

THIS DECISION IS NOT A
PRECEDENT OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

GCP

Mailed: June 8, 2015

Opposition No. 91206921

Rich Products Corporation

v.

VegiPro Brands, LLC DBA Exposure SMI

**Before Cataldo, Bergsman, and Goodman,
Administrative Trademark Judges.**

By the Board:

VegiPro Brands, LLC d/b/a Exposure SMI (“Applicant”) seeks to register the mark BETTER ON TOP!, in standard characters, for “whipped topping” in International Class 29.¹

Rich Products Corporation (“Opposer”) opposes the registration of Applicant’s mark on the ground of likelihood of confusion based upon its pleaded registrations for the marks ON TOP and RICH’S ON TOP, as well as ON TOP and design, as displayed below, all used in association with whipped topping products.

¹ Application Serial No. 85577551, filed on March 22, 2012, based upon an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.



Applicant, in its answer, has denied the salient allegations of the notice of opposition.

This proceeding now comes before the Board for consideration of Opposer's motion (filed January 23, 2015) for summary judgment regarding its claim of likelihood of confusion. The motion is fully briefed.

Opposer's Motion for Summary Judgment

In support of its motion, Opposer maintains there are no genuine disputes of material fact with respect to Opposer's claim of likelihood of confusion. Specifically, Opposer argues that (1) it has standing to pursue this matter, (2) it has prior use of its pleaded marks, (3) the marks at issue are similar in appearance, sound and commercial impression, (4) the parties' respective trade channels are identical, (5) the parties' respective consumers are the same, (6) the parties' respective goods are identical, and (7) its pleaded ON TOP marks are strong and famous.

As evidence in support of its motion, Opposer has submitted the declaration of Erica Frank, the Manager of Intellectual Property of Opposer, who attests, *inter alia*, to the following: (1) first use of Opposer's pleaded marks in commerce, and (2) Opposer's trade channels. Ms. Frank's declaration also introduces the following exhibits: (1) samples of product packaging of Opposer's goods sold under its pleaded mark, and (2) sample advertisements of Opposer's ON TOP whipped topping goods.

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Additionally, Opposer has submitted the declaration of Diane M. Jacquinet, a paralegal at Opposer's counsel's law firm, which introduces the following evidence: (1) electronic copies of Opposer's pleaded registrations downloaded from the USPTO's Trademark Status and Document Retrieval database; and (2) the dictionary definition of the term "better" downloaded from the online Merriam-Webster dictionary.

In response, Applicant argues, among other things, that (1) the parties' respective whipped toppings differ because Applicant's goods are completely vegan in nature while Opposer's whipped toppings contain milk derivatives and high fructose corn syrup, (2) the parties' respective consumers differ in light of the differences in the parties' respective products, (3) Opposer's pleaded marks are weak because of the existence of numerous registered marks incorporating the term TOP for whipped topping goods, and (4) the parties' respective marks are visually dissimilar and convey different commercial impressions and meaning. With regard to the marks at issue, Applicant specifically contends that the inclusion of the term "BETTER" and the exclamation point at the end of Applicant's involved mark creates a double entendre relating to a sexual innuendo that references a sexual position and, therefore, militates against a finding of confusing similarity.

As evidence in support of its response to Opposer's motion for summary judgment, Applicant has submitted the declaration of Andrew Harrison, Applicant's director, who attests to the dissimilarity of the parties' respective goods, marks and trade channels. Additionally, Applicant has submitted the declaration of Bruno

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Tarabichi, Applicant's counsel, which introduces the following exhibits: (1) a copy of Applicant's involved application downloaded from the USPTO's electronic database,² (2) a copy of the search conducted by the examining attorney who prosecuted Applicant's subject application, (3) copies of third party registrations that include the term TOP for whipped topping products, and (4) the notice of publication of Applicant's involved application.

In reply, Opposer argues, *inter alia*, that the mere addition of the term BETTER and the punctuation mark to Applicant's involved mark does not distinguish the marks at issue. Furthermore, Opposer contends that Applicant's allegation that its BETTER ON TOP! mark creates a double entendre relating to sexual innuendo is unpersuasive in light of the lack of any evidence of record to demonstrate such an innuendo. Opposer also maintains that Applicant's attempts to distinguish the parties' respective goods by identifying differences in the ingredients of the goods is without merit because the Board must consider the nature and scope of the parties' goods based on the identification of goods as identified in Opposer's pleaded registrations and Applicant's involved application which Opposer contends do not recite the ingredients for the parties' respective goods.

Decision

A party is entitled to summary judgment when it has demonstrated that there are no genuine disputes as to any material facts, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The evidence must be viewed in a light

² It was unnecessary for Applicant to submit a copy of its involved application since it is automatically of record. *See* Trademark Rule 2.122(b).

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favorable to the nonmoving party, and all justifiable inferences are to be drawn in the nonmovant's favor. *Opryland USA Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

Upon careful consideration of the arguments and evidence presented by the parties, and drawing all inferences with respect to the motion in favor of the Applicant as the nonmoving party, we find that Opposer has not demonstrated the absence of a genuine dispute of material fact for trial.

At a minimum, the Board finds that a genuine dispute of material fact exists as to whether Opposer's pleaded marks and Applicant's involved mark are similar in sound and appearance and whether the marks convey a similar meaning and/or commercial impression. Additionally, we find that a genuine dispute of material fact exists as to the strength of Opposer's pleaded marks. In view thereof, Opposer's motion for summary judgment is **DENIED**.

Accelerated Case Resolution

We note that the legal issues presented in this proceeding appear to be limited and that the parties are well-acquainted with the relevant facts. Accordingly, the parties may wish to stipulate to resolution of this proceeding by means of the Board's accelerated case resolution ("ACR") procedure, on summary judgment briefs and incorporating the current record pursuant to an agreement to proceed under ACR with respect to Opposer's likelihood of confusion claim. *See e.g., Freeman v. National Association of Realtors*, 64 USPQ2d 1700 (TTAB 2002) (parties agreed that evidence and arguments submitted with Opposer's motion for summary judgment

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and Applicant's response could be treated as the final record and briefs). *See also* TBMP § 528.05(a)(2) (2014) and authorities cited therein. In the event the parties agree to ACR using summary judgment briefs and incorporating the current evidence, including any supplementation of evidence they may agree would be appropriate, they will need to stipulate that the Board may determine any genuine disputes of material fact the Board may find to exist.³ *See* TBMP § 702.04 (2014) for more information.

The parties are therefore encouraged, within **FIFTEEN DAYS** of the mailing date of this order, to jointly contact the Board's interlocutory attorney responsible for this proceeding by telephone to discuss the possibility of ACR, any necessary stipulations, and an agreed schedule for proceeding under ACR.

If the parties determine not to proceed via ACR the proceeding will continue on the schedule as set below.

Trial Schedule

Proceedings are hereby RESUMED.⁴ Discovery is closed. Remaining trial dates are reset as follows:

³ However, absent such an agreement, the parties should note that the evidence submitted in connection with the present motion for summary judgment is of record only for consideration of the present motion. To be considered at final hearing, any such evidence must be properly introduced during the appropriate trial period. *See Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993). The parties may, however, stipulate that any or all of the summary judgment evidence be treated as properly of record for purposes of final decision. *See e.g., Micro Motion Inc. v. Danfoss A/S*, 49 USPQ2d 1628, 1629 n.2 (TTAB 1998).

⁴ Inasmuch as this proceeding is on the verge of trial, the parties are hereby **precluded from filing any further motions for summary judgment in this matter.**

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Plaintiff's 30-day Trial Period Ends ⁵	7/28/2015
Defendant's Pretrial Disclosures Due	8/12/2015
Defendant's 30-day Trial Period Ends	9/26/2015
Plaintiff's Rebuttal Disclosures Due	10/11/2015
Plaintiff's 15-day Rebuttal Period Ends	11/10/2015

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

⁵ The Board notes that Opposer filed its motion for summary judgment subsequent to the deadline for serving its pretrial disclosures. The Board assumes, therefore, that Opposer has already served its pretrial disclosures on Applicant's counsel. To the extent Opposer has yet to serve its pretrial disclosures, it must do so immediately and no later than **five (5) calendar days** from the mailing date of this order.