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UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. BOX. 1451  
Alexandria, Virginia 22313-1451

Mailed: May 18, 2005

Opposition No. 91156385

Jet's America, Inc.

v.

Jet City Pizza Co., Inc.

Before Walters, Rogers and Kuhlke, Administrative Trademark Judges.

Kuhlke, Administrative Trademark Judge:

This opposition now comes before the Board for consideration of applicant's motion for summary judgment on the claim of likelihood of confusion under Section 2(d) of the Trademark Act. The motion has been fully briefed.<sup>1</sup>

Opposer has opposed registration of the mark JET CITY PIZZA CO. in typed form for use in connection with "restaurant services specializing in pizzas" in class 43.<sup>2</sup> Opposer alleges, inter alia, that it "is in the restaurant business specializing in pizza," and applicant's mark used in connection with the recited services is likely to cause

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<sup>1</sup> The Board has exercised its discretion and has considered applicant's reply brief. Trademark Rule 2.127(e).

<sup>2</sup> Application Serial No. 78144080 filed on July 15, 2002, under Section 2(f), disclaiming PIZZA CO., and claiming first use and first use in commerce on November 15, 1994.

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confusion with opposer's "'JET'S PIZZA' trademark." Opposer has pleaded several registrations incorporating the term "JET'S" registered for a variety of goods in classes 25, 29 and 30.<sup>3</sup>

A party is entitled to summary judgment when it has demonstrated that there are no genuine issues as to any material facts, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The evidence must be viewed in a light favorable to the nonmoving party, and all justifiable inferences are to be drawn in the nonmovant's favor. *Opryland USA Inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

In support of its motion for summary judgment, applicant essentially argues that the marks are so dissimilar that the opposition should be dismissed based on this one factor. *Kellogg Co. v. Pack 'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). In particular, applicant argues that the dominant portion of its mark is the phrase "JET CITY" which "is a direct reference to the city of Seattle and

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<sup>3</sup> The pleaded marks include Registration No. 2133757 for JET'S PIZZA and design for use in connection with hats, shirts and sweatshirts in class 25, garden salads in class 29, and food products, namely, pizza, submarine sandwiches, calzones and bread in class 30; and Application Serial No. 76211800 for JET'S PIZZA in stylized form lined for the colors green and red for use in connection with sweatshirts in class 25, salads, namely, antipasto, garden, tuna in class 29, and food products, namely,

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therefore, the commercial impression conveyed to consumers is that of a Seattle based restaurant chain." Further, applicant argues that "opposer's use of the 'jet's' term is a reference to the founders of Jet's Pizza" and opposer's "JET'S PIZZA" marks are a combination of words and design elements that present a different commercial impression from applicant's mark. Applicant also contends that "there has been no actual confusion between the marks despite their coexistence for over ten years."<sup>4</sup>

In response, opposer essentially contends that the marks are similar inasmuch as the dominant element of their respective marks is the word "JET" and that opposer's mark is strong and entitled to a broad scope of protection.

Upon careful consideration of the arguments and evidence presented by the parties, and drawing all inferences in favor of opposer, we find that applicant has not demonstrated the absence of a genuine issue of material fact and that trial is therefore unnecessary. We find that there are genuine issues of fact, at a minimum, with respect to the strength of opposer's marks and the commercial

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pizza, submarine sandwiches, calzones and bread in class 30 (this application has subsequently issued as Registration No. 2712642).

<sup>4</sup> We note that applicant does not provide complete evidence of the conditions under which concurrent use existed (e.g., the location and extent of *applicant's* restaurants). *In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (factor number 8: the length of time during and conditions under which there has been concurrent use without evidence of actual confusion).

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impression of the marks.<sup>5</sup> Accordingly, applicant's motion for summary judgment is denied.<sup>6</sup>

Discovery and trial dates are reset as indicated below.<sup>7</sup>

DISCOVERY PERIOD TO CLOSE:	<b>July 31, 2005</b>
Testimony period for party in position of plaintiff to close:	<b>October 29, 2005</b>
Testimony period for party in position of defendant to close:	<b>December 28, 2005</b>
Rebuttal testimony period to close:	<b>February 11, 2006</b>

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<sup>5</sup> For example, applicant's argument that the meaning or connotation of its mark incorporating the phrase "JET CITY" is a reference to Seattle, Washington known for its aircraft industry can also lead to the conclusion that opposer's marks that incorporate the word "JET'S" is a reference to the products coming out of that aircraft industry.

<sup>6</sup> The Board reminds the parties that any evidence submitted in support of or opposition to a summary judgment motion is only considered of record for the purposes of that motion. See TBMP § 528.05(a). If the case goes to trial, the summary judgment evidence does not form part of the evidentiary record and will not be considered at final hearing unless it is properly introduced in evidence, during the appropriate trial period.

<sup>7</sup> Applicant's motion to extend discovery is granted as indicated above.