THIS DECISION IS
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OF THE TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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WINTER

Mailed: November 13, 2014

Cancellation No. 92056969
Cancellation No. 92056992

Vedozi Investment (PTY) Ltd.

v.

Cintron Beverage Group, LLC

Before Kuhlke, Wellington, and Ritchie,
Administrative Trademark Judges.

By the Board:

Vedozi Investment (PTY) Ltd. (hereafter "Petitioner") seeks to cancel two registrations owned by Cintron Beverage Group, LLC (hereafter "Respondent") for the marks CINTRON ENERGY ENHANCER[1] and CINTRON 21.[2] As grounds for cancellation, Petitioner asserts the following claims: the marks are primarily merely surnames; the marks are registered improperly without the written consent of the living individual identified in each mark; that the marks have been abandoned; and, with respect to

[1] U.S. Reg. No. 3600401, issued March 31, 2009, for use with "Energy drinks; Sports drinks"; Section 8 affidavit accepted. The wording "ENERGY ENHANCER" has been disclaimed.

[2] U.S. Reg. No. 3410949, issued April 8, 2008, for use with "Energy drinks; Sports drinks"; Section 8 affidavit accepted.

Cancellation No. 92056992 only, the mark CINTRON 21 is deceptive or deceptively misdescriptive of the goods. Respondent filed an answer in each proceeding, denying the salient allegations in the petitions to cancel.[3]

This consolidated case now comes up for consideration of Respondent's motion (filed July 22, 2014) for summary judgment and Petitioner's motion (filed July 24, 2014) for summary judgment. Both motions are fully briefed. Each party seeks seeks summary judgment on Petitioner's claims that the involved marks are primarily merely surnames, that Respondent has abandoned its marks with no intent to resume use, and that the marks comprise the name of a particular individual without the written consent of said individual.[4]

Summary judgment is an appropriate method of disposing of cases in which there is no genuine dispute with respect to any material fact, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c)(1). A party moving for summary judgment has the burden of demonstrating the absence of any genuine dispute as to a material fact, and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4

[3] It is noted, however, that Respondent admitted that it is currently not using the words "ENERGY ENHANCER" directly after the word "CINTRON" on product labels, product containers or point of sale displays that are used to sell the goods identified in the registration (Canc. No. 92056969, Answer ¶16).

[4] Petitioner's claim in Canc. No. 92056992 that the mark CINTRON 21 is deceptive or deceptively misdescriptive is not the subject of either motion and will not be addressed in this order.

USPQ2d 1793, 1796 (Fed. Cir. 1987). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. *See Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

Additionally, the evidence of record and all justifiable inferences that may be drawn from the undisputed facts must be viewed in the light most favorable to the non-moving party. *See Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); and *Opryland USA,* 23 USPQ2d at 1472. Further, in considering whether summary judgment is appropriate, the Board may not resolve genuine disputes as to material facts and, based thereon, decide the merits of the opposition. Rather, the Board may only ascertain whether any material fact cannot be disputed or is genuinely disputed. *See Lloyd's Food Products*, 25 USPQ2d at 2029; and *Olde Tyme Foods* 22 USPQ2d at 1542.

As regards the subject cross-motions for summary judgment, when the moving party has supported its motion with sufficient evidence which, if unopposed, indicates there is no genuine dispute of material fact, the burden then shifts to the non-moving party to demonstrate the existence of a genuine dispute of material fact to be resolved at trial. *Enbridge, Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537, 1540 (TTAB 2009). Further, merely because

both parties have moved for summary judgment does not necessarily mean that there are no genuine disputes of material fact, and does not dictate that judgment should be entered. *See University Book Store v. University of Wisconsin Board of Regents*, 33 USPQ2d 1385 (TTAB 1994).

We turn first to Petitioner's claim of abandonment. Upon careful consideration of the arguments and evidence presented by the parties,[5] and drawing all inferences with respect to each motion in favor of each nonmoving party, we find that neither Petitioner nor Respondent has demonstrated the absence of a genuine dispute of material fact for trial and that it is entitled to judgment under applicable law. At a minimum,[6] there exists a genuine dispute as to whether Respondent intended to resume use during the period of time in which Respondent was not using the involved marks in connection with the identified goods.[7] *See* 15 U.S.C. § 1127. Accordingly, Respondent's motion for summary judgment on Petitioner's

[5] The parties should note that evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period. *See, e.g., Levi Strauss & Co. v. R. Joseph Sportswear Inc.,* 28 USPQ2d 1464 (TTAB 1993). *See* TBMP § 528.05(a) (2014).

[6] The fact that we identify only a few material facts that are genuinely in dispute should not be construed as a finding that these are necessarily the only issues that remain for trial.

[7] We hasten to note that we have made no factual finding that Respondent did not use its involved marks for any period of time.

asserted abandonment claim and Petitioner's cross-motion for summary judgment on the same claim are **denied**.

With respect to Petitioner's claim that Respondent's marks are primarily merely surnames, we similarly find that the parties have failed to demonstrate the absence of a genuine dispute as to whether the involved marks are primarily merely surnames. Specifically, at a minimum, there remains in dispute whether the the mark "CINTRON ENERGY ENHANCER" as a whole would be perceived as having "primarily merely" surname significance and whether the element "21" is merely descriptive or generic of the goods described in U.S. Reg. No. 3410949. *See In re Hutchinson Technology Inc.*, 852 F.2d 552, 7 USPQ2d 1490, 1492 (Fed. Cir. 1988); *In re Hamilton Pharms. Ltd.*, 27 USPQ2d 1939, 1945 (TTAB 1993) (holding HAMILTON PHARMACEUTICALS primarily merely a surname for pharmaceutical products); *In re Cazes,* 21 USPQ2d 1796 (TTAB 1991) (holding BRASSERIE LIPP primarily merely a surname when used in connection with restaurant services); *In re Woolley's Petite Suites,* 18 USPQ2d 1810 (TTAB 1991) (holding WOOLLEY'S PETITE SUITES primarily merely a surname for hotel and motel services). In view thereof, Respondent's motion for summary judgment on Petitioner's asserted claim under Trademark Act Section 2(e)(4) and Petitioner's cross-motion for summary judgment on the same claim are **denied**.

With respect to Petitioner's claim under Trademark Act Section 2(c), Section 2(c) requires, *inter alia*, that the party asserting this ground must have a cognizable or proprietary right in the name at issue. *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.P.A.*, 32 USPQ2d 1192, 1195 (TTAB 1994) (petitioner failed to prove that it has any linkage or relationship with an individual known as the Duca D'Aosta upon which it could assert this third party's rights). Here, Petitioner has submitted no evidence, nor has it argued that it is related to or is otherwise in privity with an individual identified by the name "CINTRON." In view thereof, there is no factual dispute as to whether Petitioner has a cognizable or proprietary right in the name "CINTRON." In view thereof, we find as a matter of law that Petitioner is prohibited from bringing its Section 2(c) claim against Respondent. Accordingly, Respondent's motion for summary judgment with respect to the Section 2(c) claim in each proceeding is **granted**,[8] Petitioner's summary judgment motion as to that claim is **denied**, and Petitioner's claim under Trademark Act Section 2(c) is **denied with prejudice**.

Proceeding Resumed; Trial Dates Reset

This consolidated proceeding is resumed only with respect to Petitioner's claims under Trademark Sections 2(a), 2(e)(1), and 2(e)(4) and its

[8] The parties are reminded that our decision granting partial summary judgment is interlocutory in nature and may not be appealed until a final decision is rendered in these proceedings. *See Copeland's Enterprises Inc. v. CNV Inc.*, 887 F.2d 1065, 12 USPQ2d 1562 (Fed. Cir. 1989).

abandonment claim. Trial dates are reset in accordance with the following schedule:

Plaintiff's 30-day Trial Period Ends	**1/13/2015**
Defendant's Pretrial Disclosures Due	**1/28/2015**
Defendant's 30-day Trial Period Ends	**3/14/2015**
Plaintiff's Rebuttal Disclosures Due	**3/29/2015**
Plaintiff's 15-day Rebuttal Period Ends	**4/28/2015**

IN EACH INSTANCE, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party **WITHIN THIRTY DAYS** after completion of the taking of testimony. *See* Trademark Rule 2.125, 37 C.F.R. § 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129, 37 C.F.R. § 2.129.

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