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

Proceeding	91170341
Party	Defendant Candwich Food Corporation
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ConAgra Foods RDM, Inc., f/k/a
ConAgra Brands, Inc.

Opposer,

v.

Candwich Food Corporation,

Applicant.

In re the matter of:

Serial No.: 78/337,608

Mark: CANDWICH

OPPOSITION NO. 91170341

FILED VIA ESTTA

APPLICANT'S BRIEF ON THE MERITS

Pursuant to 37 C.F.R. § 2.128, the Applicant, Candwich Food Corporation, files and serves this Brief on the Merits in connection with the above-referenced Opposition matter.

Respectfully submitted,

/Julie K. Morriss

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III. INTRODUCTION

The Applicant, Candwich Food Corporation, seeks to register the mark CANDWICH for use in connection with food items packaged in cans, namely meat-based sandwiches, candy, popcorn, candy popcorn and dessert puddings in International Class 030, and food items packaged in cans, namely, vegetable-based snack foods in International Class 029. There is no likelihood of confusion between the Applicant's CANDWICH mark when used on the goods identified in the application and the Opposer's mark, MANWICH, because the marks and the goods are significantly dissimilar from each other. The Applicant's mark is entitled to registration.

IV. DESCRIPTION OF THE RECORD

- A. Registration No. 888,780 for MANWICH. (Opposer's First Notice of Reliance)
- B. Registration No. 1,349,839 for MANWICH. (Opposer's Second Notice of Reliance)
- C. Certain portions of the deposition of Mark R. Kirkland as set forth in Opposer's Third Notice of Reliance.
- D. Page 3 of the May 12, 2006 issue of The Baton Rouge Advocate. (Opposer's Fourth Notice of Reliance)
- E. Volume 66, Issue 1, page 19 of Food Processing. (Opposer's Fourth Notice of Reliance)
- F. Volume 42, Issue 1 dated January 1, 2005 of Packaging Digest. (Opposer's Fourth Notice of Reliance)

- G. Registration Nos. 2,899,796; 2,928,755; 2,156,879; 1,222,755; and 3,229,262. (Opposer's Fifth Notice of Reliance)
- H. Testimony Deposition of Joe Bybel taken August 6, 2007 (with Exhibits).
- I. Copy of a label taken from a can of MANWICH brand sloppy joe sauce (with supporting declaration). (Applicant's First Notice of Reliance)
- J. Testimony deposition of Mark R. Kirkland taken February 27, 2007. (Applicant's Second Notice of Reliance)
- K. Certain selected testimony from the deposition of Mark R. Kirkland, taken February 27, 2007. (Applicant's Third Notice of Reliance)

V. STATEMENT OF THE ISSUE

Whether Applicant's mark, CANDWICH, sought for registration for "food items packaged in cans, namely meat-based sandwiches, candy, popcorn, candy popcorn and dessert puddings," in International Class 030, and "food items packaged in cans, namely, vegetable-based snack foods" in International Class 029, is entitled to registration under 15 U.S.C. § 1052 because it is distinct from and not likely to cause confusion with Opposer's MANWICH mark because, *inter alia*, the nature of the goods sold and the channels of trade in which the respective goods are sold are distinct and not likely to cause confusion.

VI. RECITATION OF THE FACTS

The Applicant seeks to register the mark CANDWICH for use with food items packaged in cans, namely meat-based sandwiches, candy, popcorn, candy popcorn and

dessert puddings in International Class 030, and for food items packaged in cans, namely, vegetable-based snack foods in International Class 029. (Serial No. 78/337, 608; Exhibit 5 of Kirkland Depo.)

The goods that will be sold under the Applicant's CANDWICH mark are shelf-stable, ready-to-eat, sandwiches that are contained within vending-sized cans for sale in vending machines. (Kirkland Depo., page 15, lines 15-18; Product labels, Exhibits 4 and 6 of the Kirkland Depo.).

Applicant's product is primarily directed to sale through vending machines. (Kirkland Depo., page 24, lines 9-11.)

Other than being sold through vending machines, Applicant's canned sandwich product will likely be sold in retail stores in the snack food aisle. (Kirkland Depo., page 25, lines 7 through page 26, line 1.)

The shelf-stable sandwiches under development are peanut butter and jelly, peanut butter and jam, barbecue chicken, barbecue beef, pizza, French toast and bacon & cheddar. (Kirkland Depo., page 15, line 18 through page 16, line 5; Product labels marked as Exhibits 4 and 6 of the Kirkland Depo.)

The ready-to-eat sandwich products sold under the CANDWICH mark are not temperature-controlled and are not frozen. (Kirkland Depo., page 49, lines 13-24.)

It is also contemplated, as noted by the description of goods in Serial No. 78/337,608, that the vendable-sized cans will also contain vegetable-based snacks, such as potato chips, crackers, puddings, etc. (Kirkland Depo., page 43, line 6 through page 45, line 5.)

The consumer of the Applicant's product sold under the CANDWICH mark are

primarily people who are looking for a convenient on-the-go food that they can keep in their desk or in their car, pack into their children's lunches, or buy at a vending machine. (Kirkland Depo., page 22, line 23 through page 23, line 5.)

The mark CANDWICH is coined from the words "canned" and "sandwich."
(Kirkland Depo., page 19, line 22 through page 20, line 7.)

The MANWICH mark is registered for sandwich sauce (U.S. Registration No. 888,780) and for spice and seasoning mixes for meats (U.S. Registration No. 1,349,830). No registration for the mark MANWICH covers sandwiches, canned sandwiches, or snack food items that are vegetable-based. (*Id.*)

The MANWICH sauce product is a tomato-based sauce sold in a can. ("Hunt's Manwich® sandwich sauce" product label, Exhibit 2 to Bybel Deposition; Manwich® sauce product label, Applicant's First Notice of Reliance.) Manwich® sauce is added to ground beef or turkey meat that is purchased separately and cooked by the consumer, who then places the resulting cooked sloppy joe mixture on a bun or other separately purchased bread material to form a sloppy joe sandwich. (*Id.*, label directions.)

As Manwich® sandwich sauce is not a ready-to-eat product or a fully made sandwich product as is clear from the product label which states, "EASY TO MAKE", "Brown 1 lb. ground beef in a skill; pour off excess fat. Add 1 can Manwich, stir, simmer 5 minutes. Serve on hamburger buns. Makes 6 man-size servings." (Exhibit 2 to Bybel Deposition) The product must be made. (Bybel Depo., page 26, line 25 through page 26, line 14.)

Opposer introduced into the market a frozen product sold under the mark MANWICH which is a frozen mixture of ground beef and the traditional Manwich® sauce.

(Bybel Depo., page 27, line 16 through page 28, line 6.) The frozen MANWICH product is not ready to eat; it must be heated and then placed on a bun or other bread-like material to form a sandwich. (Bybel Depo., page 26, line 12 through page 27, line 3).

The Manwich® product is not sold in vending machines. (Bybel Depo., page 28, lines 7-9)

The main target consumer for Manwich® sauce are the people most likely to use the product and is, therefore, directed toward the head of household, typically a female, roughly 35 to 45 years old. (Bybel Depo., page 13, lines 10-20.)

MANWICH is located in the aisles of grocery or food stores where tomato sauces are located. (Bybel Depo., page 29, lines 6-21.)

The mark MANWICH is clearly a contraction of “man” and “sandwich” meant to imply a “man size sandwich,” as indicative of the label advertising, “Makes a tempting meal that bewitches all the men in your family,” and “Makes 6 man-size servings.” (Hunt’s Manwich® sandwich sauce product label, Exhibit 2 to Bybel Deposition; Bybel Depo., page 29, line 22 through page 30, line 12.)

VII. ARGUMENT

Section 2 of the Lanham Act (15 U.S.C. § 1052) provides that “[N]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office. . . as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” Determination under

Section 2(d) is based on an analysis of all the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. duPont de Nemours, & Co.* 476 F.2d 1357 (CCPA 1973); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311 (Fed. Cir. 2003).

A. The Marks Are So Dissimilar In Their Overall Commercial Impression That No Likelihood Of Confusion Can Result

The test in comparing marks is not whether the marks can be distinguished when subjected to side-by-side comparison, but whether the terms are sufficiently similar in terms of overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. V. JFD Electronics Components Corp.*, 565 F.2d 683 (CCPA 1977). The proper focus is on the recollection of the average consumer who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Wintson, Inc.*, 207 U.S.P.Q. 335, 344 (TTAB 1980).

Opposer's Manwich[®] sauce is well-known to be a tomato-based sauce that is added to ground beef, which is separately purchased and cooked by the consumer, to produce a sloppy joe mixture for placement on a hamburger bun or other separately purchased bread material. While Manwich[®] sauce admittedly enjoys a reputation as being a means of providing a relatively quick meal with relatively shortened preparation times, Manwich[®] sauce is nonetheless well-known to be but one ingredient for a sandwich product that requires preparation time and the addition of other, separately purchased ingredients (meat and bread). Consequently, Manwich[®] sauce is well-known *not* to be a ready-to-eat product, or one that is considered a ready-to-eat snack food.

Manwich[®] sauce is marketed to the head of the household, typically a female, who

is a sophisticated shopper in terms of knowing what she is shopping for (i.e., meals to prepare versus fully prepared or snack food items) and where to locate the desired products for purchase. The target consumer, head of household and/or female, knows that Manwich® sauce in a can is located in the sauce aisle of retail grocery establishments. In the case of the frozen Manwich® sauce and meat mixture, which is also a product that requires preparation time and the addition of other necessary ingredients provided by the consumer, the product is located in the frozen food section of a retail grocery establishment. The target consumer knows to find the Manwich® sauce and meat product in the frozen section of the store. The female head of household does not typically purchase the family meal from a vending machine.

The target consumer of Manwich® products is very familiar with the preparation involved in the making of the sloppy joe end product and does not consider Manwich® products to be ready-to-eat or in the nature of snack foods. The target consumer knows that purchasing the Manwich® product alone does not complete the sandwich meal; the target consumer must continue shopping to purchase hamburger buns or bread to put the sloppy joe mixture on once it is prepared. The target consumer knows not to look in the ready-to-eat or snack food aisle for Manwich® products, and the target consumer does not consider Manwich® products to be either a ready-to eat product or snack food item.

By comparison, the Applicant's CANDWICH product is a ready-to-eat, shelf-stable, fully formed sandwich that is contained in a vendable-sized can. No preparation of the sandwich is required. The target consumer is any person desiring a quick snack that is ready made and consumable by merely extracting the fully formed sandwich from a can. Such purchaser may typically be purchasing such product from a vending machine. It is

contemplated that the canned sandwich product may be coupled with other snack foods, such as vegetable-based snack foods (e.g., potato chips), candy or dessert puddings. Many different sandwiches are under consideration for sale under the CANDWICH mark, including peanut butter and jelly or jam, bacon and cheddar and French toast, none of which are sold under the MANWICH mark. Nor are vegetable-based snack foods, candy or dessert puddings sold under the MANWICH mark.

The MANWICH mark has been widely advertised over the years as a product ingredient in making “a man-sized sandwich” and that “makes a tempting meal that bewitches all the men in your family.” The MANWICH mark has been specifically marketed and advertised to suggest a sandwich befitting a man’s appetite and taste. The emphasis of the Opposer’s mark is MAN. The Opposer has never marketed the MANWICH mark to suggest that it is a ready-to-eat canned sandwich.

The Applicant’s CANDWICH mark is coined from the words “canned” and “sandwich.” There is no similarity of commercial impression that can be asserted from the elements MAN versus CAND, and there is no suggestive similarity between MAN and CAND such that likelihood of confusion would attach.

The commercial impressions provided by the Opposer’s products and the Applicant’s products are significantly dissimilar. The marks themselves, coupled with the difference in products, and where those products are sold, establishes in the mind of the average consumer a specific impression of the marks that is significantly dissimilar. Even to the recollection of the average consumer who retains a general rather than specific impression of the marks, the impression is distinctly dissimilar. Therefore, there is no likelihood of confusion between the marks.

B. The Dissimilarity Of The Marks Is Supported By The Application And Registrations

It is well settled that likelihood of confusion is determined on the basis of the goods as they are identified in the application and the cited registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F. 3d 1261 (Fed. Cir. 2002). The Applicant's mark is sought for registration for use with food items packaged in cans, namely meat-based sandwiches, candy, popcorn, candy popcorn and dessert puddings in International Class 030, and for food items packaged in cans, namely, vegetable-based snack foods in International Class 029. The Opposer's mark is registered for sandwich sauce and for spice and seasoning mixes for meats. The Opposer does not have a registration for the mark MANWICH for sandwiches in a can or snack food items (e.g., vegetable-based snack foods, candy, popcorn, dessert puddings) in a can.

The Opposer essentially argues that because of the long use of the MANWICH mark, that the Opposer is entitled to a vastly broader scope of goods description, and thus a broader application of implied consumer and trade channels, than is warranted by the plain language of the goods described in its registrations.

The Opposer urges that the goods described in the application and the registrations are closely related and fall within the Opposer's "zone of expansion." No evidence is provided that supports what Opposer's "zone of expansion" is or might be. The proper context is not whether sauces and sandwiches are offered under the trademarks of "A Taste of India" or "Planet Cook," but whether ConAgra has shown any substantial marketing efforts to extend its MANWICH mark into vending of canned sandwiches and canned snack food items such as vegetable-based snack foods, candy, popcorn and dessert puddings. No such evidence exists in the record.

The likelihood of confusion must be determined on the basis of the goods as stated in the application and registrations, and the goods, as well as the marks, are clearly dissimilar. There is no likelihood of confusion.

C. The Balance Of The DuPont Factors Weighs In Favor Of Applicant

In applying the *duPont*¹ factors to the present case, the factors weight significantly in favor of the Applicant. The sound and appearance of the marks, MANWICH and CANDWICH, are dissimilar. The commercial impression, MANWICH sauce in a can versus CANDWICH ready-to-eat sandwich and/or snack food items, is significantly dissimilar. The connotation of the marks, MANWICH for a man-sized sandwich versus CANDWICH for a ready-to-eat canned sandwich or snack food item, is significantly dissimilar.

The goods as identified in the application and registrations, namely sandwiches, candy, popcorn, candy popcorn and dessert puddings and vegetable-based snack foods packaged in a can versus sandwich sauce, spices and seasonings, are significantly dissimilar. Purchasers of the respective goods are sophisticated consumers in terms of knowing exactly what kind of food item they are looking for, ready-to-eat snack food items versus sauce that requires the purchase of additional items to then prepare a hot sandwich; thus, consumers would not be confused as to the source of the products.

The use of the marks in the marketplace is significantly different, not only because of the difference in the products (e.g., ready-to-eat peanut butter and jelly sandwich in a can versus a sauce), but the commercial impression of the product labels is significantly different. (See respective product labels: MANWICH, Exhibit 2 to Bybel Depo. and

¹ *In re E. I. duPont de Nemours, & Co.* 476 F.2d 1357 (CCPA 1973), which establishes thirteen factors to be considered in determining likelihood of confusion.

CANDWICH, Exhibits 4 and 6 of Kirkland Depo.)

The evidence of record supports a finding in favor of the Applicant on a predominance of the *duPont* factors.² The only one of the *duPont* factors that weighs in favor of the Opposer is the length of time that the Opposer's mark has been in use, and it is that factor that the Opposer would urge the Board to apply as being the sole factor that outweighs all others, and on which the Opposer should be given the presumption of likelihood of confusion. However, where, as here, the predominance of the factors establishes that no likelihood of confusion attains, the balancing of the factors should reflect accordingly.

SUMMARY

The evidence supports a finding that the marks at issue are dissimilar when applying a predominance of the *duPont* factors to the evidence, and a finding of no likelihood of confusion should be rendered. The Applicant's mark is entitled to registration accordingly.

Respectfully submitted this 7th day of March 2008,

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² There is no evidence of actual confusion. Therefore, those *duPont* factors dealing with actual confusion are not discussed and are not subject to consideration by the Board.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on the person or persons indicated below a true and correct copy of the foregoing APPLICANT'S BRIEF ON THE MERITS, which was sent via first-class mail and electronic mail on the 7th day of March 2008.

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