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

Proceeding	91202421
Party	Defendant FLORIDA GARDEN SUPPLIES, INC.
Correspondence Address	EDMAR M AMAYA LLM EDAM LAW PLLC INTERAMERICAN PLAZA , 701SW 27TH AVE SUITE 707 MIAMI, FL 33135 UNITED STATES edmar.amaya@edamlaw.com
Submission	Opposition/Response to Motion
Filer's Name	Edmar M. Amaya
Filer's e-mail	edmar.amaya@edamlaw.com
Signature	/Edmar M Amaya/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

VALENT U.S.A. CORPORATION,	)	
Opposer,	)	
v.	)	Opposition No.: 91202421
FLORIDA GARDEN SUPPLIES, INC,	)	
Applicant.	)	
_____	)	

APPLICANT'S REPLTY MEMORANDUM IN SUPPORT IN OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND APPLICANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

Florida Garden Supplies, ("Applicant"), files this Reply Memorandum in Opposition to Motion to Summary Judgment filed by Valent U.S.A. Corporation ("Opposer") regarding Serial No. 85/236,790 for the mark COBRA.

I. INTRODUCTION

Opposer, moves for summary judgment based on its own assumptions there is no triable issue of material fact on the issue of likelihood of confusion. Opposer offers no survey or other supporting evidence showing a likelihood of confusion. Opposer's evidence does not support a finding of likelihood of confusion, and on the contrary, the evidence demonstrates there is no likelihood of confusion.

This proceeding involves two trademarks used in two distinct classes of goods. Opposer uses the COBRA mark for: 1) "herbicide for agricultural use" (Reg. No. 1503537) in international class 005, and 2) "herbicide" (Reg. No. 1514273) also in international class 005, and Applicant's COBRA mark for "Non-chemical bio-fertilizers containing beneficial bacteria

and fungi for domestic and agricultural use for use with plants, crops and fruit." (US Serial No. 85236790) in international class 001.

Opposer

Applicant

Opposer relies on three elements of the test of likelihood of confusion set out in *In Re E I DuPont de Nemours*, 76 F.2d 1357 (C.C.P.A. 1973): Similarity of goods, similarity of marks, and similarity in the channels of trade. The evidence supplied, however, supports only one element, that both the marks are named COBRA. As to similarity of the marks, appearance, overall commercial impression and channels of trade, the marks as used is entirely different. The trademark examiner properly recognized this, and concluded confusion never was found after he searched the USPTO databases, and therefore Applicant's COBRA mark was approved for publication. (emphasis). On the element of actual confusion, Opposer has failed to provide any a scintilla of evidence of consumer confusion. The record Opposer has placed before the Board cannot support any finding of actual confusion.

Based on the evidence presented by Opposer and by Applicant in this opposition, Opposer's motion for summary judgment should be denied and summary judgment should be granted in favor of Applicant.

II. ARGUMENTS

A. Summary Judgment Standard

Summary judgment is a device to dispose of cases in which, based on the evidence developed by discovery and affidavit evidence, there "is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." TBMP §528.01; Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, the Trademark Trial and Appeal Board (TTAB) must not try issues of fact, but must "determine instead if there any genuine issues of material fact to be tried." TBMP §528.01; *Dyneer Corp. v. Automotive Products pic*, 37 U.S.P.Q. 1251, 1254 (T.T.A.B. 1995). The non-moving party "must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist; the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the non-moving party" TBMP §528.01; *see Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, (Fed. Cir. 1993) (impermissible inferences against nonmovant).

However, if the TTAB "concludes that there is no genuine issue of material fact, but that the nonmoving party is the one entitled to judgment as a matter of law, the Board may enter summary judgment *sua sponte* in favor of the nonmoving party." TBMP §528.01 (emphasis added).

B. There is No Likelihood of Confusion between the marks

To determine if a likelihood of confusion exists between two marks, the TTAB employs a multi-factor test first announced by the Court of Customs and Patent Appeals in the E I DuPont case. The TTAB considers the following factors in this analysis: 1) the similarity/dissimilarity of the marks as to their appearance, sound, connotation, and overall commercial impression, 2) the

similarity/dissimilarity of the goods and services, 3) the similarity/dissimilarity of trade channels, 4) the conditions under which buyers to whom sales are made (i.e., impulse versus careful, sophisticated purchasing), 5) the fame of the prior mark, 6) the number and nature of similar marks in use on similar goods, 7) the nature and extent of any actual confusion, 8) the length of time during and conditions under which there has been concurrent use without evidence of actual confusion, 9) the variety of goods on which the mark is or is not used, 10) the market interface between the applicant and the owner of the prior mark, 11) the extent to which the applicant has a right to exclude others from use of its mark on its goods, 12) the extent of potential confusion, and 13) any other established fact probative of the effect of use. *In re E I DuPont de Nemours*, 476 F.2d at 1361. The TTAB reviews "factual underpinnings" of the likelihood of confusion analysis (i.e., the DuPont factors) for "substantial evidence." *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee* 1772, 396 F.3d 1369, 1371 (Fed. Cir. 2005).

1. The marks are sufficiently different in appearance to avoid confusion.

Marks are compared as to their appearance, sound, connotation, and commercial impression. *In re E.I DuPont de Nemours & Co*., 476 F.2d 1357, 1361 (C.C.P.A. 1973). The basic principle in determining confusion between marks is that "the marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used*." In re National Data Corp*., 224 U.S.P.Q. 749, 750 (TTAB 1978).

Here, the overall appearance, connotation, and commercial impression of the marks are different. As noted by the Seventh Circuit, "it is essential to consider the marks' visual characteristics" as used by the competing users in analyzing likelihood of confusion. *Barbecue*

Marx, Inc. v. 551 Ogden, Inc., 235 F.3d 1041, 1044 (7th Cir. 2000). Where the mark is a design mark, the question of similarity becomes a question of visual similarity. TMEP 1207.01(c) See, e.g., In re United Service Distributors, Inc., 229 USPQ 237 (TTAB 1986) (silhouette of two profiles facing right within a teardrop background for distributorship services in the field of health and beauty aids held likely to be confused with silhouette of two profiles facing left within an oval background for skin cream).

It is Applicant's contention there are sufficient differences between the trademarks themselves so that confusion is not likely. The comparison of composite marks must be done on a case-by-case basis without reliance on mechanical rules of construction. *See, e.g., Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, (Fed. Cir. 1984)

The relevant public's recollection of a design is often general and hazy. As a matter of law, the purchaser is presumed not to retain a specific memory of the exact components of a mark, but rather a general impression. *See, e.g., Red Carpet Corp. v. Johnstown American Enterprises Inc.*, 7 USPQ2d 1404 (TTAB 1988). It is that general impression that forms the basis for likelihood of confusion. Here the general impression is not confusing.

Opposer

Applicant

The Applicant's mark provides the following description in its application for trademark: "The mark consists of the stylized wording 'COBRA' appearing above the depiction of the head of a cobra all of which is surrounded by a rectangle." *See* US Serial No. 85236790. Applicant' COBRA mark is a complex graphic depiction of a realistic cobra snake head, almost shocking. The COBRA wording is above the cobra snake head mark, is separated by a black space, and both the letters and the cobra snake head are surrounded by a rectangle. The marks have the following material differences: 1) Opposer's COBRA design is not separated from the words COBRA and are instead part or fused together into the design of the cobra snake; 2) Opposer's COBRA mark is not separated by a black space, black background, or surrounded by black rectangle; 3) Opposer's COBRA is a simple caricature and do not resemble Applicant's realistic complex graphic cobra snake head; 4) Opposer's COBRA mark is not shocking. Consumers will not get confused by looking at two different marks and Opposer has not presented any evidence to show the contrary.

VS.

As shown above, the marks as used in commerce are also readily distinguishable. When considering whether two marks are confusingly similar, it is appropriate to consider how the marks are used in commerce and how consumers will encounter the two marks. *See Russell v. Caesar,* 62 U.S.P.Q.2d 1125, 1129 (N.D. Cal. 2001) ("While the Court agrees that the first term

of a composite mark fosters confusion, this characteristic alone does not resolve the similarity analysis .... [T]he similarity of the marks must also be considered in light of the way the marks are encountered in the market place."). Indeed, "a comparison of the labels rather than simply the trademarks is appropriate. When a prospective purchaser goes to the supermarket to buy salad dressing, it is the label that the purchaser sees." *Henri's Food Prods. Co. v. Kraft, Inc.*, 717 F.2d 352, 355 (7th Cir. 1983); *see also Packman v. Chicago Tribune Co.*, 267 F.3d 628, 644 (7th Cir. 2001) ("Although the words on defendants' and [plaintiffs] t-shirts are the same, the words' appearances do not resemble each other and are not likely to cause confusion"). Differing labels lessen a finding of similarity of the marks. *Russell*, 62 U.S.P.Q.2d at 1129. (comparing the labels associated with two competing word marks and finding that "the manner in which the marks are encountered suggests a finding of dissimilarity").

Opponent argues that the "dominant feature is the word COBRA" in both of the marks. [**DE 17 at 5**] Although it is not proper to dissect a mark, if one feature of a mark is more significant than another feature, greater weight may be given to the dominant feature to determine likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565 (Fed. Cir. 1983). Here, it is visually clear the dominant part is the snake design, however, the fundamental rule in this situation is the marks must be considered in their entireties, and even so, the marks are very different as a whole. *See Massey Junior College, Inc. v. Fashion Institute of Technology*, 492 F.2d 1399, 181 USPQ 272 (C.C.P.A. 1974).

2. Opposer's mark lacks commercial strength.

The strength of marks is measured in two ways: inherent strength and acquired strength. *See Edison Bros. Stores, Inc.* v. Cosmair, Inc., 651 F.Supp. 1547, 1555 (S.D.N.Y. 1987) ("In evaluating the 'strength' of a mark ... one considers not only its conceptual strength... but also its commercial strength.") Opposer has supplied no evidence to establish its mark has acquired sufficient commercial strength to distinguish itself in the market place. Acquired strength may be proven by consumer testimony or surveys. *Century Wear, Inc. v. Sanmark-Stardust, Inc.,* 815 F.2d 8, 10 (2d Cir. 1987). Opposer has supplied neither. The extent and success of advertising on the subject mark, sales volume, and consumer base are also relevant to assess acquired strength. *Nutri/Sys., Inc. v. Con-Stan Indus., Inc.,* 809 F.2d 601, 605 (9th Cir. 1987) ("advertising remains only one of many factors taken into account when classifying the strength of marks"); *Bank ofTex. v. Commerce Southwest, Inc.,* 741 F.2d 785, 788 (5th cir. 1984) ("it is not the amount of money spent on advertising that is important, but the results achieved"); Charles of *Ritz Group, Ltd. v. Quality King Distribs.*, Inc., 832 F .2d 1317, 1321 (2d Cir. 1987) (considering "commercial success" in determining acquired strength). Opposer has provided no such evidence to prove acquired strength. Therefore, this element supports a finding no confusion is likely.

3. Applicant's non-chemical bio-fertilizers products (Int. Class 1) and Opposer's herbicide products (Int. Class 5) are two very different and opposite types of products in separate channels of trade.

Applicant's "non-chemical bio-fertilizer" products have nothing in common with the "chemical herbicide" products, and both are classified differently by the USPTO. To find likelihood of confusion merely because Applicant caters to the "Agricultural" industry is to broad of a generalization. *In re Quadram Corp.,* 228 U.S.P.Q. 863 (TTAB 1985) (There is no per se rule that goods which relate to a broad industry are likely to cause confusion). *General*

Electric Co. v. Graham Magnetics Inc., 197 USPQ 690, 694 (TTAB 1977) and Harvey Hubbell Inc. v. Tokyo Seimitsu Co., Ltd., 188 USPQ 517, 520 (TTAB 1975); (The mere fact, that a term may be found which encompasses the respective goods does not mean that customers will view the goods as related in the sense that they will assume that they emanate from or are associated with a common source). (emphasis).

Applicant identification of goods is a narrow description to a subset of "fertilizer" products namely, "non-chemical, bio-fertilizers" (bio is short for biological). Applicants product is organic and non-chemical in contrary to Opposer's product very chemical and corrosive. *See* [**Exhibit A**] (a copy if the MSDS label of Opposer's product stating danger...hazards to humans...corrosive...handlers must wear chemical resistant gloves); compare to [**Exhibit B**] (Applicant label and the product's web description state that Cobra contains different strains of micro-organisms and organic root hormones, note also that is used a hydroponic stimulant).

Applicant's goods "bio-fertilizers" used with the COBRA mark have very specific applications for sophisticated hydroponic growers. *See* [**Exhibit C**]. (product information printed from Applicants Web site labeling it as a hydroponic stimulant). Engineer Eliecer Salcerio, a 15 year veteran in the hydroponic industry, states in his affidavit his COBRA product is sold to the hydroponic industry, and those customers would know the difference not to confuse a fertilizer and an herbicide. [**Exhibit D**] ("In general, fertilizers promote growth and herbicides promote death…"). Applicant also states that Opposer does not attend trade shows in the hydroponic industry, or advertise in hydroponic industry, because herbicides and pesticides are usually not needed in hydroponic soil-less growing, so there is no demand for their products. *Id.* *See* [**Exhibit F**] (Wikipedia article about hydroponic agriculture). These two products flow in separate channels of trade.

Opposer argues in its memorandum that the products are "intrinsically related." [**DE 17 at 7**] Opposer's own description of their COBRA product online, explains that; "In addition, Cobra can be tank mixed with popular herbicides, including Select Max Herbicide with inside technology, Roundup, Classic, FirstRate, Raptor or Pursuit," it does not mention anything about being able to be mixed with popular fertilizers or plant growth media. *See* [**Exhibit G**]

4. The relevant consumers are very sophisticated and distinguish between a weed killer chemical vs. a non-chemical plant growing promoter since if a mistake is made when purchasing, their crop or plant will suffer or die.

Various factors inform the sophistication of consumers and degree of care exercised with purchases. For example, the cost of the items, personal sales by knowledgeable salespersons, whether the purchasers have a specific purpose involving the product, and whether the consumer is a professional or retail buyer. Each of these factors suggests the relevant consumers-who are plant growing business retailers and their customers-are very sophisticated and unlikely to be confused. This is because purchasing the wrong plant product will has severe consequences; hence if it is the wrong one, their plants will likely suffer or even die.

Applicant, Mr. Salcerio explains in his affidavit that hydroponic soil-less growing requires specialized knowledge. *See also* [**Exhibit D**] ("Consumers that buy in the hydroponic industry are very knowledgeable about what they buy. This is because there is no soil, and all the parameters of plant growth have to be precisely controlled. Temperature, PH, fertilization, humidity etc., cannot be left to chance or the plant will die."). This shows even less likelihood of confusion.

5. There is no evidence of actual confusion.

Opposer offers no s supporting evidence showing actual confusion. This is corroborated by Applicant, Mr. Salcerio, when he states that "In four years, I have not received a single phone call in regards to their products, no one has asked for their products at a trade show, no one has asked for their products online, and no one has asked for their products in any of my four stores." [**Exhibit D**] One appellate court has noted that: "it is certainly proper for the trial judge to infer from the absence of actual confusion that there was also no likelihood of confusion." *Affiliated Hosp. Prod., Inc. v. Merdel Game Mfg. Co.*, 513 F.2d 1183, 1188 (2d Cir. 1975).

C. Triable Issues Remain on Applicant's Affirmative Defenses

Opposer has not produced evidence to show they have used the mark COBRA in commerce in connection with the goods listed in Applicant's application serial number 85/236,790 filed on February 8, 2011. This is an issue of material fact.

Opposer has not produced evidence to show currently using the mark COBRA in commerce in connection with the goods listed in Applicant's application serial number 85/236,790 filed on February 8, 2011. This is an issue of material fact.

Opposer has not produced evidence to show that as of the date of this document, customers can purchase a product bearing the mark COBRA for any goods listed in Applicant's application serial number 85/236,790 filed on February 8, 2011, or the date of first use of February 3, 2009, from Opposer, or any entity associated with Opposer, as evidenced by Opposer's own website, http://www.valent.com. This is an issue of material fact.

III. CONCLUSION

Opposer provides no competent evidence of a likelihood of confusion between its mark and Applicant's COBRA mark. On the contrary, the evidence establishes there is no likelihood of confusion between the marks. Therefore, Opposer's motion should be denied, and summary judgment should be granted in favor of Applicant. Applicant's mark should be permitted to proceed to registration on the Principal Register.

CERTIFICATE OF TRANSMISSION

I certify this Notice of Opposition is being transmitted thought the Electronic System for Trademark Trials and Appeals (ESTTA), to the Assistant Commissioner for Trademarks at, http://estta.uspto.gov/filing-type.jsp and via e-mail and by prepaid, first-class mail upon Opposer's Correspondent:

Teresa D. Tambolas Esq.

VALENT U.S.A. CORPORATION

Attorneys for Opposer

870 Technology Way

Libertyville, IL 60048

Respectfully submitted on this Friday, September 13, 2013

Florida Garden Supplies, Inc. 2692 W 79 St. Hialeah, Florida 33016 Applicant	Edmar M. Amaya, LL.M., Esq. EDAM LAW PLLC Attorneys at Law Attorney for Applicant