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

Proceeding	91214329
Party	Plaintiff Traditional Medicinals, Inc.
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Date	01/29/2015
Attachments	TradMed Reply 91214329.pdf(59433 bytes)

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

In re: Application Serial No: 85694743
For the Mark: **WEIGHTLESS WATER**

)	
TRADITIONAL MEDICINALS, INC.,)	
Opposer,)	
)	Opposition No. 91214329
v.)	
)	REPLY BRIEF IN FURTHER
KEVIN ALAN TUSSY,)	SUPPORT OF OPPOSER’S
Applicant.)	MOTION FOR SUMMARY
_____)	JUDGMENT

Opposer, Traditional Medicinals, Inc. (“TradMed”) submits this Reply brief in further support of its Motion for Summary Judgment.

PRELIMINARY STATEMENT

In its moving papers, TradMed provided undisputed evidence confirming it has used its WEIGHTLESS trademark for many years and that Applicant’s WEIGHTLESS WATER intent-to-use mark poses an obvious likelihood of confusion.

Applicant responded with no admissible evidence showing a disputed issue of fact, and largely irrelevant legal arguments that do not address (or ignore) the settled authority cited by TradMed. Simply, Applicant raises no issue of material fact that would preclude summary judgment.

Applicant makes no attempt to address TradMed’s showing of likelihood of confusion in its Opposition to Opposer’s Motion for Summary Judgment (“App. Opp.”) and fails to address

any of the applicable *DuPont* factors directly- effectively showing that Applicant's registration would create a likelihood of confusion.

ARGUMENT

The Undisputed Evidence Shows that TradMed has Standing

TradMed's mark is Inherently Distinctive

As TradMed stated in its moving papers, "TradMed's WEIGHTLESS trademark is at worst suggestive, inherently distinctive, and protectable." (Opposer' Motion for Summary Judgment; "Motion" at 4). Applicant concedes that it is as worst suggestive, where he concludes it is "rather a suggestive mark" (App. Opp. at page 8).

TradMed believes it Will be Injured by Applicant's Registration.

TradMed pled in its Motion, and Applicant concedes in its Opposition, that TradMed believes "it will be injured by the registration of, and Applicant's use of, the Proposed Mark..." (Motion at; Motion at 3; App. Opp. at 8)

The Undisputed Evidence Shows the Similarity of the Marks

There is no real dispute that Applicant's WEIGHTLESS WATER mark is substantially identical to TradMed's WEIGHTLESS trademarks. Applicant attempts to distract from the fact that the marks are substantially identical by listing various cases regarding similarity of the marks, yet fails to apply any of those cases to the instant case. At one point he mentions TradMed's precedent, yet fails to apply it nor distinguish it from the instant case.

It appears Applicant's real argument is focused on similarity of goods , completely avoiding the topic of similarity of the marks and essentially conceding that they are in fact substantially similar (App. Opp. at page 13).

The Undisputed Evidence shows the Similarity of the Goods

As stated in TradMed's moving papers, "It is well settled that the goods need not be identical, or even competitive, to support a finding of likelihood of confusion; instead it is sufficient that the goods are related in some manner or that the circumstances surrounding their marketing are such that they would likely been countered by the same persons under circumstances that could give rise to the mistaken belie[f] that they emanate from, or are associated with the same source." (Motion at page 7)

TradMed cited numerous registrations covering both tea and water beverage products demonstrating that companies manufacture, and are the source of, both products (Motion at page 7). Applicant, in its Opposition, does not provide any evidence to contradict TradMed; instead Applicant provides its counsel's conclusory and unsupported assertions, including that "companies that consumers associate [with beverages] are entirely different than the companies [that consumers associate] with [tea]." (App Opp at page 19). As stated in *Venture Out Properties LLC v. Wynn Resort Holdings LLC*, "The nonmoving party may not rest on the mere allegations of its pleadings and assertions of counsel, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine issue of material fact for trial." 81 USPQ2d 1887, 1890 (TTAB 2007)¹

Applicant has provided no evidence to refute the goods are similar; It is undisputed therefore that TradMed's use and Applicant's identified goods are related within the meaning of the Trademark Act.

The Undisputed Evidence Shows the Channels of Trade overlap

Applicant admits that TradMed's products are sold in national retail chains such as Whole Foods, Target, Kroger, Safeway, and Amazon.com (App. Opp. at page 4) . Applicant also implicitly admits, by its failure to deny, that bottled water is sold in these same stores (Motion at page 14)

In an attempt to distract from the clear overlapping channels of trade, Applicant cites its own declaration². Notably, Applicant makes declaratory statements as to where TradMed and its proposed product are located in the store without any supporting evidence- merely pointing to its internet searches (App. Opp. at 17) In the same declaration, Applicant asserts that it is not likely the products will be in the same outlet- but provides no evidence to support that assertion. See, *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793 , 1797 (Fed. Cir. 1987) (conclusory statements and denials do not raise genuine issues of material fact)

The Undisputed evidence shows that other than TradMed's WEIGHTLESS mark, there is no other third party use on food or beverage

Applicant does not deny this, but rather cites to an abandoned registration and registrations for products completely unrelated to beverages (App. Opp. at page 6; Gile Declaration Exhibit E)

The Undisputed Evidence Shows that there is a likelihood of confusion.

By failing to address TradMed's arguments showing a likelihood of confusion, as outlined above, Applicant effectively concedes that there is a likelihood of confusion.

¹ Applicant cites to Declaration of Kevin Alan Tussy ("Tussy Dec.")

² Said declaration is neither sworn, nor does it show competence of the declarant to testify as to the matters it addresses pursuant to TBMP §528.05(b).

TRADMED'S EVIDENTIARY OBJECTIONS

As explained above, Applicant's evidence, even if fully considered by the board is insufficient to raise a triable issue of fact on the matter of likelihood of confusion (and sometimes irrelevant altogether).

Additionally and perhaps most important, both declarations cited by Applicant through which it introduces its evidence are both deficient: neither is sworn under penalty of perjury, and should be stricken from the record. Furthermore in both declarations, neither Mr. Gile nor Mr. Tussy authenticate any of the exhibits they intend to introduce. In many cases, neither Declarant indicates where the documents cited in their declaration came from, nor who provided (or downloaded) them.

The declarations do not meet the minimum requirements to establish that the exhibits or the facts contained therein should be considered as admissible evidence.

Beyond the aforementioned deficiencies, Kevin Tussy has not provided evidence or statements to demonstrate that he is competent to testify to the matter at hand, particularly as to the Food and Drug law which he purports to have knowledge of³ (App. Opp. at page 15; Tussy Dec. ¶ 5)

CONCLUSION

TradMed, in its moving papers, demonstrated a likelihood of confusion, which Applicant has effectively conceded in its Opposition. For this reason as well as those set forth above, and in its moving papers, TradMed respectfully requests that the Board grant TradMed's motion for

³ Interestingly, the document Mr. Tussy attempts to introduce contains the disclaimer on its first page "This guidance represents the [FDA's] current thinking on this topic. It does not create or confer any rights for or on any person and does not bind the FDA or public." (KAT 000312). Even if admissible, Applicant fails to explain what about the guidance document is relevant.

summary judgment and refuse registration of Applicant's infringing WEIGHTLESS WATER trademark.

Dated this 29th day of January, 2015 .

TRADITIONAL MEDICINALS, INC.

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CERTIFICATE OF MAILING

I hereby certify that a copy of the attached **REPLY BRIEF IN FURTHER SUPPORT OF OPPOSER'S MOTION FOR SUMMARY JUDGMENT** (together with a copy of this Certificate) was served this 29th day of January, 2015 by email and US mail to:

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_____/Jeremy M Johnson/_____
Signature

Date of Signature: 29.January.2015