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

Proceeding	91204389
Party	Defendant Coastal Federal Credit Union
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Coppermark Bank, Opposer, v. Coastal Federal Credit Union, Applicant.	In the matter of Application Serial No. 85134559 For the mark: COPPER & Application Serial No. 85134552 For the mark: 29 CU COPPER (design) Opposition No. 91204389

APPLICANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Federal Rule of Civil Procedure 12(c) and the TTAB Manual of Procedure (TBMP) § 504, Coastal Federal Credit Union (hereinafter, "Applicant") hereby moves the Board for judgment on the pleadings in Opposition No. 91204389 filed on March 12, 2012 ("Opposition") by Coppermark Bank ("Opposer"). Applicant submits this brief in support of a motion for judgment on the pleadings, taking all of Opposer's pleaded factual allegations as true and all inferences drawn in its favor, Applicant is entitled to judgment on the pleadings and dismissal of this Opposition on the grounds that Applicant's marks, 29 CU COPPER (design) and COPPER do not create a likelihood of confusion with Opposer's COPPERMARK mark.

I. INTRODUCTION

Applicant is the owner of U.S. Trademark Application Serial Nos. 85/134,552 (the "29 CU COPPER Application") and 85/134,559 (the "COPPER Application") (collective, "Applicant's marks 29 CU COPPER and COPPER" or "Applicant's marks"). Opposer filed a Notice of Opposition against Applicant's marks on March 12, 2012 allegedly based on Opposer's own registration for COPPERMARK, Registration No. 3,118,247 ("Opposer's COPPERMARK mark").

Applicant filed an Answer to the Notice of Opposition on April 30, 2012. Based on the pleadings submitted, Applicant asserts that even if all of Opposer's factual allegations are accepted as true for the purposes of this motion, there is no likelihood of confusion between Applicant's marks and Opposer's marks as a matter of law.

II. STANDARDS APPLICABLE TO A MOTION FOR JUDGMENT ON THE PLEADINGS

> A motion for judgment on the pleadings is a test solely on the undisputed facts occurring in all the pleadings, supplemented by any facts of which the Board will take judicial notice. For purposes of the motion, all well pleaded factual allegations of the nonmoving party must be accepted as true, while those allegations of the moving party which had been denied (or which are taken as denied, pursuant to FRCP 8(d), because no responsive pleading thereto is required or permitted) are deemed false. Conclusions of law are not taken as admitted. All reasonable inferences from the pleadings are drawn in favor of the nonmoving party. A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment, on the substantive merits of the controversy, as a matter of law.

TBMP 504.02 (citations omitted).

Applicant asserts that there are no material factual issues regarding a likelihood of confusion, and thus the Board should review the matter and find that Opposer's claims of likelihood of confusion should be dismissed as a matter of law.

III. AS A MATTER OF LAW, APPLICANT'S MARKS DO NOT CREATE A LIKELIHOOD OF CONFUSION WITH OPPOSER'S REGISTRATION

A. FOR THE PURPOSES OF THIS MOTION ALL MATERIAL FACTS ALLEGED BY OPPOSER REGARDING LIKELIHOOD OF CONFUSION ARE TAKEN AS ESTABLISHED

Taken is true for the purpose of this motion, Opposer's factual allegations related to the issue of likelihood of confusion can be found in paragraph Nos. 4 and 8 as follows:

> 4. Opposer is the owner of a federally registered mark, United States Registration No. 3,118,247, for the mark COPPERMARK for "commercial and consumer banking, estate trust management, lending, funds investment, commercial and consumer financial services, namely, investment securities" (collectively the "Registered Goods and Services") in class 036, on the Principal Register.
>
> 8. Upon information and belief, Opposed Goods and Services identified in the applications for Applicant's marks for COPPER and 29 CU COPPER are virtually identical to the goods and services offered under Opposer's COPPERMARK mark....

Assuming for the purposes of this motion that each of the material facts alleged above are true, Applicant submits that no likelihood of confusion exists regarding Applicant's marks 29 CU COPPER and COPPER and Opposer's COPPERMARK mark as a matter of law.

B. AS A MATTER OF LAW, THERE IS NO LIKELIHOOD OF CONFUSION BETWEEN APPLICANT'S MARKS AND OPPOSER'S MARK

In assessing the issue of likelihood of confusion, and whether there is any genuine issue of material fact, the Board considers the factors listed in *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). The first factor is the similarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *E.I. DuPont,* 476 F.2d at 1361, 177 USPQ at 567.

In *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545 (T.T.A.B. 1990), Opposer opposed registration of the mark FROOTEE ICE and Design based on its registration for the mark FROOT LOOPS. The Board found "there is no genuine issue as to any fact that would be material to our decision on the question of likelihood of confusion" and granted summary judgment for the Applicant. *Kellogg,* 14 USPQ2d at 1550.

The Board considered all the factors in *E.I. duPont*, 476 F.2d at 1361, and held that "[c]onsidering the marks in their entireties, ... they differ so substantially in appearance, sound, connotation and commercial impression that there is no likelihood that their contemporaneous use by different parties will result in confusion." *Kellogg*, 14

USPQ2d at 1550. Finding Applicant's and Opposer's goods were closely related, the Board stated that there would be no likelihood of confusion.

> [E]ven if opposer offered evidence at trial establishing that it has made prior and continuous use of its mark on goods...which are very closely related to the goods identified in applicant's application; that the goods move through the same channels of trade to the same classes of purchasers; that the goods are purchased casually rather than with care; and that opposer's mark "FROOT LOOPS" has become a very strong and well known, indeed, famous, mark as applied to its goods in commerce. ... *The first Dupont factor simply outweighs all of the others which might be pertinent to this case.*

Id. (emphasis added.)

The Federal Circuit affirmed the Board's judgment. *Kellogg Co. v. Pack'Em Enterprises Inc.*, 21 USPQ2d 1142 (Fed. Cir. 1991). The Federal Circuit held additionally that:

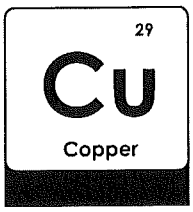
> We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive. *DuPont* recognized that in determining likelihood of confusion "each case must be decided on its own facts." It also recognized that "each [of the thirteen elements] may from case to case play a dominant role." *Id.* The court noted examples of cases in which a particular element made confusion likely or unlikely.

21 USPQ2d at 1145. The Board confirmed this holding in *Champagne Louis Roederer S.A. v. Delicato Vineyards,* 47 USPQ2d 1459, 1460 (Fed. Cir. 1998)(CRYSTAL CREEK for wines so dissimilar from CRISTAL for champagnes that opposition may be dismissed based on this factor alone). *See also Keebler Co. v. Murray Bakery Products*, 9 USPQ2d 1736, 1739 (Fed. Cir. 1989)("the more important fact for resolving the issue of likelihood of confusion in this case is the dissimilarity in commercial impression between the marks...").

In the instant case, the differences between the marks are so pronounced that this Board may render judgment on the pleadings based upon their dissimilarities alone even if the factual allegations of Opposer, such as the similarities of the channels of commerce and the goods and services used with respect to the marks, are accepted as true. Applicant submits that its design mark 29 CU COPPER and its mark COPPER are so dissimilar when compared to the Opposer's Registration for COPPERMARK that, when considered in their entireties, they differ so substantially in appearance, sound,

connotation and commercial impression that there would be no likelihood of confusion as a matter of law.

The mark 29 CU COPPER is directed to the following design:



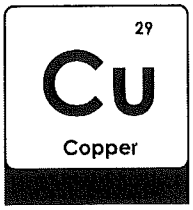
Applicant's 29 CU COPPER design mark conveys the impression of a periodic table symbol for the element "copper," including the atomic number ("29"), and the atomic symbol for copper ("CU"). The 29 CU COPPER design mark clearly suggests the element "copper" on the scientific periodic table, and therefore, the 29 CU COPPER design mark is very different in appearance and meaning when compared to COPPERMARK, which has no such suggestion or connotation.

The 29 CU COPPER design mark and the mark COPPER are both connected in meaning with, among other things, other precious metals, such as gold, silver and platinum. In contrast, "coppermark" is a compound word that generally refers to a mark on copper or copperware, such as a coppersmith's stamp or mark that would be affixed to copperwares to identify the copper maker. Thus, the term "coppermark" connotes copper maker's marks and copperwares and has an entirely different meaning, connotation and commercial impression from Applicant's marks.

Moreover, if Opposer were able to successfully oppose Applicant's marks COPPER and 29 CU COPPER, Opposer would apparently possess exclusive rights to the term "copper" alone when used with respect to financial and investment services. Opposer's attempt to expand its rights from the COPPERMARK mark to the term "copper" cannot be maintained. In particular, a search of the USPTO Trademark Electronic Search System (TESS) reveals several registered marks for financial services or investment related services that include "copper" as a part of the mark, including, *e.g.*, U.S. Registration 2636536 for COPPERWYND (for, among other things, real estate investment in Class 36), U.S. Registration No. 3821947 for COPPERDIME (for, among other things, financial services, transmission of electronic financial transactions, namely, electronic debit and credit transactions in Class 36), Registration No. 3767548 for

COPPER BEECH (for, among other things, financial affairs, namely, banking, capital investment services, financial clearing houses, credit card services, debit card services in Class 36), and Registration No. 3095343 for THE COPPER RIVER GROUP INC. (for, among other things, business consultation services for financial institutions in Class 35). Notably, U.S. Registration 2636536 for COPPERWYND (for, among other things, real estate investment in Class 36) was filed July 7, 2000 and registered October 15, 2002, which is before Opposer's COPPERMARK registration, which was filed October 28, 2004 and registered July 18, 2006. Based on the numerous registrations for financial and investment services that incorporate the term "copper," Opposer's apparent position that it controls rights to the term "copper" apart from the full mark COPPERMARK cannot be maintained.

Even if there is overlap between the parties' goods sold under their marks, the differences between Applicant's 29 CU COPPER design mark:



and Applicant's mark COPPER and the Opposer's COPPERMARK registration in appearance, sound, connotation and commercial impression are so stark as to preclude confusion. Applicant respectfully asserts it is entitled to judgment on the pleadings based on these differences alone. *Kellog*, 21 USPQ2d at 1145; *Champagne Louis Roederer*, 47 USPQ2d at 1145.

IV. CONCLUSION

Applicant respectfully requests that the Board enter judgment on the pleadings in favor of Applicant for the design mark 29 CU COPPER in the present Opposition.

Applicant respectfully requests that the Board enter judgment on the pleadings in favor of Applicant for the mark COPPER in the present Opposition.

DATED: May 18, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that today, May 18, 2012, a true and correct copy of the foregoing Answer was served via first class mail upon the following:

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