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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Peace Mountain Natural Beverages Corp.

v.

Sunset Health Products, Inc.

Opposition No. 91167165 to application Serial No. 76561323
filed on November 24, 2003

Mario G. Ceste of Law Offices of Mario G. Ceste LLC for Peace Mountain Natural Beverages Corp.

John F. Sicotte of Law Offices of Lawrence J. Turner for Sunset Health Products, Inc.

Before Quinn, Hohein and Walsh, Administrative Trademark Judges.
Opinion by Hohein, Administrative Trademark Judge:

Sunset Health Products, Inc. has filed an application to register the mark "QUENCH HOLLYWOOD MIRACLE DIET WATER" in standard character form on the Principal Register for "bottled drinking water" in International Class 32.¹

Inspiration Software, Inc. has opposed registration on the ground that opposer "has for many years been engaged in the research, development, manufacture and marketing of water products which are designed to help people loose [sic] and

¹ Ser. No. 76561323, filed on November 24, 2003, which is based on an allegation of a date of first use anywhere and in commerce of September 30, 2002. The words "DIET WATER" are disclaimed.

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maintain their weight"; that opposer "has also developed, manufactures and distributes bottled water products, organic juices and energy drinks under its brands"; that opposer "owns numerous Federal[ly] Registered trademarks including but not limited to Diet Water® Reg. No. 2576866 (... hereinafter 'DIET WATER'); Miracle Juice® Reg. No. 2245092 and Reg. No. 2178534, Miracle-Ade® Reg. No. 2317040, Miracle Healing Juice® Reg. No. 2245093, Miracle Juice Energy Drink® Reg. No. 2248239, Skinny Water® Reg. No. 2557075, and Peace Mountain Cardio Water® Reg. No. 2632310"; that, on information and belief, applicant "is currently selling in the United States ready to drink water products to promote weight loss"; that "[s]ince prior to November 2003, Opposer has had valid and enforceable rights in and to its DIET WATER mark"; that since such date, opposer "has advertised and promoted throughout the United States the sale and distribution in interstate commerce of its goods and licensed goods bearing the DIET WATER mark," with the result that such mark "has become identified in the minds of the public and trade as evidencing products that emanate from Opposer"; that, "[o]n information and belief, Opposer's DIET WATER product and Applicant's QUENCH HOLLYWOOD MIRACLE DIET WATER product may be used by consumers for similar purposes, that is[,] to promote and maintain weight loss," such products "will be sold in the same or similar channels of trade ... to the same or a similar class of consumers"; that contemporaneous use by applicant of its "QUENCH HOLLYWOOD MIRACLE DIET WATER" mark in connection with its "bottled drinking water" is likely to cause confusion with

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opposer's use of its "DIET WATER" mark in connection with its various "water products"; and that inasmuch as opposer, as indicated previously, also "owns numerous registered marks containing the word 'Miracle' including the registration for 'Miracle Juice,'" the "combination of the words 'MIRACLE' and 'DIET WATER'" in applicant's mark "will only increase the likelihood that the consuming public will attribute the Applicant's goods with being affiliated with the Opposer."

Applicant, in its answer, has specifically admitted the allegations that opposer "owns numerous Federal[ly] Registered trademarks including but not limited to Diet Water® Reg. No. 2576866 (... hereinafter 'DIET WATER'); Miracle Juice® Reg. No. 2245092 and Reg. No. 2178534, Miracle-Ade® Reg. No. 2317040, Miracle Healing Juice® Reg. No. 2245093, [and] Miracle Juice Energy Drink® Reg. No. 2248239 ..." and that applicant "is currently selling in the United States ready to drink water products to promote weight loss." Applicant, however, has denied the remaining salient allegations of the opposition, including in particular the allegation that "[s]ince prior to November 2003, Opposer has had valid and enforceable rights in and to its DIET WATER mark."

The record consists solely of the pleadings and the file of the involved application. Trial dates have expired without either party having taken testimony or filed a notice of reliance, and only opposer filed a brief on the case. While it is noted that opposer, with its brief, attached various exhibits, including what it characterizes as "a copy of the label from a

DIET WATER bottle" and a plain copy, as taken from the Trademark Electronic Search System (TESS) database of the U.S. Patent & Trademark Office, of its pleaded "DIET WATER Reg. No. 2576866,"²

² Aside from the untimely submission thereof, it is pointed out that in any event Trademark Rule 2.122(d)(2) provides that:

A registration owned by any party to a proceeding may be made of record in the proceeding by that party by appropriate identification and introduction during the taking of testimony or by filing a notice of reliance, which shall be accompanied by a copy (original or photocopy) of the registration prepared and issued by the Patent and Trademark Office showing both the current status of and current title to the registration. The notice of reliance shall be filed during the testimony period of the party that files the notice.

As explained in TBMP §704.03(b)(1)(A) (2d ed. rev. 2004) (footnotes omitted; italics in original; emphasis added):

A party that wishes to rely on its ownership of a Federal registration of its mark that is not the subject of a proceeding before the Board may make the registration of record by offering evidence sufficient to establish that the registration is still subsisting, and that it is owned by the party which seeks to rely on it. This may be done in a number of different ways.

....

A Federal registration *owned by any party* to a Board inter partes proceeding will be received in evidence and made part of the record in the proceeding if that party files, during its testimony period, a notice of reliance on the registration, accompanied by a copy of the registration prepared and issued by the Office showing both the current status of and current title to the registration.

....

The registration copies "prepared and issued by the Patent and Trademark Office showing both the current status of and current title to the registration," as contemplated by ... [Trademark Rule] 2.122(d), are printed copies of the registration on which the Office has entered the information it has in its records, at the time it prepares and issues the status and title copies, about the current status and title of the registration. That information includes information about the renewal, cancellation ...; affidavits or declarations under Sections 8, 15 and 71 of the Act ...; and recorded documents transferring title. **Plain copies of the registration, and the electronic equivalent thereof, such as printouts of the registration from the electronic**

no consideration can be given to such evidence. As stated in TBMP §801.01 (2d ed. rev. 2004) (footnote omitted), "[a] brief may not be used as a vehicle for the introduction of evidence." In particular, TBMP §539 (2d ed. rev. 2004) provides in pertinent part that "[e]videntiary material attached to a brief on the case can be given no consideration unless it was properly made of record during the testimony period of the offering party." Likewise, TBMP §704.05(b) (2d ed. rev. 2004) states in relevant part that "[e]xhibits and other evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony." Furthermore, as set forth in TBMP §704.06(b) (2d ed. rev. 2004), "[f]actual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial."

Trademark Rule 2.121(a)(1) provides that "[n]o testimony shall be taken except during the times assigned, unless by stipulation of the parties approved by the Board, or, upon

records of the Office's trademark automated search system, are not sufficient.

....

A Federal registration *owned by any party* to a Board inter partes proceeding may be made of record by that party by appropriate identification and introduction during the taking of testimony, that is, by introducing a copy of the registration as an exhibit to testimony, made by a witness having knowledge of the current status and title of the registration, establishing that the registration is still subsisting, and is owned by the offering party.

Opposer, however, has failed to utilize any of such methods and, thus, none of its pleaded registrations, including its registration for the mark "DIET WATER," forms part of the record herein.

motion, by order of the Board." In addition, Trademark Rule 2.121(b)(1) states, in particular, that the Board "will schedule a testimony period for the plaintiff to present its case in chief." Here, opposer presented no testimony or other evidence during its initial testimony period and has offered no reason, much less a showing of excusable neglect as required by Fed. R. Civ. P. 6(b) to reopen such period, for its failure to timely submit the evidence attached to its brief. Thus, and inasmuch as Trademark Rule 2.123(1) specifies that "[e]vidence not obtained and filed in compliance with" the rules of practice "will not be considered," there is no evidence which is properly of record in this proceeding on behalf of opposer other than--as noted above--the two admissions by applicant in its answer.

Although applicant, with respect to such admissions, has admitted in particular that opposer is the owner of the pleaded registration for the mark "DIET WATER,"³ applicant has also specifically denied that "[s]ince prior to November 2003, Opposer has had valid and enforceable rights in and to its DIET WATER mark," a denial which encompasses whether such registration is subsisting in addition to any common law rights which opposer may possess in the mark. Therefore, in order for priority not to be in issue with respect to its claim of priority of use and likelihood of confusion, it was incumbent upon opposer to prove that the current status of its pleaded registration for the mark

³ Reg. No. 2,576,866, issued on the Supplemental Register on June 4, 2002 for "bottled drinking water containing electrolytes and natural extracts," sets forth a date of first use of such mark anywhere of May 15, 2000 and a date of first use of the mark in commerce of January 10, 2001; the word "WATER" is disclaimed.

"DIET WATER" is that such registration is subsisting and not merely, as applicant has admitted, that such registration is currently owned by opposer. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

Accordingly, irrespective of whether confusion is likely from contemporaneous use of the marks at issue in connection with the respective goods of the parties, because opposer, as the party bearing the burden of proof in this proceeding,⁴ has not presented testimony or properly introduced any other evidence during its initial testimony period as proof establishing its priority of use or precluding the need to determine such issue, it is adjudged that opposer cannot prevail on its claim of priority of use and likelihood of confusion and that the opposition must fail.

Decision: The opposition is dismissed.

⁴ It is settled that opposer, as the plaintiff in this proceeding, bears the burden of proof with respect to its claim of priority of use and likelihood of confusion. See, e.g., Bose Corp. v. QSC Audio Products Inc., 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) ["[t]he burden of proof rests with the opposer ... to produce sufficient evidence to support the ultimate conclusion of [priority of use] and likelihood of confusion"]; Hoover Co. v. Royal Appliance Mfg. Co., 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) ["[i]n opposition proceedings, the opposer bears the burden of establishing that the applicant does not have the right to register its mark"]; Champagne Louis Roederer S.A. v. Delicato Vineyards, 143 F.3d 1373, 47 USPQ2d 1459, 1464 (Fed. Cir. 1998) (Michel, J. concurring); Sanyo Watch Co., Inc. v. Sanyo Elec. Co., Ltd., 691 F.2d 1019, 215 USPQ 833, 834 (Fed. Cir. 1982) ["[a]s the opposer in this proceeding, appellant bears the burden of proof which encompasses not only the ultimate burden of persuasion, but also the obligation of going forward with sufficient proof of the material allegations of the Notice of Opposition, which, if not countered, negates appellee's right to a registration"]; and Clinton Detergent Co. v. Proctor & Gamble Co., 302 F.2d 745, 133 USPQ 520, 522 (CCPA 1962) ["[o]pposer ... has the burden of proof to establish that applicant does not have the right to register its mark."]. It remains opposer's obligation to satisfy its burden of proof, regardless of whether applicant offers any evidence.