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

Proceeding	91217482
Party	Plaintiff Stokely-Van Camp, Inc.
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Attachments	MotForSJ-FNL W Attach.pdf(263795 bytes)

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

STOKELY-VAN CAMP, INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91217482
)	
JEFF PEARSON,)	
)	
Applicant.)	

**OPPOSER’S MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM IN SUPPORT**

Opposer, Stokely-Van Camp, Inc. hereby moves for summary judgment sustaining its opposition to applicant’s application to register the mark GamerAid for “energy drinks, soft drinks, soda pops” on the grounds that it is likely to cause confusion with, and to dilute, opposer’s famous Gatorade mark.

In support of its Motion For Summary Judgment, opposer submits the Declaration Of Andrew Hartshorn, Senior Marketing Director, Gatorade.¹ Opposer also relies on its registrations which were made of record with the Notice Of Opposition, the application file for the application which is the subject of the opposition, and applicant’s admissions in his Answer to the Notice Of Opposition entitled “Opposition To The Notice Of Oposition.”

I. THE PLEADINGS

The Notice Of Opposition alleges that opposer has been engaged in the advertising, promotion and sale of beverage and food products for many years and has used the GATORADE mark in

¹ Hartshorn Declaration Exhibit 4 is a CD which is being filed separately since it cannot be filed through ESTTA. A copy of the Notice Of Filing Of Exhibit 4 To Declaration Of Andrew Hartshorn is attached hereto.

connection with beverage and food products, including sports drinks and soft drinks, since long prior to the filing date of the opposed application. Notice Of Opposition ¶¶ 1, 2. The Notice Of Opposition further alleges that opposer has extensively advertised and promoted its GATORADE mark and products since 1967, has spent hundreds of millions of dollars in advertising and promotion for products sold under its GATORADE mark, and has sold billions of dollars of products under its GATORADE mark. Notice ¶¶ 8, 9, 10. Applicant admits each of these allegations. Applicant's Answer titled "Notice Of Opposition To The Opposition" (hereafter "Answer") ¶¶ 1, 2, 8, 9, 10.

The Notice Of Opposition also alleges that opposer's GATORADE mark is a distinctive mark and has been since prior to the filing date of the opposed application. Notice of Opposition ¶ 7. The Notice of Opposition further alleges that as a result of opposer's extensive sales, advertising and promotional efforts, opposer's GATORADE mark is a famous mark and has been a famous mark since prior to the filing date of the opposed application and that the GATORADE mark represents an incredibly valuable asset with enormous good will. Notice Of Opposition ¶¶ 11, 12. The Answer admits each of these allegations as well. Answer ¶¶ 11, 12.

The Notice Of Opposition additionally alleges that opposer is the owner of numerous registrations for its GATORADE trademarks, including a number of incontestable registrations. Notice Of Opposition ¶¶ 3 - 6. Copies of opposer's registrations were made of record by the attachment of TSDR printouts as Exhibits A - V to the Notice of Opposition.

With respect to applicant, the Notice Of Opposition alleges that applicant filed an application to register the mark GamerAid for "energy drinks, soft drinks, soda pops," that applicant adopted the GamerAid mark with knowledge of opposer's GATORADE mark and products, and that applicant has made no use of the mark GamerAid. Notice Of Opposition ¶¶ 13 - 16. Applicant admits the filing of the application, that it was done with knowledge of the GATORADE mark, and that there

has been no use of the GamerAid mark for drinks. Answer ¶¶ 13 – 16.

The Notice Of Opposition alleges that applicant’s use of the mark GamerAid is likely to cause confusion with, and to dilute, opposer’s GATORADE mark. Notice Of Opposition ¶¶ 17, 18. In response, applicant states that likelihood of confusion can “go either way” and that applicant’s product is not for athletes (“GAMER AID – ‘It’s not for athletes’”). Answer ¶ 17. Applicant denies the allegation of dilution. Answer ¶¶ 17, 18.

II. FACTS

A. Opposer’s Use Of GATORADE

Opposer has produced and marketed beverages under its Gatorade mark since 1967.² Hartshorn Dec. ¶ 2. Opposer’s primary product sold under its Gatorade mark is a sports drink. Hartshorn Dec. ¶ 3. This is the product that was introduced under the Gatorade mark in 1967, although it was not until later that the term “sports drink” came into common usage. Hartshorn Dec. ¶ 3. The Gatorade product was scientifically formulated to keep athletes “in the game.” Hartshorn Dec. ¶ 3. It was formulated both to quench thirst and to replenish fluids and minerals lost during exercise. Hartshorn Dec. ¶ 3.

Since its introduction almost fifty years ago, Gatorade beverages have been the number one sports drink in the country. Hartshorn Dec. ¶ 4. As a result of extensive advertising, promotion, sales and publicity, Gatorade products have achieved great commercial success and Gatorade has been a famous mark throughout the United States for years. Hartshorn Dec. ¶¶ 5, 12, 25. As noted above, applicant’s answer admits that Gatorade has been a distinctive and famous mark since prior to the filing of the application opposed herein. Notice of Opposition ¶¶ 7, 11; Answer ¶¶ 7, 11.

² As shown in the Exhibits submitted herewith, opposer displays its Gatorade mark both with an initial cap and in all caps. See also Hartshorn Dec. ¶ 5.

Opposer expanded use of its Gatorade mark to other products. Hartshorn Dec. ¶ 6. GATORADE powder for making sports drinks was introduced in 1978. Hartshorn Dec. ¶ 6. Gatorade energy bars and nutrition shakes were introduced in 2001. Hartshorn Dec. ¶ 6. In 2010, opposer added a new line of products to provide fuel, fluid and nutrients before and after a game or other activity. Hartshorn Dec. ¶ 7. Opposer's GATORADE PRIME drink, for example, is identified as "pre-game fuel." Hartshorn Dec. ¶ 7. Its GATORADE RECOVER drink is identified as "Post-Game Protein." Hartshorn Dec. ¶ 7.

Opposer's Gatorade products are sold both to athletes and the general public. Hartshorn Dec. ¶ 8. Gatorade products often are consumed before, during or after participation in a game or other sporting event. Hartshorn Dec. ¶ 9. Opposer's Gatorade products also are consumed by those attending a game or sporting event, as well as during the game to quench thirst or when engaged in other activity. Hartshorn Dec. ¶ 9.

Opposer's Gatorade sports drinks are low-cost and are sold in individual-sized bottles or packages, as well as larger bottles or packages. Hartshorn Dec. ¶ 10. Gatorade sports drinks frequently are purchased for immediate consumption. Hartshorn Dec. ¶ 10. As a result, sales of products sold under opposer's Gatorade marks include impulse purchases. Hartshorn Dec. ¶ 10.

Opposer's Gatorade products are sold through a wide variety of channels of trade. Hartshorn Dec. ¶ 11. They are sold through grocery stores, drug stores, convenience stores, dollar stores, club stores and mass merchandisers. Hartshorn Dec. ¶ 11. Gatorade sports drinks also are sold at refreshment stands, at schools, through vending machines, and via the internet. Hartshorn Dec. ¶ 11. In addition, Gatorade sports drinks are sold at sporting goods stores, golf courses, and gyms. Hartshorn Dec. ¶ 11. They also are sold at football games, basketball games and hockey games. Hartshorn Dec. ¶ 11.

Opposer has extensively advertised and promoted its Gatorade drinks. Hartshorn Dec. ¶ 12; Notice of Opposition ¶¶ 8, 9; Answer ¶¶ 8, 9. Since at least as early as 1998, fifteen years prior to the filing of applicant's application, more than a hundred million dollars has been spent *each year* in advertising and promoting opposer's Gatorade products. Hartshorn Dec. ¶ 12.

Opposer's Gatorade products have been advertised in print, on radio and on TV, including prime time network TV and sports networks. Hartshorn Dec. ¶ 13. Advertising often appears during nationally televised sporting events, including college football games, major league baseball games, professional football games, and professional basketball games. Hartshorn Dec. ¶ 14. Opposer's Gatorade products have been promoted in the printed programs distributed at football, basketball, and baseball games and other sporting events. Hartshorn Dec. ¶ 15. Opposer's Gatorade products also are promoted over the Internet and through the use of in-store displays. Hartshorn Dec. ¶¶ 11, 19 .

Gatorade products have been promoted with slogans such as: "Gameday Hydration"; "Your Game. Your Fuel."; and, "Get The Gear. Own The Game." Hartshorn Dec. ¶ 16, Exh. 1. Use of advertising or promotion creating a connection between opposer's Gatorade products and games is not new; it goes back to the inception of the product. Hartshorn Dec. ¶ 17. Television commercials and other advertising for opposer's Gatorade products have referred to a game or used a backdrop of players involved in a game. Hartshorn Dec. ¶ 17. Often, the game shown involves high profile athletes such as Michael Jordan, Mia Hamm, or Derek Jeter. Hartshorn Dec. ¶ 17.

Opposer's advertisements or promotional material have stated, for example:

What puts Major League Baseball, NFL and NBA players back in the game?
(Hartshorn Dec. ¶ 18, Exh. 2)

You can tell a player by what he brings to the game Gatorade thirst quencher.
It's standard equipment.
(Hartshorn Dec. ¶18, Exh. 3)

Just as the games never end, so the legend continues.
(Hartshorn Dec. ¶ 18, Exh.4, ORIGINS1)

And today Gatorade is on every sideline, every down, every game.
(Hartshorn Dec. ¶ 18, Exh.4, ORIGINS2)

Every game needs a hero.
(Hartshorn Dec. ¶ 18, Exh. 5)

Just add water [to Gatorade powder] to hydrate with the most scientifically researched
and game-tested way to replace electrolytes lost in sweat.
(Hartshorn Dec. ¶ 19, Exh.6)

Opposer's Gatorade marks are given considerable exposure through the sideline presence of opposer's Gatorade mark at football, basketball and baseball games and other sporting events since long prior to applicant's filing date. Hartshorn Dec. ¶ 20. Opposer's Gatorade product is the official sports drink of the NFL, the NBA and Major League Baseball. Hartshorn Dec. ¶ 21. In 1987, the ritual dumping of Gatorade drink on a coach by his team to celebrate a game victory became a sideline staple that has continued until today. Hartshorn Dec. ¶ 21. Opposer's Gatorade mark appears on signage at ballparks, stadiums and arenas. Hartshorn Dec. ¶ 22. Opposer's sports drinks, as well as towels, coolers, and cups bearing the Gatorade mark, appear on the sidelines of major league football, basketball, baseball and hockey games and are shown being used by the players during the broadcast of such games. Hartshorn Dec. ¶ 22.

The presence of the Gatorade mark and products at games is so ubiquitous that the Gatorade mark and products have been incorporated into popular electronic games intended to simulate professional games. Hartshorn Dec. ¶ 23. They have been a part of the NBA 2K basketball video games since 2008. Hartshorn Dec. ¶ 23. They have had a presence in the Madden NFL American football video game series since 2011. Hartshorn Dec. ¶ 23. They were added to the NBA Live video games in 2014 and the NHL video game series in 2015. Hartshorn Dec. ¶ 23. GATORADE

appears within the games on signage and other ways representative of how the GATORADE mark is seen at actual NBA or NFL games. Hartshorn Dec. ¶ 23, Exhs. 7, 8.

Opposer's Gatorade mark also is prominently displayed on a variety of merchandising items. Hartshorn Dec. ¶ 24 The items on which the mark has been used and which are covered by opposer's Gatorade registrations include pens, playing cards, umbrellas, beverage coolers, glass and plastic beverage ware, paper cups, insulated glass holders, plastic beverage bottles, sweatbands, watches, tote bags, garment bags, duffle bags, luggage, briefcases, fanny packs, towels, jackets, pullovers, shorts, shirts, sweaters, hats, visors, sweatpants, sweatshirts, sweatshorts, sweatsuits, sweatbands, t-shirts, golf bags, golf balls, and head covers for golf clubs, beach balls, baseballs, soccer balls, basketballs and hockey pucks. Reg. Nos. 1,229,701, 1,605,457, 3,181,037, and 3,881,115. Consumer use of merchandising items with the Gatorade mark leads to further exposure of the Gatorade mark. Hartshorn Dec. ¶ 24.

As indicated above, opposer's Gatorade sports drink has been the leading product of its type in the United States for decades and has enjoyed very substantial sales. Hartshorn Dec. ¶ 25; Notice of Opposition ¶ 10; Answer ¶ 10. Billions of dollars worth of Gatorade drinks had been sold in the United States prior to the filing of applicant's application. Hartshorn Dec. ¶ 25; Notice of Opposition ¶ 10; Answer ¶ 10. As early as in the 1990's, long before the filing of applicant's application, the sales of Gatorade products exceeded a billion dollars (\$1,000,000,000.00) *each year*. Hartshorn Dec. ¶ 25. Since 2002, more than ten years before the filing of the opposed application, sales have exceeded two billion dollars (\$2,000,000,000.00) worth of Gatorade products *each year*. Hartshorn Dec. ¶ 25. For years, the GATORADE mark has been a famous mark. Hartshorn Dec. ¶ 5.

B. Applicant's Admissions Regarding Opposer's Mark

Applicant admits the long and extensive use of the GATORADE mark. Answer ¶¶ 1, 2, 8 -

10. Applicant further admits that GATORADE was both a distinctive and a famous mark prior to the filing of the GamerAid application. Answer ¶¶ 7, 11.

C. Opposer's GATORADE Registrations

Opposer owns, *inter alia*, the following registrations:

Trademark	Reg. No.	Date	Goods
GATORADE	848,245	4/30/1968	Fruit flavored soft drink and powder for making the same
GATORADE	1,229,701	3/08/1983	Pens, decalcomanias, playing cards Beverage coolers, glass beverage ware, paper cups, insulated glass holders, plastic beverage bottles Sport shirts, hats, sweatbands
	1,410,822	9/23/1986	Thirst quenching soft drink and powder for making the same
GATORADE	1,605,457	7/10/1990	Watches Tote bags, garment bags, duffle bags and luggage Portable beverage dispensers and ice chests Towels Jackets, pullovers, shorts, shirts, sweaters, visors, sweatpants, sweatshirts, sweatshorts, sweatsuits and t-shirts Golf bags, golf balls and head covers for golf clubs
THE SCIENCE OF GATORADE	1,663,400	11/05/1991	Leaflets, pamphlets and brochures relating to topics in exercise, nutrition and sports medicine Educational services; namely, conducting classes and seminars in the fields of exercise, nutrition, and sports medicine
GATORADE CIRCLE OF CHAMPIONS	1,692,032	6/09/1992	Organizing and conducting award presentations recognizing outstanding achievements in athletics

GATORADE	1,905,547	7/18/1995	Electric coolers in the nature of refrigeration units for commercial use
GATORADE	2,444,436	4/17/2001	Grain-based food bars
	2,856,121	6/22/2004	Non-alcoholic, non-carbonated sports drinks
	3,181,037	12/05/2006	Umbrellas, tote bags, garment bags for travel, duffel bags, luggage, briefcases, and fanny packs Portable beverage dispensers, portable ice chests for food and beverages, portable beverage coolers, glass and plastic beverage ware, paper cups, insulating sleeve holders made of glass for holding beverage cans and plastic beverage bottles sold empty Sport shirts, hats, sweatbands, jackets, pullovers, shorts, shirts, sweaters, sweatpants, sweatshirts, sweatshorts, sweatsuits, t-shirts, and visors Beach balls, golf bags, golf balls, head covers for golf clubs; and other sports apparatus, namely baseballs, soccer balls, basketballs and hockey pucks
	3,454,836	6/24/2008	Educational services, namely, classes, seminars, conferences and workshops in the field of exercise, science and sports medicine
	3,659,283	7/21/2009	Non-alcoholic, non-carbonated fruit flavored beverages
	3,677,719	9/01/2008	Non-alcoholic, non-carbonated fruit flavored beverages
GATORADE	3,681,221	9/08/2009	Non-alcoholic, vitamin and/or nutritionally fortified fruit-flavored beverages

GATORADE PERFORM	3,831,889	8/10/2010	Non-alcoholic, non-carbonated fruit flavored beverages
GATORADE PRIME	3,838,892	8/24/2010	Fruit flavored beverages, namely, non-alcoholic fruit flavored beverages containing vitamins and/or nutrients and/or protein
GATORADE RECOVER	3,874,932	11/09/2010	Non-alcoholic, fruit-flavored beverages containing proteins
GATORADE the int	3,881,115	11/23/2010	Portable beverage dispensers and ice chests for food and beverages; paper cups and plastic beverage bottles sold empty
GATORADE REPLAY	4,075,184	12/20/2011	Entertainment, namely, continuing shows broadcast over television and the internet that chronicle the journeys of former athletes who are training for and competing in sports competitions
	4,077,266	12/27/2011	Non-alcoholic, non-carbonated fruit flavored beverages
GATORADE PRIME	4,428,963	11/05/2013	Snack food chews made primarily from corn syrup, enhanced with vitamins, for consumption before and during athletic activities
GATORADE RECOVER	4,557,300	6/24/2014	Soy-based food bars; whey-based food bars

Each of the aforesaid registrations is valid and subsisting and owned by opposer. Notice of Opposition ¶¶ 3 - 6, Exhibits A - V; Answer ¶¶ 3 - 6. Registration Nos. 848,245, 1,410,822, 1,605,457, 1,905,547, 2,444,436, 2,856,121, and 3,181,037 have become incontestable in accordance with 15 U.S.C. 1065 and 1115(b). Notice of Opposition ¶¶ 3 - 5, Exhibits A, B, C, D, L, P, Q; Answer ¶¶ 3 - 5.

D. Applicant's GamerAid Mark

Applicant's application to register GamerAid for "energy drinks, soft drinks, soda pops" was

filed on September 27, 2013 based on an intent to use. SN 86076424. Applicant admits that he was aware of opposer's GATORADE mark and products when he adopted the GamerAid mark. Answer ¶ 14 - 16. As of the time applicant answered, applicant had made no use of GamerAid for beverage products. Answer ¶ 14 - 16.

III. ARGUMENT

Opposer moves for summary judgment sustaining its opposition on the grounds that there is no genuine issue of material fact that applicant's use of GamerAid for legally identical goods is likely to cause confusion with, and to dilute the distinctiveness of, opposer's famous GATORADE mark.

A. Summary Judgment Standard

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56 Fed.R.Civ.P.; Rule 2.116(a) T.R.P.; *Callaway Vineyard & Winery v. Endsley Capital Group Inc.*, 63 USPQ2d 1919, 1921 (TTAB 2002). Here, as discussed below, there is no genuine issue of material fact that opposer has standing, that opposer has priority, or that applicant's mark is likely to cause confusion with opposer's GATORADE mark. There also is no genuine issue that opposer's mark is a famous and distinctive mark and has been since prior to the filing of the opposed application or that applicant's mark is likely to dilute opposer's GATORADE mark. Summary judgment should be granted.

B. Standing

Opposer's standing is established by its registration and use of Gatorade and its well-pleaded allegations that use of applicant's GamerAid mark is likely to cause confusion with, and to dilute the distinctive quality of, opposer's Gatorade trademarks. *Jewelers Vigilance Committee Inc. v. Ullenberg Corp.*, 2 USPQ2d 2021, 2023-24 (Fed. Cir. 1987).

C. Priority

Opposer's priority is established by its ownership of Gatorade registrations, which long predate the filing of the application opposed herein. 15 USC 1052(d); *NASDAQ Stock Market Inc. v. Antarctica S.r.L.*, 69 USPQ 2d 1718, 1726 (TTAB 2003). The absence of a genuine issue of material fact as to opposer's priority is further shown by applicant's admissions that opposer's use and registration of Gatorade predates the filing of applicant's application, that applicant was aware of opposer's Gatorade mark and products prior to filing his application, and that Gatorade was a distinctive and famous mark prior to the filing of his application. Answer ¶¶ 2 - 12, 16.

D. Likelihood Of Confusion

Looking to the likelihood of confusion factors, there is no genuine issue of material fact that applicant's GamerAid mark is likely to cause confusion with opposer's Gatorade mark. It is undisputed that opposer's Gatorade mark is a famous mark and therefore entitled to a broad scope of protection. Applicant's use of a similar mark for legally identical goods sold through the same channels of trade to the same customers necessarily would cause confusion.

1. GATORADE Is a Famous Trademark Entitled To A Broad Scope Of Protection

As an inherently distinctive mark, Gatorade was entitled to protection upon its first use. Hundreds of millions of dollars of advertising and promotion, billions of dollars of sales, and widespread exposure have served to increase the distinctiveness and establish the fame of the Gatorade mark. Opposer's Gatorade sports drink is the leading sports drink and the Gatorade mark has been famous throughout the United States for years. Applicant admits that Gatorade was a distinctive and famous mark prior to the filing of the opposed application. Answer ¶¶ 7, 11. There is no issue that Gatorade is a well-known and famous mark. It accordingly is entitled to a broad scope

of protection. *Recot Inc. v. M.C. Becton*, 54 USPQ2d 1894, 1897-98 (Fed.Cir. 2000); *Kenner Parker Toys Inc. v. Rose Art Industries Inc.*, 22 USPQ2d 1453, 1456-57.

Once fame is established, it is the dominant factor and weighs heavily in favor of finding likelihood of confusion. *Recot Inc.*, 54 USPQ2d at 1897. As stated by the Court of Appeals for the Federal Circuit, “the Lanham Act’s tolerance for similarity between competing marks varies inversely with the fame of the prior mark.” *Kenner*, 22 USPQ2d at 1456. *See also, Nina Ricci S.A.R.L. v. E.T.F. Enterprises Inc.* 12 USPQ2d 1901, 1904 (Fed. Cir. 1989) (There is “no excuse for even approaching the well-known trademark of a competitor”); *Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd.*, 227 USPQ 541, 542 (Fed. Cir. 1985).

2. The Parties’ Goods Are Legally Identical

The parties’ products are closely related and are legally identical in part. The products sold under opposer’s Gatorade mark include sports drinks, powders for making same, and soft drinks. Applicant seeks to register GamerAid for “energy drinks, soft drinks, soda pops.” This identity of goods weighs in favor of a finding of likelihood of confusion. It is well established that less similarity in the marks is required to establish a likelihood of confusion where applicant’s proposed products include ones legally identical to those offered by opposer. *Century 21 Real Estate Corp. v. Century Life Of America*, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *ECI Division of E-Systems, Inc. v. Environmental Communications Inc.*, 207 USPQ 443, 449 (TTAB 1980).

3. The Channels Of Trade Are The Same

Opposer’s products are sold through a wide variety of channels of trade. Given the absence of any restriction in applicant’s application, applicant’s goods must be assumed to travel in the channels of trade normal for those goods. *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). This similarity in

channels of trade weighs in favor of a finding of likelihood of confusion and reduces the degree of similarity of marks required. *ECI Division of E-Systems, Inc.*, 207 USPQ at 449.

4. The Parties' Customers Are The Same

The customers for the parties' products are the same. As discussed above, Gatorade products are sold to the general public. The lack of any restriction in applicant's application requires an assumption that applicant's goods would be sold to all classes of prospective purchasers for the goods in question. *In re Linkvest S.A.*, 24 USPQ2d at 1716. This overlap in customers also weighs in favor of a finding of likelihood of confusion. *Century 21 Real Estate Corp.*, 23 USPQ2d at 1700, *ECI Division of E-Systems, Inc.*, 207 USPQ at 449.

5. The Parties Products Are Relatively Inexpensive

Both parties' goods include low-cost items of a type that may be purchased on impulse. This weighs in favor of a finding of likelihood of confusion. Purchasers of relatively inexpensive products are held to a lesser standard of care. *Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd.*, 227 USPQ 541, 542 (CCPA 1985).

6. The Marks Are Confusingly Similar

Applicant's GamerAid mark is highly similar to opposer's Gatorade mark. The marks are virtually identical in sight and sound. The marks rhyme and have identical cadence. The pronunciation of applicant's mark is identical to the pronunciation of opposer's mark other than one consonant in the middle of the mark. Both marks begin with the sound "Gay" and end with the sound "ade." The use of a different middle letter does not remove their overall similarity. The marks are confusingly similar. *See, e.g., Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910, 1913 (TTAB 2000) (YO-YO'S and HOHOs found confusingly similar); *Krim-Ko Corp. v. Coca-Cola Co.*, 156 USPQ 523, 526 (CCPA 1968) (VEEP and BEEP found confusingly similar;

sound of marks of particular importance for products like soft drinks which may be purchased by the spoken word).

Applicant's GamerAid mark also evokes opposer's Gatorade mark. Opposer's Gatorade product is the official drink of the sponsors of major league games. The consumers of opposer's Gatorade products include persons preparing for, engaged in or watching games. Opposer's Gatorade mark is heavily promoted at games through its sideline presence. The connection between Gatorade and games is reinforced in opposer's advertising and promotional materials.

7. Confusion Is Likely

A consideration of the likelihood of confusion factors establishes that there is no genuine issue that confusion is likely. Applicant has applied to register a mark similar to opposer's famous Gatorade mark for legally identical goods to be sold to the same customers through the same channels of trade. In addition, the goods are low-cost goods which may be purchased on impulse. There is no genuine issue of material fact that there is a likelihood of confusion.

Opposer should be granted summary judgment on its 2(d) claim.

E. Dilution

There also is no genuine issue of material fact that applicant's mark is likely to dilute the distinctive quality of opposer's mark. 15 USC 1125(c)(1). The factors relevant to establishing dilution are met here.

Applicant admits that opposer's Gatorade mark was a distinctive and famous mark before applicant filed his intent-to-use application. Answer ¶¶ 5, 6. As discussed, above, applicant's GamerAid mark is highly similar to opposer's mark and is identical in pronunciation but for one internal letter. Opposer's Gatorade mark enjoys great renown. Under these circumstances, consumers are likely to associate applicant's mark with opposer's Gatorade mark. As a result, the

distinctive quality of opposer's mark is likely to be diluted if applicant were to use his proposed mark. Summary judgment should be granted on the grounds of dilution. *NASDAQ Stock Market Inc. v. Antartica S.r.L.*, 69 USPQ2d 1718, 1737 (TTAB 2003).

V. CONCLUSION

For the foregoing reasons, opposer requests that its opposition to applicant's GamerAid application be sustained.

Respectfully submitted,

SMART & BOSTJANCICH

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Attorneys for Opposer

CERTIFICATE OF SERVICE

I, Patricia S. Smart, an attorney for opposer, hereby certify that a copy of the foregoing Opposer's Motion For Summary Judgment And Memorandum In Support is being served upon Jeff Pearson, 508 Saint Camille St., Lafayette, Louisiana 70506-4321, this 3rd day of August 2015, by first class mail, postage prepaid.

By: / P S Smart /

ATTACHMENT

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

STOKELY-VAN CAMP, INC.,)
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 Opposer,)
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 v.) Opposition No. 91217482
)
JEFF PEARSON,)
)
 Applicant.)

**NOTICE OF FILING OF EXHIBIT 4 TO
DECLARATION OF ANDREW HARTSHORN**

Opposer, Stokely-Van Camp, Inc., hereby gives notice in connection with Opposer’s Motion For Summary Judgment and the Declaration Of Andrew Hartshorn being filed in support of opposer’s motion, that the attached CD which is Exhibit 4 to the Hartshorn Declaration is being filed herewith.

Respectfully submitted,

SMART & BOSTJANCICH
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CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as Priority Mail Express (EK 942648325 US) in an envelope addressed to United States Patent and Trademark Office, Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, VA 22313-1451 on August 3, 2015.

Patricia S. Smart

Stokely-Van Camp, Inc.

v.
Jeff Pearson

Oppn. No. 91217482

Hartshorn Decl.

Exhibit 4

CERTIFICATE OF SERVICE

I, Patricia S. Smart, an attorney for opposer, hereby certify that a copy of the foregoing Notice Of Filing Of Exhibit 4 To Declaration Of Andrew Hartshorn is being served upon Jeff Pearson, 508 Saint Camille St., Lafayette, Louisiana 70506-4321, this 3rd day of August 2015, by first class mail, postage prepaid.

Patricia S. Smart
