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

Proceeding	91204070
Party	Plaintiff Brody Chemical Company, Inc.
Correspondence Address	DAVID G BRAY DICKINSON WRIGHT/MARISCAL WEEKS 2901 N CENTRAL, STE 200 PHOENIX, AZ 85012-2705 UNITED STATES dbray@dickinsonwright.com, sclus@dickinsonwright.com, karendt@dickinsonwright.com
Submission	Other Motions/Papers
Filer's Name	David G. Bray
Filer's e-mail	DBray@dickinsonwright.com
Signature	/David G. Bray/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Brody Chemical Company, Inc.

Opposer,

v.

Goldthorpe, Tammy L. fka Tammy Price,

Applicant.

OPPOSITION NO. 91/204,070

Mark: Slippery Wizard
Serial No. 85/099,334

OPPOSER'S REPLY BRIEF

David G. Bray (Arizona Bar #014346)
dbray@dickinsonwright.com
DICKINSON WRIGHT / MARISCAL WEEKS
2901 North Central Avenue, Suite 200
Phoenix, Arizona 85012-2705
Telephone: (602) 285-5000
Facsimile: (602) 285-5100
Attorneys for Opposer Brody Chemical Company

OPPOSER’S REPLY BRIEF

1
2 Applicant Tammy Goldthorpe’s Brief does not, and cannot dispute, the key fact that she has
3 never used SLIPPERY WIZARD to identify herself as the source or origin of any goods sold under
4 that mark. During her trial deposition, Ms. Goldthorpe testified that, prior to joining Brody Chemical
5 in October of 2004 she never sold an asphalt release product under the name SLIPPERY WIZARD
6 (Tammy Goldthorpe Trial Deposition (hereafter, “Golthorpe Tr.”), at p. 29:12-16.] Moreover, the
7 evidence is undisputed that the SLIPPERY WIZARD mark has always and only identified Brody
8 Chemical’s asphalt release products. Indeed, the very specimen that Ms. Goldthorpe submitted to the
9 Trademark Office with her application in fact evidences Brody Chemical’s use of the SLIPPERY
10 WIZARD mark and not her own.

11 Applicant claims that she “licensed” the SLIPPERY WIZARD mark -- a name she admits that
12 she had theretofore never used in commerce or applied to any goods -- to Brody Chemical in October
13 of 2004. The so-called license however is not evidenced by a single contemporaneous document
14 between the parties. Not only is there no actual license agreement, Applicant offered no documents
15 created or exchanged between the parties in the months immediately prior to and following October of
16 2004 that evidence any kind of understanding that the parties were contemplating or entering into a
17 trademark “license”. The 2006 Agreement for payment of override commissions for Ms.
18 Goldthorpe’s sales supervision and training efforts (Trial Exhibit 4) relied on by Applicant was
19 executed two years *after* the supposed license was entered into and nowhere uses the words “license”,
20 “royalties”, “quality control” or even the word “trademark”.

21 Moreover, because Ms. Goldthorpe had never used the SLIPPERY WIZARD mark in
22 commerce and never applied it to any goods offered for sale in the marketplace, even if one were to
23 accept, *arguendo*, her version of events, the fact is that she had nothing to “license” to Brody
24 Chemical in October of 2004. Ms. Goldthorpe’s trial testimony was unequivocal: Prior to Joining
25 Brody Chemical in October of 2004 Ms. Goldthorpe never sold an asphalt release product under the
26 name SLIPPERY WIZARD (Goldthorpe Tr. at p. 29:12-16.). At most she had an “idea” for a mark.
27 Trademark law, however, does not extend its protection to mere ideas; rather it protects only the
28 goodwill of the product or service it represents:

1 “A trademark is a very peculiar kind of property. For it has no existence apart
2 from the good will of the product or service it symbolizes. Good will of a
3 business and its symbol, a trademark, are inseparable.”

4 * * *

5 “The Supreme Court has noted that trademarks, unlike patents and copyrights,
6 have no existence independent of the article, service or business in connection
7 with which the mark is used. It is a “fundamental error” to suppose “that a
8 trademark right is a right in gross or at large, like a statutory copyright or a
9 patent for an invention, to either of which, in trust, it has little or no analogy”

10 *2 McCarthy on Trademarks and Unfair Competition* § 2:15 at p. 2-40 (Release # 65, March 2013).

11 In the words of the Supreme Court: “There is no such thing as property in a trademark except
12 as a right appurtenant to an established business or trade in connection with which the mark is
13 employed.” *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 63 L. Ed. 141, 39 S. Ct. 48
14 (1918). Applicant does not attempt to refute or distinguish this law in her Opposition.

15 Finally, the fact that Ms. Goldthorpe used the same deceptive tactics in applying for and
16 obtaining registrations for Brody Chemical’s WHITE WIZARD and CLEAR WIZARD marks (again
17 submitting specimens that evidence *Brody Chemical’s* use and ownership of the marks and not her
18 own) while she was employed by Brody Chemical has no bearing on the outcome of this case. Each
19 registration is less than five (5) years old and is subject to a potential petition for cancellation. Brody
20 Chemical has merely chosen to devote its limited resources to preserving its rights in the most
21 important of the three marks --SLIPPERY WIZARD -- and will turn to the other two improperly
22 obtained registrations at the conclusion of this proceeding.

23 Conclusion

24 The parties’ trial testimony and exhibits conclusively establish that it is Brody Chemical who
25 has continuously used the SLIPPERY WIZARD mark to identify its goods in commerce since
26 October of 2004. It similarly establishes that Applicant has never labeled or advertised any goods
27 under the mark SLIPPERY WIZARD that identified her as the source or origin of the goods sold.
28 Applicant’s Brief points to no evidence to the contrary.

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The SLIPPERY WIZARD mark belongs to Brody Chemical, not Ms. Goldthorpe. As such, the Board should not permit Ms. Goldthorpe's trademark application to mature into a trademark for registration.

DATED this 21st day of February, 2014.

DICKINSON WRIGHT/MARISCAL WEEKS

By /David G. Bray/
David G. Bray
2901 North Central Avenue, Suite 200
Phoenix, Arizona 85012-2705
Attorneys for Opposer

CERTIFICATE OF DEPOSIT

I hereby certify that this correspondence is being deposited with the Trademark Trial and Appeal Board via ESTTA on the date indicated below:

Date of Deposit 2/21/14 /David G. Bray/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing OPPOSER'S REPLY BRIEF was served on Applicant by depositing said true and correct copy with the United States Postal Service, First Class Mail, postage prepaid, this 21st day of February, 2014, in an envelope addressed to Applicant's attorney of record as follows:

Nathan S. Winesett
AVERY, WHIGHAM & WINESETT, P.A.
P.O. Box 3277
Duluth, MN 88508

A courtesy copy of the foregoing was also e-mailed to Mr. Winesett at nwinesett@awwlegal.com on this date.

/David G. Bray/