



TTAB

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

GURU BEVERAGE CO.)
)
Petitioner,)
)
v.)
)
SAGAR SHAH)
)
Registrant.)

Cancellation No. 92056634

Reg. No. 4,125,408
NATURE'S GURU

Attorney's Reference: 115412-341732

PETITIONER'S MOTION FOR SUMMARY JUDGMENT

Petitioner, GURU BEVERAGE CO., respectfully moves for summary judgment, pursuant to Rule 2.116 of the Trademark Rules of Practice and Rule 56 of the Federal Rules of Procedure. This motion is supported by the accompanying Memorandum and the attached exhibits.

Respectfully submitted,

Dated: May 8, 2014

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Attorneys for Petitioner



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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GURU BEVERAGE CO.)

Petitioner,)

v.)

SAGAR SHAH)

Registrant.)

Cancellation No. 92056634

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NATURE'S GURU

Attorney's Reference: 115412-341732

PETITIONER'S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT

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Petitioner, GURU BEVERAGE CO., respectfully submits this memorandum in support of its motion for summary judgment, pursuant to Rule 2.116 of the Trademark Rules of Practice and Rule 56 of the Federal Rules of Procedure, in its Petition for Cancellation of Registration No. 4125408 for the mark NATURE'S GURU.

I. INTRODUCTION

Summary judgment is a “salutory method of disposition ‘designed to secure [the] just, speedy and inexpensive determination of every action.’” Sweats Fashions, Inc. v. Pannill Knitting Co., Inc., 4 USPQ 2d 1793, 1795 (Fed. Cir. 1987) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate in a case such as this where there is no genuine issue as to any material fact and Petitioner is entitled to judgment as a matter of law.

It is well settled that between conflicting parties, the right to use the same mark is based on the priority of appropriation. See National Chemsearch Corp. v. Chemtek Corp., 170 USPQ 110, 111 (TTAB 1971). Also a mark is not entitled to registration if it so resembles a mark used by another as to cause confusion, mistake or deception. Id. Likelihood of confusion is based on similarity of the goods or services and similarity of the marks.

In this case, there is no material fact at issue regarding priority of use or similarity of the goods. Petitioner has superior rights in the mark. Petitioner owns U.S. Trademark Registration No. 2775940 issued October 21, 2003 from an application filed February 11, 1999 for the mark GURU covering “sports drinks, energy drinks and soft drinks.” See Notice of Opposition ¶ 3; Certified copy of Reg. No. 2775940, attached as Ex. 1.

Petitioner also owns U.S. Trademark Registration No. 2789042 issued December 2, 2003 from an application filed February 11, 1999 for the mark GURU ENERGY DRINK covering “sports drinks, energy drinks and soft drinks.” See Notice of Opposition ¶ 4; Certified copy of Reg. No. 2789042, attached as Ex. 2.

Petitioner has used its marks on its goods in the U.S. since at least as early as 2005. See Attached Declaration of Joseph Zakher, Petitioner’s Secretary.

Registrant has admitted that it did not use the mark NATURE’S GURU for the goods listed in its application for registration prior to October 9, 2009. See Registrant’s Answer to Paragraph 7 of the Petition for Cancellation.

With respect to the likelihood of confusion, Registrant’s mark and Petitioner’s marks are used in connection with the same goods. Both marks are used in connection with “sports beverages.” The subject registration covers “Powder and concentrates used in the preparation of sports beverages, fruit-flavored beverages and tea-flavored beverages” and the Petitioner’s registrations cover “sports drinks.”

Finally, the marks are so similar in appearance, sound and commercial impression as to cause confusion and lead to deception as to the source or origin and/or sponsorship of Registrant’s goods and/or Petitioner’s goods.

II. STATEMENT OF UNDISPUTED FACTS

1. The Registrant has admitted that it did not use its trademark prior to October 9, 2009.
2. Petitioner’s relied upon registrations both significantly pre-date October 9, 2009.
3. Petitioner has used its marks on its goods in the U.S. since at least as early as 2005.

See Attached Declaration of Joseph Zakher, Petitioner’s Secretary.

4. Registrant's goods encompass "Powder and concentrates used in the preparation of sports beverages, fruit-flavored beverages and tea-flavored beverages"
5. Petitioner's goods encompass "sports drinks, energy drinks and soft drinks."
6. Petitioner is the owner of U.S. Trademark Registration No. 2775940 issued October 21, 2003 from an application filed February 11, 1999 for the mark GURU covering "sports drinks, energy drinks and soft drinks." See Notice of Opposition ¶ 3; Certified copy of Reg. No. 2775940, attached as Ex. 1.
7. Petitioner is the owner of U.S. Trademark Registration No. 2789042 issued December 2, 2003 from an application filed February 11, 1999 for the mark GURU ENERGY DRINK covering "sports drinks, energy drinks and soft drinks." See: Notice of Opposition ¶ 4; Certified copy of Reg. No. 2789042, attached as Ex. 2.
8. Both Registrant's mark and the Petitioner's marks contain the identical term GURU. See: Registrant's Answer to Paragraph 9 of the Petition for Cancellation.
9. Registrant does not always use a design element in connection with its NATURE'S GURU trademark. Registrant's Answer to Paragraph 11 of the Petition for Cancellation.

III. ARGUMENT

A. Petitioner's Motion for Summary Judgment Should Be Granted When, As Here, There Is No Issue of Material Fact for Trial.

Summary judgment is appropriate to dispose of trademark cases "where no genuine issue of material fact remains and more evidence than is already available in connection with the summary judgment motion could not reasonably be expected to

change the result.” Societe Des Produits Marnier Lapostolle v. Distillerie Moccia S.R.L., 10 USPQ 2d 1241, 1244 (TTAB 1989); see also Sweats Fashions, 4 USPQ 2d at 1795.

Summary judgment is appropriate and warranted where the moving party demonstrates that there is no genuine issue of material fact regarding a particular contention and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Flatley v. Trump, 11 USPQ 2d 1284, 1287 (TTAB 1989). Upon a motion for summary judgment, the moving party must inform the Board of the basis for its motion and identify the evidence demonstrating the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 256 (1986). The burden then shifts to the non-moving party to set forth “[s]pecific facts showing that there is a genuine issue for trial.” Anderson, 477 U.S. at 248-49; Fed. R. Civ. P. 56(e). A mere “scintilla” of evidence in support of the non-moving party’s position is not enough to defeat a moving party’s summary judgment motion; rather, when viewed in the light most favorable to the non-moving party, the evidence must be sufficient for a reasonable jury to find in favor of that party. See Anderson, 477 U.S. at 252.

As described below, Petitioner has demonstrated that there is no genuine issue of material fact. Registrant, as the non-moving party, will not be able to establish that there is a genuine issue of material fact for trial. Therefore, Petitioner is entitled to summary judgment as a matter of law.

B. Both the Facts and Law Support Granting this Motion for Summary Judgment and Refusing the Application for Registration.

Pursuant to the Lanham Act, a mark is not entitled to registration, if the mark for which registration is sought (1) “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark office, or a mark or trade name previously used in the United States by another and not abandoned” and (2) is likely to cause “confusion, or to cause mistake, or to deceive.” 15 U.S.C. §1052(d).

It is a fundamental principle of United States Trademark law that, “as between conflicting claimants, the rights to use the same mark is based on priority of appropriation.” National Chemsearch Corp. v. Chemtek Corp., 170 USPQ 110, 111 (TTAB 1971). In this case, it is undisputed that Petitioner has prior rights in its GURU and GURU ENERGY DRINK marks.

Because there is no issue of fact as to priority of use, the issue of priority of use is ripe for summary adjudication.

1. Registrant’s Use and Registration of the Mark NATURE’S GURU Is Likely To Cause Confusion

The Federal Circuit has established that likelihood of confusion is an issue of law. See In re Shell Oil Co., 992 F.2d 1204, 1206 (Fed. Cir. 1993); Kimberly-Clark Corp. v. H. Douglas Enterprises, Ltd., 227 USPQ 541, 542 (Fed. Cir. 1985). Accordingly, disputes regarding a likelihood of confusion may be resolved on a motion for summary judgment. See Sweats Fashions, 4 USPQ 2d at 1797.

A likelihood of confusion analysis entails determining “whether there is a likelihood of confusion as to the source of the goods because of the marks used thereon.” In re Rexel, Inc., 223 USPQ 830, 831 (TTAB 1984).

The principal considerations relevant to the issue of a likelihood of confusion are listed in In re E.I. DuPont deNemours & Co., 476 F.2d 1357, 1361 (CCPA 1973). See

Opryland USA, Inc. v. Great American Music Show, 970 F.2d 847, 850 (Fed. Cir. 1992).

Not all the listed factors are relevant in each case. See DuPont, 476 F.2d at 1361; see also Opryland, 970 F.2d at 850; Kellogg Co. v. Pack'em Enterprises, Inc., 951 F.2d 330 (Fed. Cir. 1991). Relevant factors with respect to the marks here at issue include (1) “similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use”; (2) “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” See Dupont, 476 F.2d at 1361.

Here, there is no dispute as to the substantially identical nature of the Petitioner's and Registrant's goods. The nature and scope of goods is determined on the basis of the goods set forth in the application or registration. See, e.g., Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); Paula Payne Products Co. v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973); see also TMEP § 1207.01(a)(iii). The goods identified by Registrant in its subject registration are “Powder and concentrates used in the preparation of sports beverages, fruit-flavored beverages and tea-flavored beverages” and the Petitioner’s goods are “sports drinks, energy drinks and soft drinks.”

By their very definition, Registrant’s goods are powders and concentrates that would be used to make sports beverages, i.e., sports drinks of the type covered in Petitioner’s registrations.

This issue was, in fact, decided by the TTAB many years ago in the Coca-Cola Company v. Clay, 133 USPQ 606 (TTAB 1962) where, in a cancellation proceeding, the Board specifically determined that concentrate powders intended for use in making a

non-carbonated hot cola flavored drink and a carbonated soft drink “are, nevertheless, products which purchasers would more than likely attribute to the same source if they were to be sold under the same or similar marks.” Id at p. 609.

It is also undisputed that Registrant’s services and Petitioner’s goods will travel in the same channels of trade. Neither the subject registration nor Petitioner’s registrations are limited to specific channels of trade; therefore, each are considered to travel in all the normal channels of trade and are available to all class of purchasers. See TMEP §1207.01(a)(iii) (“If the cited registration describes goods or services broadly, and there is no limitation as to the nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods or services of the type described, that they move in all normal channels of trade, and are available to all classes of purchasers”).

This too, was determined by the TTAB in In re Clay, 154 USPQ 620 (TTAB 1967) wherein the Board determined that “cola flavored concentrate powder for preparing hot food beverages” and “cola flavored beverages” are products which may emanate from same source, especially given no restrictions as to channels of trade in either the subject application or cited registrations.

The only remaining issue is the similarity of the marks. Considering this factor, the marks are so similar that Registrant’s use and registration of the mark to identify the same services in the same channels of trade is likely to cause confusion and lead to deception as to the source or origin and/or sponsorship of Registrant’s goods and/or Petitioner’s goods.

2. The Marks Are Confusingly Similar in Appearance, Sound, Connotation and Commercial Impression

The test of likelihood of confusion is whether the marks are so similar that there is a likelihood of confusion as to source and not whether the marks can be distinguished when subjected to a side-by-side comparison. See TMEP § 1207.01(b). "The emphasis must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks." See id.; Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

When marks are used on virtually identical goods or services, "the degree of similarity necessary to support a likelihood of confusion declines." Century 21 Real Estate v. Century Life of America, 970 F.2d 874, 877 (Fed. Cir. 1992); see also MCCARTHY ON TRADEMARKS, § 23:20.50 ("Where the goods and services are directly competitive, the degree of similarity required to prove likelihood of confusion is less than in the case of dissimilar products"). As discussed above, the marks are used in connection with identical services; therefore, the degree of similarity of the marks necessary to support a likelihood of confusion is less.

Registrant's mark NATURE'S GURU is virtually identical to Petitioner's GURU and GURU ENERGY DRINK marks in appearance, sound, connotation and commercial impression. The extra wording NATURE'S in Registrant's mark does nothing to deter from the similarity of the marks, and if anything give the implication that the Registrant's product is a subset or variety of the Petitioner's products. "There is a general rule that a subsequent user may not appropriate another's entire mark and avoid likelihood of confusion therewith by merely adding descriptive or otherwise subordinate matter to it." In re Rexel, 223 U.S.P.Q. 830, 831 (TTAB 1984); see also, TMEP § 1207.01(b)(iii).

“[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.” See Rexel, 223 U.S.P.Q. at 831.

Likelihood of confusion is not necessarily avoided between otherwise confusingly similar marks merely by adding or deleting a house mark, other distinctive matter, or a term that is descriptive or suggestive of the named goods or services; if the dominant portion of both marks is the same, then the marks may be confusingly similar notwithstanding peripheral differences. See e.g., Stone Lion Capital Partners, L.P. v. Lion Capital LLP, 110 USPQ2d 1157, 1161 (Fed. Cir. Mar. 26, 2014) (affirming TTAB’s finding that applicant’s mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, and that the noun LION was the dominant part of both parties’ marks).

The dominant portion of both marks is clearly the term GURU.

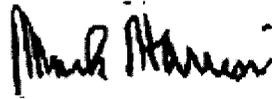
Given the specific similarity of meanings of Registrant’s mark and Petitioner’s marks, as well as the similarity in sound and sight, it is respectfully submitted that confusion as to source of the goods is likely. Moreover, when considering the imperfect recollection of the average customer faced with similar marks used in connection with virtually identical goods in the same channels of trade, those customers are likely to be confused and deceived as to the source or origin and/or sponsorship of Registrant’s goods and/or Petitioner’s goods. See e.g., TMEP § 1207.01(b)

IV. CONCLUSION

Petitioner has demonstrated that there is no genuine issue of material fact and Registrant, as the non-moving party, will not be able to establish that there is a genuine issue of material fact for trial.

For the reasons set forth above, Petitioner respectfully requests that summary judgment be entered in its favor, and that Registration No. 4,125,408 be cancelled.

Respectfully submitted,



Date: May 8, 2014

By: _____

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P.O. Box 34385
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Telephone: (202) 344-4000
Facsimile (202) 344-8300

Attorneys for Petitioners

CERTIFICATE OF SERVICE

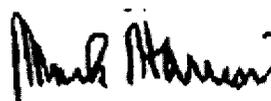
The undersigned, attorney for Opposer, hereby certifies that a true and complete copy of foregoing PETITIONER'S MOTION FOR SUMMARY JUDGMENT and PETITIONER'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT have been served on this 8th day of May 2014 via e-mail to attorney of record for Registrant:

Jason E Garcia

Novak Druce Connolly Bove + Quigg LLP

21771 Stevens Creek Boulevard | First Floor | Cupertino, CA 95014

Email: jason.garcia@novakdruce.com and tmocket@novakdruce.com



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SAGAR SHAH)	
)	Reg. No. 4,125,408
)	NATURE'S GURU
Registrant.)	

Attorney's Reference: 115412-341732

**DECLARATION OF JOSEPH ZAKHER IN SUPPORT OF PETITIONER'S
MOTION FOR SUMMARY JUDGMENT**

I, Joseph Zakher, declare as follows:

1. I am Secretary of Guru Beverage Co., the Petitioner in this matter.
2. That all statements made herein are of my own personal knowledge or on information and belief where so stated. If called as a witness, I could and would competently testify to the truth of the matters asserted herein.
3. I have been employed by Guru Beverage Co. since 2005.
4. I am familiar with the products marketed by Guru Beverage Co. under the GURU and GURU ENERGY DRINK trademarks as listed in U.S. Trademark Registrations Nos. 2,789,042 and 2,775,940.
5. Such products have been offered in the United States continuously since at least as early as 2005.
6. That all statements made herein of his/her own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code

Done this 8 day of May, 2014, Montreal, Quebec, Canada



Joseph Zakher

EXHIBIT 1

1949112



THE UNITED STATES OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL COME:

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office

May 07, 2014

THE ATTACHED U.S. TRADEMARK REGISTRATION 2,775,940 IS CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES PATENT AND TRADEMARK OFFICE.

REGISTERED FOR A TERM OF *10* YEARS FROM *October 21, 2003*
1st RENEWAL FOR A TERM OF *10* YEARS FROM *October 21, 2013*
SECTION 8 & 15

SAID RECORDS SHOW TITLE TO BE IN:

GURU BEVERAGE CO.

A DELAWARE CORPORATION

By Authority of the
Under Secretary of Commerce for Intellectual Property
and Director of the United States Patent and Trademark Office

CATHY FOWLER

Certifying Officer



Int. Cl.: 32

Prior U.S. Cls.: 45, 46, and 48

Reg. No. 2,775,940

United States Patent and Trademark Office

Registered Oct. 21, 2003

**TRADEMARK
PRINCIPAL REGISTER**

GURU

G.I. ENERGY DRINKS CORPORATION (CANADA CORPORATION)
2004, ST-LAURENT #411
MONTREAL H2X 2T2, CANADA

FIRST USE 1-1-1999; IN COMMERCE 2-9-1999.

SN 75-638,686, FILED 2-11-1999.

FOR: SPORTS DRINKS, ENERGY DRINKS AND
SOFT DRINKS, IN CLASS 32 (U.S. CLS. 45, 46 AND
48).

LINDA M. KING, EXAMINING ATTORNEY

Int. Cl.: 32

Prior U.S. Cls.: 45, 46 and 48

Reg. No. 2,775,940

United States Patent and Trademark Office

Registered Oct. 21, 2003

Amended

OG Date July 22, 2008

**TRADEMARK
PRINCIPAL REGISTER**

GURU

G.I. ENERGY DRINKS CORPORATION
(CANADA CORPORATION)
2004, ST-LAURENT #411
MONTREAL H2X 2T2, CANADA

FOR: SPORTS DRINKS, ENERGY
DRINKS AND SOFT DRINKS, IN CLASS
32 (U.S. CLS. 45, 46 AND 48).
FIRST USE 8-0-1999; IN COMMERCE
9-30-1999.
SER. NO. 75-638,686, FILED 2-11-1999.

*In testimony whereof I have hereunto set my hand
and caused the seal of The Patent and Trademark
Office to be affixed on July 22, 2008.*

DIRECTOR OF THE U.S. PATENT AND TRADEMARK OFFICE

EXHIBIT 2

1949112



THE UNITED STATES OF AMERICA

TO ALL TO WHOM THESE PRESENTS SHALL COME:

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office

May 07, 2014

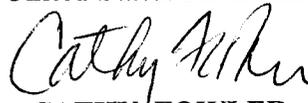
THE ATTACHED U.S. TRADEMARK REGISTRATION 2,789,042 IS
CERTIFIED TO BE A TRUE COPY WHICH IS IN FULL FORCE AND
EFFECT WITH NOTATIONS OF ALL STATUTORY ACTIONS TAKEN
THEREON AS DISCLOSED BY THE RECORDS OF THE UNITED STATES
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CATHY FOWLER
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Registered Dec. 2, 2003

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GURU ENERGY DRINK

G.I. ENERGY DRINKS CORPORATION (CANADA CORPORATION)
2004, ST-LAURENT #411
MONTREAL H2X 2T2, CANADA

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "ENERGY DRINK", APART FROM THE MARK AS SHOWN.

FOR: SPORTS DRINKS, ENERGY DRINKS AND SOFT DRINKS, IN CLASS 32 (U.S. CLS. 45, 46 AND 48).

SN 75-638,687, FILED 2-11-1999.

FIRST USE 1-1-1999; IN COMMERCE 2-9-1999.

KARAN CHHINA, EXAMINING ATTORNEY

Int. Cl.: 32

Prior U.S. Cls.: 45, 46 and 48

Reg. No. 2,789,042

United States Patent and Trademark Office

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32 (U.S. CLS. 45, 46 AND 48).

FIRST USE 8-0-1999; IN COMMERCE
9-30-1999.

SER. NO. 75-638,687, FILED 2-11-1999.

*In testimony whereof I have hereunto set my hand
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DIRECTOR OF THE U.S. PATENT AND TRADEMARK OFFICE