

ESTTA Tracking number: **ESTTA726164**

Filing date: **02/10/2016**

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

Proceeding	91223512
Party	Defendant Atmos Nation LLC
Correspondence Address	DIVYA KHULLAR USAPATENTS.COM/ KHULLAR PA 4786 W COMMERCIAL BLVD TAMARAC, FL 33319-2878 UNITED STATES dkhullar@usapatents.com;notices@khullar, notices@khullarlaw.com, assistant@usapatents.com
Submission	Motion for Summary Judgment
Filer's Name	Divya Khullar, Esq.
Filer's e-mail	notices@khullarlaw.com, assistant@usapatents.com, dkhullar@usapatents.com
Signature	s/Divya Khullar/
Date	02/10/2016
Attachments	Applicant's Motion for Summary Judgment with date.pdf(643695 bytes)

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

Opposition No. 91223512
In re Serial No. 86/459,048
Mark: AIRWALK
Published: April 28, 2015

ABG COLLECTIVE LLC,)

 Opposer,)

v.)

ATMOS NATION LLC,)

 Applicant.)

**APPLICANT’S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF
LAW IN SUPPORT THEREOF**

U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

Pursuant to Federal Rules of Civil Procedure 56, Applicant Atmos Nation, LLC, by counsel, hereby move this Court to grant them judgment as a matter of law as to all of Opposer’s claims. For the reasons provided in the supporting Memorandum, Applicant contends that there is no genuine disputed issue as to any material fact and that they are entitled to judgment as a matter of law on their claim. Consequently, Applicant respectfully prays that this Court grant summary judgment in their favor and allow that the ATMOS application for AIRWALK, Serial No. 86/459,048 be considered for allowance for grant.

INTRODUCTION

Applicant, Atmos Nation, LLC (“Applicant”), a Nevada Limited Liability Company, brings this motion for summary judgment against Opposer, ABG Collective, LLC, (“Opposer”) on all its claims, in pursuit of consideration of grant for the application of the trademark “AIRWALK.” Since inception, Applicant has been in the business of designing, selling, and marketing portable vaporizers and their accessories throughout the United States and the World under the brand name ATMOS RX®. Since 1989, Opposer has been in the business of selling footwear, apparel, and sporting goods.

FACTUAL BACKGROUND

On November 19, 2014, Applicant filed application no. 86/459,048 (the “Application”) with the purpose of adding “AIRWALK” to its large inventory of existing trademarks. The application was filed based on an intent to use in the United States under Class 34 which includes “electronic cigarettes, electronic cigars, electronic hookahs, electronic smoking pipes, mechanical electronic cigarettes, and smokeless cigarette vaporizer pipes.” Applicant currently has over forty registered trademarks in the United States. Some of these trademarks have been extended to other prominent economies around the world. Aside from trademarks, Applicant also has a large portfolio of patents and copyrights. Applicant has fought, and has succeeded, in litigating for its intellectual property rights in the past. *see Atmos Nation, LLC et al, v. Pana Depot et al; Atmos Nation, LLC et al v. Winston Trading Corp et al.*

Opposer, in its Notice of Opposition (the “NOO”) filed with the USPTO on August 26, 2015, provided Applicant with a list of dates, goods, and classes, that pertain to Opposer’s use of the AIRWALK trademark. Opposer has obtained registrations of the AIRWALK trademark in

the following classes: 9, 12, 14, 16, 18, 25, 28, 35, 36, 41. Opposer has never acquired, nor even applied for, a trademark in Class 34. Specifically, in paragraph 8 of the NOO, Opposer states “Opposer has used and is using the AIRWALK mark in interstate commerce in connection with the goods and services described in the Opposer’s Registrations.” None of the goods and services described in Opposer’s registrations are related to the goods and services Applicant produces. None of the goods and services described in Opposer’s registrations bare any resemblance to those of Applicant. Consequently, the consumer base for both Applicant and Opposer are inherently different.

STANDARD OF REVIEW

Summary Judgment is proper where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp v. Catrett*, 477 U.S. 317, 322-23 (1986). The materiality of a fact is determined by referring to applicable substantive law. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

“[T]he moving party bears the burden of showing that he or she is entitled to summary judgment.” *United Transp. Union v. Nat’l R.R. Passenger Corp.*, 588 F.3d 805, 809 (2d Cir. 2009). Once the moving party has satisfied the burden, in order to defeat the motion, “the party opposing summary judgment . . . must set forth ‘specific facts’ demonstrating that there is ‘a genuine issue for trial.’” *Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009) (quoting Fed. R. Civ. P. 56(e)). *see also Anderson*, 477 U.S. at 252 (stating that a non-moving party must point to more than a mere “scintilla” of evidence in order to defeat a motion for summary judgment).

LEGAL FRAMEWORK

The Lanham Act and protectable trademarks

“In order to qualify for Lanham Act protection (15 U.S.C. § 1051 et seq.), a mark must either be suggestive, arbitrary, or fanciful, or must be descriptive with a demonstration of secondary meaning [while] generic marks receive no protection; indeed, they are not "trademarks" at all.” *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 205 (3d Cir. 2000). The use of generic terms does not identify and distinguish the product of only one seller. *Gaylord Entm't Co. v. Gilmore Entm't Grp.*, 187 F. Supp. 2d 926, 930 (M.D. Tenn. 2001). Generic names are regarded by the laws of the United States as “free for all to use”. . . generic words are in the public domain. *Id.*

If a mark is in widespread use, it is not famous for the goods and services of a business. *Times Mirror Magazines Inc. v. Las Vegas Sports News*, 212 F.3d 157 (3d Cir. 2000); *see also Sports Authority v. Abercrombie & Fitch, Inc.*, 965 F. Supp. 925, 941 (E.D. Mich. 1997)(third-party use of “authority”, whether or not in the relevant market, diminishes any distinctive or famous aspects of mark rendering it ‘not so famous as to deserve protection under the FTDA); *Mkts., Ltd. V. Texaco, Inc.*, 950 F. Supp. 1030 (D. Haw. 1996)(noting multiple uses of “Star” and “Star Markets” in the food industry as well as unrelated industries).

Likelihood of Confusion

Once the threshold question of whether the mark is distinctive enough to deserve protection is answered affirmatively . . . the court must determine whether there is a likelihood of confusion between the names and symbols used by the two parties.” *Glen Raven Mills, Inc. v. Ramada Int'l, Inc.*, 852 F. Supp. 1544, 1546 (M.D. Fla. 1994). Likelihood of confusion exists

when consumers viewing the mark would probably assume that the product or service it represents is associated with the source of a different product or service identified by a similar mark. *Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1229 (3d Cir. 1978). The Court held in *Scott Paper* that “although the products of each company [in the suit were] advertised on television, sold primarily in supermarkets, and [were] designed to be sold to female heads of households, these circumstances [did] little to narrow the scope of the market shared by both. *Scott Paper Co.*, 589 F.2d at 1229. This shows that even goods in similar markets have the ability to co-exist without one damaging the trademark of another.

In cases where the courts have found a likelihood of confusion between two non-competing goods, the relationship between the products shall be considerably closer. *Id*; see *Scarves by Vera, Inc. v. Todo Imps., Ltd.*, 544 F.2d 1167 (2d Cir. 1976)(women's scarves and apparel with women's cosmetics and fragrances); *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266 (7th Cir. 1976)(liquor with restaurant selling liquor); *Union Carbide Corp. v. Ever-Ready, Inc.*, 531 F.2d 366 (7th Cir. 1976)(batteries and lamps with lightbulbs and lamps).

When assessing the elements for likelihood of confusion, “no one factor is necessarily determinative, but each must be considered by the court in assessing the factors ‘on the whole’ . . . [Rather], they must be evaluated in context, and any meaningful inquiry into the likelihood of confusion necessarily must replicate the circumstances in which the ordinary consumer actually confronts (or probably will confront) the conflicting mark.” *Anheuser-Busch, Inc. v. Caught-On-Bleu, Inc.*, 2003 DNH 173, 288 F. Supp. 2d 105, 108.

Trademarks and Summary Judgment

To avoid summary judgment, ABG must show a genuine issue about whether APPLICANT's use of the AIRWALK mark is likely to cause confusion about source. *K.P. Permanent Make-up v. Lasting Impression I*, 543 U.S. 111, 117 (2004) (infringement "requires a showing that defendant's actual practice is likely to produce confusion about the minds of consumers about the origin of the goods or services in question"). Speculation and theories about the possibility of confusion do not suffice; the law requires a substantial likelihood of confusion. *International Ass'n of Machinists and Aerospace Workers v. Winship Green Nursing Center*, 103 F.3d 196, 200 (1st Cir. 1996) ("[A] markholder . . . must show more than the theoretical possibility of confusion."); *Star Fin. Servs., Inc. v. AASTAR Mortg. Corp.*, 89 F.3d 5, 10 (1st Cir. 1996) ("We require evidence of a "substantial" likelihood of confusion --- not mere possibility.")

Summary judgment thus is necessary unless a genuine factual dispute exists about whether APPLICANT's use of AIRWALK is likely to cause an appreciable number of reasonable consumers exercising ordinary care to believe that ABG created, sponsors, or approves of APPLICANT's dry herb vaporizers or that ABG is affiliated with APPLICANT. As shown below, there is no likelihood of confusion.

ARGUMENT

I. THE UNDISPUTED FACTS BAR OPPOSER'S TRADEMARK INFRINGEMENT CLAIMS

A. ABG's Claims Fail Under a Traditional Confusion Analysis

Similarly, consideration of the traditional “likelihood of confusion” factors strongly supports Applicant’s contention that there is no likelihood of confusion. The factors, laid out in *Winship Green*, 103 F.3d at 201, are (1) the similarity of the marks; (2) similarity of the goods; (3) the relationship between the parties’ channels of trade; (4) the juxtaposition of their advertising; (5) the classes of prospective purchasers; (6) the evidence of actual confusion; (7) the defendant’s intent in adopting its allegedly infringing mark; and (8) the strength of the plaintiff’s mark.

1. Similarity of the marks

Applicant acknowledges the aesthetic similarities in Applicant and Opposer’s marks. However, due to the above arguments, the aesthetic similarity of the marks alone becomes a factor that is entirely irrelevant.

2. Similarity of the goods

Applicant’s goods – dry herb vaporizers and other devices that contribute to better experiences for vaping, including cases, vaporizer attachments, and other modifications—have no similarity whatsoever to Opposer’s athletic wear and sneakers. Opposer has neither provided proof that the goods produced by both Applicant and Opposer have ever been sold in the same store nor have been advertised to the same class of purchasers.

“Although both gasoline and motor oil are petroleum products and fall within the same general classification under the United States Patent Office regulations, the fact remains that they are different products having different uses and serving different purposes.” *Crown Cent. Petroleum Corp. v. Standard Oil Co.*, 135 So. 2d 26, 36-37 (Fla. 1st DCA 1961) (dissenting that while both Plaintiff and Defendant shared the same trademark name of “Crown”, one company produced gasoline and another produced motor oil—these both have different uses and different purposes”).

Applicant’s mark has been registered under **CLASS 34-SMOKING**. Opposer’s mark is registered under **CLASS 25-CLOTHING** as well as **CLASS 009- SUNGLASSES FOR SPORTS**, **CLASS 012-BICYCLES**, **CLASS 018- ATHLETIC AND SPORTS BAGS**, **CLASS 14- WATCHES**, **CLASS 41- AWARDS**, and **CLASS 36- CHARITABLE FUND RAISING SERVICES**. The parties’ goods are not related to one another, and the prudent purchaser would neither expect for ABG to expand into a class such as 34.

3. Relationship between the parties channels of trade/advertising

Going off the dissimilarity of the goods and the consequential lack of similar purchasers, the parties’ channels of trade and advertising do not overlap. As mentioned previously, in order to enter a store that sells dry herb vaporizers or even purchase a tobacco based product, a consumer, under the state laws of the United States, must be eighteen (18) years old. Most, if not all of Opposer’s client base is the early-teen market. This alone precludes the possibility of a minor even being exposed to APPLICANT product, let alone the APPLICANT Airwalk trademark that would be used on its product. One need not be 18 years old to enter a sneaker

store or an athletic good store. The parties' channels of trade and their advertising therefore do not overlap. ABG has produced no evidence that it sells athletic apparel at smoke shops.

4. *Classes of prospective purchasers*

In its NOO, Opposer states that “[t]he target customers for the AIRWALK brand are children, young adults, and youthful people who support board culture and value an active, healthy lifestyle.” Opposer also states that “Opposer’s AIRWALK mark is closely associated with board sports, active lifestyles, and peak athletic performance” Even if Opposer wished to receive protection for their mark, it could only apply to use in **CLASS 34**.

The business of vaporizers is one that, since its inception, has been marketed to people over the ages of eighteen (18). Applicant’s products are found only in designated “smoke shops”, which not only require the consumer to be eighteen-years old to make a purchase, but require the consumer be of age to enter the shop itself. These safeguards further ensure that Applicant’s consumer base will continue to be, as it has always been, adults. .

As a result of Applicant and Opposer engaging in the distribution of different goods to different consumer bases, neither share the same channel of trade or forms of advertising. Consequently, Consumers would not attribute Applicant and Opposer’s products as stemming from the same source. This assertion can be corroborated by the fact that the mark “AIR WALK” and various forms of it (e.g. AIR WALKER), are currently in use by other entities, co-existing on the market with Opposer’s mark. Opposer has yet to show any evidence of actual confusion between their and Applicant’s marks.

Moreover, because Applicant's product is a "niche" product aimed at a very particular class of purchasers who take great care in their purchase decisions, confusion is very unlikely. *Merchant & Evans v. Roosevelt Bldg Prods.*, 963 D.2d 628, 636-637 (3d Cir. 1992).

5. *Evidence of actual confusion*

Opposer has produced no evidence of actual confusion of any kind, much less confusion as to affiliation or confusion as to product origin, sponsorship, or approval. The absence of such evidence is very strong evidence of no likelihood of confusion. *A&H Sportswear, Inc.*, 237 F.3d at 227.

6. *Applicant's intent in adopting its allegedly infringing mark (class)*

Applicant's application for the mark "AIR WALK" is in international **CLASS 34**—"electronic cigarettes, electronic cigars, electronic hookahs, electronic smoking pipes, mechanical electronic cigarettes, and smokeless cigarette vaporizer pipes. Opposer holds no trademark in Class 34, or any class that may be considered the natural scope of expansion. Applicant's goods are therefore unrelated to and are outside the natural scope of expansion of Opposer's goods.

Courts have stated that "[m]arks should not be simply compared side-by-side, but in light of what occurs in the marketplace, taking into account the circumstances surrounding the purchase of the goods." *Anheuser-Busch, Inc. v. Caught-On-Bleu, Inc.*, 2003 DNH 173, 288 F. Supp. 2d 105, 108

7. *Strength of Opposer's mark*

Under a traditional likelihood of confusion analysis in conjunction with pure common sense, no likelihood of confusion exists between Applicant and Opposer's marks, and Applicant is entitled to summary judgment.

II. OPPOSER'S TRADEMARK DILUTION CLAIMS FAIL AS A MATTER OF LAW

A. Opposer's Marks are Not Famous

Opposer contends that Applicant's use of the AIRWALK mark constitutes trademark dilution. For the reason following, this claim has no merit.

Dilution laws only protect a small class of very-well known marks, known as household names, against specific harm. However, "[dilution laws] are not intended to serve as mere fallback protection for trademark owners unable to prove trademark infringement." *I.P. Lund Trading Co. v. Kohler Co.*, 163 F.3d 27, 48 (1st Cir. 1998).

15 U.S.C. § 1125(c)(1), only protects famous marks and requires a showing of dilution by blurring. *Id.* Opposer's marks are not "famous" to afford protection under federal dilution laws. "Famous" is a very high standard. *Id.* at 46. A mark must be a household name. *Thane Intern, Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 911 (9th Cir. 2002) (affirming summary judgment against trademark owner due to failure to create a triable issue of "famousness"). "Fame in just one industry or line of business or only to professional buyers in one market niche is not sufficient."⁴ McCarthy on Trademarks § 24:105.

Opposer recognizes its goods as widely recognized by purchasers in the athletic community, failing to show as a matter of law that its mark is "widely" recognized by the general

consuming public of the United States.”¹⁵ U.S.C. § 1125(c). There have even been accounts written on about Opposer’s AIRWALK line decreasing in popularity over the years. Simply put, there is no evidence that would permit the inference that Opposer’s AIRWALK mark has achieved famousness as a household name.

B. There is no Likelihood of Dilution

Blurring

Even assuming Opposer’s mark is “famous”, its argument for dilution is meritless. “The basic idea of blurring is that the [opposer’s] use of the [applicant’s] mark causes the public no longer to think only of the plaintiff’s product upon seeing the famous mark, but rather to associate both the [applicant] and [opposer] with the mark. *Hasbro, Inc. v. Clue Computing, Inc.* 66 F. Supp. 2d 117, 134 (D. Mass. 1999), *aff’d*, 232 F.3d 1 (1st Cir. 2000).

A classic example of dilution by blurring would be when a mark such as “Coca-Cola” attempts to protect its trademark against a company wishing to produce chairs under “Coca-Cola Chair Co.” This would impair the distinctiveness of the coca-cola soda company and would diminish the true Coca-Cola Co. to serve as a singular identifier of its source. No evidence has been provided by Opposer that shows Applicant’s mark could impair Opposer’s customers from identify Opposer’s products.

Tarnishment

Tarnishment of a mark cannot be found on mere criticism. 4 McCarthy on Trademarks and Unfair Competition §24:90 (4th ed. 2009). The First Circuit has described tarnishment as follows:

Neither the strictures of the first amendment nor the history and theory of anti-dilution law permit a finding of tarnishment based solely on the presence of an unwholesome or negative context in which a trademark is used without authorization. Such a reading of the anti-dilution statute unhinges it from its origins in the marketplace. A trademark is tarnished when consumer capacity to associate it with the appropriate products or services has been diminished. The threat of tarnishment arises when the goodwill and reputation of a plaintiff's trademark is linked to products which are of shoddy quality or which conjure associations that clash with the associations generated by the owner's lawful use of the mark.

L.L. Bean, Inc., 811 F.2d at 31. Tarnishment claims often involve the association of famous marks with unsavory or degrading activities like adult entertainment. 4 McCarthy on Trademarks § 24.89. Applicant has not “linked [the Marks] to products” at all similar to Opposer’s, much less to products which are “of shoddy quality or which conjure associations that class with the associations.” *L.L. Bean*, 811 F.2d at 31.

C. Opposer Cannot Prove Causation

As a result of the foregoing, no basis exists for a fact-finder to draw a causal connection between Applicant’s use of the AIRWALK mark and any theoretical dilution causes of action.

CONCLUSION

WHEREFORE, Applicant moves this Court to grant judgment as a matter of law based on the above arguments. There are no factual disputes present that would affect any outcome of litigation, making them immaterial. There is neither substantial evidence going beyond the allegations of the NOO that would manifest a factual dispute and make it genuine. As a result of Opposer and Applicant’s marks being filed under different classes and representing entirely different goods, and assessing confusion factors laid out by various courts, there is no likelihood of confusion between Applicant and Opposer’s marks. As a result, this Court should grant judgment as a matter of law in favor of Applicant and consider Applicant’s trademark application 86/459,048 for grant.

Respectfully submitted,



Divya Khullar, Esq.

Florida Bar No. 0101116

USA PATENTS

4786 W. Commercial Blvd.

Tamarac, Florida 33319

Phone: (954) 642-2308

Fax: (754) 999-7057

dkhullar@usapatents.com

Attorney for Applicant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **APPLICANT'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF** was served via U.S. First Class Mail, postage prepaid, and properly addressed to Opposer's counsel of record:

Tamar Y. Duvdevani, Esq.
DLA Piper, LLP (US)
1251 Avenue of the Americas
New York, NY 10020
(212) 335-4799

Kerry A. O'Neill
DLA Piper, LLP
1251 Avenue of the Americas
New York, NY 10020
(212) 335-4799

as well as sent via electronic mail to Opposer's counsel of record at tamar.duvdevani@dlapiper.com and kerry.o'neill@dlapiper.com.

This 10th day of February, 2016