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

Proceeding	91229200
Party	Plaintiff Ganz
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Signature	/Shannon V. McCue/
Date	11/24/2017
Attachments	Ganz Response to Cross Motion for Summary Judgment with exhibits.pdf(1246388 bytes)

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

Ganz,

Opposer,

v.

SJM Partners, Inc.

Applicant.

Opposition No. 91229200 (parent)

Serial No. 86052534

Ganz,

Opposer,

v.

SJM Partners, Inc.

Applicant.

Opposition No. 91232397

Serial No. 86053370

**OPPOSER'S RESPONSE TO
APPLICANT'S CROSS-MOTION FOR SUMMARY JUDGMENT**

Applicant, SJM, submits a cross motion for summary judgment on the issue of whether SJM is estopped from registering the applied for GOOGLES trademarks based on the parties' Coexistence Agreement. In making this cross-motion, SJM raises no new issues and in essence is only responding to Opposer Ganz's opening brief on this issue. To that end, Ganz has provided its reply, and incorporates that reply herein by reference.

Separately, SJM seeks summary judgment on Ganz's claim that SJM committed fraud on the Trademark Office. This motion is premature, as discovery is ongoing; moreover, there are

genuine issues of fact that must be decided through testimony and trial. Ganz hereby opposes SJM's motion.

I. MATERIAL FACTS IN DISPUTE ON THE FRAUD CLAIM

In its Notice of Opposition, Ganz brought a claim of fraud, namely that SJM, through its attorney misrepresented facts to the Trademark Office to overcome a rejection based on Ganz's GOOGLES trademark registration. Complaint (paras. 31-47).

Ganz alleged, and SJM admitted in its Answer (para. 32) that it submitted a response to an office action containing the statement:

Additionally, the Examining Attorney has cited U.S. Registration Number 2554518, the mark, "Googles" owned by Ganz S. H., Ganz Holdings, Inc. (the "Ganz Mark") as potentially barring Applicant's registration... Upon information and belief, The Ganz Company no longer uses the subject mark and otherwise has made a pledge to Applicant not to use it. That pledge amounts to a consent agreement. Accordingly, there is no conflict or likelihood of confusion between Applicant's filing and U.S. Registration Number 2554518.

(File Histories, Jun. 16 2014 Response). SJM further admitted in its Answer that the above statement was submitted by SJM to overcome a Section 2(d) refusal based on Opposer's trademark registration 2554518. (Answer, para. 33).

Ganz alleged that this statement intentionally mischaracterized the Coexistence Agreement between the parties. (Complaint, para. 34). The Coexistence Agreement contains no pledge by Ganz not to use the GOOGLES mark. (Complaint, para. 35). Ganz further alleged that SJM deliberately failed to disclose the Coexistence Agreement in an effort to overcome the examiner's refusal. (Complaint, paras. 46-47).

In a February 2016 response, SJM's attorney incorporated the response containing this statement by reference. (File Histories, Feb. 1, 2016 Response). The Trademark Office record

shows that following this statement, the section 2(d) refusal based on 2554518 was withdrawn and a notice of publication issued. (File Histories, Mar. 9, 2016 Notice of Publication).

As alleged in the Notice of Opposition, in addition to making the above statement, SJM withheld the Coexistence Agreement between the parties. In doing so, it concealed the falsity of its statement from the examiner and material facts relating to the likelihood of confusion including whether the parties agreed to restrict their use as identified in the Examiner's office action. (July 5, 2014). Notably, SJM abandoned the application following this office action. (Feb. 6, 2015 Notice of Abandonment). In reviving the application, SJM cancelled the class 28 goods presumably to avoid further rejection based on Opposer's registration in the same class.

II. GANZ HAS NOT COMPLETED DISCOVERY ON ITS FRAUD CLAIM AGAINST SJM

SJM's motion for summary judgment on Ganz's fraud claim against SJM is premature since it involves a matter of ongoing discovery. Prior to the Board suspending the proceedings, Ganz had noticed a 30(b)(6) deposition of SJM (see Ex. M). Among the topics was discovery relevant to the fraud claim including, but not limited to, SJM's intent to defraud the Trademark Office. For this reason alone, SJM's motion for summary judgment should be denied.

III. GENUINE ISSUES OF MATERIAL FACT REMAIN ON THE FRAUD CLAIM MAKING SUMMARY JUDGMENT PREMATURE.

A. The Standard For Summary Judgment

Even if the Board decides to consider the substance of SJM's motion for summary judgment on the fraud claim, SJM has not met its burden to show there are no genuine issues of material fact. The party seeking summary judgment always bears the initial responsibility of identifying the portions of the pleadings which it believes demonstrate the absence of a genuine

issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). SJM has failed to meet this burden and has merely identified areas where there is a genuine dispute including, but not limited to, SJM’s intent to mislead the Trademark Office in arguing that Ganz had consented to SJM’s use and abandoned the GOOGLES mark. *See, Copelands’ Enterprises Inc. v. CNV Inc.*, 945 F.2d 1563 (Fed. Cir. 1991) (“as a general rule, the factual question of intent is particularly unsuited to disposition on summary judgment”).

To determine whether a genuine issue of material fact exists, the Board must review the record, construing all facts in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party’s favor. *Anderson v. Liberty Lobby*, 477 U.S. 242,255 (1986).

B. The Dispute Over The Materiality Of SJM’s Statements

SJM argues that its statements to the Trademark Office during prosecution of its applications were not material—an issue hardly ripe for summary judgment. The test for materiality is whether the Trademark Office would have granted the same rights without the representation. *Nationstar Mortgage LLC v. Jujahid Ahmad*, 112 U.S.P.Q.2d, 1361, 2014 WL 6480655 (T.T.A.B. 2014); *see also, In re Bose Corp.*, 480 F.3d 1240, 1245 (Fed. Cir. 2009).

1. The Fraudulent Statements

Here, SJM admitted in its Answer that it submitted a response to an office action containing the alleged fraudulent statement that the “Ganz Company no longer uses the subject mark and otherwise has made a pledge to Applicant not to use it” to overcome a Section 2(d) refusal based on Opposer’s trademark registration 2554518, and again incorporated the response containing this statement by reference on Feb. 1, 2016. The Trademark Office record shows that following this statement, the section 2(d) refusal based on 2554518 was withdrawn and a notice of publication issued.

SJM obviously withheld the Coexistence Agreement between the parties, concealing the falsity of its statement from the examiner and material facts relating to the likelihood of confusion including whether the parties agreed to restrict their use as identified in the Examiner's office action. (July 5, 2014).

Notably, SJM abandoned the application following this office action. (Feb. 6, 2015 Notice of Abandonment). In reviving the application, SJM cancelled the class 28 goods presumably to avoid further rejection based on Opposer's registration in the same class.

The statement made in response to an office action and failure to produce the actual Coexistence Agreement between the parties is material to whether the Trademark Office would have granted the same rights, since the Coexistence Agreement restricted the types of use SJM could make. This restriction, at a minimum, would have required the goods identification to specify goods featuring extraterrestrial characters and alien-themed properties.

The statement that the applications were ultimately allowed based on straightforward likelihood of confusion arguments is inaccurate. The Feb. 1, 2016 Response cited in SJM's brief included a statement incorporating all prior responses by reference. This statement invited the examiner to consider all prior responses making it impossible to determine what impact the statement had other than the ultimate allowance of the applications. Moreover, since SJM never revealed the Coexistence Agreement to the examiner, its impact cannot be measured.

The parties' Coexistence Agreement is evidence of the falsity of the statement. SJM's unsupported inference that "it is quite possible that Galloway was under the impression that Ganz was not using GOOGLES" or that he had the Google settlement agreement in mind is an unsupported theory and does not excuse SJM's fraud. *Hachette Filipacchi Presse v. Elle Belle, LLC*, 84 U.S.P.Q.2d 1090, at *6-7 (T.T.A.B. 2007) (applicant's mistake in submitting a false

statement to the Office did not excuse fraud). At best, this theory shows that there is a genuine issue of fact for testimony and trial.

C. SJM's Self-Serving Testimony on the Issue of Intent is Unavailing

The affidavit from Mr. Garchik, president of SJM and previously Director and CFO for Stelor,--without the opportunity to depose him or other representatives for SJM with actual knowledge of the facts--only raises issues of fact that require resolution through trial. Although Mr. Garchik purports to have intimate knowledge of Stelor's use of Googles, he claims that neither he nor SJM were aware of the Coexistence Agreement between Silvers/Stelor and Ganz until June 2016. (Garchik Affd't, para. 10). He also makes the statement that he does not know if Stelor ever received a copy of the Coexistence Agreement. *Id.* The dichotomy between Mr. Garchik's knowledge of Stelor's use and licensing with Silvers contrasted with alleged ignorance of the Coexistence Agreement defies credulity.

For example, Mr. Garchik indicates that he became aware of Stelor Productions in 2002 through his wife's sister Lori Esrig and her husband Steven Esrig. *Id.* (Garchik Affd't para. 4). In 2004, Steven Esrig, as CEO of Stelor, wrote to Ganz and attached a copy of the Coexistence Agreement to a letter indicating that Stelor's team is "carefully assessing" all of its intellectual property agreements. Ex. N. This letter demonstrates that Stelor and Steven Esrig had a copy of the Coexistence Agreement and certainly were aware of its terms.

Mr. Garchik goes on to explain that he became the Director of Stelor in 2006 and CFO in 2007 and also loaned money to Stelor. (Garchik Affd't, paras. 4) Mr. Garchik secured this loan with Stelor's intellectual property assets, including the GOOGLES trademarks and googles.com domain name assigned to Stelor by Silvers. *Id.* at 6-7. When Stelor defaulted, those assets ultimately were assigned to SJM. *Id.* at 7. Given that Mr. Garchik became aware of Stelor

through Mr. and Mrs. Esrig in 2002 and later acted as a Director and CFO of Stelor raises a factual question as to whether he was involved in the review identified in Mr. Esrig's 2004 letter or had discussed the results of that review in 2006-2007 as Stelor's Director and CFO. The fact that Mr. Garchik and other partners that eventually formed SJM had loaned money to Stelor secured with the GOOGLES trademarks and Stelor's related intellectual property assets (Garchik Affd't, para. 6), raises factual questions as to the diligence performed and disclosures made in connection with these assets. All reasonable inferences from Mr. Garchik's affidavit and the 2004 letter suggest that SJM had knowledge of the Coexistence Agreement. Indeed, as noted in Ganz's Reply brief, up until the present oppositions were filed, SJM's website demonstrated compliance with the Coexistence Agreement. The only reasonable inference, therefore, is that SJM was aware of the Coexistence Agreement during prosecution of the SJM Applications.

With respect to the false statement made in prosecuting these applications, there is no dispute that Mr. Galloway was the authorized representative for SJM at the time the statement was made and when the Coexistence Agreement was subsequently withheld. By granting Mr. Galloway authority to respond on its behalf, SJM is charged with knowledge of the representations made to the Office. *Hachette Filipacchi Presse v. Elle Belle, LLC*, 84 U.S.P.Q.2d 1090, at *6-7 (T.T.A.B. 2007) (applicant and legal counsel share a duty to ensure the accuracy of information submitted in connection with an application).

In *Hachette*, petitioner sought to cancel a registration on the basis of fraud. The applicant claimed it was using the mark in association with certain goods, and petitioner alleged that the statement was made knowing that it was not true. *Hachette* at *2. In response, the applicant argued that the representation was a mistake. *Id.* The Board rejected this defense stating that "nor does the misunderstanding on the part of respondent's attorney preclude our findings of

fraud.” The Board also found that applicant’s subsequent amendment to remove the goods for which it had not used the mark ineffective with respect to the claim of fraud and granted summary judgment to petitioner on the fraud claim. *Id* at *7.

Here, despite extended prosecution following the statements including revival of the application, neither Galloway nor SJM sought to correct the statement or submit the Coexistence Agreement. The only logical inference is that Galloway/SJM knowingly made the false statement and withheld the Coexistence Agreement to hide the falsity of the statement and conceal the terms agreed to with Ganz that would have prevented registration of the applications.

As in *Hachette*, SJM argues that the statement was a mistake offering the theory that Mr. Galloway was confused as to the agreement being referred to or the fact that Ganz had not abandoned its mark. SJM’s theory is not supported by any evidence and is pure speculation. The record, however, is clear in that SJM never withdrew or corrected the statement, and indeed incorporated the statement in its last response. The record is also clear that neither SJM nor its predecessor that negotiated the Coexistence Agreement never provided the Agreement to the examiner. At a minimum, there are genuine issues of fact on the issue of intent.

In view of the evidence in the record and the pending discovery relevant to this issue, SJM’s motion for summary judgment on the fraud claim should be denied.

IV. CONCLUSION

SJM’s cross motion for summary judgment should be denied and summary judgment granted in Ganz’s favor for the reasons stated in Ganz’s Motion for Partial Summary Judgment and its Reply.

SJM's motion for summary judgment on the fraud claim should be denied as premature since discovery is ongoing, and also because there are genuine issues of material fact that require testimony and trial.

Dated this 24th day of November 2017

Respectfully submitted:

/s/Shannon V. McCue

Deborah A. Wilcox

Shannon V. McCue

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Attorneys for Ganz

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of November, 2017, a true and correct copy of the foregoing OPPOSER'S RESPONSE TO APPLICANT'S CROSS-MOTION FOR SUMMARY JUDGMENT was served on Applicant via electronic filing with the Trademark Trial and Appeal Board, via email and via the Electronic System for Trademark Trial and Appeals (ESTTA):

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/s/Shannon V. McCue

Shannon V. McCue

EXHIBIT M

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

Ganz,

Opposer,

v.

SJM Partners, Inc.

Applicant.

Opposition No. 91229200
(parent)

Serial No. 86/052,534

Ganz,

Opposer,

v.

SJM Partners, Inc.

Applicant.

Opposition No. 91232397

Serial No. 86/053,370

NOTICE OF RULE 30(b)(6) DEPOSITION

Addressed to:

SJM Partners, Inc.
1930 Issac Newton Square West
Suite 207
Reston, VA 20190

PLEASE TAKE NOTICE that, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure and § 404.06(b) of the Trademark Board Manual of Procedure, Opposer Ganz (“Opposer”), by and through its undersigned counsel, will take the deposition upon oral examination of the person(s) designated by Applicant SJM Partners, Inc. (“Applicant”) with respect to the topics set forth in

the attached Schedule A. The deposition will take place at 9:00 a.m. on October 13, 2017, at the offices of Baker Hostetler LLP, 999 Third Avenue, Suite 3600 Seattle Washington 98104-4040, or other location agreed to by the parties.

Said deposition will be upon oral examination, before a court reporter or some other officer duly authorized by law to take depositions. The testimony will be recorded by stenographic means and may be videotaped.

Respondent will provide the Petitioner's counsel with written notice at least five (5) days before the date of the deposition of the name(s) and title(s) of the designee(s) who will testify on Respondent's behalf and shall identify the matters as to which each designee will testify.

The deposition is being taken for the purpose of discovery, for use at trial, or both of the foregoing, or for such other purposes as are permitted under the applicable governing Federal Rules of Civil Procedure, or other statute or rule.

Respectfully submitted:

September 21, 2017

/s/Shannon V. McCue
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Attorneys for Ganz

SCHEDULE A

Opposer requests that Applicant name one or more of Applicant's proper employees, officers, agents, or other persons duly authorized to testify on Applicant's behalf who shall testify as to matters known or available to Applicant regarding the categories of information and documents described below. Applicant's designee shall bring any and all of the requested documents in Applicant's possession, custody or control which existed or originated within the last three (3) years (unless otherwise indicated) to the date of the deposition. This request shall be continuing in nature, and any items not so produced which may subsequently come into existence are further requested.

DEFINITIONS

1. Opposer incorporates the Definitions set forth in Opposer's First Set of Requests for Production of Documents and Things, and Opposer's First Set of Interrogatories, served on April 14, 2017 (collectively, "Opposer's Discovery Requests").
2. "You" or "your" means Applicant as defined in the documents incorporated above.
3. "Applicant" means SJM Partners, Inc., the applicant in the above-captioned proceeding.

4. “Coexistence Agreement” means the agreement entered into between Ganz and Applicant’s predecessor, Steven A. Silver’s and The Googles Children’s Workshop” on January 4, 2001, attached to Opposer’s Notice of Opposition as Exhibit D.

5. The term “Mark” means any word, name, symbol or device (including any key word or metatag) or any combination thereof.

6. “Concerning” or “relating to” means having any relationship or connection to, being connected to, commenting on, responding to, containing, constituting, showing, memorializing, describing, analyzing, reflecting, pertaining to, comprising, identifying, referring, discussing, or otherwise establishing a reasonable, logical or causal connection.

7. “Including” means “without limitation” and any terms following such terms are used by way of example only.

8. “Person” means any natural person or any legal entity, including, but not limited to, any business or governmental entity, organization or association.

DEPOSITION TOPICS

TOPIC NO. 1: The facts and circumstances concerning the creation, selection, development, and adoption of the GOOGLES Mark, and dates related to those facts and circumstances.

TOPIC NO. 2: The facts and circumstances concerning your first use of GOOGLES in the United States generally and in specific states, and dates related to those facts and circumstances.

TOPIC NO. 3: All versions of GOOGLES that you have used in commerce or currently intend to use in commerce, including all presentations and appearances of the marks and all facts and circumstances concerning how the marks have been displayed to consumers in connection with goods or services.

TOPIC NO. 4: The goods and services that you currently advertise, promote, distribute, offer, provide, or sell in connection with GOOGLES.

TOPIC NO. 5: Plans you have to alter or supplement the goods and services that are currently sold in connection with GOOGLES.

TOPIC NO. 6: Advertisement and promotion of goods and services offered, provided, or sold in connection with GOOGLES.

TOPIC NO. 7: The geographic areas where you have or will advertise, promote, distribute, offer, provide, or sell goods or services in connection with GOOGLES.

TOPIC NO. 8: The channels of trade through which you have or will advertise, promote, distribute, offer, provide, or sell goods or services in connection with GOOGLES.

TOPIC NO. 9: Identification of and information relating to the consumers to whom you have advertised, promoted, distributed, offered, provided, and sold goods and services in connection with GOOGLES, including the sophistication of these consumers.

TOPIC NO. 10: Plans you have to expand or otherwise change: the geographic areas where you currently advertise, promote, distribute, offer, provide, or sell goods or services in connection with GOOGLES; and channels of trade through which or consumers to whom you currently advertise, promote, distribute, offer, provide, or sell goods or services in connection with GOOGLES.

TOPIC NO. 11: The facts and circumstances concerning any instances of actual confusion as to (i) the source, sponsorship or affiliation of Applicant's goods or services; (ii) the source, sponsorship or affiliation of Applicant's goods or services; or (iii) the relationship between Opposer and Applicant.

TOPIC NO. 12: The facts and circumstances concerning any trademark search reports, market studies, market research, or surveys conducted by you or on your behalf concerning any of GOOGLES, Applicant's Marks or Applicant.

TOPIC NO. 13: The facts and circumstances concerning any applications to register or registrations for GOOGLES, or past or existing plans to apply for registration of GOOGLES, with the United States Patent and Trademark Office.

TOPIC NO. 14: The facts and circumstances concerning your knowledge of the Coexistence Agreement.

TOPIC NO. 15: The facts and circumstances concerning when you first became aware of Opposer's Marks.

TOPIC NO. 16: The facts and circumstances concerning any communications between Applicant and Opposer.

TOPIC NO. 17: The facts and circumstances concerning any communications between Applicant and any third party concerning Opposer, any goods or services of Opposer, or this proceeding.

TOPIC NO. 18: The GOOGLES.com website.

TOPIC NO. 19: Your sales of goods and services in connection with the GOOGLES.

TOPIC NO. 20: The facts and circumstances that form, in whole or in part, the basis for your denial of any paragraph contained within Opposer's Notice of Opposition as reflected in Applicant's Answer to Notice of Opposition filed January 27, 2017.

TOPIC NO. 21: Your basis for why Applicant did not commit fraud on the U.S. Patent and Trademark Office as alleged in Claim III of Opposer's Notice of Opposition.

TOPIC NO. 22: Your basis for why Applicant did not or will not breach the Coexistence Agreement by registering U.S. Trademark Application Nos. 86/052,534 and 86/053,370.

TOPIC NO. 23: Your prior statements to the USPTO in connection with U.S. Trademark Registration Nos. 86/052,534 and 86/053,370, included but not limited to Applicant's response to a USPTO Office Action denying Registration No. 86/053,370 because of a "likelihood of confusion with the marks in U.S. Registration Nos. 2,087,590 and 2,554,518" on December 16, 2013.

TOPIC NO. 24: The facts and circumstances concerning your collection and production of documents in this litigation.

TOPIC NO. 25: Any other businesses through which or marks under which you or parties involved with Applicant have offered goods or services similar or identical to those offered under GOOGLES.

TOPIC NO. 26: Applicant's responses to Opposer's Discovery Requests.

TOPIC NO. 27: The circumstances surrounding document Bates-labeled SJM002118, including but not limited to when the document was drafted and whether the document was disseminated to third parties.

TOPIC NO. 28: Compliance with COPPA Regulations for Children's Entertainment.

EXHIBIT N

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2017, a true and correct copy of Opposer's Notice of Rule 30(b)(6) Deposition was duly served upon Opposer by email, pursuant to Trademark Rule 2.119:

Stuart R. Dunwoody
Alexander M. Montgomery
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Tel: 206-757-8034
Fax: 206-757-7034

/s/Shannon V. McCue
One of the Attorneys for Ganz



January 14, 2004

Mr. Howard Ganz
C/O Ganz
ATTN: Maria Belfiore
One Pearce Road
Woodbridge, ON L4L 3T2

Dear Howard,

Thank you again for returning my call. I have enclosed in this package a copy of the co-exist agreement entered into between your company and the licensor for "The Googles from Goo," Mr. Steven A. Silvers. As I mentioned to you on the phone, Stelor Productions acquired this intellectual property for the purpose of developing a variety of children's media/educational products. To that end we have assembled a world-class team of educators, media, scientists, and entertainment professionals who have jumped on the bandwagon to be a part of this groundbreaking property.

Howard, we are at a point in our development where our advisors and counl are carefully assessing all of our patent, trademark, copyright, etc. agreements and the enclosed agreement falls into that category. In addition to producing a plush line of toys (which I would like to explore with you,) we are developing all original music, several songs of which are being "Grammy-tracked" as we speak. I have also taken the liberty of enclosing two CDs for you to explore (play the round one first) and I promise, you will be in for a treat.

As I mentioned in our conversation, I believe it is critical for us to meet so I may share with you a business proposal that we believe could be potentially lucrative for both of our companies. If February third will work for you, I will plan on making the trip and promise to take no more than one hour of your time. I will be traveling extensively for the next few weeks, so if you would be kind enough to have Maria contact my office at 301/963-0000 to confirm our meeting, I would be grateful.

Very truly yours,

Steven A. Esrig
CEO, President
Stelor Productions, Inc.

RECEIVED JAN 16 2004

14701 Mockingbird Drive, Darhestown MD 20874

Ph: 301.963.0000

Fax: 301.990.3636

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