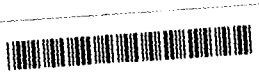
Exhibits.

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

In the matter of Application Serial No. 75/519,076



12-31-2001
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #26

Mark	:	VISION COMPASS
International Class	:	9
Filed	:	July 16, 1998
Published	:	August 8, 2000

COMPASS HOLDING BV, COMPASS PUBLISHING, BV and COMPASS AMERICA, INC. Opposers, v. VISIONCOMPASS, INC. Applicant.	)	Opposition No. 121,332 **APPLICANT'S MOTION TO STRIKE BRIEF IN SUPPORT OF OPPOSER'S MOTION FOR SUMMARY JUDGMENT**

Applicant, VisionCompass, Inc., hereby moves the Trademark Trial and Appeal Board to strike all or part of Opposer's Brief in Support of Opposer's Motion for Summary Judgment (Opposer's Motion).

I. BASIS FOR MOTION

Applicant makes this motion under TBMP §517, as evidence submitted in support of Opposer's brief with regards to Opposer's answers to discovery requests and interrogatories are hearsay and not authenticated.

"..Documents and other exhibits which are not self-authenticating may be submitted in

conjunction with a summary judgment motion, pursuant to the provisions of Rule 56(e). To be admissible under Rule 56(e), such documents and/or exhibits must be authenticated by and attached to an affidavit (or declaration in a Board proceeding) complying with the Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." (Raccioppi v. Apogee Inc., 47 USPQ2d 1368, 1369 (TTAB 1998).

The documents submitted in support of Opposer's Motion section II, section III.C.3, sections III.C.3.1 through III.C.3.11, section III.D, and section III.F are the Opposer's own answers and production items

It is possible that the Opposer's will state that these documents are self-authenticating. However, there is no indication that these documents meet the requirements of printed publications, as they are printouts from the Internet with no identification of a permanent source for the articles See Raccioppi v. Apogee, 47 USPQ2d 1368, 1370). In addition, these documents include advertising flyers and pamphlets, which must authenticated (see Glamorene Products Corp. v. Earl Grissmer Co., 203 USPQ 1090 (TTAB, 1979). Similarly, the documents include press releases, press clippings or product information prepared by a party (see Harjo v. Pro-Football Inc., 50 USPQ2d 1705, 1722, (TTAB 1998). Therefore, these documents are not admitted into evidence and are subject to a hearsay objection (see Gravel Cologne, Inc. v. Lawrence palmer, Inc., 176 USPQ 123 (CCPA 1972). The Board should therefore disregard and strike at least those portions of the Opposer's Brief listed above.

Applicant has simultaneously filed a Brief in Opposition to Opposer's Motion for Summary Judgment. Applicant submits that if the Board grants Applicant's Motion to Strike, there remain no grounds for Opposer's Motion for Summary Judgment. Therefore, Applicant requests that, if the Board grants this motion, that the Opposer's Motion for Summary Judgment be overruled.

DATED this 24th day of December, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Applicant's Motion to Strike Brief in Support of Opposers' Motion for Summary Judgment has been served on the attorney for Opposers via first-class mail, postage prepaid, on the date set forth below, addressed to:

Mr. Thomas J. Vande Sande
Hall, Priddy, Myers and Vande Sande
10220 River Road, Suite 200
Potomac, MD 20854

12/24/2001
Date

James E. Harris, Reg. No. 40,013
for Julie L. Reed, Reg. No. 35,349

Attorney Docket No. 9660-3

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

Compass Holding BV, Compass Publishing BV and Compass America, Inc.,	)	
Opposers,	)	Opposition No. 121,332
v.	)	
VisionCompass, Inc.,	)	
Applicant.	)	

Box TTAB NON FEE
Assistant Commissioner for Trademarks
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

TRANSMITTAL LETTER

Enclosed for filing are:

1. Applicant's Motion to Strike Brief in Support of Opposers' Motion for Summary Judgment;

2. Applicant's Brief in Opposition to Opposers' Motion for Summary Judgment; and

3. Postcard.

Any deficiency or overpayment should be charged or credited to deposit account number 13-1703.

Respectfully submitted,

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

In the matter of Application Serial No. 75/519,076

Mark	:	VISIONCOMPASS
International Class	:	9
Filed:		July 16, 1998
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COMPASS HOLDING BV, COMPASS PUBLISHING BV and COMPASS AMERICA, INC.	)	Opposition No. 121,332
Opposers,	)	
v.	)	**APPLICANT'S BRIEF IN OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT**
VISIONCOMPASS, INC.,	)	
Applicant.	)	

BACKGROUND

Applicant's application to register "VISIONCOMPASS," Serial No. 75/519,076, was published for opposition on August 8, 200. Opposers, Compass Holding, et al. (Compass), filed a Notice of Opposition on December 6, 200. Discovery in this case closed on September 29, 2001. Opposers filed a Motion for Summary Judgment on November 21, 2001. The Applicant files this brief in opposition of this motion for the reasons as set forth below.

The Applicant has simultaneously filed a Motion to Strike Brief on Motion with regard to Opposers' Brief in Support of Motion for Summary Judgment. The Applicant submits this brief in opposition to Opposers' motion if the Board were to rule against Applicant on the Motion to Strike.

ARGUMENT

I. OPPOSER'S HAVE NOT MET THEIR BURDEN

A. Summary Judgment and the Likelihood of Confusion Analysis

Federal Rule of Civil Procedure 56, made applicable to Trademark Trial and Appeal Board (TTAB) proceedings by 37 CRF § 2.166(a), makes summary judgment appropriate only in those cases in which there exists no genuine issue of material fact, and is otherwise inappropriate (see *Milliken & Co. v. Image industries, Inc.* 39 USPQ2d 1192 (TTAB 1996).

Under Rule 56 of the Federal Rules of Civil Procedure (Rule 56), the moving party has the burden of showing the absence of any genuine issue as to all the material facts, which, under the applicable standards of substantive law, entitled the moving party to judgment. (See *Old Grantian Co. v. William Grant & Sons, Ltd.*, 150 USPQ 58 (CCPA 1966).

The factors set forth in *In re E.I. du Pont de Nemours & Co.*, 177 USPQ 563 (CCPA 1973) provide the bases upon which the TTAB analyzes the likelihood of confusion issue. As set forth below, the analysis of the relevant *Du Pont* factors shows that the Opposers have not met their burden under Rule 56.

B. The Parties' Marks are not Similar

Applicant's proposed mark is for VISIONCOMPASS, which does not look or sound like Opposers' mark COMPASS. Applicant's proposed mark has a different connotation than Opposers' mark and therefore will result in a different commercial impression. A mark that "merely calls to mind" another mark does not cause likelihood of confusion (see *Viacom International Inc. v. Komm,* 46 USPQ2d 1233 (TTAB 1998).

In their brief refer to instances where Applicant refers to "various of its offerings" with

designations such as "the Compass Document (*Opposers' Brief*, p. 3)." Applicant submits that this reference has been taken out of context and in all fairness should be viewed in its entirety. The "Compass document" to which Opposers' refer is defined as "This details the process of generating and validating the Aspects. To ensure that *VisionCompass and its usage*...[emphasis added]." This reference is made internal to the documentation provided along with the VisionCompass software (*Opposers' Brief*, Ex. 4). This document is only provided with a purchase of the VisionCompass software and as such, its similarity would not give rise to the likelihood of confusion.

As Opposers have not met their burden of showing the absence of any genuine issue as to the material facts, summary judgment is inappropriate.

C. The Parties' Goods and Services

Opposers' mark is used in connection with offering and rendering consulting and advisory services for the analysis and improvement of Information Technology and business operations (See *Compass America's Answers To Applicant's First Set Of Interrogatories*, attached, specifically the answer to Interrogatory No. 2, hereinafter referred to as *Opposers' First Responses*, as the responses of Compass Publishing BV and Compass Holding BV refer to the responses of Compass America, Inc.). Applicant's proposed mark is used to mark packaging and media containing a software package as set forth in Applicant's identification of goods (see *Applicant's application Serial No. 75/519,076*).

In their brief, the Opposers state several times that "Applicant seeks to provide... (p. 5)," "Applicant also attempts to identify...(p. 6)," as examples. Similarly, the Opposers refer to Applicant's consulting services, (p. 8) and provide an excerpt that states, "After signing

contracts, the first group of people that were sent in by VisionCompass, Inc. was a team of consultants. (*Opposer's Brief, Ex. 35).* Applicant again submits that these comments have been taken out of context. Indeed, the next sentence in that very same document states, "Armed with the latest information in how to measure and evaluate all aspects of the supply chain, these consultants worked closely *with the implementation team...*" These consultants are only provided to assist with training, implementation and utilization of the VisionCompass software.

Therefore, Opposers have not met their burden of showing an absence of genuine issues as to the material facts.

D. Consideration of Channels of Trade Undermines Likelihood of Confusion

Both Applicant and Opposers promote their goods through three main mediums: tradeshows, a company web site, and through print advertisements (*Opposers' Brief* p. 9). However, as set forth below with regard to the sophistication of targeted consumers, this overlap of trade channels further confirms that the consumers that encounter either the Opposers or the Applicant in these channels of trade are sophisticated consumers.

E. The Sophistication of Targeted Consumers Eliminates the Likelihood of Confusion

The sale of both Applicant's goods and Opposers' services are made in an environment of careful, sophisticated purchasing. As set forth in *Opposers' First Responses*, specifically the response to Interrogatory No. 3, Opposers' goods and services are (summarized below):

1) offered for sale, and directly sold by, Opposers' employees;
2) reach ultimate consumers and/or users through the rendering of services by Opposers' employees; and

3) purchasers and users of Opposers' goods and services include companies, organizations, and governmental entities, and personnel of same concerned with business efficiency and the analysis and improvement of IT (Information Technology) and business operations.

Applicant's goods are offered for sale through a direct sales force of Applicant or through identified value added resellers. Purchasers of Applicant's goods are companies, organizations and governmental entities and personnel of same.

Circumstances which have increased the degree of care and reduced likelihood of confusion include institutional purchasing practices which are the result of interlocking levels of responsibility (*Inc. Publishing Corp. v. Manhattan Magazine, Inc.*, 227 USPQ 257, 269, 276-77 (SDNY 1985, *aff'd without opinion,* 788 F.2d 3 (2nd Cir. 1986)), consultation with experts (*Washington National Insurance Co. v. Blue Cross and Blue Shield United of Wisconsin*, 14 USPQ2d 1307, 1310 (ND Ill. 1990)), the purchasers has a 'reasonably focused need' or 'specific purpose' or plan involving the product (*Haydon Switch & Instrument v. Rexnord, Inc.*, 4 USPQ2d 1510, 1517 (D. Conn 1987)), and the nature of the product is unusual in terms of size or complexity (*Astra Pharmaceutical Prods. Inc., v. Beckman Instruments, Inc.*, 220 USPQ 786, 790-791 (1st Cir. 1983)).

As is commonly known, most companies and government agencies have several levels of approval prior to making an expensive purchase. Opposers' goods and services and Applicant's goods are expensive and would therefore involve several layers of approval for most entities purchasing these goods and services (see *Opposers' Response to Request for Production 3,* submitted under protective order in a sealed envelope attached). Opposers have admitted that any goods sold are through consultants, presumably experts in Opposers' goods and services (see

Opposers' First Responses). Both Opposers' goods and services and Applicant's goods are intended for a specific purpose, business management, and the consumers purchasing these items would be sophisticated consumers. Finally, consulting services and software packages for business management have high degrees of complexity.

Therefore, Applicants submit that there is evidence to support that a high degree of care is used in making purchases of either Opposers' goods and services, or Applicant's goods, and the likelihood of confusion is reduced. As Opposers have not met their burden on their motion for summary judgment, Opposer's Motion for Summary Judgment should be denied.

F. No Actual Confusion Exists

In their brief, Opposers acknowledge that no actual confusion has occurred. Therefore, while no material issue of genuine fact exists, this factor weighs against a finding of a likelihood of confusion and would therefore render summary judgment inappropriate, as Opposers have not met their burden of showing an absence of genuine issues of material facts.

G. Applicant's Mark is Clearly Distinguishable

As stated in Opposers' Brief, Applicant did have knowledge of the Opposers' mark (*Applicant's Response to Office Action* 8/18/99 at p. 8), the fact the Trademark Examiner found no likelihood of confusion further bolsters no likelihood of confusion. Therefore, a Opposers have not met their burden of showing absence as to genuine issues of material fact exists as to the distinguishability of the Applicant's mark and the motion for summary judgment should be denied.

SUMMARY JUDGMENT IS NOT WARRANTED

Summary judgment is appropriate where no genuine issues of material fact remain to be

resolved and the moving party is entitled to judgment as a matter of law (*Buffet v. Chi-Chi's, Inc.*, 226 USPQ 428 (TTAB 1985)). For the reasons stated above, Opposers have not met their burden under Rule 56 of the Federal Rules of Civil Procedure.

CONCLUSION

Summary judgment is inappropriate and the Opposers' motion should be denied, as they have not met their burden of showing the absence of genuine issues at to the material facts.

Respectfully submitted this 24th day of December, 2001.

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