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

Proceeding	91204070
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

Brody Chemical, Inc. Opposer, v. Tammy L. Goldthorpe fka Tammy Price Applicant.	Opposition No. 91/204,070
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**APPLICANT'S BRIEF IN RESPONSE
TO OPPOSER'S MOTION FOR RECONSIDERATION**

Applicant hereby files this brief in response to Opposer's Motion for Reconsideration filed July 3, 2014 in accordance with TBMP § 543 and 37 CFR 2.129(c), and requests that Opposer's motion for reconsideration be denied and that the opposition be granted in favor of Applicant.

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that this correspondence is being electronically transmitted to the United States Patent and Trademark Office through ESTTA.

on July 23, 2014

/Nathan S. Winesett/

Introduction and the Nature of Opposer's Request for Reconsideration

TMBP §543 and 37 C.F.R. §2.129(c) provide for a party to request reconsideration of the Board's final decision. Pursuant to §543, the premise underlying a request for reconsideration under Trademark Rule 2.129(c) is that, based on the evidence of record and the prevailing authorities, the Board erred in reaching the decision it issued. The request may not be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in the requesting party's brief on the case. See *Amoco Oil Co. v. Amerco, Inc.*, 201 USPQ 126 (TTAB 1978). Rather, the request normally should be limited to a demonstration that, based on the evidence properly of record and the applicable law, the Board's ruling is in error and requires appropriate change. See, for example, *Steiger Tractor Inc. v. Steiner Corp.*, 221 USPQ 165 (TTAB 1984), different results reached on reh'g, 3 USPQ2d 1708 (TTAB 1984). Cf. *In re Kroger Co.*, 177 USPQ 715, 717 (TTAB 1973).

However, by way of the request for reconsideration, opposer is again arguing the points that 1) the mere conception of a trademark does not create a trademark right enforceable in the marketplace and that 2) the use of the SLIPPERY WIZARD mark could not inure to Applicant's benefit if Applicant did not have trademark rights at the time the parties entered into the alleged agreement. Notably, Opposer does not dispute the Board's findings of fact in its reconsideration.

These issues have already been briefed by the parties, nevertheless, Applicant files this concise brief in response so that the Board clearly understands Applicant's position with respect thereto.

I. Opposer's reconsideration is simply a reargument of the issues, and thus, the request should be denied.

Opposer fully briefed these points in its main and reply briefs, and thus the Board has already considered both of these issues. Therefore, Opposer's request for reconsideration should be denied.

II. Regardless of the existence of established trademark rights in the marketplace, the parties can enter into a contract for the usage of a mark. Opposer acknowledges that Applicant may have other rights enforceable under contract law, and indeed, the contract between the parties established that Applicant owns and controls usage of the SLIPPERY WIZARD mark as found by the Board.

Opposer acknowledges at page 4, line 25 of its brief for reconsideration that Applicant may have other rights under contract law. Moreover, the Opposer's own quotation of *McCarthy on Trademarks and Unfair Competition* at page 3, line 21 indicates that a party can secure its rights in a name through contract law prior to the development of enforceable trademark rights in the marketplace. The Opposer quoted: “The idea person who fails to make sure of the intent-to-use system will find herself without trademark rights and *having to rely on the law of trade secrets and confidential disclosures for any possible relief against another's use*” (emphasis added). This statement indicates that a party can, in fact, secure rights with another party in an intent-to-use mark through the use of contract. Thus, not having established trademark rights enforceable in the marketplace does not prevent the parties from entering into a contract for the usage of SLIPPERY WIZARD. In the present case, the parties clearly entered into an agreement for the use of the SLIPPERY WIZARD mark as the Board found.

III. Opposer's argument ignores the entire relationship and conduct of the parties.

“Mere conception” is not the case here; Rather, Applicant developed the product, conceived of the mark, developed the marketing material, negotiated a license with Opposer to manufacture and distribute and sell the product under her mark, received a royalty for all uses of the mark, and controlled the nature and quality of the product sold in connection with the mark.

Opposer's argument ignores the entire relationship and conduct of the parties that establishes that Applicant is the owner of the SLIPPERY WIZARD mark. Opposer is attempting to confuse legal issues pertaining to the formation of the license between the parties by suggesting that Applicant merely conceived of the mark and nothing more. This is clearly not the case in this matter. The Board found that the unrebutted and corroborated testimony of Matt Forsgren clearly and unequivocally established that Applicant developed the product, came up with the SLIPPERY WIZARD mark to use with her product, licensed use to Opposer who paid her a royalty, and that Applicant controlled the nature and quality of the product. As such, Applicant is the owner of the mark and the proper registrant thereof.

While it is true that enforceable trademark rights are created through usage of a mark in the marketplace and by controlling the nature and quality of the goods, the Board found that Applicant clearly and unequivocally did so. Accordingly, Opposer's argument that Applicant “merely conceived” of the mark is clearly not accurate.

IV. Regardless of a favorable resolution of these issues presented for reconsideration,

Opposer's still has not met the burden of proof to sustain the Opposition.

Even if the Board decided these issues in favor of Opposer, Opposer still has not met burden of proof by a preponderance of the evidence to establish priority of use or to establish any use that was not subject to a license from Applicant that inured to Applicant's benefit. Opposer has not proffered any invoices, sales records, or any dated materials evidencing sales of SLIPPERY WIZARD prior to the filing date of August 3, 2010. The catalog materials showing use of the SLIPPERY WIZARD mark submitted by Opposer are shown to have been conceived of and drafted by Applicant prior to her business relationship with Opposer. The testimony of Opposer's own witness, Buzz Butler, corroborates Applicant's testimony and evidence that the SLIPPERY WIZARD mark and product were

owned and controlled by her. Applicant's witnesses Matt Forsgren, Dennis Brunetti, and Nancy Ayers testimony also corroborates and is consistent with Tammy Goldthorpe as the owner and licensor of the SLIPPERY WIZARD mark. Opposer's only evidence of ownership is the uncorroborated testimony of Opposer's owner, Jon Liddiard, that has been determined by the Board to be unreliable in view of the contradictions in his testimony and his tampering with evidence.

V. Conclusion

In view of the foregoing, it is respectfully requested that the Board deny Opposer's Motion for Reconsideration, dismiss the Opposition, and allow Applicant's mark registration on the Register.

DATED this 23rd day of July, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the APPLICANT'S BRIEF IN RESPONSE TO OPPOSER'S MOTION FOR RECONSIDERATION was served upon Applicant by depositing a copy of the same with the United States Post Office as first class mail, postage prepaid, in an envelope addressed to:

David G. Bray
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on the 23rd day of July, 2014.

/Nathan S. Winesett/