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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Tootsie Roll Industries LLC
v.
Cormorant Group LLC

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Opposition No. 91178031
to Application Serial No. 78929824
filed on 7/14/2006

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Douglas R. Wolf of Wolf, Greenfield & Sacks, P.C. for Tootsie Roll Industries LLC.

John J. Driscoll of Thompson & Knight LLP for Cormorant Group LLC.

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Before Grendel, Walsh and Wellington, Administrative Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

Tootsie Roll Industries LLC (opposer) has opposed the application by Cormorant Group LLC (applicant) to register the mark MISTER FLUFFY on the Principal Register in standard characters for "candy" in International Class 30.[1]

[1] Notice of Opposition filed June 26, 2007, against Application Serial No. 78929824, filed July 14, 2006, claiming first use of the mark anywhere and first use of the mark in commerce on November 15, 2005.

Opposer asserts priority and likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), as the grounds for the opposition. Specifically, opposer asserts priority and a likelihood of confusion between applicant's MISTER FLUFFY mark for candy and opposer's FLUFFY STUFF mark used in connection with candy products, including lollipops and cotton candy. Opposer asserts its prior rights (1) based on two registrations, Registration No. 1860481 for FLUFFY STUFF and Registration No. 2869460 for FLUFFY STUFF COTTON CANDY POPS, and (2) based on opposer's common law use of FLUFFY STUFF at least as early as February 23, 1993.

Applicant has denied the essential allegations in the notice of opposition. Opposer filed a brief; applicant did not file a brief.

By rule the record includes the pleadings and the USPTO file for the opposed application. Trademark Rule 2.122, 37 C.F.R. § 2.122. Opposer filed a notice of reliance on (1) copies of records related to opposer's registrations referenced above, and (2) requests for admissions opposer served on applicant as to which, opposer states, applicant failed to respond. Applicant did not submit any evidence.

Before proceeding further we will address the copies opposer submitted related to opposer's asserted

registrations because the acceptance or rejection of these records as evidence is determinative in this case.

The rules in effect for this proceeding specify the requirements for introducing evidence of registrations, and provide as follows:

> (1) A registration of the opposer … pleaded in an opposition … will be received in evidence and made part of the record if the opposition … is accompanied by two copies … of the registration prepared and issued by the [USPTO] showing both the current status of and current title to the registration. For the cost of a copy of a registration showing status and title, see §2.6(b)(4).
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> (2) A registration owned by any party to a proceeding may be made of record … 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 … of the registration prepared and issued by the [USPTO] 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.

Trademark Rule 2.122(d).[2]

Opposer did not provide any records related to its registrations with its notice of opposition. Thus, Trademark Rule 2.122(d)(1) does not apply here. Nor did

[2] The USPTO amended the Trademark Rules, including Trademark Rule 2.122(d), recently. *See* Miscellaneous Changes to Trademark Trial and Appeal Board Rules, 72 Fed. Reg. 42,242 (Aug. 1, 2007). The amendment to Rule 2.122(d) only applies to proceedings commenced on or after August 31, 2007 and not to this proceeding. *Id.* at 42,242. The quoted language is from the rule, as previously worded, which applies to this proceeding. Furthermore, the amendment only changed subsection 2.122(d)(1) and not subsection 2.122(d)(2), the subsection which is relevant here.

opposer provide any testimony related to its registrations or any other matter. With its notice of reliance, opposer did provide copies, apparently from its own files, of Registration No. 1860481 for FLUFFY STUFF and Registration No. 2869460 for FLUFFY STUFF COTTON CANDY POPS, along with copies of related records from the USPTO "TARR" and "assignments" electronic data bases. The records opposer provided do not qualify as "… a copy … of the registration prepared and issued by the [USPTO] showing both the current status of and current title to the registration" as required by Trademark Rule 2.122(d). Accordingly, we have not considered these registrations because opposer failed to make the registrations of record in accordance with the Trademark Rules. See *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d 1953, 1957-1958 (TTAB 2008).

Opposer bears the burden of proving its claims by a preponderance of the evidence. *Life Zone Inc. v. Middleman Group Inc.*, 87 USPQ2d at 1959.

The Board must consider an opposer's standing as a threshold issue in every case. In *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999), the Federal Circuit has enunciated a liberal threshold for determining standing, i.e., whether one's belief that one will be damaged by the registration is reasonable and reflects a real interest in the case. *See also Jewelers Vigilance*

Committee Inc. v. Ullenberg Corp., 823 F.2d 490, 2 USPQ2d 2021, 2023 (Fed. Cir. 1987). In the notice of opposition opposer has adequately asserted its standing by claiming ownership of the referenced registrations and prior common law rights in the FLUFFY STUFF mark. The only issue is whether opposer has proven its standing. If opposer had introduced acceptable evidence of its ownership of the asserted registrations, that would have been adequate to show standing. As we noted, opposer failed to do so.

In the alternative, we may look to the admissions which opposer submitted under its notice of reliance for this purpose. Opposer states that opposer properly served applicant with Requests for Admissions and applicant failed to respond. In the absence of any argument from applicant as to why we should not accord the admissions full effect, we deem the requested admissions as admitted and as properly of record. *Hobie Designs Inc. v. Fred Hayman Beverly Hills Inc.*, 14 USPQ2d 2064 (TTAB 1990). The admissions in question are brief and address certain factors related to likelihood of confusion and include a reference to "Opposer's Marks FLUFFY STUFF and FLUFFY STUFF COTTON CANDY POPS." In view of the liberal standard for standing, we construe this language as sufficient to show that opposer owns the FLUFFY STUFF and FLUFFY STUFF COTTON CANDY POPS marks. Accordingly, we conclude that opposer has made the

minimal showing necessary to establish its interest in the case, and thus its standing.

Next we must consider the issue of priority. An opposer must first show priority to prevail on a claim of likelihood of confusion. Here too, if opposer had introduced acceptable evidence of its ownership of the asserted registrations, priority would not be an issue. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). We would proceed on the basis that opposer had priority. However, again as we discussed above, opposer failed to introduce acceptable evidence of its ownership of the asserted registrations. Accordingly, we must look for other evidence of opposer's priority.

The only evidence of record is the admissions. In this instance, the admissions fail to establish opposer's priority. Conspicuous by its absence from the admissions is any mention of opposer's use of the FLUFFY STUFF or FLUFFY STUFF COTTON CANDY POPS marks prior to the filing date of the opposed application. Nor do we find any other language which could in any sense be construed as establishing opposer's priority. Accordingly, because opposer has failed to establish its priority its likelihood-of-confusion claim fails.

Decision: We dismiss the opposition.