ESTTA Tracking number: **ESTTA199980**

Filing date: **03/21/2008**

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

Proceeding	91170341
Party	Plaintiff ConAgra Brands, Inc.
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Date	03/21/2008
Attachments	DOC032108.pdf (10 pages)(303752 bytes)

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

IN THE MATTER OF OPPOSITION NO. 91170341
Serial No. 78/337,608
CANDWICH

CONAGRA FOODS RDM, INC., f/k/a CONAGRA BRANDS, INC.	)
Opposer,	)
v.	)
CANDWICH FOOD CORPORATION	)
Applicant.	)

OPPOSER'S REPLY BRIEF

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Dated: March 21, 2008

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I. INTRODUCTION

In the above styled matter, Opposer, ConAgra Foods, RDM, Inc. ("Opposer" or "ConAgra") hereby replies to the Trial Brief filed by the Applicant, Candwich Food Corporation ("Applicant" or Candwich").

The disputed issues in this matter have narrowed considerably with the filing of the initial briefs on the merits. Applicant does not dispute that ConAgra has standing to oppose registration of Applicant's mark. Significantly, Applicant concedes that ConAgra's MANWICH Mark is strong, famous and entitled to broad protection. In addition, Applicant offers nothing to refute ConAgra's position that registration of the CANDWICH mark would result in dilution by blurring.

Applicant attempts to argue that the CANDWICH goods are not in ConAgra's natural zone of expansion because ConAgra has not marketed its MANWICH mark to the precise goods referenced in the CANDWICH application. *Applicant's Brief* at 9. This argument falls flat, however, because the pertinent inquiry with respect to the natural zone of expansion turns on what purchasers might believe is logical in encountering the junior mark; the absence of evidence that ConAgra has engaged in substantial marketing efforts to extend its MANWICH mark is wholly irrelevant.

Much of Applicant's brief is directed to alleged differences in the target customers and channels of trade for the products sold under the MANWICH mark and the CANDWICH mark. As explained below, however, neither the application nor the registration at issue include any restrictions as to channels of trade. Therefore, extrinsic evidence and argument suggesting trade-channel restrictions not specified in the application must be rejected.

Applicant does not dispute that in considering the likelihood of confusion, all doubts must be resolved in favor of ConAgra, the senior user. Despite Applicant's arguments to the contrary, ConAgra submits that it has met its burden of proof of establishing a likelihood of confusion between its MANWICH mark and Applicant's CANDWICH mark. Accordingly, registration of CANDWICH should be refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052.

II. ARGUMENT

Opposer's position regarding the likelihood of confusion has been set out in its initial Brief and will not be restated here. Opposer submits that based on the evidence before the Board, it is clear that ConAgra's MANWICH mark is famous and distinctive, the marks in question are confusingly similar, and there is substantial similarity in the nature of the goods, channels of trade, purchasers and promotional channels. Moreover, the products at issue fall in the category of impulse items. The evidence, as applied to each of these factors, strongly supports Opposer's position. Accordingly, there is sufficient evidence to show that there is a likelihood of source confusion between the Applicant's CANDWICH mark and Opposer's MANWICH mark.

A. Applicant Concedes that ConAgra's MANWICH Mark is Strong, Famous and Entitled to Broad Protection.

Importantly, Applicant's Brief does not challenge ConAgra's assertion that the MANWICH mark is strong, famous and entitled to broad protection. The only comment Applicant makes on this point is that "the length of time that the Opposer's mark has been in use" weighs in favor of Opposer. *Applicant's Brief* at 11. Since the registered MANWICH mark is well known, a competitor is advised to avoid "even approaching such mark." *Nina Ricci S.A.R.L. v. E.T.F. Enterprises*, 889 F.2d 1070, 1074, 12 USPQ 1901, 1904 (Fed. Cir. 1989). Moreover, MANWICH should be considered a famous mark in this opposition proceeding, and the fame of this senior mark should play a dominant role in balancing the *du Pont* likelihood of confusion factors. *See Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1327, 54 USPQ2d 1894, 1897 (Fed. Cir. 2000).

B. The Goods are Confusingly Similar and the Goods Described in the CANDWICH Application Fall within ConAgra's Natural Zone of Expansion.

Applicant wrongly assumes that identical goods are needed for a finding of a likelihood of confusion. *Applicant's Brief* at 9. This is not so. It is well-established that goods and services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods are related in some manner such that their marketing would be likely to be

seen by the same persons which give rise to a mistaken belief that the goods are associated. *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In its opening brief, ConAgra established that the goods in question are substantially similar and that the goods described in the CANDWICH application fall within ConAgra's natural zone of expansion. Applicant attempts to refute the zone of expansion argument because there is no evidence that ConAgra has engaged in 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. *Applicant's Main Brief* at 9.

Applicant's argument completely misses the mark. The test is not what ConAgra foresees as its logical zone of expansion, but rather, what purchasers might believe is logical when encountering the newcomer's trademark. *CPG Products Corp. v. Perceptual Play, Inc.*, 221 USPQ 88 (TTAB 1983) (holding that lack of evidence of foreseeable expansion of opposer's product into the field to which applicant's product is directed is irrelevant).

Applicant's own president recognizes that it would be logical to combine MANWICH meat sauce with the CANDWICH meat sandwich. (Opposer's Third Notice of Reliance, Kirkland Dep. 38:16-24). Moreover, the existence of several third party registrations for sandwich sauces and sandwiches offered under the same mark further supports the conclusion that the goods described in the CANDWICH application fall within the zone of expansion for goods described in the MANWICH registrations. *Opposer's Initial Brief* at 8-10.

Clearly, there is a likelihood of confusion between the parties' respective products as they are related in some manner and/or the circumstances surrounding their marketing would be such that they would likely be encountered by the same persons under conditions that give rise to the mistaken belief that they emanate from the same source. *In Re Pollic Dairy Products Corp*, 8 USPQ2d 2012, 2015 (TTAB 1988).

C. The Trade Channels are Confusingly Similar.

Applicant argues that due to extremely limited channels of trade *i.e.* Applicant's product will primarily be sold through vending machines (*Applicant's Brief* at 3, 7), there can be no confusion. Applicant also attempts to distinguish the products at issue by asserting that while MANWICH is marketed to the head of the household, the target customer for the CANDWICH product is any person desiring a quick snack. *Applicant's Brief* at 7. However, neither the application nor the registration at issue include any restrictions as to the channels of trade. Therefore, it must be assumed that Applicant's goods would travel in all appropriate trade channels to all potential purchasers of such goods. *See Cunningham v. Laser Golf Corp,* 55 USPQ2d 1842, 1844 (Fed. Cir. 2000).

The decision in *CPG Products Corp. v. Perceptual Play*, 221 USPQ 88 (TTAB 1983) is instructive. That proceeding involved an application for registration of SHAPE CLUES that was opposed by the owner of the CLUE trademark. The SHAPE CLUES mark identified goods to be sold under the mark as "equipment sold as a unit for playing an early childhood educational game to develop visual closure skills" while CLUE was intended for "equipment for use in playing a board game." *CPG* at 89. In vying for the right to register its mark, SHAPE CLUES focused on differences in the products identified by the respective marks, including variation in the target customer for the products. The Board rejected such arguments explaining:

> We need not consider this and other argued differences in our determination of the opposition. The law is clear that, in regard to the goods, the issue of likelihood of confusion must be determined by us on the basis of the goods as they are identified in the application for registration, and where applicable, in the registration of the opposer. Here, there are no limitations either in the application or in the registration as to the age group for which the respective products of the parties are intended or as to any other aspect of the channels of trade in which the goods described in the application and registration would move or as to the purchasers to which such goods would be directed. Accordingly, for our purposes here, the respective goods of the parties must be considered as closely related.

CPG at 89-90. The same is true here. Neither the application nor the registration at issue include any restrictions as to the channels of trade. Accordingly, any asserted limitation in the actual trade channels of applicant cannot be considered. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-

65 (TTAB 1986) (extrinsic evidence and argument suggesting trade-channel restrictions not specified in application rejected).

Moreover, the record does not support Applicant's position with respect to channels of trade and target customers for goods it intends to sell under the CANDWICH mark. The record establishes that Applicant intends to offer the CANDWICH product through a wide range of retail grocery and convenience stores. (Opposer's Third Notice of Reliance, Kirkland Dep. at 22-23). Furthermore, the evidence in the record reveals that the intended purchaser of the CANDWICH product is "anyone that intends to purchase a food item" more specifically, the individual responsible for purchasing household groceries. (Opposer's Third Notice of Reliance, Kirkland Dep. at 22-23, 41; Applicant's Second Notice of Reliance, Kirkland Dep. at 41-42).

D. ConAgra has Satisfied its Burden of Proof.

ConAgra submits that it has satisfied its burden of proof of establishing a likelihood of confusion between its famous MANWICH mark and Applicant's CANDWICH mark. ConAgra has submitted evidence that its mark is famous and distinctive, that the goods are closely related, that the marks are confusingly similar, that the purchasers, channels of trade and promotional channels are identical, and the products at issue are impulse purchase items. Moreover, the CANDWICH application was filed on an intent to use basis so the opportunity for actual confusion is limited and the absence of actual confusion is immaterial. In addition, ConAgra has persuasively proven that registration of the CANDWICH mark would result in dilution of its famous MANWICH mark.

CONCLUSION

For the foregoing reasons and those set forth in its initial trial brief, ConAgra Foods, RDM, Inc. respectfully requests that registration for the mark CANDWICH be denied.

Dated: March 21, 2008

Respectfully submitted,

CONAGRA FOODS RDM, INC.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document entitled Opposer's Reply Brief has been duly served on Applicant by mailing the same to Applicant's attorney, via U.S. Postal Service, first class, postage prepaid on this 21st day of March, 2008 at the following address:

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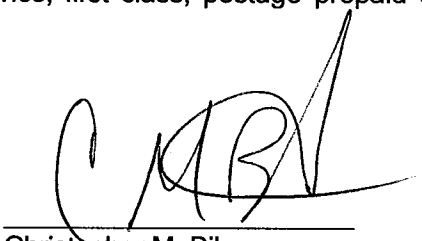
CERTIFICATION UNDER 37 C.F.R. §1.8

I hereby certify that this Opposer's Reply Brief is being filed with the United States Patent and Trademark Office, via U.S. Postal Service, first class, postage prepaid on this 21st day of March, 2008.



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