

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed:  
March 17, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board  
—

*AlpinBreeze, LLC*  
*v.*  
*Evertec Information Technology Co., Ltd.*  
—

Opposition No. 91198063  
—

Matthew H. Swyers of The Trademark Company for AlpinBreeze LLC.

Evertec Information Technology Co., Ltd., *pro se*.<sup>1</sup>  
—

Before Quinn, Cataldo, and Hightower, Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

On January 28, 2010, Applicant Evertec Information Technology Co., Ltd.  
("Applicant") applied to register the mark shown below:



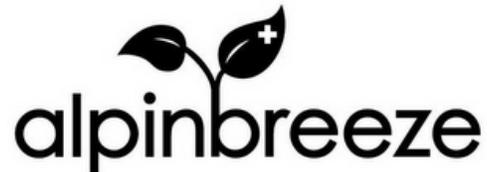
---

<sup>1</sup> You-Yi Lin, president of Taiwanese company Evertec Information Technology Co., Ltd., represented the company in this proceeding pursuant to Trademark Rule 11.14(e)(3), 37 C.F.R. § 11.14(e)(3). See Board Order of May 4, 2011 and Applicant's May 16, 2011 Response to Board Order/Inquiry, 9 and 10 TTABVue, respectively.

Opposition No. 91198063

for “humidifiers, electric air deodorizers, air purifiers, electric aromatherapy machines” in International Class 11.<sup>2</sup> The application was filed based on a bona fide intention to use the mark in commerce pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Eight months later, on September 29, 2010, Opposer AlpinBreeze, LLC (“Opposer”) applied to register the mark shown below:



for “humidifiers, electric air deodorizers, air purifiers, electric vaporizers, water ionizers and electric aromatherapy machines” in International Class 11.<sup>3</sup> Opposer’s application was filed based on Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), claiming first use anywhere and first use in commerce at least as early as March 10, 2009.

Opposer timely opposed registration of the application under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), asserting common-law ownership and priority and a likelihood of confusion with the mark in its suspended application.

Applicant asserts as a defense that “Opposer is not the rightful owner of the Alpinbreeze Mark, and Applicant is the rightful owner of the same. . . .”<sup>4</sup>

---

<sup>2</sup> Application Serial No. 77922346.

<sup>3</sup> Application Serial No. 85140585.

<sup>4</sup> Answer ¶ 11.

The Record

Each party has objected to evidence introduced by the other. Opposer moves to strike the only evidence proffered by applicant, the testimony (with exhibits) of applicant's president, You-Yi "Frans" Lin, a resident of Taiwan. Opposer contends that applicant submitted an affidavit rather than following the procedures for testimonial depositions on written questions required by FED. R. CIV. P. 28.

The parties did not stipulate to the submission of testimony in the form of an affidavit pursuant to Trademark Rule § 2.123(b). We agree that applicant apparently submitted notarized typewritten answers instead of following the procedure required under Trademark Rule § 2.124(e), which states in part: "The officer designated in the [deposition] notice shall take the testimony of the witness in response to the questions and shall record each answer immediately after the corresponding question." We therefore grant opposer's motion to strike applicant's testimony and exhibits, although we hasten to add that consideration of this evidence would not have changed the outcome herein.

Applicant, in turn, moves to strike the affidavit of Yungshiun Lin submitted as an exhibit (Exhibit 16) to the deposition of opposer's principal, Samanta Ng. Applicant's motion is granted. Even though used as a deposition exhibit, this affidavit is inadmissible in the absence of an agreement between the parties under Trademark Rule § 2.123(b). Yungshiun Lin's testimony constitutes inadmissible hearsay and has been given no consideration.

We also note that some of the documents opposer attempted to introduce via notice of reliance are not admissible in that manner. However, all of the documents

attached to opposer's notice of reliance also were introduced as exhibits to the Ng deposition, so we have considered them as such.

Therefore, the record consists of the file of the opposed application, Serial No. 77922346, which forms part of the record of the proceeding without any action by the parties pursuant to Trademark Rule § 2.122(b)(1); and the transcript of the testimonial deposition on written questions of Ms. Ng, a resident of Switzerland, with all exhibits except Exhibit 16.

### Standing

We first consider whether opposer has standing to bring this proceeding. 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, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 188 (CCPA 1982). Under Section 13 of the Trademark Act, 15 U.S.C. § 1063, anyone with a reasonable belief they would be damaged by a registration has standing to oppose. 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 Indus., Inc.*, 213 USPQ at 189. In a Board proceeding, the plaintiff is required to show that it has a "real interest," that is, a "direct and personal stake in the outcome of the proceeding." *Ritchie*, 50 USPQ2d at 1026; *see also Lipton Indus., Inc.*, 213 USPQ at 189.

As detailed further *infra*, we find that opposer has established its common-law use of the mark  in the United States for goods identical or

highly related to those identified in the application. This establishes that opposer possesses a real interest in the proceeding and is not a mere intermeddler. *See Toufigh v. Persona Parfum Inc.*, 95 USPQ2d 1872, 1874 (TTAB 2010) (finding standing in a cancellation proceeding where petitioner holds “a reasonable belief that there is a likelihood of confusion between the marks, or that the presence on the register of the respondent’s mark may hinder the petitioner in using or registering [its] mark”).

Opposer pleaded ownership of application Serial No. 85140585 in its notice of opposition. An opposer can establish its standing – that is, a reasonable belief that it will be damaged by the registration of applicant’s mark – simply by making of record a copy of the application file of its pleaded application demonstrating that it has been refused registration or suspended pending disposition of applicant’s earlier-filed application. *Life Zone Inc. v Middleman Group, Inc.*, 87 USPQ2d 1953, 1959 (TTAB 2008). *See also, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *ShutEmDown Sports, Inc. v. Lacy*, 102 USPQ2d 1036, 1041 (TTAB 2012).

Opposer failed to introduce into the record a copy of the pleaded application. Unlike the file of the opposed application, opposer’s pleaded application and its file history are not automatically of record. *See Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 704.03(b)(2)* (3d ed. rev. 2 June 2013). The Board does not take judicial notice of applications or registrations; they must be proven by competent evidence. *See, e.g., In re Jonathan Drew Inc.*, 97 USPQ2d 1640, 1644

n.11 (TTAB 2011) (stating that “the Board’s well-established practice is not to take judicial notice of registrations that reside in the USPTO”); *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1293 (TTAB 1986). However, applicant admitted that opposer owns the pleaded application (but not the applied-for mark),<sup>5</sup> and also included opposer’s application in its description of the record in its brief.<sup>6</sup> Based on these admissions by applicant, we treat opposer’s application as being of record.

### Analysis

#### A. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); *see also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *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.”).

---

<sup>5</sup> See Answer ¶¶ 1, 9.

<sup>6</sup> Applicant’s Brief at 5, 38 TTABVUE 6.

Here, applicant's mark (below, left) is nearly identical to opposer's mark:



We find that the marks are essentially identical in terms of appearance, sound, connotation, and overall commercial impression, the only difference being subtle shading in the letter “b” and leaf design in applicant's mark which is not claimed as a feature thereof. Therefore, the first *du Pont* factor, similarity of the marks, weighs strongly in favor of a likelihood of confusion.

Turning to the second and third *du Pont* factors – similarity of the goods and channels of trade – we find that applicant's identified “electric aromatherapy machines” are highly related, if not identical, to opposer's aroma diffusers, which are described further in the following section. We presume that the goods move in all normal channels of trade and are available to all potential classes of ordinary consumers. *See Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011). Accordingly, we presume the trade channels and classes of customers to be the same. *See American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003). The second and third *du Pont* factors thus strongly support a finding of likely confusion.

To the extent that any other *du Pont* factors for which no evidence was presented may be applicable, we treat them as neutral.

In view of our findings that the marks are highly similar and the goods are highly related or identical and move in the same channels of trade and to the same customers, we find that applicant's mark is likely to cause confusion with opposer's mark when used in association with applicant's goods.

B. Priority

When, as here, the marks are confusingly similar and the goods are highly related or identical, the only issue is one of priority of use between applicant and opposer. *See Joseph & Feiss Co. v. Joseph Kanner Hat Co.*, 337 F.2d 1014, 143 USPQ 297, 297 (CCPA 1964). To establish priority on a likelihood of confusion claim brought under Section 2(d), a party must prove that, vis-à-vis the other party, it owns "a mark or trade name previously used in the United States . . . and not abandoned." A party may establish its own prior proprietary rights in a mark through an earlier constructive filing date accorded to the party's own registration or application, actual use, or through use analogous to trademark use, such as in advertising brochures, trade publications, catalogs, newspaper advertisements, and Internet websites which create a public awareness of the designation as a trademark identifying the party as a source. *Giersch v. Scripps Network Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009).

An applicant may rely on the filing date of its intent-to-use application as its constructive use priority date. *See H.D. Lee Co. v. Maidenform, Inc.*, 87 USPQ2d 1715, 1722 (TTAB 2008); *Zirco Corp. v. Am. Tel. & Tel. Co.*, 21 USPQ2d 1542, 1544 (TTAB 1991). Here, applicant's priority date is January 28, 2010. Applicant does not argue that it used the applied-for mark in the United States before that date.

Rather, applicant contends that it fulfilled its first order from a U.S. customer well after its constructive use date, on December 7, 2010.<sup>7</sup> Therefore, in order to establish priority over applicant, opposer must prove use of its mark in commerce before applicant's priority date of January 28, 2010.

Opposer has established that it made actual use of the mark on goods transported in U.S. commerce in October 2009. Exhibit 13 to the Ng deposition transcript is an invoice demonstrating that 192 units of "Alpinbreeze Ultrasonic Steamer for Essential Oil With US power adapter" were ordered by H2OATHOME France for subsidiary H2OATHOME INC. in Allentown, Pennsylvania on October 19, 2009.<sup>8</sup> The exhibit also includes an air waybill dated October 21, 2009 shipping these goods from Taiwan to Pennsylvania.<sup>9</sup> Ms. Ng testified that H2O At Home Group is a customer of opposer's that is based in France and also sells products in Belgium and the United States,<sup>10</sup> and that the estimated value of the diffusers in this order was \$9,854.<sup>11</sup> Ms. Ng testified that the products delivered to the United States per this invoice were aroma diffusers,<sup>12</sup> which "had the ALPINBREEZE logo

---

<sup>7</sup> Applicant's Brief ¶ 23, 38 TTABVUE 11. Although applicant alleges that it had displayed the mark on its website [www.evertec.asia](http://www.evertec.asia) before filing the application, *see id.* at ¶ 21, applicant does not prove that the display was sufficient to constitute use analogous to trademark use in the United States.

<sup>8</sup> 29 TTABVUE 136.

<sup>9</sup> 29 TTABVUE 137.

<sup>10</sup> Ng Transcript at 30, 29 TTABVUE 33.

<sup>11</sup> *Id.* at 57, 29 TTABVUE 60.

<sup>12</sup> Ms. Ng testified that opposer's diffusers "are used as a home appliance to deodorize, humidify and spread essential oils into a room using ultrasonic technology." *Id.* at 25, 19 TTABVUE 28.

printed on each box as well as each product and each User Guide.”<sup>13</sup> Ms. Ng also testified that H2O At Home Inc. has “a sales network of 1,200 sales representatives all over the US selling products under [the] ALPINBREEZE logo,”<sup>14</sup> and that opposer’s aroma diffusers were “sold to the entire US territory.”<sup>15</sup>

The testimony of a single witness may be sufficient to establish priority when the testimony is proffered by a witness with knowledge of the facts and the testimony is clear, convincing, consistent, and sufficiently circumstantial to convince the Board of its probative value. *See, e.g., Panda Travel Inc. v. Resort Option Enters. Inc.*, 94 USPQ2d 1789, 1795 n.15 (TTAB 2009); *Liquacon Corp. v. Browning-Ferris Industries, Inc.*, 203 USPQ 305, 316 (TTAB 1979).

We have evaluated the evidence of prior use as a whole. *See West Fla. Seafood Inc. v. Jet Rests. Inc.*, 31 F.3d 1122, 31 USPQ2d 1660, 1663 (Fed. Cir. 1994). Based on this evidence, we find that opposer has shown common-law use of its mark in the United States in association with electric aromatherapy machines before January 28, 2010 and therefore has priority over applicant.

C. Ownership of the Mark

As noted *supra*, applicant asserts as a defense that “Opposer is not the rightful owner of the Alpinbreeze Mark, and Applicant is the rightful owner of the same.”<sup>16</sup> The parties explore in some detail what appears to be a soured

---

<sup>13</sup> *Id.* at 33-34, 29 TTABVUE 36-37.

<sup>14</sup> *Id.* at 37, 29 TTABVUE 40.

<sup>15</sup> *Id.* at 29, 29 TTABVUE 32.

<sup>16</sup> Applicant also asserted the defense of fraud on the USPTO. Because applicant did not address this defense in its trial brief, it has been waived.

international business collaboration between opposer's principal, Ms. Ng, and applicant's president, Mr. Lin, which has resulted in trademark disputes in Europe and Asia as well as the United States.

Through the testimony of Ms. Ng and accompanying exhibits, opposer credibly recounts the creation of the logo featured in both applicant's and opposer's applications, the development of a diffuser product, and the introduction of that product into the U.S. market. Ms. Ng testified in detail about the development of the mark opposer has applied to register and the significance of the constituent elements of that logo.<sup>17</sup> In addition, Ms. Ng is listed as the contact on opposer's product brochure.<sup>18</sup>

The evidence does show previous collaboration between Ms. Ng and Mr. Lin. However, Ms. Ng refers to Mr. Lin as her employee,<sup>19</sup> her "interpreter and my assistant to contact with Chinese-speaking supplier[s],"<sup>20</sup> and later her "business-finder trying to find customer[s] as a sales manager."<sup>21</sup> Ms. Ng testified that the title "sales manager" was a "perfectly accurate portrayal of his [Mr. Lin's] role with the company. He was a business-finder and a translator; no more, no less. He was basically my subordinate in the daily business."<sup>22</sup>

---

<sup>17</sup> See Ng Transcript at 16, 29 TTABVUE 19.

<sup>18</sup> Exhibit 8 to the Ng Deposition, 29 TTABVUE 124.

<sup>19</sup> Exhibit 1 to the Ng Deposition, November 13, 2008 email to manufacturer copying Frans Lin, stating "I have to pay the salary of my employee Mr. Lin," 29 TTABVUE 107.

<sup>20</sup> Ng Transcript at 39-40, 29 TTABVUE 42-43.

<sup>21</sup> *Id.* at 40, 29 TTABVUE 43.

<sup>22</sup> *Id.* at 42-43, 29 TTABVUE 45-46.

Mr. Lin denies that he was subordinate to or employed by opposer.<sup>23</sup> Instead, Applicant, in its brief, argues that Mr. Lin was Ms. Ng's business partner and that it was he who chose the name "alpinbreeze" and had the applied-for logo designed.<sup>24</sup> However, Mr. Lin held himself out as the sales manager of opposer Alpinbreeze LLC in an email to a prospective distributor on April 14, 2009.<sup>25</sup>

Based on the preponderance of the evidence admitted into the record as a whole, we find that opposer is the owner of the mark and therefore deny applicant's ownership defense.<sup>26</sup>

*Decision:* The opposition to registration of application Serial No. 77922346 on the grounds of priority and likelihood of confusion pursuant to Trademark Act Section 2(d) is sustained.

---

<sup>23</sup> See Answer ¶ 3; Applicant's Brief at 11, 38 TTABVUE 12.

<sup>24</sup> See Applicant's Brief at 9-12, 38 TTABVUE 10-13.

<sup>25</sup> Exhibit 15 to the Ng Deposition, 29 TTABVUE 139.

<sup>26</sup> We also note that opposer filed its application on September 29, 2010, claiming first use anywhere and first use in commerce at least as early as March 10, 2009. However, the record in this proceeding does not establish first use in commerce by opposer as of that date. There is record evidence that opposer formed Alpinbreeze LLC in Delaware on March 10, 2009. Ng Transcript at 26-28 & Exhibit 10, 29 TTABVUE 29-31, 127-28. Trade name use, however, is not trademark use. See *In re Letica Corp.*, 226 USPQ 276, 277 (TTAB 1985); *Oromeccanica, Inc. v. Ottmar Botzenhardt G.m.b.H. & Co. KG*, 223 USPQ 59, 64 (TTAB 1983). Opposer should amend its application if its mark was not used in commerce in the United States, as defined in the Trademark Act, at least as early as March 10, 2009. See, e.g., *In re W.W. Henry Co.*, 82 USPQ2d 1213, 1213-14, 1216 (TTAB 2007).