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

Proceeding	91212112
Party	Defendant Jordan Gerberg
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Opposer's Claimed Mark: Q QUINTESSENTIAL and Design  as more fully identified in U.S. Registration No. 3,224,142 (hereinafter "Opposer's Mark") for use in connection with the following goods, namely: "alcoholic beverages, namely gin;" ("Opposer's Goods") in International Class 33 (See Applicant's Motion for Summary Judgment Exhibit 1).

4. On or about August 27, 2013 Applicant filed its Answer and Ground of Defense in response to Opposer's Notice of Opposition (See Applicant's Motion for Summary Judgment Exhibit 2).

5. On or about October 30, 2013 the parties conducted the Discovery Conference in this matter.

6. On or about November 18, 2014 Applicant served its initial disclosures on Counsel for Opposer.

7. On or about January 9, 2014 Applicant served its First Requests for Production of Documents, First Requests for Interrogatories and Supplemental Initial Disclosures to Counsel for Opposer.

8. On or about January 16, 2014 Applicant served its First Requests for Admissions to Counsel for Opposer.

9. On or about February 10, 2014 Opposer served its Responses to Applicant's First Requests for Production of Documents and Applicant's First Requests for Interrogatories and Applicant's First Set of Admissions to Counsel for Applicant.

10. On or about April 1, 2014 Opposer served its First Requests for Production of Documents and First Requests for Interrogatories and First Requests for Admissions to Counsel for Applicant.

11. On or about April 28, 2014 Counsel for Applicant filed a thirty (30) day Motion to Extend all dates in the instant proceeding with consent of Opposer as the parties were not able to complete discovery and were involved in settlement discussions at the time of filing said consent motion.

12. The Board granted the stipulated extension of all dates in the instant proceeding on or about April 28, 2014 extending the discovery deadline until on or about May 28, 2014.

13. On or about May 6, 2014 Applicant served its Responses to Opposer's First Requests for Production of Documents and First Requests for Interrogatories and First Requests for Admissions to Counsel for Opposer.

14. On or about May 16, 2014 Applicant served its Supplemental Responses to Opposer's First Requests for Production of Documents and First Requests for Interrogatories.

15. On or about May 27, 2014 Opposer served its Second Request for Requests for Production of Documents and Second Requests for Interrogatories to Counsel for Applicant.

16. On or about June 2, 2014 Applicant received Opposer's Supplemental Responses to Applicant's First Set of Requests for Production of Documents.

17. On or about July 1, 2014 Applicant served its responses to Opposer's Second Set of Requests for Production of Documents and Second Requests for Interrogatories to Counsel for Opposer.

18. On or about July 15, 2014 Opposer served its Pretrial Disclosures on Counsel for Applicant.

19. On or about July 23, 2014 Applicant filed a Motion for Summary Judgment pursuant to TBMP § 528 *et seq* on the grounds that there are no genuine issues of material fact as to Opposer's claim of a likelihood of confusion between the party's marks herein. In reply to the Opposer's brief

20. On or about August 20, 2014 Opposer filed an Opposition to Applicant's Motion for Summary Judgment.

21. Applicant now timely files its Reply in support of Applicant's Motion for Summary Judgment.

SUMMARY OF OPPOSER'S RESPONSE

In response to the Applicant's Motion for Summary Judgment Opposer's Opposition may be distilled into two simple contentions:

1. The party's marks are similar in appearance, sound connotation and commercial impression; and

2. The remaining *DuPont* Factors support the conclusion that a likelihood of confusion exists with respect to the party's marks.

ARGUMENT

In its Response to Applicant's Motion for Summary Judgment, Opposer states "Applicant rests his Motion for Summary Judgment on only one factor- the similarity or dissimilarity of the marks in question". Applicant relies heavily on the first Dupont Factor because this factor alone is dispositive of this case as in *Kellogg Co. v. Pack'em Enterprises, Inc.*, 951 F.2d 330 (Fed. Cir. 1991) (affirming TTAB decision finding no likelihood of confusion based on the first DuPont factor alone).

In its response to said Motion, Opposer does not negate the fact that the only visual resemblance that the parties respective marks have in common is the abundantly used letter "Q". The use of the generic letter "Q" alone is not sufficient to claim that the designs are similar. Opposer does not present any evidence to justify its assertion that the stylized letter "Q" is the dominant and/or prominent portion of its trademark in minds of potential purchasers. The overwhelming differentiating aspect of the applicant's unique design is the use of the Mexican Agave plant used to manufacture Tequila and removes any notion the designs are similar. The applicant's design is based on the stylized use of an Agave plant "pina" and the unique pattern of an Agave plant's leaf when cut from the Agave plant. Neither of these individually unique elements specifically incorporated to distinguish and emphasize the applicant's association with Tequila, are incorporated in the mark of the opposer. The unique design elements of the applicant mark are not used in the opposers mark and the mere use of the generic letter "Q" is not sufficient to claim that the designs are similar. Furthermore, the Mexican Agave Pina is not associated in any way the goods provided by the Opposer under its mark, namely: gin as this plant is commonly used for tequila; therefore, sophisticated purchasers are not likely to associate Applicant's Design Mark with the goods provided by Opposer under Opposer's Mark. The evidence submitted by Opposer in its Opposition to Applicant's Motion for Summary Judgment (see Opposer's Opposition to Applicant's Motion for Summary Judgment Exhibit 4) does not sufficiently support

Opposer's claims that consumers purchasing Opposer's goods specifically associate the letter "Q" exclusively with Opposer and Opposer's Goods. This evidence merely demonstrates that the Opposer at times refers to its gin products under its mark using the abbreviated term "Q Gin" or "Q Quintessential", not just the letter "Q", of which, neither are even remotely similar in design or connotation to a Mexican Agave plant design used by the applicant to reference Tequila.

As such, Opposer's Opposition to Applicant's Motion for Summary fails to provide any evidence to support its bare allegations, namely that: 1) The party's marks are similar in appearance, sound connotation and commercial impression and that 2) The remaining DuPont Factors support the conclusion that a likelihood of confusion exists with respect to the party's marks. Pursuant to 37 C.F.R. §§ 2.116 and 2.127, 1 the Federal Rules of Civil Procedure are applicable to this case. Federal Rules of Civil Procedure 56(e) states that, when a motion for summary judgment is made and supported as provided in the rule, the nonmoving party may not rest upon the mere allegations or denials of their pleadings, but must set forth specific facts, by affidavit or otherwise, showing that there is a genuine issue for trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-257 (1986). This is precisely what the Opposer, as the nonmoving party, has failed to do.

The party opposing summary judgment has the burden of showing sufficient evidence of a genuine issue of material fact in dispute. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Although Opposer claims that genuine issues of material fact exist as to confusion among the marks, Opposer does not put forth any evidence supporting this allegation. Rather, Opposer simply rehashes the assertions outlined in the Notice of Opposition. This practice is explicitly proscribed by Federal Rules of Civil Procedure 56(e). As the record presently stands, the Opposer has produced no evidence to satisfy its burden and, therefore, there is no issue for trial.

CONCLUSION

WHEREFORE for the premises considered, the Applicant has sufficiently met the burden of showing there is no genuine issue for trial. The Opposer's response failed to provide any evidence to

counter the Motion and thereby failed to show that a genuine issue in fact does exist. For these reasons, and those in the Motion, the Board should grant the Motion.

Respectfully submitted this 4th day of September, 2014.

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