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

Proceeding no.	91276953
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

MAY FLOWER INTERNATIONAL, INC.,

Opposer,

v.

AMOY FOOD LIMITED,

Applicant.

Mark: AMOY

Opposition No.: 91276953

Serial No.: 90757571

**APPLICANT’S REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT;
OPPOSITION TO CROSS MOTION TO
SUSPEND**

Commissioner for Trademarks
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REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT;

OPPOSITION TO CROSS MOTION TO SUSPEND

Applicant AMOY FOOD LIMITED (“Amoy”) is entitled to summary judgment in its favor and against Opposer MAY FLOWER INTERNATIONAL, INC. (“May Flower”) pursuant to Fed. R. Civ. P. 56. In opposing the Motion, May Flower primarily seeks to engage in further dilatory tactics in attempting to suspend this matter in favor of a lawsuit it recently filed in federal court, rather than actually countering Applicant’s core facts, evidence, and arguments supporting summary judgment with citations to Opposer’s own facts and evidence in the record. May Flower’s actions in attempting to evade summary judgment by raising a federal lawsuit at the very last moment match its pattern of conduct throughout this case of delay and abuse of process. Amoy strongly opposes May Flower’s Cross Motion to Suspend as Board rules firmly discourage such attempts to suspend at the dying breath to escape a pending dispositive motion.

See TBMP § 510.02(a). The federal lawsuit also simply does not have a bearing on the matters at issue in this action.

Opposer's minimal showing as to the merits of the Motion fails to raise any genuine issue as to: Opposer's lack of standing (entitlement to a statutory cause of action); Opposer's lack of priority and ownership of its asserted mark; and Opposer's claims being barred by the defenses of unclean hands and estoppel. Tellingly, Opposer has failed to address in any way the damaging facts it admitted under oath on its Rule 30(b)(6) deposition. The affidavit Opposer has submitted with its opposition brief is conclusory and unavailing, presenting no genuine facts or evidence supporting Opposer's claim. The actual facts and evidence in the record support one conclusion – Opposer's claim fails as a matter of law.

ARGUMENT

A. Opposer's Cross Motion to Suspend Must Be Denied

May Flower seeks again to suspend the matter and further delay these proceedings, on this late occasion due to a lawsuit it recently filed in federal court – *May Flower International, Inc. v. Amoy Food Limited, et al.*, E.D.N.Y. Case No. 24-cv-04909-OEM-VMS (the “Civil Action”). May Flower's attempt to suspend while Amoy's dispositive motion is pending comes after May Flower similarly attempted to suspend to try to avoid Amoy's previous Motion for Sanctions, which the Board rightly denied. (See Dkt. No. 22, 24). May Flower has engaged in a pattern of bad faith conduct to avoid adverse consequences in this matter. The Cross Motion to Suspend is improper, not taken in good faith, and should be denied.

1. The Board discourages attempts to suspend while a dispositive motion is pending

Pursuant to TBMP § 510.02(a), “If there is pending, at the time when the question of suspension of proceedings before the Board is raised, a motion that is potentially dispositive of

the case, the potentially dispositive motion may be decided before the question of suspension is considered. The purpose of this rule is to ***prevent a party served with a potentially dispositive motion from escaping the motion*** (emphasis added) by filing a civil action and then moving to suspend before the Board has decided the potentially dispositive motion.”

The Board should decide the pending Motion for Summary Judgment before considering suspension according to its directive stated in TBMP § 510.02(a). The present circumstance is precisely that which TBMP § 510.02(a) seeks to prevent. Opposer’s Cross Motion to Suspend is a blatant attempt to escape the dispositive Motion for Summary Judgment by raising the recently filed Civil Action. Opposer’s intention of evasion and delay is made all the more apparent given its pattern of similar conduct throughout the case. Opposer sought to employ the very same tactic in response to Applicant’s Motion for Sanctions and thereby evade the consequences of its discovery misconduct. The Board rightly denied Opposer’s attempt to suspend, reasoning that the civil case raised then by Opposer had no bearing on this opposition. (Dkt. No. 24 at 3).

Opposer also improperly sought to extend the time for its Rule 30(b)(6) deposition compelled by the Board, and improperly attempted to reopen discovery to take a deposition of Applicant’s witness in violation of the Board’s prior order which reopened discovery for the sole purpose of taking Opposer’s Rule 30(b)(6) deposition. (*See* Dkt. No. 17). Again, the Board denied Opposer’s attempts at extension and delay, noting among other things that “If anything, it is Opposer who has attempted to manipulate discovery by withholding pertinent facts while seeking to delay its compliance with a Board order...” (Dkt. No. 24 at 8), and that Opposer had “only its own inaction and unreasonable delay to blame.” (*Id.* at 10).

When faced with pending motions which have had the likelihood to negatively impact its standing in the case, Opposer had repeatedly sought suspension, extension, and delay. Opposer’s

pattern is clear – rather than facing Applicant’s motions on their merits, Opposer has sought to evade. Its intention on the Cross Motion to Suspend is not genuinely to serve judicial economy by relying on the Civil Action, but to dodge and delay. The Board should hold Opposer to account on the Motion for Summary Judgment and not allow it to escape and hide behind the recently filed Civil Action.

2. The Civil Action has no bearing on the issues of this opposition

The matters at issue in the Civil Action – namely, whether Amoy defrauded May Flower and was not the manufacturer of AMOY mooncakes delivered to May Flower – simply do not have bearing on this opposition.

“[T]he civil action does not have to be dispositive of the Board proceeding to warrant suspension,” however, it must “have a bearing on the issues before the Board.” *New Orleans Louisiana Saints LLC & NFL Props. LLC v. Who Dat?, Inc.*, 2011 TTAB LEXIS 208, *7, 99 U.S.P.Q.2D (BNA) 1550, 1552 (TTAB 2011) (“Inasmuch as the decision by the district court to enjoin use of the WHO DAT mark by opposers would have a bearing on this proceeding, each party has moved to suspend proceedings.” – suspension request granted by Board).

Whether May Flower defrauded May Flower will not decide or have a bearing on any claim or issue in this action. Opposer has not claimed any fraud or misrepresentation by Applicant in the Notice of Opposition which might render the subject application void ab initio or otherwise serve as ground of opposition. Opposer only makes one claim in this opposition, for priority/likelihood of confusion. The Civil Action does not involve a trademark issue; rather Opposer alleges a claim for fraud (that Amoy misrepresented the original source of the mooncakes) and a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO) (that Amoy and other defendants engaged in intimidation and threats of violence to obtain

payment from May Flower). The issues germane to the Civil Action are not germane to the issues of this opposition. The federal court will not make a determination of priority or likelihood of confusion, nor decide any matter at issue herein.

May Flower appears to claim in the Civil Action that the source of the mooncakes at issue was not Amoy in Hong Kong, but ACC in China, and therefore that May Flower has priority rights in the Amoy mark and Amoy does not; May Flower argues then that the priority issue flowing from the alleged fraud bears upon this action. However, May Flower has presented no facts or evidence, by allegation in the Civil Action or as presentation of proof in this matter, that May Flower itself garnered priority rights or acted as anything more than mere distributor/importer with respect to the AMOY mooncake products. Even if the mooncake products originated with ACC in China, May Flower certainly did not manufacture the products, did not originate the brand, and received no authorization or agreement from any manufacturer to act as the brand owner in the U.S. The Civil Action cannot make any finding that May Flower has obtained priority rights or made any use of the mark because May Flower has claimed there, like here, that it has acted as mere distributor/importer. (*See* Dkt. No. 31 Ex. 2 ¶ 32, 36 (“The Amoy Mooncakes were delivered between June and August, 2021 to May Flower’s New York and California warehouses. After the Amoy Mooncakes were shipped from Asia to U.S...” “ACC was named as the shipper and manufacturer of the Amoy Mooncakes on the sampling and examination result...”)) Such use is not May Flower’s, but rather inures to the benefit of the brand owner. *See, e.g., Quality Candy Shoppes/Buddy Squirrel of Wisconsin, Inc. v. Grande Foods*, 90 USPQ2d 1393 (TTAB 2007).

Opposer raises the Civil Action too late in this opposition process to warrant suspension, and in any event the Civil Action will not decide any issue having a bearing on this action.

Opposer cannot evade the pending Motion for Summary Judgment at the last moment in favor of the recently filed Civil Action. The request for suspension should be denied.

B. Applicant Is Entitled to Summary Judgment as a Matter of Law

No genuine issue of material fact remains in this action. Applicant is entitled to judgment as a matter of law, and Opposer has submitted essentially no testimony or evidence to contradict this inescapable conclusion.

1. The Board may properly consider all documents and evidence submitted with Applicant's Motion for Summary Judgment

As one of its main arguments in its response brief, Opposer contends that chain of distribution documents should not be considered because they were submitted through Amoy's attorney. (*See* Viau Decl. Ex. B). Opposer's argument directly contradicts the clear rules of the Board. As provided by the Board pursuant to TBMP § 528.05(c):

“For purposes of summary judgment only, the Board will consider any of the following, if a copy is provided with the party's brief on the summary judgment motion: written disclosures or disclosed documents, a discovery deposition or any part thereof with any exhibit to the part that is filed, an interrogatory and answer thereto with any exhibit made part of the answer, *a request for production and the documents or things produced in response thereto*, or a request for admission and any exhibit thereto and the admission (or a statement that the party from which an admission was requested failed to respond thereto). If any motion for summary judgment is denied, the parties may stipulate that the materials submitted with briefs on the motion be considered at trial as trial evidence, which may be supplemented by additional evidence during trial.”

Applicant produced all exhibits submitted through the Viau MSJ Decl. Ex. B during discovery. (*See* Viau MSJ Decl. ¶ 3). The Board may accordingly properly consider all such documents. Further, Opposer provides no testimony or evidence to support any reason to question the documents submitted by Applicant through the Viau Decl. The only documentation related to chain of title submitted in the Liu Decl. consist of an invoice to a retailer to which May Flower purportedly distributed AMOY mooncakes. May Flower's testimony and evidence do

nothing to negate the conclusion established by Amoy's testimony and evidence that Amoy originated the AMOY mooncake brand and is the proper mark owner and user, and May Flower is not.

2. Opposer has proffered no admissible evidence

If the moving party meets its burden, that is, if the moving party has supported its motion with affidavits or other evidence that, if unopposed, would establish its right to judgment, the nonmoving party may not rest on mere denials or conclusory assertions, but rather must proffer countering evidence, by affidavit or as otherwise provided in Fed. R. Civ. P. 56, showing that there is a genuine factual dispute for trial. TBMP § 528.01. A factual dispute is genuine if sufficient evidence is presented such that a reasonable fact finder could decide the question in favor of the nonmoving party. *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1797 (Fed. Cir. 1987) (“Mere conclusory statements and denials do not take on dignity by placing them in affidavit form”); *Embarcadero Techs., Inc. v. Delphix Corp.*, 117 USPQ2d 1518, 1523 (TTAB 2016) (non-moving party failed to rebut moving party's evidence or raise genuine dispute of material fact); *Venture Out Properties LLC v. Wynn Resort Holdings LLC*, 81 USPQ2d 1887, 1890 (TTAB 2007) (“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.”)

May Flower does not rebut that, regardless of mooncake source, it was only ever a distributor. May Flower has generated zero evidence to show that it was involved in creating/adopting the Mark. May Flower has further produced no facts or evidence showing its priority of use other than conclusory statements in the Liu Decl. May Flower states in conclusory

fashion that “Under my advice and suggestion, the Taoda Mark was finally adopted and used on mooncake products.” (Liu MSJ Decl. ¶ 9). However, a declaration made without personal knowledge and that *does not assert any facts as opposed to conclusions* will not create a genuine dispute of fact whether self-serving or not. *See, e.g., Nitkin v. Main Line Health*, 67 F.4th 565, 567 (3d Cir. 2023) (plaintiff cannot create a genuine dispute of fact with bare assertions, conclusory allegations, or suspicions; instead, plaintiff must set forth specific facts establishing a triable issue).

The testimony on record, including from the May Flower deposition and the rest of the Liu MSJ Decl., firmly establishes that May Flower did not use the AMOY mark in any sense, was not the mark owner, and did not originate the brand. May Flower does not devote even one word in its response brief to its Rule 30(b)(6) deposition in which it repeatedly admitted that it was not product or brand originator or manufacturer, but rather was merely distributor/importer. (*See* MSJ, Dkt No. 25 *passim*). Even having the opportunity to view Applicant’s Motion and rehabilitate the admissions it made at deposition, in response to the pending Motion May Flower has declared that in April 2021 it was approached by Amoy’s Eric Liu to sell AMOY mooncakes (*See* Liu MSJ Decl. ¶ 9), thereby supporting the conclusion that Amoy originated the brand.

There is no genuine factual support whatsoever in the Liu MSJ Decl. that May Flower proffered any advice or suggestion to originate and adopt the AMOY brand. May Flower has attached the complaint filed in the Civil Action, however, the statements made in the complaint are pure allegations. May Flower has not submitted testimony in its Liu MSJ Decl. which attest and affirm the complaint’s allegations, nor is the complaint verified. The complaint’s bare allegations thus should not be afforded weight on this Motion.

Additionally, Opposer repeatedly claims in its response brief that the facts and evidence support that May Flower “*might* (emphasis added) have proprietary rights.” (Dkt. No. 31 at 8). However, as established above, Opposer cannot create a genuine issue with mere suspicions or conclusions that *might* be true. *See Nitkin v. Main Line Health*, 67 F.4th at 567. “If the moving party does not bear the burden of proof at trial, then its burden at summary judgment may be met by showing ‘that there is an absence of evidence to support the nonmoving party’s case.’” TBMP § 528.01. As Opposer, it is May Flower’s burden to prove priority, likelihood of confusion, and standing. There is an absolute absence of evidence on record to establish that May Flower obtained any proprietary rights whatsoever. By contrast, the record is replete with evidence that May Flower was mere distributor/importer and Amoy the brand originator, such that no genuine issue of fact remains on May Flower’s single claim.

Opposer makes much of the fact that Applicant filed an intent-to-use application after it produced the AMOY mooncake products and distributed them for transport to the U.S. (*See* Dkt. No. 31 at 7). However, Opposer has made no claim that Applicant lacked a bona fide intent to use the mark when filing the subject application, and accordingly cannot rely on such an unpleaded claim when attempting to raise a genuine issue of material fact. *See infra* section (B)(3). Nor has Opposer even explained a foundation of why Applicant’s filing of an intent to use application is relevant to its prior/likelihood of confusion claim. Additionally, Opposer has presented no objective testimony or evidence to establish that Applicant lacked a bona fide intent to use at application filing. *See Lane Ltd. v. Jackson International Trading Co.*, 33 USPQ2d 1351, 1355 (TTAB 1994). Quite the contrary, the available evidence on record firmly establishes that Applicant did have a bona fide intent to use given its efforts through Eric Liu to roll out the brand in the U.S. and its actions toward making actual distributions of mooncake products for

importation to the U.S. by the likes of May Flower and Amoy's direct distributors prior to filing the subject application.

3. Opposer cannot defend against summary judgment by relying on unpleaded claims

Opposer essentially asks the Board to consider matters raised in the Civil Action which are unpleaded in the Notice of Opposition and fall entirely outside the scope of discovery which the parties conducted in this action. Opposer never raised the issues of fraud or Racketeer Influenced and Corrupt Organizations Act (RICO) conduct in its pleading or discovery. A party may not defend against a motion for summary judgment by asserting the existence of genuine disputes of material fact as to an unpleaded claim or defense. TBMP § 528.07(b) (citing *Perma Ceram Enterprises Inc. v. Preco Industries Ltd.*, 23 USPQ2d 1134, 1135 n.2 (TTAB 1992) (no consideration given to three unpleaded grounds asserted by opposer in response to applicant's motion for summary judgment)).

CONCLUSION

Wherefore, Applicant requests the Board to grant summary judgment in Applicant's favor and against Opposer, to dismiss this opposition with prejudice, and to allow Applicant's subject App. Serial No. 90757571 to proceed toward registration.

Dated: October 15, 2024

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CERTIFICATE OF SERVICE

I am over the age of 18 and am not a party to this action. I am employed in the County of Santa Clara, California, and my business address is 1871 The Alameda, Suite 250, San Jose, California 95126.

I hereby certify that on October 15, 2024, I served the foregoing **APPLICANT’S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; OPPOSITION TO CROSS MOTION TO SUSPEND** on Opposer via email by sending the document to the person(s) at the email addresses listed below.

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Dated: October 15, 2024

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