

ESTTA Tracking number: **ESTTA346894**

Filing date: **05/11/2010**

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

Proceeding	91194369
Party	Defendant United Football League, LLC
Correspondence Address	RENEE INOMATA BURNS & LEVINSON LLP 125 SUMMER STREET BOSTON, MA 02110-1624 trademarks@burnslev.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Diane Noel
Filer's e-mail	trademarks@burnslev.com
Signature	/Diane Noel/
Date	05/11/2010
Attachments	MTD 69.pdf (2 pages)(5882 bytes) Memo 69.pdf (17 pages)(175280 bytes)

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

_____)	Opposition No. 91194369
Upward Unlimited,)	
))	
Opposer,)	
))	
v.)	
))	
United Football League, LLC,)	Application Serial Nos. 77/838,780;
))	77/838,783; 77/838,785; 77/838,787
))	and 77/838,790
Applicant.)	
_____)	

Applicant’s Motion to Dismiss

Pursuant to Fed. R. Civ. P. 12(b)(6), United Football League, LLC (“Applicant”), by and through its counsel, hereby moves to dismiss Opposition No. 91194369 (the “Opposition”) lodged by Upward Unlimited (“Opposer”). As grounds for this Motion, and as more fully set forth in Applicant’s Memorandum of Law filed herewith, Applicant states that there are myriad visual distinctions between Applicant’s design mark and Opposer’s unregistered design marks; the myriad differences create vastly different commercial impressions; and accordingly, there is no likelihood of confusion between Applicant’s design mark and Opposer’s design marks as a matter of law. Because of the dissimilarity of the design marks as pleaded by Opposer and as appearing within Applicant’s Serial Nos. 77/838,780;77/838,783; 77/838,785; 77/838,787 and 77/838,790, no confusion is likely and the Opposition should be dismissed.

WHEREFORE, Applicant United Football League, LLC requests that this Board grant its Motion to Dismiss and award Applicant such other and further relief as deemed just and proper.

Respectfully submitted,

Applicant United Football League, LLC,

By Its Attorneys,

/Laura L. Carroll/

Laura L. Carroll
Diane A.D. Noël
Burns & Levinson LLP
125 Summer Street
Boston, MA 02110
617-345-3000

Date: May 11, 2010

CERTIFICATE OF MAIL AND CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Motion to Dismiss has been served upon counsel for Opposer by electronic filing through ESTTA, as well as by mailing said copy on May 11, 2010 via First Class Mail, postage prepaid to:

Tim F. Williams, Esquire
Douglas L. Lineberry, Esquire
DORITY & MANNING, P.A.
P.O. BOX 1449
Greenville, SC 29602
UNITED STATES

/Diane Noël/

Diane A.D. Noël

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

<hr/>)	
Upward Unlimited,)	
)	Opposition No. 91194369
Opposer,)	
)	
v.)	
)	
United Football League, LLC,)	Application Serial Nos. 77/838,780;
)	77/838,783; 77/838,785; 77/838,787
)	and 77/838,790
Applicant.)	
<hr/>)	

Applicant’s Memorandum of Law in Support of Its Motion to Dismiss

I. Introduction

Applicant United Football League, LLC (“Applicant”) has moved to dismiss the Consolidated Opposition of Opposer Upward Unlimited (“Opposer”), in which Opposer claims that Applicant’s independently developed design mark, consisting of the word “CHAMPIONSHIP,” with a design of a crown with the word “THE” flanked on each side by a star and a shield with the letters “UFL” and a football with a star emerging from the football below the words:



(“The Championship Design Mark”), is confusingly similar with all of the following unregistered design marks, allegedly owned by Opposer:



The undisputed evidence, however, on the face of the Consolidated Opposition alone, shows that confusion is unlikely due to the visually unique design of The Championship Design Mark and the myriad visual distinctions between Applicant’s design mark and all of Opposer’s common law marks. Accordingly, this Board should enter judgment in Applicant’s favor on this Consolidated Opposition.

II. Factual Background

A. Applicant’s The Championship Design Mark



On September 30, 2009, Applicant filed five (5) applications for registration of The Championship Design Mark, shown below, pursuant to section 1(b) of the Trademark Act, 15 U.S.C. §1051. Consolidated Opposition, p.1.



B. Opposer’s Marks

In its Consolidated Opposition, Opposer identified four (4) of its design marks upon which it based its oppositions to the registration of Applicant’s The Championship Design Mark on the grounds that The Championship Design Mark was confusingly similar to each of Opposer’s four design marks. Opposer referred to each of its four marks as follows:

“Upward Bifurcated Star”	
“Upward Outlined Star”	

“Upward Integrated Star”	
“Upward Flag Football Shield”	

As admitted by Opposer in its pleading, none of these marks is registered with the U.S. Patent and Trademark Office.

III. Legal Analysis

A Motion to Dismiss should be granted where, taking all facts asserted by Opposer as true, Opposer does not state a viable claim as a matter of law and has not alleged facts that would permit the legal conclusions required to sustain its case. Bayer Consumer Care AG v. Belmora LLC, 90 U.S.P.Q.2d 1587 (TTAB 2009); Toho Co., Ltd. v. Sears, Roebuck & Co., 645 F.2d 788, 791 (9th Cir. 1981). Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief and if it appears certain that the plaintiff is entitled to no relief under any set of facts that could be proved in support of its claim. Trademark Trial and Appeal Board Manual of Procedure, §503.02; 2A Moore’s Federal Practice (2d ed. 1992) ¶¶12.07[2-5], at 12-68.

Likelihood of confusion between the marks at-issue is decided based on the factors set forth in In re E. I. DuPont DeNemours & Co., 476 F.2d 1357, 1361 (CCPA 1973). “[A] single DuPont factor ‘may be dispositive in a likelihood of confusion analysis, especially when that single factor is the dissimilarity of the marks.’” Odom’s Tennessee Pride Sausage, Inc. v. FF Acquisition, LLC, 2010 U.S. App. LEXIS 5787, *5-7 (Fed. Cir. March 19, 2010) (*quoting Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1375 (Fed. Cir. 1998)

in affirming Board decision that dissimilarity of marks alone sufficient basis to conclude no confusion likely).

A. As Appears On The Face Of the Consolidated Opposition, The Championship Design Mark Is Visually Distinctive From Each Of Opposer's Design Marks.

Consumers will not be confused between Applicant's The Championship Design Mark and Opposer's marks for the simple reason that the marks are utterly visually dissimilar. While DuPont identifies thirteen factors relevant to determining likelihood of confusion, not every DuPont factor must be considered by the Board. DuPont, 476 F.2d at 1361-62 (noting that each factor may, from case to case, play a dominant role and citing cases hinging on one factor alone). Of significance in this case, and as stated above, a single DuPont factor may be dispositive in a likelihood of confusion analysis, "especially when that single factor is the dissimilarity of the marks." Champagne Louis Roederer, 148 F.3d at 1375 (affirming Board dismissal of opposition, concluding that dissimilarity of the marks alone precluded any reasonable likelihood of confusion, with "appearance, sound, significance, and commercial impression as the dispositive DuPont factor"). Indeed, the Board routinely dismisses cases solely because the marks at-issue are dissimilar. *See, e.g., Champagne Louis Roederer*, 148 F.3d at 1373; Keebler Co. v. Murray Bakery Prods., 866 F.2d 1386, 1388, 9 U.S.P.Q.2d (BNA) 1736, 1739 (Fed. Cir. 1989) (agreeing with Board that dissimilarity of marks is "more important fact" for resolving matter); Kellogg Co. v. Pack'Em Enterprises Inc., 951 F.2d 330, 333, 21 U.S.P.Q. 2d (BNA) 1142 (Fed. Cir. 1991) (upholding Board decision to dismiss opposition, with dissimilarity of marks as single DuPont factor considered); Odom's Tennessee Pride Sausage, 2010 U.S. App. LEXIS 5787, at *5-7 (affirming Board decision that dissimilarity of marks alone sufficient basis to conclude no confusion likely); Inspiration Software, Inc. v. Teacher Inspired Practical Stuff, Inc., 2007 TTAB LEXIS 154, *5 (TTAB March 7, 2007) (opposition dismissed solely on dissimilarity of marks,

after plain viewing of the visual appearance, aural differences, and connotation, without need for evidence as to any matter). In addition, the mere presence of a common feature does not mean confusion is likely. Beaute Prestige Int'l v. Oro America, Inc., 2002 TTAB LEXIS 155, *13-14 (TTAB February 5, 2002) (where both marks featured woman without a head, confusion unlikely where other features were different).

The present dispute is on all fours with the Odom's decision and Odom's should control the Board's determination of Opposer's claims and this Motion. In Odom's, the Board (and subsequently the Federal Circuit) had to consider whether the marks below were confusingly similar.



Based purely upon a visual, element by element analysis, the Board concluded, and the Federal Circuit affirmed, that the marks were not visually similar at all, despite the fact that they each included some similar elements. Specifically, the Board considered the fact that both marks were comprised of a smiling boy wearing a hat (in some instances, both waving a hand). Despite these similarities, the Board concluded that the marks were visually distinctive from one another because, for example, the size and shape of the boys' hands and feet were different, as were the shape and style of their hats. In reaching its conclusion of dissimilarity, the Federal Circuit emphasized that "... these individual aspects ... collectively create a difference in overall impressions made by the marks." Odom's at *5 citing In re Nat'l Data Corp., 753 F.2d 1056, 1058 (Fed. Cir. 1985). The Federal Circuit went on to affirm that where the visual distinctions are so profound, no further inquiry into the remaining DuPont factors is warranted or necessary.

Id. at *6. See also Trademark Manual of Examining Procedure (“TMEP”) §1207.01(c), citing Red Carpet Corp. of Am. v. Johnstown Am. Enters., Inc., 1988 TTAB LEXIS 26, *9, 7 U.S.P.Q.2d (BNA) 1404, 1405 (TTAB 1988) (stylized house designs which created different visual impressions held not confusingly similar as a matter of law) and Ocean Spray Cranberries, Inc. v. Ocean Garden Products, Inc., 223 U.S.P.Q. 1027 (TTAB 1984) (abstract circular design mark not likely to be confused with oval breaking wave design).¹

Applicant’s case is even more compelling than Odom’s. A point by point analysis convincingly reveals the very profound visual distinctions between all of Opposer’s marks and Applicant’s The Championship Design Mark.

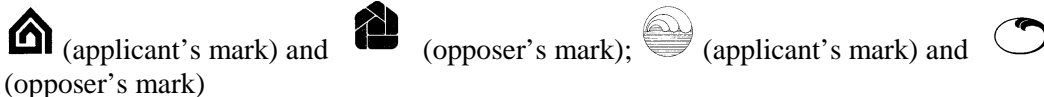
1. The Singular Common Element Of A Star Is Not Enough To Show Likelihood Of Confusion.

Although both The Championship Design Mark (pictured below left) and the “Upward Bifurcated Star” mark (pictured below right) include star-like elements, that singular common element is not enough to show a likelihood of confusion, where the marks are visually dissimilar and create a different commercial impression.



As in Odom’s, a host of visual distinctions exist between the marks to create a very different commercial impression. In Odom’s, both marks generally involved a “farm boy.” Yet, the size of the feet, the shape of the feet, the size of the hands, the shape of the hands, the type of the hat

¹ For the Board’s convenience, the marks at-issue in Red Carpet and Ocean Spray found to be dissimilar as a matter of law appear in the USPQ decisions as follows, respectively :



worn by the farm boy, the angle at which the hat was worn, the straw being chewed by one farm boy, and the body size of the farm boys all were different. Thus, when taken together, these nominal differences gave rise to a dissimilar overall commercial impression. The instant case is equally compelling, and, in fact The Championship Design Mark includes myriad additional elements such that the general inclusion of star designs somehow embedded in the mark is a nominal similarity far outweighed by the dissimilarities overall.

a. The Marks Contain Different Elements Creating an Overall Distinct Commercial Impression.

First, and most obvious, Opposer's "Upward Bifurcated Star" mark consists solely of a single star-like element, without any other element whatsoever. By contrast, The Championship Design Mark contains many elements, including a star embedded in the shield element, the word "CHAMPIONSHIP" with a design of a crown with the word "THE" flanked on each side by a star, and a shield with the letters "UFL" and a football below the words. All of which, when taken as a whole, create an entirely different and distinct commercial impression than that of a star alone. In sum, the "Upward Bifurcated Star" mark is conspicuously devoid of all of the numerous other elements that comprise and dominate The Championship Design Mark.

b. The Star Elements Differ In Number, Size, Shape, Shading, and Depth Perspective.

In addition to the minimal impact of the stars in proportion to all of the other elements in The Championship Design Mark, when analyzing and dissecting the individual elements of marks themselves, as the Board and Court did in Odom's, even the visual aspects of the respective star-like elements are distinct. *See Odom's*, at *5 (Court found Board appropriately "dissected" the marks into components to perform analysis, and affirmed that individual aspects collectively created a difference in overall impressions of the marks).

In this case, the “Upward Bifurcated Star” mark is entirely comprised of a single, two-dimensional outline of a star with a break in the line leading to the base of the lower left arm of the star and a break in the outline at the lower right arm of the star, and thus “bifurcated”. By contrast, the star element in the shield of The Championship Design Mark is a complete star (*i.e.*, not bifurcated) and appears in relation to (and subset of) the larger design element of a shield, as a highlight or underscore to the letters “UFL” and emerging from the vertical axis of a football. The shield design is also then a subset of a larger design element of the word “CHAMPIONSHIP” with two more additional stars above the word, flanking the word “THE” within the design of a crown. With regard to these two additional stars, the stars themselves are symmetrical, are in a solid color, and appear above the word “CHAMPIONSHIP” on either side of a crown. The Applicant’s star elements are certainly not the only portion of The Championship Design Mark as a whole and are, in fact, a substantially minor element of the whole. Indeed, as mentioned above, the star elements of The Championship Design Mark must be viewed part and parcel with the other elements, including the size of the stars in relation to the mark as a whole. In contrast, Opposer’s “Upward Bifurcated Star” mark is only a star, with no other design or words. When taken in this light, the size and perspective of the star elements within The Championship Design Mark cannot be deemed similar to the “Upward Bifurcated Star” mark which comprises Opposer’s mark as a whole.

Further, Opposer’s “Upward Bifurcated Star” mark consists of an open interior star shape in which none of the points have similar widths or lengths, giving the star shape an asymmetrical, distorted appearance. In contrast, the two star elements flanking the word “THE” within a crown design in The Championship Design Mark are completely symmetrical, and the

star element within the shield is substantially symmetrical except for a single point which extends outward with a comet-like tail.

With regard to shading of the star element, Opposer's "Upward Bifurcated Star" mark has no gradation of color or thickness and appears completely devoid of any characteristics of shading. Again, by contrast, the star within the shield of Applicant's The Championship Design Mark has an alternating black/white pattern on each prong of its star tips, creating an obvious and intentional shading effect.

With regard to depth perspective, because the "Upward Bifurcated Star" mark has an open empty interior completely devoid of lines or shading, this results in a flat, two-dimensional appearance. In contrast, the star element in the shield of Applicant's The Championship Design Mark includes interior lines and selective shading which collectively define a central point and give the star a three-dimensional, relief-like impression. In addition, the stars flanking the word "THE" within a crown comprising The Championship Design Mark are uniform in size, shape, and position and appear smaller and ornamental in relation to the rest of The Championship Design Mark, which further distinguishes the overall star elements as a whole from the "Upward Bifurcated Star" mark.

Because of the numerous visual dissimilarities between the marks, most notably Opposer's lack of the word "CHAMPIONSHIP" with a design of a crown with the word "THE" flanked on each side by a star, and a shield with the letter "UFL" and a football with an additional star below the words, as well as the visual dissimilarities of the respective star elements in number, size, shape, shading, and depth perspective, and prominence within the marks, The Championship Design Mark and the "Upward Bifurcated Star" mark create

unquestionably different commercial impressions and preclude a finding of likelihood of confusion. Accordingly, Applicant's Motion to Dismiss should be granted.

2. Applicant's The Championship Design Mark and Opposer's "Upward Outlined Star" Mark are Visually Dissimilar.

As with the prior mark, while The Championship Design Mark (pictured below left) and Opposer's "Upward Outlined Star" mark (pictured below right) both include star-like elements, that is where any commonality ends. The marks are visually dissimilar and create a completely different commercial impression:



As with its "Upward Bifurcated Star" mark, Opposer's "Upward Outlined Star" mark comprises only a star-like element and lacks the "CHAMPIONSHIP" wording, a design of a crown with the word "THE" flanked on each side by a star, and the shield, the football, and the letters "UFL" below the words, which further comprise The Championship Design Mark. These visual distinctions alone are enough to create different commercial impressions. Odom's, at *5. Here too, the respective star elements of Applicant's The Championship Design Mark and Opposer's "Upward Outlined Star" mark also have different visual characteristics, including their respective relative size, shape, shading, number, and depth perspective, as was the case with Opposer's "Upward Bifurcated Star" mark, discussed above. The star element in the "Upward Outlined Star" mark has a dark filled interior resulting in a thick, interior outline of the star's shape. In contrast, neither the star element within the shield of The Championship Design Mark, nor the two stars which flank a crown and word "THE" has a dark interior, or a thick outline of the star

shape. The two stars flanking a crown with the word “THE” are also symmetrical, and uniform in size, shape, and color.

As in the prior analysis, because of the visual dissimilarities between the marks, most notably the “Upward Outlined Star’s” lack of the word “CHAMPIONSHIP” with a design of a crown with the word “THE” flanked on each side by a star, and a shield with the letter “UFL” and a football with an additional star below the words, as well as the visual dissimilarities of the respective star elements, The Championship Design Mark and Opposer’s “Upward Outlined Star” mark create unquestionably different commercial impressions and preclude a finding of likelihood of confusion. Odom’s, at *5. Accordingly, Applicant’s Motion to Dismiss should be granted.

3. Applicant’s The Championship Design Mark and Opposer’s “Upward Integrated Star” Mark Are Visually Dissimilar.

As with Opposer’s prior two marks, while The Championship Design Mark (pictured below left) and Opposer’s “Upward Integrated Star” mark (pictured below right) both include star-like elements, there are no other design elements which The Championship Design Mark has in common with Opposer’s Upward Integrated Star. Thus, the marks are visually dissimilar and create a different commercial impression:



a. The Words Within The Designs Are Utterly Different.

As shown above, Opposer’s “Upward Integrated Star” mark essentially comprises Opposer’s “Upward Outlined Star” mark with the addition of the letters “UPWARD” arranged so that the top point of the star element also serves as an “A” to suggest the word “UPWARD”. By

contrast, The Championship Design Mark contains the word “CHAMPIONSHIP,” and the word “THE” within a crown, the shield, the football, stars, and the letters “UFL.”

In this case, the verbiage within the overall design of The Championship Design Mark is completely distinct from the letters “UPWARD” within the “Upward Integrated Star” mark. There is nothing in the appearance, connotation, definition, or commercial impression left by those marks to lead to any confusion in the minds of consumers and, in fact, the commercial impression left by each is vastly different. *See, e.g., Rite Aid Corp. v. Rite-Way Discount Corp.*, 508 F.2d 828, 830, 184 U.S.P.Q. 351 (Fed. Cir. 1975) (dismissal of opposition to registration affirmed where composite mark consisting of RITE WAY words within octagonal design found sufficiently dissimilar from RITE AID words within shield design). Whereas the phrase “THE CHAMPIONSHIP,” when combined with the letters “UFL” (connoting initials of some sort), suggests imagery of football and a football season, as well as a championship game or match, when used in conjunction with the image of a football on the overall design, there is no similar connotation derived from the word “UPWARD.” In sum, the letters present in both marks are entirely dissimilar and unlikely to be confused.

b. The Marks Contain Different Elements Creating an Overall Distinct Commercial Impression and, To The Extent the Marks Both Contain A Star, the Star Elements Also Differ In Number, Size, Shape, Shading, and Depth Perspective.

Moreover, as is the case with Opposer’s prior two marks, Opposer’s “Upward Integrated Star” mark lacks the word “CHAMPIONSHIP” with the word “THE” within the design of a crown flanked on each side by a star and a shield with the letters “UFL” and a football with the an additional star below the words, all of which further comprise The Championship Design Mark. In addition, the star elements of The Championship Design Mark and the “Upward Integrated Star” mark are visually dissimilar for substantially the same reasons set forth above

with reference to the “Upward Outlined Star” mark. That is, the star elements differ in their respective relative number, size, shape, shading, and depth perspective. Additionally, The Championship Design Mark does not include the word “UPWARD” (or “UPWARD”). The lettering in The Championship Design Mark is rendered with uniform shading, while the letters “UPWARD” in Opposer’s “Upward Integrated Star” mark are rendered in contrasting light and dark letter outlines, again creating significant visual differences between the two marks.

In sum, because of the visual dissimilarities between the marks, most notably the lack of the word CHAMPIONSHIP, the word “THE” within a design of a crown flanked on each side by a star, and the shield and the football in Opposer’s “Upward Integrated Star” mark, the absence of the word “UPWARD” in The Championship Design Mark, and the visual dissimilarities of the respective star elements, The Championship Design Mark and Opposer’s “Upward Integrated Star” mark create unquestionably different commercial impressions and preclude a finding of likelihood of confusion. Odom’s, at *5. Accordingly, Applicant’s Motion to Dismiss should be granted.

4. Applicant’s The Championship Design Mark and Opposer’s “Upward Flag Football” Mark are Not Visually Similar.

The Championship Design Mark (pictured below left) and Opposer’s “Upward Flag Football” mark (pictured below right) are visually dissimilar and create a different commercial impression:



a. The Design Elements of the Shape of a Star, Shield, and Football Appear Sufficiently Different Such That No Likelihood of Confusion Exists.

Although both marks include a design of a shield, a star, and a football, like the farm boys in Odom's, this overlap of merely generic shapes is where any purported “similarity” ends. *See Odom's*, at *2, 5. Because one cannot hold a monopoly on use of such common shapes, it is crucial to dissect these elements into their design parts in a likelihood of confusion analysis, as the Board and Federal Circuit did in Odom's. In this case, there are sufficient distinctions within the star, shield, and football to conclude that confusion simply is not possible. *See id.* (although each mark was of a full-length farm boy, Board found different size and shape of boys’ hands and feet and shape and style of hats on each dissimilar in rejecting a likelihood of confusion argument). The inclusion of the words THE CHAMPIONSHIP and two additional, symmetrical stars flanking the word “THE” within a crown, further differentiates The Championship Design Mark from the Upward Flag Football mark.

Here, Opposer’s “Upward Flag Football” mark comprises elements that are dissimilar to The Championship Design Mark. Namely, the “Upward Flag Football” mark prominently displays the word “UPWARD” integrated with a star element and the words “Flag Football”. This image is visually dissimilar to Applicant’s.

In addition, the football graphic elements of Applicant’s and Opposer’s respective marks differ visually. The football in The Championship Design Mark is of a solid shade, is oriented more vertically relative to the shield, and appears to have a star emerging therefrom. In contrast, the football in the “Upward Flag Football” mark is larger relative to the size of the shield, is a substantially dark shape, appears to be lying horizontally relative to the shield, and has contrasting light and dark to outline both the stripes and the seams of a football.

Moreover, the shield elements of Applicant's and Opposer's respective marks also differ significantly. The shield in The Championship Design Mark is defined by clean lines which imply a three-dimensional perspective and completely encompasses other elements of the mark. In contrast, the shield element of Opposer's "Upward Flag Football" mark appears flat without depth and does not encompass the other elements of the mark, and instead serves merely as a background for the phrase "FLAG FOOTBALL" and the "Upward Integrated Star" mark superimposed thereon.

Also, the star graphic elements of Opposer's "Upward Flag Football" mark, which are identical to Opposer's "Upward Integrated Star" mark, differ from the star graphic elements of The Championship Design Mark for the same reasons set forth above. Lastly, the incorporation of additional elements of the word "THE" appearing in a crown flanked by two additional, symmetrical stars, and the word CHAMPIONSHIP dominating The Championship Design Mark clearly distinguish it from the Upward Flag Football Mark.

b. The Appearance of the Words Within the Designs Are Utterly Different.

In addition, as previously discussed, the words within each mark are distinctly different, which is a crucial factor in analyzing similarity of designs featuring words. Opposer's "Upward Flag Football" mark comprises the additional phrases "FLAG FOOTBALL" and "UPWARD.ORG". In contrast, The Championship Design Mark does not include either the words or phrases "FLAG FOOTBALL" or "UPWARD.ORG" or "UPWARD," and includes the words "THE CHAMPIONSHIP," along with the letters UFL. These differences in literal elements contribute significantly to the overall dissimilarity of the marks.

Further, The Championship Design Mark uses uniform shading for the letters "UFL," while the words "UPWARD" and "FLAG FOOTBALL" in the "Upward Flag Football" mark

are rendered in contrasting light and dark outlined lettering. The Championship Design Mark also does not have a background field of alternating light and dark stripes anywhere within the interior of the shield, unlike the “Upward Flag Football” mark, again creating significant dissimilarity between the marks. Last, The Championship Design Mark has as part of its design a crown, whereas the “Upward Flag Football” mark does not.

In sum, because of the visual dissimilarities between the parties’ respective marks, The Championship Design Mark and Opposer’s “Upward Flag Football” mark create unquestionably different marks with utterly distinct commercial impressions that clearly preclude a finding of likelihood of confusion. Odom’s, at *5. Accordingly, Applicant’s Motion to Dismiss is warranted and Opposer’s Opposition should be dismissed.

IV. Conclusion

For the reasons set forth herein, Applicant respectfully requests that Applicant’s Motion to Dismiss be granted, and that Opposer’s Consolidated Opposition be dismissed with prejudice. Because of the visual dissimilarities and different commercial impressions of the marks at-issue, Applicant is entitled to judgment as a matter of law, dismissing all likelihood of confusion claims under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), between Applicant’s The Championship Design Mark and Opposer’s pleaded “Upward Bifurcated Star” mark, “Upward Outlined Star” mark, “Upward Integrated Star” mark, and “Upward Flag Football” mark in this matter.

Respectfully submitted,

Applicant United Football League, LLC,

By Its Attorneys,

/Laura L. Carroll/

Laura L. Carroll
Diane A.D. Noël
Burns & Levinson LLP
125 Summer Street
Boston, MA 02110
617-345-3000

Date: May 11, 2010

CERTIFICATE OF MAIL AND CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Memorandum of Law in Support of its Motion to Dismiss has been served upon counsel for Opposer by electronic filing through ESTTA, as well as by mailing said copy on May 11, 2010 via First Class Mail, postage prepaid to:

Tim F. Williams, Esquire
Douglas L. Lineberry, Esquire
DORITY & MANNING, P.A.
P.O. BOX 1449
Greenville, SC 29602
UNITED STATES

/Diane Noël/

Diane Noël