This Opinion Is a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

James S. Fallon[1]
v.
Brown Innovation, LLC

Opposition No. 91252488

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for Brown Innovation, LLC

[1] Although the extension of time to oppose was granted to Apnea Sciences Corporation, while the notice of opposition was filed by James S. Fallon, we find this permissible under Trademark Rule 2.102(b), 37 C.F.R. § 2.102(b). The rule permits an opposition by someone other than the person to whom the extension was granted if the opposer is "in privity" with that person. *Id.* Because, as discussed below, the record reflects that James S. Fallon and Apnea Sciences Corporation had a licensor-licensee relationship, we find that he was in privity with Apnea Sciences Corporation for purposes of the opposition. *See Warren Distribution, Inc. v. Royal Purple, LLC*, 115 USPQ2d 1667, 1669 (TTAB 2015) ("In trademarks, the concept of privity generally includes … the relationship shared by 'related companies' within the meaning of Sections 5 and 45 of the Trademark Act, 15 U.S.C. §§ 1055 and 1127." We therefore have amended the caption in this proceeding accordingly, to show James S. Fallon as the opposer.

Before Cataldo, Lynch, and Johnson, Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Brown Innovation, LLC. ("Applicant") seeks registration on the Principal Register of the standard character mark SNORE DOCTOR, with SNORE disclaimed, for "Nasal dilators; Therapeutic mouthpieces for the prevention of snoring" in International Class 10.[2] By his Notice of Opposition, James S. Fallon ("Opposer") opposes registration of the mark based on alleged likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with Opposer's common law[3] mark SNORE[MD] for "An oral appliance, namely, a therapeutic mouthguard to be worn over the teeth of an individual during sleep to reduce the effects of snoring." Opposer has applied to register this mark, and his application has been suspended based on potential likelihood of confusion, pending the disposition of Applicant's application.[4] In its Answer, Applicant denies the salient allegations in the Notice of Opposition.[5]

The record includes, as a matter of course, the pleadings and pursuant to Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of the opposed application.

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[2] Application Serial No. 88124764 was filed on September 20, 2018, based on Applicant's alleged intent to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

[3] Opposer filed Application Serial No. 88269681 for the trademark SNORE[MD] on January 21, 2019, for the goods "An oral appliance, namely, a therapeutic mouthguard to be worn over the teeth of an individual during sleep to reduce the effects of snoring" in International Class 10.

[4] 1 TTABVUE 2, 4 (Notice of Opposition); 8 TTABVUE 66-70 (Opposer's Notice of Reliance).

[5] 4 TTABVUE (Answer).

Opposer submitted a testimony declaration with exhibits from James C. Fallon, President and CEO of Apnea Sciences Corporation ("Apnea"), Opposer's licensee.[6] Opposer also submitted a Notice of Reliance containing documents from the record of Opposer's U.S. Trademark Application Serial No. 88269681, certain of Applicant's discovery responses, and dictionary definition evidence.[7]

Applicant submitted a testimony declaration from its President, Thomas W. Brown, with one exhibit.[8] Applicant also submitted a notice of reliance containing Opposer's interrogatory responses, dictionary definition evidence, and records from Opposer's previously filed Trademark Application Serial No. 86028810 for the mark SNORE[MD].[9]

The opposition is fully briefed. For the reasons set forth below, we sustain the opposition.

II. Entitlement to a Statutory Cause of Action[10]

Entitlement to a statutory cause of action is a threshold issue in every inter partes case. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 at *3 (Fed. Cir. 2020) (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067 n.4 (2014)). A party in the

[6] 8 TTABVUE 2-52.
[7] 8 TTABVUE 53-95 (Opposer's Notice of Reliance).
[8] 9 TTABVUE.
[9] 10 TTABVUE (Applicant's Notice of Reliance).
[10] Board decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain equally applicable. *See Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

position of plaintiff may oppose registration of a mark when such opposition is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the plaintiff has a reasonable belief in damage that is proximately caused by registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at * 6-7 (Fed. Cir. 2020). Opposer has established his statutory entitlement to bring this opposition proceeding based on the suspension of his application on the ground of likelihood of confusion with Applicant's application. *See Lipton Indus., Inc. v. Ralston Purina Co.,* 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) ("To establish a reasonable basis for a belief that one is damaged by the registration sought to be cancelled, a petition may assert ... a rejection of an application during prosecution."); *Fiat Grp. Autos. S.p.A. v. ISM, Inc.,* 94 USPQ2d 1111, 1112 (TTAB 2010) ("The filing of opposer's application and the Office's action taken in regard to that application [a provisional refusal based on the involved application] provides opposer with a basis for pleading [entitlement to a statutory cause of action].").

Further, Mr. James C. Fallon, as president and CEO of Opposer's licensee, Apnea, testified that Apnea has used the mark SNORE[MD] since 2013 for anti-snore mouth guards under license from Opposer.[11] *See Giersch v. Scripps Networks Inc.,* 90 USPQ2d 1020, 1022 (TTAB 2009) (common law use of similar mark sufficient to establish standing); *see also In re Raven Marine, Inc.*, 217 USPQ 68, 70 (TTAB 1983) ("Use of a mark by a licensee pursuant to a controlled licensing agreement is a use which may properly inure to a licensor/owner. . ."). Based on such common law use

[11] 8 TTABVUE 2-4 (Fallon Declaration).

through its licensee, Opposer has asserted a plausible likelihood of confusion claim against the involved application, thereby showing a real interest in this proceeding beyond that of a mere intermeddler, and a reasonable basis for his belief of damage. We therefore conclude that Opposer has proven his entitlement to bring this opposition proceeding.

III. Priority

We next consider whether Opposer has established priority, a necessary element of his likelihood of confusion claim. *See Embarcadero Techs., Inc. v. RStudio, Inc.*, 105 USPQ2d 1825, 1834 (TTAB 2013) (citing *Hydro-Dynamics Inc. v. George Putnam & Co. Inc.,* 811 F.2d 1470, 1 USPQ2d 1772, 1773 (Fed. Cir. 1987)). Opposer has not pleaded ownership of a federal registration, but instead relies on common law rights in his mark. Applicant is entitled to rely on the September 20, 2018, filing date of its intent-to-use application as its constructive use date, and Applicant does not assert an earlier date of use.[12] Applicant does not contest Opposer's claim of priority and has not objected to any of the evidence proffered by Opposer in support of his priority.[13]

As support for Opposer's priority, Mr. James C. Fallon testified in his capacity since 2009 as president and CEO of Opposer's licensee, Apnea.[14] According to his declaration, Apnea has been using the SNORE[MD] trademark in association with anti-snore mouth guards since February, 2013.[15] The declaration includes information and

[12] 12 TTABVUE 6 (Applicant's Trial Brief).
[13] 12 TTABVUE (Applicant's Trial Brief).
[14] 8 TTABVUE 2-3 (Fallon Declaration).
[15] 8 TTABVUE 3 (Fallon Declaration).

documentary evidence consisting of invoices bearing dates from 2013 through 2018,[16] product packaging,[17] online product descriptions and reviews with dates in 2018 and 2020,[18] and product instructions packaged with the goods[19] corroborating the testimony that Apnea has sold anti-snore mouth guards bearing the SNORE[MD] trademark in interstate commerce since 2013.

We find Mr. Fallon's testimony and the evidence of record sufficient to establish the existence of Opposer's prior common law rights in the SNORE[MD] mark. At the outset we note:

> [I]t is recognized that use of a mark by a licensee pursuant to a controlled licensing agreement is a use which may properly inure to a licensor/owner for purposes of trademark registration, even though the licensor may never have used the mark itself [*Pneutek, Inc. v. Scherr*, 211 USPQ 824 (TTAB 1981)]….

Raven Marine, 217 USPQ at 70. Further, although the record does not include a written license agreement, Opposer need not produce one to establish that a license between the parties exists because an oral license may suffice. *Id.* ("[I]t is also clear that controlled licensing agreements may be recognized whether oral or written in form . . . ."). Accordingly, we find Mr. Fallon's uncontradicted testimony sufficient to establish the existence of the license from Opposer to Apnea,[20] and we find his

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[16] 8 TTABVUE 37-43 (Exhibits to Fallon Declaration).
[17] 8 TTABVUE 46-52 (Exhibits to Fallon Declaration).
[18] 8 TTABVUE 9-33 (Exhibits to Fallon Declaration).
[19] 8 TTABVUE 34-35(Exhibits to Fallon Declaration).
[20] Oral testimony, if sufficiently probative, is normally satisfactory to establish priority of use. *Powermatics, Inc. v. Globe Roofing Products Co.*, 341 F.2d 127, 52 C.C.P.A. 950, 1965 Dec. Comm'r Pat. 163, 144 USPQ 430, 432 (CCPA 1965) and *Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana Inc.*, 98 USPQ2d 1921, 1931 (TTAB 2011). In this regard, the oral testimony should be clear, consistent, convincing, and uncontradicted. *See National*

testimony taken together with the documentary evidence of record sufficient to establish use of the mark in commerce by Apnea since 2013. This use inures to Opposer's benefit and predates Applicant's constructive use date, thus establishing Opposer's priority.

In view thereof, Opposer has established priority as to his use of the SNORE[MD] trademark with anti-snore mouth guards.

IV. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as "*DuPont* factors"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). A likelihood of confusion analysis often focuses on the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of

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Blank Book Co. v. Leather Crafted Products, Inc., 218 USPQ 827, 828 (TTAB 1993) (oral testimony may be sufficient to prove the first use of a party's mark when it is based on personal knowledge, it is clear and convincing, and it has not been contradicted); *Liqwacon Corp. v. Browing-Ferris Industries, Inc.*, 203 USPQ 305, 316 (TTAB 1979) (oral testimony may be sufficient to establish both prior use and continuous use when the testimony is proffered by a witness with knowledge of the facts and the testimony is clear, convincing, consistent, and sufficiently circumstantial to convince the Board of its probative value); *GAF Corp. v. Anatox Analytical Services, Inc.*, 192 USPQ 576, 577 (TTAB 1976) (oral testimony may establish prior use when the testimony is clear, consistent, convincing, and uncontradicted).

the goods and differences in the marks."). Opposer bears the burden of proving his claim of likelihood of confusion by a preponderance of the evidence. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

A. The Goods, Trade Channels, and Classes of Consumers

We must compare the goods as identified in the application and the goods for which Opposer has established common law rights. *See Stone Lion Capital Partners, LP v. Lion Capital LLP,* 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). In this case, the goods identified in the opposed application are "Nasal dilators; Therapeutic mouthpieces for the prevention of snoring" in International Class 10. Opposer's goods are anti-snore mouth guards, which Mr. Fallon described as "oral appliances, namely, therapeutic anti-snore mouth guards to be worn in the mouth and over the teeth of individuals 18 years of age and older during sleep to reduce the effects of snoring and sleep apnea."[21] The goods at issue thus overlap to the extent they consist of anti-snore devices to be placed in the mouth. The goods are legally identical in part, which weighs heavily in favor of likely confusion. A finding of likely confusion made with respect to the therapeutic mouthpieces for the prevention of snoring in this opposed single-class application

[21] 8 TTABVUE 2. The goods identified in Opposer's currently suspended U.S. Trademark Application Serial No. 88269681 are "An oral appliance, namely, a therapeutic mouthguard to be worn over the teeth of an individual during sleep to reduce the effects of snoring" in International Class 10. 8 TTABVUE 56-57.

suffices to establish likely confusion. *Tuxedo Monopoly, Inc. v. General Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).[22]

As to trade channels, Applicant's identification contains no restrictions, so its goods are deemed to move in all the usual trade channels for anti-snore devices. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods"). Applicant's and Opposer's goods are legally identical in part, and we thus presume, under the third *DuPont* factor, that they travel through the same channels of trade to the same classes of purchasers. *See American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011) (where the services were legally identical, "the marketing channels of trade and targeted classes of consumers and donors are the same"); *see also In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion). We find that the trade channels and classes of purchasers overlap, and this factor also weighs heavily in favor of likely confusion.

[22] It is not necessary to prove likelihood of confusion with respect to each of the goods identified; an opposition may be sustained if there is likelihood of confusion with respect to any of Applicant's identified goods in this single-class application. *See Tuxedo Monopoly*, 209 USPQ at 988.

B. The Strength of Opposer's Mark

Before we turn to the similarity of the marks, we consider the strength of Opposer's mark, as that will affect the scope of protection to which it is entitled. In determining the strength of a mark, we consider its conceptual strength, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010). The commercial strength of the mark also is affected by the number and nature of third-party use of similar marks for similar goods.

At the outset, we note that although Applicant makes a passing reference in its Brief to common "use" of SNORE by third parties in connection with anti-snore devices, Applicant points to no such evidence of use whatsoever. Under the sixth *DuPont* factor, proof of recent consumer exposure to third-party use of similar marks on similar goods may show commercial weakness of a mark, in that consumers have been conditioned to distinguish among similar marks based on minor differences. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). Given that the record contains no evidence of consumer exposure to third-party use, there is no indication of commercial weakness of Opposer's mark.

In support of its position that Opposer's mark is conceptually weak, Applicant's Brief first lists twelve third-party registrations utilizing the word "SNORE" for similar devices, providing only the marks and registration numbers.[23] Opposer responds that Applicant's assertion of weakness lacks proof, and correctly argues that

[23] 12 TTABVUE 8-9 (Applicant's Trial Brief).

the third party registrations are impermissibly late.[24] "Submitting lists of third-party registrations . . . is not an acceptable way to make such registrations . . . of record." *Black & Decker Corp. v. Emerson Elec. Co.*, 84 USPQ2d 1482, 1494 (TTAB 2007). Applicant failed to introduce the registrations during its trial period. Evidence not obtained and filed in compliance with the rules of practice governing inter partes proceedings before the Board will not be considered. Rule 2.123(k), 37 C.F.R. § 2.123(k). *See also Maytag Co. v. Luskin's, Inc.*, 228 USPQ 747, 748 (TTAB 1986); *Binney & Smith Inc. v. Magic Marker Ind., Inc.*, 222 USPQ 1003, 1009 n.18 (TTAB 1984); and TBMP § 706. We therefore decline to consider evidence that was not previously introduced that is referenced for the first time in Applicant's trial brief. *Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020 at *5 (TTAB 2020) ("The Board will not consider evidence and other evidentiary materials attached to the briefs unless they were properly made of record during the time assigned for taking testimony.") (citing *Syngenta Crop Protection, Inc. v. Bio-Chek, LLC*, 90 USPQ2d 1112, 1116 (TTAB 2009)). "A brief may not be used as a vehicle for the introduction of evidence." TBMP § 801.01 (2021).[25]

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[24] 13 TTABVUE 4 (Opposer's Rebuttal Brief).

[25] Even if we considered the third-party registrations, without accompanying use evidence, they would only relate to conceptual weakness, not commercial weakness. *See Tao Licensing LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976).

Additionally, Applicant argues that the common element "SNORE" shared by the marks is descriptive and conceptually weak in relation to the goods based on its disclaimer of "SNORE" as required by the examining attorney.[26]

Given that the goods at issue all constitute anti-snoring devices, and the record includes promotional materials for Opposer's goods that clearly indicate its descriptive nature,[27] we find the word "SNORE" conceptually weak.

The additional component of Opposer's mark is "MD." Applicant argues that this component also is descriptive. According to Applicant, "[a]lthough not set forth in the dictionary, "md" can be an abbreviation for 'medical device' which makes Opposer's mark, 'snore medical device' entirely descriptive of the Opposer's goods. Opposer has even asserted that its 'use of the last two letters, MD is a designation that the product is a FDA registered Medical Device.'"[28]

As discussed further below, we do not agree that this would be the likely consumer perception of MD in the context of Opposer's mark. The evidence of record shows that "MD" is a common abbreviation for "doctor of medicine."[29] We find it more likely that consumers would attach this connotation to the MD in Opposer's mark. Because Opposer's goods are therapeutic and intended to mitigate snoring, in relation to the

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[26] 12 TTABVUE 8.
[27] *E.g.*, 8 TTABVUE 17 ("Stop the Snore" and "Solution for Snoring"; "SnoreMD treats snoring….").
[28] 12 TTABVUE 10 (Applicant's Brief), citing 10 TTABVUE 45-46 (Applicant's Notice of Reliance on Opposer's May 19, 2014 Response to Office Action in Application Serial No. 86028810).
[29] 8 TTABVUE 91; 10 TTABVUE 22. The parties' contentions regarding alternative meanings to the abbreviation "MD" will be addressed *infra*.

goods we find the term "MD" suggestive of curing or treating snoring using Opposer's products.[30]

C. Similarity of the Marks

We turn next to comparing Applicant's and Opposer's marks, which we must compare "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772,* 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)) (quoting *DuPont*, 177 USPQ at 567). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff'd mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Cai v. Diamond Hong,* 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018); *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Inter IKEA*

[30] *See In re Noble Co.*, 225 USPQ 749, 750 (TTAB 1985) (NOBURST for liquid antifreeze and rust inhibitor for hot water heating systems "suggests a desired result of using the product rather than immediately informing the purchasing public of a characteristic, feature, function, or attribute thereof.")

Sys. B.V. v. Akea, LLC, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Where the goods are legally identical, as they are in part in this case, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods. *See In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Coach Servs.*, 101 USPQ2d at 1721); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014) (quoting *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992)).

Opposer's mark is SNORE^{MD} with the first component SNORE appearing in standard size type, and the second component "MD" in superscript. Applicant's mark is SNORE DOCTOR in standard character form. Both marks share the identical first component "SNORE." Consumers often focus on the first part of a mark, which here is the same term. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (noting that the first word of a mark is "most likely to be impressed upon the mind of a purchaser and remembered"). This shared identical term contributes to some similarity in the appearance and sound of the respective marks.

The second component of Applicant's mark is "DOCTOR." A "DOCTOR" is defined as "a qualified practitioner of medicine; a physician."[31] The second component of Opposer's mark is "MD," which is a common abbreviation for "doctor of medicine."[32]

[31] 8 TTABVUE 95 (Opposer's Notice of Reliance).
[32] 8 TTABVUE 91 (Opposer's Notice of Reliance); 10 TTABVUE 22 (Applicant's Notice of Reliance).

Applicant argues that the terms "DOCTOR" and "MD" sound completely different and further that the abbreviation "MD" can mean different things.[33] Opposer argues that the terms "MD" and "DOCTOR" are synonymous, and that "dictionaries commonly use MD and Doctor interchangeably to refer to a doctor of medicine or a qualified practitioner of medicine."[34] As such, Opposer argues that the average consumer will view "MD" as referring to a medical doctor, and accordingly, that the marks at issue share the same connotation and commercial impression.[35]

In support of its argument that "MD" may have many different meanings, Applicant references a prior U.S. Trademark Application for the mark SNORE^{MD} filed by Opposer on August 5, 2013.[36] This mark was refused registration for likelihood of confusion with a prior registration for the mark "SNOREDOC" for similar goods.[37] No registration issued from Opposer's previously-filed application. In that case, as noted above, contrary to his position in this case that MD would be perceived as the abbreviation of "medical doctor," in responding to the refusal in the earlier application, Opposer contended that "MD" would be perceived as the abbreviation of "medical device."[38] While not conclusive of consumer perception of the mark, Opposer's prior statements are facts to be considered in our analysis.

It is well settled that a party's prior inconsistent statements in its application for registration or in another proceeding do not give rise to an estoppel in subsequent

[33] 12 TTABVUE 10 (Applicant's Trial Brief).
[34] 11 TTABVUE 8 (Opposer's Trial Brief).
[35] 11 TTABVUE 8 (Opposer's Trial Brief).
[36] 10 TTABVUE 30-34 (Applicant's Notice of Reliance).
[37] 10 TTABVUE 35-40 (Applicant's Notice of Reliance).
[38] 10 TTABVUE 43-54 (Applicant's Notice of Reliance).

proceedings. *Institutional Wholesalers v. Saxons Shoppes, Inc.*, 170 USPQ 107 (TTAB 1971); *Textron, Inc. v. Gillette Co.*, 180 USPQ 152, 154 (TTAB 1973) and cases cited therein. However, such statements constitute admissions and may be considered as evidence. *Bakers Franchise Corp. v. Royal Crown Cola Co.*, 160 USPQ 192, 193-94 (CCPA 1969); *Maremont Corp. v. Airlift Corp.*, 174 USPQ 395, 396 (CCPA 1972).[39] However, "[u]nder no circumstances, may a party's opinion, earlier or current, relieve the decision maker of the burden of reaching his own ultimate conclusion on the entire record." *Interstate Brands Corp. v. Celestial Seasonings, Inc.,* 576 F.2d 926, 198 USPQ 151, 154 (CCPA 1978).

While we find Opposer's argument as to the likely consumer perception of the MD superscript in its mark somewhat inconsistent in these two cases, given the lack of supporting evidence, we find the prior arguments concerning likely consumer perception of "MD" as a reference to "medical device" to be unpersuasive. The

[39] *See also EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.,* 213 USPQ 597, 599 (TTAB 1982)*, aff'd,* 706 F.2d 1213, 217 USPQ 986 (Fed. Cir. 1983); *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.,* 748 F.2d 669, 223 USPQ 1281, 1283 (Fed. Cir. 1984) (applicant's earlier contrary position taken before the examining attorney as to the meaning of its mark, as demonstrated by statements in the application illustrating the variety of meanings that may be attributed to, and commercial impression projected by, applicant's mark, may be relevant); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.,* 101 USPQ2d 1163, 1172 (TTAB 2011) (prior statement by itself not conclusive, but is relevant evidence in support of conclusion based on the entire record); *M.C.I. Foods, Inc. v. Brady Bunte,* 96 USPQ2d 1544, 1552 (TTAB 2010) (considered opposer's contrary position when opposer prosecuted its application noting that opposer's prior position does not relieve the Board of making its own findings of fact); *Plyboo Am., Inc. v. Smith & Fong Co.,* 51 USPQ2d 1633, 1642 (TTAB 1999) ("prior inconsistent positions may properly be considered as 'illuminative of shade and tone in the total picture' confronting the trier of fact, and thus are some evidence that 'PLYBOO' is a trademark instead of a merely descriptive term."). *Compare In re John Harvey & Sons Ltd.,* 32 USPQ2d 1451, 1455 (TTAB 1994) ("Applicant's prior registrations which include disclaimers or claims of acquired distinctiveness are of little moment" because "[w]e are not privy to the files of those registrations.").

"medical doctor" abbreviation is supported by the dictionary evidence in the record and the nature of the use of Opposer's mark in connection with the goods.

When viewed in the context of the marks and goods at issue in this case, the terms "DOCTOR" and "MD" in the respective marks have highly similar meanings and commercial impressions. We thus find that the parties' marks are very similar in meaning and overall connotation. That is, both marks convey the idea of a doctor, and as such, that the goods will treat or cure snoring. This strong similarity in meaning and commercial impression outweighs the differences in sight and sound between the marks, brought about by these different second components. *See, e.g., Hancock v. Am. Steel & Wire Co. of N.J.*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) ("[A]n opposition to registration may be sustained if the marks are identical or so similar in meaning that confusion as to origin is deemed likely."); *Procter & Gamble Co. v. Conway*, 419 F.2d 1332, 164 USPQ 301, 304 (CCPA 1970) (reversing the Board's dismissal of the opposition between the marks MR. CLEAN and MISTER STAIN, both for cleaning products: "A designation may well be likely to cause purchaser confusion as to the origin of goods because it conveys, as used, the same idea, or stimulates the same mental reaction, or in the ultimate has the same meaning."); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125, 128 (TTAB 1978) (holding TUNA O' THE FARM for canned chicken likely to be confused with CHICKEN OF THE SEA for canned tuna); *Downtowner Corp. v. Uptowner Inns, Inc.*, 178 USPQ 105, 109 (TTAB 1973) (holding UPTOWNER for motor inn and restaurant services likely to be confused with DOWNTOWNER for the same services).

Overall, particularly in the context of overlapping goods, we find the marks similar in terms of appearance and sound because of the identical first word appearing in each mark, and highly similar in connotation and commercial impression. This *DuPont* factor weighs in favor of finding a likelihood of confusion.

IV. Conclusion

Opposer's and Applicant's marks are similar, and are for use on in-part legally identical goods that travel in overlapping channels of trade to overlapping consumers. Given this, a likelihood of confusion exists.

Decision: The opposition is sustained based on a likelihood of confusion.