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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

BUO

Mailed: August 17, 2016

Opposition No. 91222878

*Wonderful Citrus LLC f/k/a Paramount  
Citrus LLC*

*v.*

*Quality Fresh Farms, Inc.*

Before Kuczma, Gorowitz, and Goodman,  
Administrative Trademark Judges.

By the Board:

Quality Fresh Farms, Inc. (“Applicant”) seeks registration of the following mark:

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The mark is for use in connection with “[f]resh fruit and vegetables,” in International Class 31; and “[w]arehousing services, namely, storage, distribution, pick-up,

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<sup>1</sup> Application Serial No. 86375060, filed August 22, 2014, alleging Applicant’s use of the mark in commerce under Trademark Act Section 1(a), 15 U.S.C. § 1051(a). The application alleges September 12, 2012, as the date of first use of the mark anywhere, and September 17, 2012, as the date of its first use in commerce.

packing, and shipping of fresh fruit and vegetables,” in International Class 39. Wonderful Citrus LLC f/k/a Paramount Citrus LLC (“Opposer”) alleges prior use and ownership of the mark:



The mark is the subject of Registration No. 3934863 for “[f]resh citrus fruits,” in International Class 31.<sup>2</sup> 1 TTABVUE 4, ¶ 2.<sup>3</sup> Opposer is challenging registration on the ground that registration of Applicant’s mark would be likely to cause confusion with Opposer’s registered mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). 1 TTABVUE 5, ¶ 8. In its answer, Applicant denied most of the salient allegations in the notice of opposition; however, Applicant admitted that “the U.S. Patent and Trademark Office’s Trademark Electronic Search System indicates that Paramount Citrus LLC is the owner of registration number 3934863.” 4 TTABVUE 2, ¶ 2. Applicant also asserted four affirmative defenses.

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<sup>2</sup> Issued March 22, 2011, from an application filed November 10, 2008. The registration includes a disclaimer of the term CITRUS.

<sup>3</sup> Citations to the record will be to TTABVUE, the docket history system for the Trademark Trial and Appeal Board. Because the Board primarily uses TTABVUE in reviewing evidence, the Board prefers that citations to material or testimony in the record that has not been designated confidential include the TTABVUE docket entry number and the TTABVUE page number. For material or testimony that has been designated confidential and which cannot be viewed on TTABVUE, the TTABVUE docket entry number where such material or testimony is located should be included in any citation. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

This case is now before the Board for consideration of Applicant's motion, filed April 4, 2016, for summary judgment on Opposer's likelihood of confusion claim, which Opposer contests. In conjunction with its opposition of the motion, Opposer seeks relief under Rule 56(d) for discovery necessary to respond to the motion for summary judgment. However, inasmuch as Opposer filed a response to the motion for summary judgment on the merits, Opposer will not be heard to complain of an inability to effectively respond to the motion without first taking discovery, since a response has already been filed. Therefore, the request for Rule 56(d) discovery is deemed **MOOT**. See *Ron Cauldwell Jewelry, Inc. v. Clothestime Clothes, Inc.*, 63 USPQ2d 2009, 2012 n.8 (TTAB 2002) (Rule 56(f) motion denied where opposer filed a response to the motion for summary judgment on the merits).

***Motion for Summary Judgment***

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to material facts, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(a). In deciding motions for summary judgment, the Board must follow the well-established principles that, in considering the propriety of summary judgment, all evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. The Board may not resolve disputes of material fact; it may only ascertain whether such disputes are present. See *Lloyd's Food Prods. Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA Inc. v. Great Am. Music Show*

*Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

The burden on the non-movant to respond arises only if the summary judgment motion is properly supported. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160-161 (1970). If the evidence produced in support of the summary judgment motion does not meet the moving party's burden, "summary judgment must be denied even if no opposing evidentiary matter is presented." *Id.* (quoting Fed. R. Civ. P. 56 advisory committee notes to the 1963 amendments).

- *Section 2(d) Likelihood of Confusion*

In a likelihood of confusion analysis, two key factors are the degree of similarity of the parties' marks and the degree to which their respective goods or services are related. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). The U.S. Court of Customs and Patent Appeals, in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), set forth thirteen factors relevant to a determination of likelihood of confusion. These factors include the similarity or dissimilarity of established, likely-to-continue trade channels, sophisticated purchasing, fame of the prior mark, and the nature and extent of any actual confusion. *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. Nonetheless, not all of the factors are necessarily relevant and only those relevant factors for which there is evidence in the record must be considered. *Id.* at 567-68; see also *In re Mighty Leaf Tea*, 601 F.3d 1342, 1346, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) ("Not all of the *DuPont* factors are relevant to every case, and only

factors of significance to the particular mark need be considered.”); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1845 (Fed. Cir. 2000).

As previously stated, Applicant admitted in its answer that Opposer is the owner of Registration No. 3934863. Additionally, Applicant concedes in its brief on the instant motion that Opposer’s mark “is a valid trademark and has priority.”<sup>4</sup> 5 TTABVUE 6. Thus, the only remaining “dispute pertains to whether the marks identified in Applicant’s application and Opposer’s registration are confusingly similar and, more specifically, whether Applicant’s use of the Quality Fresh Mark [*i.e.*, the design mark in application Serial No. 86375060] on its goods and services is likely to cause confusion ...” *Id.* Applicant also includes in its statement of undisputed facts the conclusory statement that, based upon discovery responses served by Opposer, “[n]either Applicant nor Opposer knows of any instances of actual consumer confusion caused by the use in commerce of Applicant’s Quality Fresh Mark.” 5 TTABVUE 5 (citing RFA No. 19 at 5 TTABVUE 63).

Nonetheless, Applicant argues that despite the stipulated facts, there remains no likelihood of confusion because the parties’ respective marks are not confusingly similar. Specifically, Applicant argues, “the only thing in common between the two marks is that they each contain two leaves and some parts of both marks have circular arcs. The individual aspects and visual distinctions between the marks create

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<sup>4</sup> In addition to Applicant’s concession, for purposes of the motion for summary judgment, priority and standing are established by Applicant’s submission of a status and title copy of Opposer’s pleaded registration. *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

unquestionably different connotations and commercial impressions, thereby precluding any likelihood of confusion among consumers.” 5 TTABVUE 10.

In support of its argument, Applicant introduced the declarations of Gurdeep S. Billan, the President and CEO of Applicant, and Sherrie M. Flynn, Applicant’s counsel, which included the following exhibits:

- (i) a printout of Opposer’s pleaded registration from the USPTO’s Trademark Status and Document Retrieval database (“TSDR”);<sup>5</sup>
- (ii) a copy of an Office Action issued during the examination of the underlying application that matured into Opposer’s ’305 registration, raising a refusal based upon a likelihood of confusion with a third-party registration;<sup>6</sup>
- (iii) a copy of Opposer’s response to the above-referenced Office Action describing the dissimilarities between its mark and the cited third-party mark;<sup>7</sup>
- (iv) a copy of Applicant’s Requests for Admissions propounded on Opposer;<sup>8</sup>
- (v) a copy of Opposer’s responses to Applicant’s Requests for Admissions;<sup>9</sup>

Applicant also included a “Request for Judicial Notice in Support of Motion for Summary Judgment.” By this submission, Applicant requests that the Board take judicial notice of: (i) its subject application Serial No. 86375060, (ii) the notice of

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<sup>5</sup> 5 TTABVUE 24-28.

<sup>6</sup> 5 TTABVUE 30-35.

<sup>7</sup> *Id.* at 37-45.

<sup>8</sup> *Id.* at 47-53.

<sup>9</sup> *Id.* at 55-67.

opposition filed by Opposer in this proceeding, and (iii) Applicant's answer.<sup>10</sup> 5  
TTABVUE 68.

Opposer argues in response that "the Board employs an 'eye ball test' that considers the 'overall impression created by the mark as a whole rather than simply comparing individual features of the mark," and therefore, the test applied by Applicant "is not the proper test for similarity between two design marks." 8  
TTABVUE 2. Opposer asserts that, "consumers don't view the USPTO records and the descriptions of trademarks therein when they encounter them in the marketplace," thus, Applicant's argument regarding the dissimilarities in the mark descriptions in the subject application and Opposer's pleaded registration are of no moment. *Id.* at 4. Opposer goes on to state that evidence of actual confusion is not required for a finding of likelihood of confusion, and that in any event, "the overall design of the marks at issue are similar." *Id.* at 4 and 8-9. Opposer also concludes that the remaining *DuPont* factors favor a finding of likelihood of confusion. *Id.* at 9.

Applicant's arguments for summary judgment appear to be based squarely upon the premise that despite any relatedness of the goods and services, similar marketing channels and target audience, and the presumably impulse nature of the consumer's purchase of the products and services, there is no likelihood of confusion because the

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<sup>10</sup> The Board need not take judicial notice of these documents as they automatically form part of the record of this proceeding. *See* Trademark Rule 2.122(b)(1) (The file of an application or registration that is the subject of a Board *inter partes* proceeding "forms part of the record of the proceeding without any action by the parties, and reference may be made to the file by any party for any relevant and competent purpose.") The Board discourages filing a copy of the subject application or subject registration because it is of record. *See Venture Out Properties LLC v. Wynn Resorts Holdings LLC*, 81 USPQ2d 1887, 1889 n.8 (TTAB 2007).

parties' marks are sufficiently dissimilar. *See, e.g., Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011) (despite the fame of opposer's marks and virtual identity of services, the Court upheld Board's finding of no likelihood of confusion based in large part upon the dissimilarity of the parties' marks); *Innovation Ventures, LLC v. N.V.E., Inc.*, 747 F. Supp. 2d 853 (E.D. Mich. 2010) (despite the court's finding that the products were related, sold in similar trade channels, and that consumers "impulse buy" the products, the dissimilarity between the marks weighed in favor of finding of no likelihood of confusion).

It should be noted, even where the goods of the parties are closely related or identical, likelihood of confusion may not be found if the subject marks are not sufficiently similar. *See Marcal Paper Mills, Inc. v. Am. Can Co.*, 212 USPQ 852, 863 (TTAB 1981). Applicant expended a great deal of its brief picking apart the involved marks in a side-by-side, element-to-element analysis. At one point, Applicant provides a five-point listing of distinctions, including: "[Applicant's mark is not precisely a circular arc," "[t]he large leaf in [Opposer's] Mark extends upward to the left ... whereas the large leaf in [Applicant's] Mark extends upward to the right," "[t]he base of the small leaf in [Opposer's] Mark is offset ... whereas the base of the small leaf in [Applicant's] Mark is approximately centered," and "[t]he leaves in [Opposer's] Mark extend outward in opposite directions, whereas the leaves in [Applicant's] Mark extend in roughly the same direction." 5 TTABVUE 9-10.

Although confusion can be found between two marks consisting of disparate elements, this depends on a finding that in spite of the elemental dissimilarities the

overall marks nonetheless convey the same meaning or create substantially similar commercial impressions. *See Bank of Am. Nat'l Trust and Sav. Assoc. v. The Am. Nat'l Bank of St. Joseph*, 201 USPQ 842, 845 (TTAB 1978), and cases cited therein. Further, the determination of the similarity of marks is particularly fact intensive and relative rather than absolute; therefore, it is a determination not particularly well-suited for disposition on summary judgment.

Moreover, while absence of actual confusion may be a factor to consider, it is certainly not dispositive of a proceeding such as this. In fact, while there may be no evidence of actual confusion in the record, it is not necessary to show actual confusion in order to establish likelihood of confusion. *See Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651 (TTAB 2014) (citing *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1571, 218 USPQ 390, 396 (Fed. Cir. 1983)). An absence of any instances of actual confusion may be a meaningful component in a likelihood of confusion analysis only if "the record indicates appreciable and continuous use by applicant of its mark for a significant period of time in the same markets as those served by opposer under its marks." *See Citigroup Inc. v. Capital City Bank Group Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff'd*, 98 USPQ2d 1253 (Fed. Cir. 2011). Applicant failed to proffer sufficient evidence of actual marketplace interface between the marks over such a period of time that would lead to a reasonable opportunity for actual confusion. *See Cunningham*, 55 USPQ2d at 1847; *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1201, 1202 (TTAB 2007).

Despite Applicant's proffered evidence, and its concessions, the Board cannot conclude that the parties' marks are so dissimilar so as to deny the opposition based upon no likelihood of confusion. At a minimum, there are genuine disputes as to the connotation of the parties' respective marks, the strength of Opposer's mark, and the extent to which evidence of an absence of actual confusion may indicate a lack of likelihood of confusion.<sup>11</sup> Based upon the evidence made of record, and drawing any inferences, as we must, in a light favorable to Opposer, we conclude that Applicant has failed to discharge its burden of showing that there are no genuine disputes of material fact, and that it is entitled to judgment on the issue of likelihood of confusion.

In light of the foregoing Applicant's motion for summary judgment is **DENIED**.<sup>12</sup>

#### ***Accelerated Case Resolution***

In light of this motion for summary judgment and the relatively straight-forward issues that remain to be resolved, the Board strongly encourages the parties to stipulate to resolution of this proceeding by means of the Board's Accelerated Case Resolution ("ACR") procedure. They may do so through the current record and/or supplemental summary judgment-type briefs accompanied by additional evidence. See e.g., *Freeman v. Nat'l Ass'n of Realtors*, 64 USPQ2d 1700 (TTAB 2002) (parties

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<sup>11</sup> The fact that we have identified only certain genuine disputes as to material facts should not be construed as a finding that these are necessarily the only disputes that remain for trial.

<sup>12</sup> The parties should note that the evidence submitted in connection with the motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); *Pet Inc. v. Bassetti*, 219 USPQ 911 (TTAB 1983); *American Meat Institute v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).

agreed that evidence and arguments submitted with petitioner's motion for summary judgment and respondent's response could be treated as the final record and briefs). *See also* TBMP § 528.05(a)(2) (2016) and authorities cited therein. Finally, the parties will need to stipulate that the Board may resolve any genuine disputes of material fact the Board may find to exist. The burden of proof will be a preponderance of the evidence as it would be for a normal final decision. *See* TBMP § 702.04 for more information.

The parties are therefore encouraged to jointly contact the assigned Board Interlocutory Attorney responsible for this proceeding by telephone to discuss the possibility of ACR, any necessary stipulations and an agreed-upon schedule for proceeding under ACR.

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

### ***Schedule***

The proceeding is **RESUMED**. The remaining disclosure and trial dates are reset as follows:

Plaintiff's Pretrial Disclosures	<b>8/31/2016</b>
Plaintiff's 30-day Trial Period Ends	<b>10/15/2016</b>
Defendant's Pretrial Disclosures	<b>10/30/2016</b>
Defendant's 30-day Trial Period Ends	<b>12/14/2016</b>
Plaintiff's Rebuttal Disclosures	<b>12/29/2016</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>1/28/2017</b>

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

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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.