. F.D.C. Wholesale Corp.*, 16 USPQ2d 1597, 1603 (TTAB 1990); *General Mills, Inc. v. Nature's Way Products, Inc.*, 202 USPQ 840, 841 (TTAB 1979).

Priority and Likelihood of Confusion

In order to prevail on her counterclaim, applicant must prove that she has prior rights in her GARDENING WITH CONFIDENCE mark and that opposer's mark is likely to cause confusion. Applicant's testimony period has expired and she has not taken testimony or offered any other evidence.

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<sup>7</sup> Applicant's "Brief for defendant and plaintiff in the counterclaim" was due April 4, 2011, and her "Reply brief as plaintiff in the counterclaim" was due May 19, 2011.

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Moreover, her trial dates have long passed and she has made no request to reopen her trial periods. The only evidence of record consists of the parties' respective application and registration files.

A party's allegations of use in its pleadings, or the dates of use recited in its application must be proved. Trademark Rule 2.122(b)(2). However, the parties may rely on their respective application and registration files for the limited purpose of proving constructive use as of their respective application filing dates. See *Brewski Beer Co. v. Brewski Bros., Inc.* 47 USPQ2d 1281, 1284 (TTAB 1998).

Here, applicant's filing date is March 20, 2007, while opposer's filing date for the application that matured into the registration at issue was December 21, 2004. Based on the foregoing, applicant has not proved priority and, accordingly, her counterclaim for cancellation is **DISMISSED with prejudice.**

Opposition

Opposer alleges that it is the owner of Registration No. 3133589 for the mark GARDENER'S CONFIDENCE for live plants, trees and flowers and that the mark has been used in commerce since June 8, 2005; that it has used its mark in commerce prior to applicant's first use of her mark; that applicant's mark is so similar to opposer's trademark that confusion, mistake and deception to the relevant public is

likely to result; and as result thereof, opposer will be damaged if registration of applicant's mark is not refused. Applicant has denied all salient allegations in the notice of opposition or states she is without knowledge or information sufficient to form a belief as to the truth of the allegations.

Opposer's Standing

In an opposition proceeding, the opposer bears the burden of proving both standing to oppose and at least one valid ground for refusal of registration. *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999) and *Sanyo Watch Co., Inc. v. Sanyo Electric Co., Ltd.*, 691 F.2d 1019, 215 USPQ 833, 834 (Fed. Cir. 1982).

Pursuant to Rule 2.122(b), opposer's Registration No. 3133589 is of record because it is the subject of applicant's counterclaim for cancellation. Trademark Rule 2.122(b)(1) ("The file of each . . . registration against which a . . . counterclaim for cancellation is filed forms part of the record of the proceeding without any action by the parties and reference may be made to the file for any relevant and competent purpose."). Therefore, despite opposer's failure to submit any evidence in support of its notice of opposition, it has proved its standing.

Opposer's Priority

We now turn to the merits of opposer's likelihood of confusion claim and refer to the foregoing discussion of the parties' priority rights. In an opposition, prior use need not be shown by a plaintiff relying on a registered mark unless the defendant counterclaims for cancellation as applicant has done here. *Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 181 USPQ 272, 275, n.6 (CCPA 1974). As discussed above, opposer's earlier filing date over applicant's application establishes opposer's priority.

Likelihood of Confusion

In determining the likelihood of confusion, we must analyze all of the probative facts in evidence that are relevant to the factors set forth in *In re E.I du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Because the evidence of record is limited to the parties' respective application and registration files, there is a lack of evidence for many of the *du Pont* factors.

In any likelihood of confusion analysis, 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, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

1. Similarity of the marks in their entireties in terms of appearance, sound, meaning and connotation

We first consider the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *du Pont de Nemours*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987) (also noting at n.4 that similarity of marks in one respect--sight, sound or meaning--will not automatically result in a finding of likelihood of confusion even if the goods are identical or closely related). In addition, in comparing the marks, we are mindful that the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons*

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*Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). In this case, the average consumers would be ordinary consumers with an interest in gardening.

Opposer and applicant have disclaimed exclusive rights to the words "gardener's" and "gardening" respectively. A disclaimer does not remove the disclaimed portion from the marks for purposes of this analysis and we must consider the marks in their entirety when determining whether there is a likelihood of confusion. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1283 (Fed. Cir. 1984); *In re MCI Communications Corp.*, 21 USPQ2d 1534, 1538 (Comm'r Pats. 1991).

The marks of the parties are similar to the extent that both marks begin with a word containing the "garden" formative (i.e., "gardener's" versus "gardening"), and end with the word "confidence." However, they differ in appearance as well as sound because the marks are not



identical; applicant's mark is a three-word slogan, while opposer's mark is two words. The marks also differ in meaning and commercial impression. Opposer's GARDENER'S CONFIDENCE mark connotes that gardeners use or rely on opposer's products, i.e., gardeners have confidence in opposer's products. On the other hand, applicant's GARDENING WITH CONFIDENCE slogan mark connotes that users of applicant's services can acquire information from applicant's website that will enable them to garden with confidence.

Based on the foregoing analysis, we find that the parties' marks are somewhat different although they nonetheless have some similarities in appearance, sound, meaning and connotation.

2. Similarity or dissimilarity and nature of the parties' goods and services

Opposer's GARDENER'S CONFIDENCE mark is registered for "live plants, trees and flowers" while the services recited in applicant's application to register "GARDENING WITH CHOICE" are "providing a website featuring information in the field of gardening." Inasmuch as the products sold by opposer are different from applicant's services, and there is no evidence in the record to support the relatedness of such products and services, we find that applicant's services are not similar or related to opposer's products.

See, e.g., *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004).

3. Remaining *du Pont* Factors

In view of the lack of evidence presented in this case, there is no basis to consider the remaining *du Pont* factors.

4. Balancing the factors

Any similarities between the marks are outweighed by the difference between the relevant goods and services, and the lack of evidence regarding the other *du Pont* factors. Accordingly, we find that applicant's mark GARDENING WITH CONFIDENCE for "providing a website featuring information in the field of gardening" is not likely to cause confusion with opposer's GARDENER'S CONFIDENCE mark for "live plants, trees and flowers." Based on the foregoing, opposer has not proved likelihood of confusion and, accordingly, the notice of opposition is **DISMISSED with prejudice.**

Decision

The counterclaim to cancel opposer's pleaded Registration No. 3133589 is dismissed with prejudice.

The opposition to registration of the mark shown in Serial No. 77135434 is also dismissed with prejudice.