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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: August 29, 2012

Opposition No. **91200168**

Bach Flower Remedies Limited

v.

Absolutely Natural, Inc.

Before Kuhlke, Wellington and Wolfson, Administrative Trademark Judges.

By the Board:

This case now comes up on applicant's motion for summary judgment (filed May 10, 2012) with respect to standing and the likelihood of confusion ground. Opposer has cross-moved for partial summary judgment with respect to standing.

A party is entitled to summary judgment when it has demonstrated that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In reviewing a motion for summary judgment, the evidentiary record and all reasonable inferences to be drawn from the undisputed facts must be viewed in the light most favorable to the nonmoving party. *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

Standing

Turning first to the question of standing, opposer pleaded ownership of Registration Nos. 1237564[1], 1822260[2], 2517685[3], and 3147761[4] and submitted copies of United States Patent and Trademark Office records (TARR printouts) with the notice of opposition. These TARR printouts show that opposer is the owner of these valid and subsisting registrations. Having established that it is the owner of these registrations and that they are valid and subsisting, there is no genuine dispute that opposer has established its standing to oppose applicant's application. *See Vital Pharmaceuticals Inc. v. Kronholm*, 99 USPQ2d 1708, 1712 (TTAB 2011) (opposer's standing is established by the introduction of its pleaded registrations with its notice of opposition,

[1] For the mark RESCUE REMEDY for Class 32 "an Herbal Beverage Made from Essences (Not Being in the Nature of Essential Oils) Extracted from Flowers"; registration issued May 10, 1983, Section 8 accepted, Section 9 granted, June 12, 2003.
[2] For the mark RESCUE REMEDY for Class 5 "homeopathic pharmaceutical preparations made from flower extracts for use in alleviating emotional and mental stress"; registration issued February 22, 1994; Section 8 accepted, Section 9 granted April 6, 2004.
[3] For the mark RESCUE for Class 5 "homeopathic pharmaceutical preparation made from flower extracts for alleviating emotional and mental stress"; for Class 30 "herbal food beverage concentrate made from essences (not being in the nature of essential oils) extracted from plants and flowers"; registration issued December 11, 2001; Section 8 accepted, and Section 9 granted February 10, 2012.
[4] For the mark RESCUE CREAM for Class 5 "preparations made from flower extracts in the form of creams for use in treating emotional and psychological conditions"; registration issued September 26 2006; Section 8 accepted, Section 15 acknowledged, October 13, 2011.

which demonstrates that opposer is the owner of record of such registrations and that they are valid and subsisting).

Accordingly, opposer's motion for partial summary judgment is granted with respect to standing, and applicant's motion for summary judgment with respect to standing is denied.

Likelihood of Confusion

Applicant has argued that a single *DuPont* factor, *see In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), may be dispositive in a particular case with respect to the likelihood of confusion ground, citing, among other cases, *Odom's Tennessee Pride Sausage Inc. v. FF Acquisition LLC*, 93 USPQ2d 2030, 2032 (Fed. Cir. 2010). Applicant argues in this case that the sixth *DuPont* factor, which involves "the number and nature of similar marks in use on the goods" is dispositive.

In response, opposer argues that applicant's evidence is insufficient to support a finding that opposer's marks are weak. Opposer asserts that the evidence opposer has provided in response to applicant's summary judgment "leads to the opposite conclusion."

In reply, applicant argues that opposer has failed to raise a genuine dispute of material fact.

Upon careful consideration of the arguments and evidence presented, we find that genuine disputes of

material fact preclude disposition by summary judgment. At a minimum, a genuine dispute remains with regard to the strength of the term RESCUE in connection with the identified goods, and to the extent it may be considered weak, the degree of weakness. *See Rearden LLC v. Rearden Commerce Inc.*, 683 F.3d 190, 103 USPQ2d 1161, 1175 (9th Cir. 2012) (citing *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 96 USPQ2d 1585, 1592 (9th Cir. 2010), quoting *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 50 USPQ2d 1545, 1560-61 (9th Cir. 1999)) ("A reasonable finder of fact could accord more significant weight to this [strength of the mark] factor . . . particularly in light of evidence that Appellants have undertaken efforts to promote the mark in association with their services; we have observed that "'advertising expenditures can transform a suggestive mark into a strong mark'").

Accordingly, applicant's motion for summary judgment on the likelihood of confusion ground is denied.

In summary, opposer's motion for partial summary judgment with respect to standing is granted; applicant's motion for summary judgment on the likelihood of confusion ground is denied.

Proceedings are resumed.

Dates are reset as follows:

Plaintiff's Pretrial Disclosures Due[5]	**9/13/2012**
Plaintiff's 30-day Trial Period Ends	**10/28/2012**
Defendant's Pretrial Disclosures Due	**11/12/2012**
Defendant's 30-day Trial Period Ends	**12/27/2012**
Plaintiff's Rebuttal Disclosures Due	**1/11/2013**
Plaintiff's 15-day Rebuttal Period Ends	**2/10/2013**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.l25.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

[5] If opposer already served its pretrial disclosures and does not intend to supplement the pretrial disclosures, it should so inform applicant; opposer need not reserve pretrial disclosures already provided.