

**THIS OPINION IS NOT
A PRECEDENT OF
THE T.T.A.B.**

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

Goodman

Mailed: January 12, 2007

Opposition No. 91158743

Golden Gate Fireworks, Inc.

v.

American Promotional Events,
Inc.

Before Hohein, Grendel and Walsh, Administrative Trademark
Judges.

By the Board:

Applicant has filed an intent-to-use application to register the mark IF IT'S NOT TNT, IT'S NOT FIREWORKS for "fireworks" in Class 13, "paper products, namely posters" in Class 16, "clothing, namely t-shirts, jackets, caps, sweatshirts" in Class 25, and "wholesale and retail store services in the field of fireworks" in Class 35.¹ As grounds for opposition, opposer has alleged a claim of deceptiveness under Section 2(a) of the Trademark Act.

This case now comes up on opposer's motion for summary judgment, filed July 19, 2006. The motion is fully briefed.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute and the moving party is entitled to judgment

¹ Application Serial No. 78206944, filed June 24, 2003.

as a matter of law. See Fed. R. Civ. P. 56(c). The party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact and that it is entitled to a judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The evidence must be viewed, however, in a light favorable to the non-moving party, and all reasonable inferences are to be drawn in the non-movant's favor. Thus, in considering the propriety of summary judgment, the Board may not resolve issues of material fact against the non-moving party; it may only ascertain whether such issues are present. See, e.g., *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992); and *Olde Tyme Foods, Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

Upon careful consideration of the arguments and evidence presented, we find that opposer has not met its burden to obtain summary judgment. Specifically, at a minimum, there are genuine issues of material fact as to whether consumers would believe that applicant is the only source of fireworks and whether this misrepresentation is material to their purchase of fireworks.²

² The fact that we have identified certain genuine issues of material fact as a sufficient basis for denying opposer's motion

In view thereof, opposer's motion for summary judgment is denied.³

Trial dates, commencing with the initial testimony period, are reset as follows:

DISCOVERY PERIOD TO CLOSE:	CLOSED
30-day testimony period for party in position of plaintiff to close:	March 11, 2007
30-day testimony period for party in position of defendant to close:	May 10, 2007
15-day rebuttal testimony period for party in position of plaintiff to close:	June 24, 2007

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. Trademark Rule 2.125.

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

for summary judgment should not be construed as a finding that these are necessarily the only issues that remain for trial.

³ We also note, however, that absent concrete evidence of consumer perception in relation to applicant's mark, there is serious doubt as to whether applicant's mark could be proven to be perceived by consumers of fireworks as anything more than puffery or hyperbole. Applicant's mark appears, for instance, to be similar in character to the slogan "When You're Out of Schlitz You're Out of Beer." See Accompanying Report to Declaration of James T. Berger, p. 8, of applicant's response to motion for summary judgment.