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

Proceeding	92049453
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IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Augustine's Spiritual Goods, Inc.,
an Illinois corporation,

Registration No.: 3438761
Cancellation No.: 92049453

Petitioner/Plaintiff,

v

Augustine's Eternal Gifts, L.L.C.,
an Illinois company,

Respondent/Defendant.

PETITIONER/PLAINTIFF'S MAIN BRIEF

TABLE OF CONTENTS

	<u>PAGE</u>
INDEX OF CASES	iii
DESCRIPTION OF THE RECORD.....	iv
STATEMENT OF THE ISSUES	v
I. RECITATION OF FACTS	1
II. ARGUMENT	7
III. SUMMARY.....	13
PROOF OF SERVICE.....	14

INDEX OF CASES

<u>CASES</u>	<u>PAGE(S)</u>
74 Am Jur 2d Trademarks and Trade Names, §19 (2009)	12
<i>Malcolm Nicol & Company, Inc., v Witco Corporation,</i> 881 F2d 1063, 11 USPQ2d 1638 (1989)	9
<i>Martahus v Video Duplication Services, Inc.,</i> 3 F3d 417, 27 USPQ2d 1846 (1993)	10
<i>Massey Junior College, Inc., v Fashion Institute of Technology,</i> 492 F2d 1399, 181 USPQ 272 (1974)	7
<i>Quality Products and Concepts Co., v Nagel Precision, Inc.,</i> 469 Mich 362 (2003)	8
<i>Signature Guardian Systems, Inc., v Lee,</i> 209 USPQ 81 (TTAB 1980)	7
<i>Stock Pot Restaurant, Inc. v Stockpot, Inc.,</i> 737 F2d 1576, 222 USPQ 665 (1984)	9

DESCRIPTION OF THE RECORD

The evidence of the record consists of:

1. The Cancellation Petition filed by the Petitioner/Plaintiff on June 6, 2008;
2. The Respondent/Defendant's Registration No. 3438761 of the mark "Augustine's";
3. The Petitioner/Plaintiff's Application for the mark "Augustine's Spiritual Goods" of April 12, 2006, bearing Serial No. 78859907;
4. The Petitioner/Plaintiff's Application for the mark "Augustine's Spiritual Goods" filed on January 22, 2008, bearing Application Serial No. 77377637;
5. The May 5, 2008, Notice of Suspension filed by the Trademark Office stating that there may be a likelihood of confusion between the Respondent/Defendant's pending mark of "Augustine's" and the Petitioner/Plaintiff's pending mark of "Augustine's Spiritual Goods";
6. The testimony deposition of Alice Pulaski of May 8, 2009, including Plaintiff's Trial Exhibits 1-25, further described in the Exhibit Index and during the testimony of Alice Pulaski [filed with the TTAB on or about June 5, 2009];
7. The August 31, 2009 rebuttal trial testimony of Alice Pulaski; and
8. The August 31, 2009 rebuttal trial testimony of Frank Pulaski, including Plaintiff's Trial Exhibits 1a-10a [filed with the TTAB on or about September 24, 2009];

STATEMENT OF THE ISSUES

Did the Petitioner/Plaintiff sell the Respondent/Defendant the right to register the mark "Augustine's"?

Should the Respondent/Defendant's Augustine's mark be cancelled?

PETITIONER/PLAINTIFF'S MAIN BREIF

I. Recitation of Facts

The Petitioner/Plaintiff has utilized the name Augustine's Spiritual Goods dating back to at least 1992 [Plaintiff's Trial Exhibit 6], and filed annual reports every year, including 2003 [Plaintiff's Trial Exhibit 6], and continued to use the name as evidenced by Plaintiff's Trial Exhibits 6-10 through 2008. Please also refer to the trial testimony of Alice Pulaski first trial deposition pages 9-14.

On October 17, 2002, the parties executed a Sales Agreement, whereby the Plaintiff sold business inventory, equipment and fixtures to the Defendant [Alice Pulaski trial testimony, p 14]. The Sales Agreement is marked as Plaintiff's Trial Exhibit 12. At pages 16-19 of Alice Pulaski's trial testimony, she explains the transaction in more detail, including the assistance that the Plaintiff gave to the Defendant in continuing the running of the business and the new store. The Plaintiff invited Carolyn Hennes to spend time at the store where the Plaintiff would introduce her to customers and show her how to run the business. Specifically, at page 17, Alice Pulaski describes the use of the business name Augustine's Spiritual Goods. It was agreed that Carolyn Hennes could use the name so that people would feel comfortable with the transition. Ms. Hennes purchased the existing inventory, store equipment, the training, store fixtures, and the names of business suppliers for \$30,000. Alice Pulaski explained on page 19 the use of the name as follows:

- Q Well, tell the Court about the transfer of the name Augustine's Spiritual Goods. Were there any conditions on that?
- A **Yes, They were - - basically because we were going to and always have been Augustine's Spiritual Goods, Incorporated, and we were going to continue our business, we said that she could use it verbally in her store just again to make the people feel comfortable, and that was it, you now. There was nothing else to it.**

- Q And this was for this transition period while she was starting the business?
- A **Yeah; right.**
- Q How long was she to be able to use that - - let me back up. Did you understand that she was going to start a business in a new name?
- A **Right. She was going to be Augustine's Eternal Gifts. And the reason for that is because we held the corporation name, we held the city license, we still held the State of Illinois revenue tax number and everything like that. So she had to become somebody else. You know, we were going to always be Augustine's Spiritual Goods, Incorporated. And when she got on her feet, things were - - she was supposed to, you know, stop introducing herself to the customers in the store as Augustine's Spiritual Goods. She was supposed to eventually break into her own - -who she was, Augustine's Eternal Gifts.**
- Q All right. Did you ever tell her she was going to have a right to interfere with your use of the name Augustine's Spiritual Goods?
- A **Would you say that again?**
- Q Did you tell her that it was important that she give up that name because you were going to be utilizing that name?
- A **Many times; many times, yeah.**
- Q All right.
- A **Well, she knew. I mean, I always told her that we were going to continue using the name.** [Alice Pulaski Trial Testimony, pp 19-20].

Most importantly, the Defendant actually confirmed in writing subsequent to the contract date, that she understood she was going to have to give up the Augustine's name, and the Defendant never took exception to the Plaintiff continuing to use the name Augustine's Spiritual Goods. Referring to all of the exhibits that will be produced in this proceeding, this Court will never find an objection raised by the Defendant to the Plaintiff's continued use of the name, but the Court will find Plaintiff's Trial Exhibit 15 where the Defendant agrees to stop utilizing the name [Alice Pulaski Trial Testimony, pp 26-27]. Pages 30 and 31 of the Alice Pulaski Trial Testimony is evidence of confusion being created by the Defendant's continuing to attempt to utilize the Augustine's name.

Alice Pulaski testified that she never gave the Defendant permission to trademark the word Augustine's.

The Defendant, in her declaration contained within her Application for a trademark of the name Augustine's, declared that she was entitled to the use of such mark and no other company has the right to use the mark in commerce either in the identical form thereof or in such near resemblance thereto as to be likely when used on or in connection with the goods to cause confusion or mistake.

Q Let me show you a declaration of Exhibit 25. The attorney, based on what he's been told by his client, "believes that the applicant" - - that would be Carolyn - - "is entitled to the use of such mark in commerce, and to the best of his knowledge and belief, no other person, firm, corporation or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely when use on or in connection wit the goods, services of such other persons to cause confusion or cause mistake or deceive and that all statements made with his or her own knowledge are true, " et cetera. Is there any question in your mind as to whether Carolyn knew of your existence, going all the way back to 1992, of Augustine's Spiritual Goods?

A **No question at all. She always knew that we were in business. She knew - - she was aware of us, that we were continuing business. There's no question in my mind that she knew of us. I mean, all our e-mails and even this last stating one - - that she knew we existed up there.**

Q All right.

A **She knew we were a company.** [Alice Pulaski Trial Testimony, pp 37-38].

Neither party utilized a lawyer in the drafting of the Exhibit 12 Agreement, however, it is clear based on the Exhibit 15 email that Carolyn Hennes understood that she was not to utilize the name in any permanent fashion, and she also understood based on that email and other emails that the Plaintiff continued to conduct business under that name.

Carolyn Hennes' trial testimony was taken on August 6, 2009. At page 49 of that transcript, she unbelievably testified that she had never seen Exhibit 15 before. Plaintiff's Exhibit 15, of course, is the email communication from Carolyn to Alice whereby Carolyn provides that: "I am not advertising as Augustine's Spiritual Goods and will not either."

Exhibit 15 is obviously a problem for the Defendant for which she had no explanation. As a result to her having no explanation, she simply and unbelievably testified that she had never seen it before.

Q Have you ever seen this e-mail before?

A **No.**

Q This e-mail purports to be - -

A **I don't recognize this e-mail.**

Q Excuse me.

A **I don't recognize this e-mail.**

Q Okay. Who is sonnymouse@aol.com?

A **That is an account that I hold.**

Q And this e-mail was sent Friday, October 24, 2003, at 2:57 p.m.

A **Well, I see what it says, but I have no reason to believe that this is authentic.**

Q You're saying that this e-mail is - - okay. Let's make sure we got this straight.

It is your testimony that Exhibit 15 is not an e-mail of yours?

MR. MC GRATH: Go ahead.

THE WITNESS: I have no reason to believe that this is authentic.

By Mr. Smith:

Q Why would you say that?

A **I don't recognize it.**

Q Would you have written Dear Alice, I couldn't compete on your level even if I wanted to because you are the queen of business. I am not advertising as Augustine's Spiritual Goods and will not either.

Would you have written that?

MR. MC GRATH: Object to the form of the question.

By Mr. Smith:

Q You can answer.

A **I'm not - - you're asking me to go back in 2003 and ask me if I've ever written. If you asked me would I have written this, you're asking me that now, I would say that I wouldn't write that.**

Q Okay. Do you think you wrote it back in 2003?

A **No.**

Q Do you think that Alice somehow fabricated this e-mail?

MR. MC GRATH: Objection, calls for speculation.

THE WITNESS: I just have - -

By Mr. Smith:

Q Well, it had to come from somewhere. What is your explanation, if any, Carolyn for the e-mail, Exhibit 15?

A **I don't have an explanation.** [Carolyn Hennes Trial Testimony, pp 49-51].

The Defendant continues to testify in evasive fashion through page 59 of her testimony. The Defendant continues to be evasive with other emails, such as Plaintiff's Exhibit 17, stating that she believes she wrote part of the email, but not all of it.

In the Hennes testimony at pages 64 to 65, she admits that she never objected to Alice Pulaski utilizing Augustine's Spiritual Goods in writing. Ms. Hennes admitted at page 66 that when she started her business, that Alice Pulaski was the registered entity with the name Augustine's Spiritual Goods, and thus, Hennes could not take the name.

Alice Pulaski and Frank Pulaski testified in rebuttal on August 31, 2009. Plaintiff's Exhibits 1a-10a were introduced into evidence during that rebuttal testimony of Frank and Alice Pulaski. The Defendant, Carolyn Hennes, attempted to testify that the inventory, store fixtures, store equipment, customer list and training were worth a small fraction of the \$30,000 that she paid to the Plaintiff. She testified that the primary value in the transaction was in the name "Augustine's Spiritual Goods". Her testimony is contradicted by the fact that she agreed to quit using the name in the Plaintiff Exhibit 15 email; and paragraph 6 of the Agreement where it is provided that the transaction was not a sale of Augustine's Spiritual Goods, Inc.; and that the transaction was not a sale of the city business license; and it is further provided in that paragraph that Carolyn was solely responsible to incorporate and procure her own business license. The essence of the business license is the name.

The Sale Agreement also provides, in the last paragraph, that the Plaintiff would deliver to the Defendant all store fixtures, business equipment, and stock between the time period of January 21, 2003 and February 7, 2003, and if Carolyn Hennes did not have a store or place of storage for the delivery of fixtures, equipment, and stock within the

timeframe stated above, that the sale would be negated. Carolyn Hennes of course did have a new location by the necessary timeframe, and Frank Pulaski, in his testimony, testified that there was so much inventory, fixtures and equipment that it took several people to assist in the move. Carolyn Hennes, during her testimony at 35-39, testified that she did not know why the sale would be negated if she did not have a place of storage ready within the necessary timeframe. Her claimed ignorance of the importance of this clause is equivalent to her claimed ignorance of the existence of Plaintiff's Trial Exhibit 15. The inventory, fixtures and equipment was of significant value and volume and it had to be moved due to the local government exercising eminent domain over the Plaintiff's existing store area. The true value of this transaction was not in the name for which the Defendant could not even obtain a business license, but instead the value was in the training, inventory, equipment, fixtures, and the cooperation extended by the Plaintiff to the Defendant in starting up her new business.

Frank Pulaski testified at page 9 that the list of the suppliers alone was worth more than \$30,000. Frank Pulaski testified at page 10 that if they were really selling the name they would have negated their business license and their corporation. At page 14, Frank Pulaski testified that it took ten adults and four truck loads of a 24' moving truck in order to move all of the hardware. He testified at page 15 that a conservative wholesale price for all of the hardware would be \$33,381. Plaintiff's Exhibit 1a is a significant set of photographs revealing the extent of the inventory equipment and fixtures.

Alice Pulaski testified through Plaintiff's Exhibits 3a-10a to the authenticity of the emails that the Defendant is now attempting to claim as unauthentic [Alice Pulaski, in rebuttal testimony page 5-12].

Alice Pulaski at page 13 explains the parties' agreement in detail regarding the name. Alice testified that Carolyn knew that Alice would own the corporation and business name and that Alice owned the business license, tax exempt number, and that there was no way that Carolyn would be able to permanently utilize the name. Hennes, in essence, was allowed to use the name for a short period of time to smooth things out. It was a revocable license. Please also refer to testimony of Alice Pulaski at page 15-17, pertaining to the agreement of use of the name.

II. Argument

The Petitioner seeking cancellation before the TTAB, has the burden of proving by a preponderance of the evidence that it owned the mark. *Massey Junior College, Inc., v Fashion Institute of Technology*, 492 F2d 1399, 181 USPQ 272 (1974).

Ownership of a mark is accorded to the first bonafide user; the right to register a mark flows from and follows its adoption in use in trade. Ownership of a mark and the exclusive right to a mark belongs to the one who first uses the mark on goods placed on the market. *Signature Guardian Systems, Inc., v Lee*, 209 USPQ 81 (TTAB 1980). Registration of the mark alone will not establish ownership. It is the Plaintiff's position that the Defendant does not own the mark and that the contract and the conduct of the parties establishes that the Defendant does not own the mark. The Defendant allegedly acquired the mark on October 17, 2002, yet waited until 2007 to attempt to register the mark. The Defendant clearly did not believe that she had ownership in the mark as a result of the Sale Agreement of October 17, 2002.

Even though parties enter into a written agreement, if they engage in a course of conduct after the agreement, inconsistent with the written agreement, that course of conduct

may be found to be a modification of the contract, under certain circumstances. *Quality Products and Concepts Co., v Nagel Precision, Inc.*, 469 Mich 362 (2003).

It is Plaintiff's position that upon reading the Agreement, it is clear that this was not an unqualified transfer of the name, but instead the transfer was heavily qualified such that the transfer was simply a short-term license to use the name. However, even should this Board conclude that it was an unqualified transfer of the name, the subsequent conduct of the parties must lead this Board to conclude, consistent with *Quality Products* that the contract was modified such that the Defendant did not have the right of ownership or the right to register the name.

It is Plaintiff's position that it did not sell to Defendant the right to register the mark Augustine's and that the Defendant's registration should be cancelled.

The Defendant knew, when she purchased the stock, fixtures, equipment and training that she was getting the use of the name Augustine's Spiritual Goods for a short period of time so as to assist in the transition from owner to owner. The Defendant confirmed that she knew that she only had limited use of the name when she transmitted the Plaintiff Exhibit 15 email to the Plaintiff.

The Defendant's mark should be cancelled because the Defendant, with obvious knowledge of the existence of Augustine's Spiritual Goods and the use of that name by Alice Pulaski, still filed an Application for a trademark bearing Serial No. 76680576 on July 30, 2007. The Defendant directed that the Application be filed and that Application contained a declaration providing that the Applicant was entitled to use the name in commerce and, to the best of her knowledge and belief, no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof

or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person to cause confusion.

The Defendant directed that the Application be filed even though the Defendant had previously told the Plaintiff in the Exhibit 15 email that the Defendant was not advertising as Augustine's Spiritual Goods and would not advertise as Augustine's Spiritual Goods. This email was written on October 24, 2003. The Defendant had received an email from the Plaintiff on October 18, 2003, where the Plaintiff told the Defendant that she was starting a new business in Michigan and that the two companies, Augustine's Spiritual Goods and Augustine's Curious Goods would be used. The Defendant was asked to stop advertising as Augustine's Spiritual Goods. In response to that email, six days later on October 24, 2003, the Defendant advised that: "I am not advertising as Augustine's Spiritual Goods and will not either." The Defendant knew almost four years prior to filing her Application for registration that the Plaintiff was using the name Augustine's, yet the Defendant advised the PTO on July 30, 2007 that: "No other person, firm, corporation, or association has the right to use the mark in commerce."

The necessary analysis to determine whether the Plaintiff or the Defendant has the right to register the name goes back to the October 17, 2002 Sale Agreement. As a preliminary matter, it is believed that the parties to this action stipulate to the fact that the use of the name "Augustine's" would create a likelihood of confusion. It is also believed that it is stipulated to by the parties that the Plaintiff began using the name many years prior to the Defendant's use of that name, and but for the Sale Agreement argument, the Plaintiff's right to the name is superior to that of the Defendant. *Stock Pot Restaurant, Inc. v Stockpot, Inc.*, 737 F2d 1576, 222 USPQ 665 (1984); *Malcolm Nicol & Company, Inc., v Witco*

Corporation, 881 F2d 1063, 11 USPQ2d 1638 (1989); *Martahus v Video Duplication Services, Inc.*, 3 F3d 417, 27 USPQ2d 1846 (1993).

As such, the primary issue to be determined through this proceeding is whether the Plaintiff conveyed to the Defendant the right to fully and exclusively use the name Augustine's in commerce such that the Defendant would have the right to register the name. The Plaintiff argues that it did not do so and the Defendant counters that it did purchase the registration rights to the name.

It is clear that the parties did not utilize an intellectual property attorney, or an attorney in the drafting of the October 17, 2002 Sale Agreement. The subject Sales Agreement at paragraph 6 provides that for the price of \$30,000, Carolyn Hennes will receive:

"The good name of Augustine's Spiritual Goods, which has an 11 year reputation. Carolyn Hennes understands that although she will be using the name Augustine's Spiritual Goods that it is not a transfer or sale of the corporation, Augustine's Spiritual Goods Inc., nor is it a transfer or sale of Augustine's Spiritual Goods Inc. city business license and state tax exempt number. It is Carolyn Hennes (buyer) responsibility to incorporate, if she chooses, and her sole responsibility to procure her own business license and tax exempt number."

The parties, in their best effort to draft the Agreement, made their best effort to explain the extent of the transfer of the name. The transfer is heavily qualified. This case would not be before the Board if the Agreement simply stated that the Defendant was to receive "the good name of Augustine's Spiritual Goods, which has an 11 year reputation." The Agreement goes on to significantly qualify the transfer. The Agreement goes on to state that Carolyn will be simply using the name and that the Agreement does not call for the transfer of the corporation, Augustine's Spiritual Goods, Inc., nor more importantly a transfer or sale of the Augustine's Spiritual Goods, Inc.'s, city business license. The

Agreement goes on to state that it was Carolyn's sole responsibility to procure her own business license. Frank Pulaski testified that if she was purchasing the name without qualification that the Plaintiff would have negated their business license and their corporate name filing in the city of Chicago and the state of Illinois, respectively.

As important as the qualification of the terms regarding the name, is the conduct of the parties subsequent to the Sale Agreement. In the correspondence that has been introduced as evidence through the testimony of Alice and Frank Pulaski, several things become clear. First, Alice continued to advise the Defendant that she was continuing to use the name Augustine's Spiritual Goods in her Upper Peninsula of Michigan business. Next, Alice advised the Defendant that the Defendant should quit utilizing the name Augustine's Spiritual Goods. In addition, the Defendant advises that she is not and she will not advertise as Augustine's Spiritual Goods in the future. Finally, the Defendant never objected to the Plaintiff's use of the name Augustine's Spiritual Goods, when the Plaintiff, at least based on her belief that she had purchased the name, would have had every right to do so. The qualifications contained within the transfer and the conduct of the parties subsequent to the transfer clearly should lead this Board to conclude that the registration of the Defendant should be cancelled because the Defendant, contrary to her declaration in her Application, was not the owner of the name and the Defendant did not believe that she had the exclusive right to use the mark in commerce.

If the Defendant truly felt that she was buying the name without qualification, why would she not demand that the Plaintiff give up the corporate name filed with the state and the city of Chicago business license utilizing the name? It simply does not make sense that the Plaintiff would purchase the name without getting the right to register her business

under that name. Likewise, the Plaintiff did not purchase the right to register the name with the USPTO.

As testified to by the Plaintiff and her husband, the Defendant only had a right to use the name for a short period of time so as to allow the Defendant to enjoy a smooth transition into ownership. This was nothing more than a license and that license clearly expired by the time the Defendant sent her October 24, 2003 email [Plaintiff's Exhibit 15] to the Plaintiff advising that: "I am not advertising as Augustine's Spiritual Goods and will not either." Clearly, the Defendant had nothing more than a license and that license had expired as of October 24, 2003. When that license expired, the Defendant knew that the Plaintiff was utilizing the Augustine's name and the Defendant had no right to attempt to register that name with this knowledge that it was being used by the Plaintiff. The Plaintiff clearly had a superior right to the name based on the Plaintiff's use of the name dating back to 1992. The Defendant also had constructive knowledge of the Plaintiff's use of the name when the Plaintiff filed for her own trademark registration. The rights of parties to the use of a trademark or trade name involved in a transaction may be governed or restricted by contract. 74 Am Jur 2d Trademarks and Trade Names, §19 (2009).

A more reasonable interpretation of the Agreement would be that the Plaintiff was assisting the Defendant in selling the inventory that the Defendant had just purchased. The Plaintiff was attempting to control the use of the name during this period of licensing because the Plaintiff provided the Defendant with the names of all of the Plaintiff's suppliers. The Plaintiff did not understand the concept of a "naked" transfer, however, through their actions, the Plaintiff was attempting to protect the name by ensuring that the Defendant was utilizing proper suppliers and thus proper products in conjunction with the

name. The email from the Plaintiff to the Defendant of October 18, 2003, advises that the Plaintiff wishes that the Defendant would stop advertising as Augustine's Spiritual Goods. On October 24, 2003, Defendant responded that she was not advertising as Augustine's Spiritual Goods and would not either. This is clear evidence of the understanding between the parties as to how the name would be used. Four years later, in 2007, the Defendant, in essence, is attempting to steal the name when the Defendant applied for registration. This conduct is not supported by the written Agreement or the conduct of the parties subsequent to the written Agreement or the representation by the Defendant that she was not advertising with the name and did not intend to. This conduct of attempting to register a name that the Defendant did not own is also not in conformance with United States Trademark Law. Again, the registration should be cancelled.

III. Summary

In summary, based on the language of the Agreement, the conduct of the parties in carrying out the Agreement, and the testimony of the parties, the Plaintiff's petition to cancel should be granted because the Defendant did not acquire the name Augustine's and, as such, the Defendant is not the owner of the name. The Plaintiff enjoys a superior right based on the Plaintiff's longtime use of the name and this registration of the Defendant if allowed to stand would be based on an erroneous claim of ownership and it would likely cause confusion.

One of the strongest pieces of evidence that dictates that the cancellation should be granted is the testimony of the Defendant herself wherein she now refuses to acknowledge that she wrote the email of October 24, 2003 [Plaintiff's Exhibit 15]. The Defendant has gone so far as to testify that the email is not authentic. The Defendant is contesting the

