UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Cancellation No. 92058100

Alvi's Drift Wine International

v.

von Stiehl Winery

Before Seeherman, Taylor, and Ritchie,
Administrative Trademark Judges.

By the Board:

Alvi's Drift Wine International (petitioner) seeks to cancel von Stiehl Winery's (respondent) Registration No. 4095243 for the mark NAUGHTY GIRL in standard character form for "fortified wines; wines and fortified wines" in Class 33.[1] As grounds for the cancellation, petitioner alleges mere descriptiveness of the mark, contending that drinking respondent's wine, which has a slightly higher alcohol content than some wines, will make women "naughty." In its answer, respondent denied the salient allegations in the petition to cancel.

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[1] Registered February 7, 2012, claiming dates of first use and first use in commerce of July 1, 2008.

This case now comes up on respondent's motion for summary judgment, filed April 28, 2014, wherein respondent seeks judgment as a matter of law with respect to petitioner's claim of mere descriptiveness. The motion is fully briefed. As evidence on summary judgment, respondent submitted the declarations of its Vice President and co-owner, Brad Schmiling, and Stephanie H. Bald, respondent's counsel, with accompanying exhibits. Petitioner's evidence on summary judgment consists of the declaration of Bruce T. Margulies, petitioner's counsel, with accompanying exhibits.

Summary judgment is an appropriate method for disposing of cases in which there are no genuine disputes as to material facts, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c). In deciding motions for summary judgment, the Board must follow the well-established principles that, in considering the propriety of summary judgment, all evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. The Board may not resolve disputes of material fact; it may only ascertain whether such factual disputes are present. *See Lloyd's Food Prods. Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993).

When the moving party has supported its motion with sufficient evidence which, if unopposed, indicates there is no genuine dispute of material fact, the burden then shifts to the non-moving party to demonstrate the existence of a genuine dispute of material fact to be resolved at trial. *Enbridge, Inc. v.*

Excelerate Energy LP, 92 USPQ2d 1537, 1540 (TTAB 2009). 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 dispute of material fact for trial.

Standing

In its petition to cancel, petitioner alleged that it filed an application for registration of the mark ALVI'S DRIFT NAUGHTY GIRL for "wine" in class 33, and that the USPTO issued an Office action refusing registration based on likelihood of confusion with respondent's registered mark.[2] In its answer respondent admitted that, according to USPTO records, the USPTO issued such an Office action, and respondent submitted a copy of the Office action as part of its response to the summary judgment motion. Petitioner may rely on the refusal of its pending application to establish its standing. *See Continental Grain Co. v. Strongheart Prods. Inc.*, 9 USPQ2d 1238, 1238 (TTAB 1988).

Arguments of the Parties

Respondent argues that the term comprising its mark, NAUGHTY GIRL, does not immediately convey any knowledge about the ingredients, qualities, functions, features or characteristics of wine. In support of its position,

[2] Application Serial No. 85766244, filed October 29, 2012.

respondent's Vice President, Mr. Schmiling, states in his declaration that the mark was selected because it is "playful, humorous and imaginative," not because it will actually make a person a "naughty girl." Mr. Schmiling also provided a copy of respondent's response to an Office action issued during the examination of its underlying application in which respondent stated:

> This wine was created to be a "fun" wine for a womens' group called "Ladies of the Vine"…it is a special blend of a red wine and a fortified dessert wine that in fun "makes women naughty."

(Respondent's resp. ltr. of September 1, 2010, 13 TTABVUE 26).

Mr. Schmiling explains in his declaration:

> By stating that NAUGHTY GIRL wine "in fun makes women naughty," I meant that the NAUGHTY GIRL mark is playful and funny. I did not mean that drinking NAUGHTY GIRL wine actually makes consumers "naughty women" or "naughty girl[s]." Rather, by modifying "makes women naughty" with "in fun" and inserting quotation marks around "makes women naughty," I was underscoring how both I and the NAUGHTY GIRL mark were joking—not making a literal statement about the attributes or purpose of NAUGHTY GIRL wine.

(Schmiling dec. at 6, 13 TTAVue 7).

Mr. Schmiling points out that the examining attorney "did not issue any refusal on the ground that the NAUGHTY GIRL mark was merely descriptive." *Id.*

Respondent's counsel, Stephanie Bald, provided a declaration stating she checked five dictionaries on-line and did not find any entries for "naughty girl" as one word or a phrase that had any reference to wine; she provides four dictionary entries for "naughty" such as this one from Merriam-Webster:

> 1.) a.) archaic : vicious in moral character : WICKED
> b.) guilty of disobedience or misbehavior

2.) lacking in taste or propriety

www.Merriam-webster.com/dictionary/naughty, *accessed* April 15, 2014, (14 TTABVue 144).

She provides four dictionary entires for "girl," such as this one, also from Merriam-Webster:

1.) a.) a female child from birth to adulthood
b.) DAUGHTER
c.) a young unmarried woman
d.) sometimes offensive : a single or married woman of any age
2.) a.) SWEETHEART
b.) sometimes offensive : a female servant or employee

www.Merriam-webster.com/dictionary/girl, *accessed* April 15, 2014, 14 TTABVue 156.

Ms. Bald also states she conducted a search of the Lexis/Nexis database for all U.S. newspaper and wire stories containing the phrases "naughty girl" and "wine" within the same article, which produced 54 unique search results, eight of which referred to respondent. However, as Ms. Bald also notes, none of the articles uses "naughty girl" to describe an ingredient, quality, characteristic, function, feature, purpose or use of wine. (Resp.'s mot. 12 TTABVue 15). Respondent argues that this evidence shows that the terms "naughty" and "girl," separately, or together as NAUGHTY GIRL, do not have any recognized meaning in relation to wine.

Petitioner argues that the evidence, in particular respondent's claim that "the effect of the NAUGHTY GIRL wine might be fun and excitement," creates a genuine dispute of material fact as to whether the mark is

descriptive of the goods, because petitioner contends respondent's intent in choosing its mark was to describe the effect ingesting the wine might have, namely,

> after someone drinks a few glasses of high alcohol wine, it is a fine line between "fun and excitement" and "act[ing] like a naughty girl." … Registrant is also navigating a slippery slope between "playful" and "act[ing]" like a "naughty girl."

(Pet. Resp. 17 TTABVue 4).

Petitioner's counsel states in his declaration that he conducted an Internet search for "'naughty girl' wine review" and submitted a search summary listing 10 results.[3] Of these 10 results, petitioner submitted web pages from a single website, http://jenniferreviews.com, consisting of a blog entry reviewing respondent's wine, which includes the following:

> When I saw this wine at the Wisconsin Cheese Chalet, the place I bought my chocolate cheese, I knew I had to try it. It was calling the party girl in me because they had a whole party girl display going by this wine. Here are the bottle toppers that started the whole "naughty girl" craze.

[3] Such a list of Internet search results, submitted without the surrounding text, has little probative value, because often it does not provide sufficient context to show how the term is used on the listed web pages. *See In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007) (deeming search engine results that provided very little context for use of term ASPIRINA to be "of little value in assessing the consumer public perception of the ASPIRINA mark"); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062, 1064 n.3 (TTAB 2008) (finding truncated search engine results entitled to little probative weight without additional evidence of how searched term is used).

(Pet.'s dec., 17 TTABVue 10 and 14).

The blog, which identifies Jennifer Stinnett as the author, was posted on February 23, 2011. Another entry, at the same URL and posted by Ms. Stinnett on the same date, is entitled "boob wine stoppers," and shows the same photo as above, with the text, "These are crazy boob party girl wine stoppers…they made me buy Naughty Girl wine."[4] *Id.* at 14. Petitioner argues respondent has offered only "unsubstantiated opinions" to support its argument that the mark is not descriptive, and that the evidence as to respondent's intent in naming its wine shows the significance the mark would have to wine consumers.

In reply, respondent argues that petitioner's "evidence" does not create a genuine dispute of material fact, but merely supports that respondent's mark is suggestive.[5]

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[4] Petitioner refers to this blog entry and states that "the merchant's 'party girl' display, comprising 'crazy boob party girl' wine stoppers, which 'made' the female reviewer buy Naughty Girl wine, invite[s] taking discovery requests to ascertain whether or not the Registrant directed this and/or a related marketing approach and if so, the scope of the relevant marketing approach." (Pet.'s resp. 17 TTABVue 6). This statement, made in the course of petitioner's six page brief, does not meet the requirements of a Rule 56(d) motion for discovery, and we do not regard it as such.

[5] In a footnote, respondent notes that the Internet printouts offered as evidence by petitioner are admissible under *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1037 n.14 (TTAB 2010), but are probative only for what they show on their

Decision

While the parties disagree as to the test to be applied for descriptiveness, the Board follows the test set out by our primary reviewing court, the Federal Circuit. As set forth in *In re Chamber of Commerce*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012), *citing In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987), a term is merely descriptive, and therefore, pursuant to Section 2(e)(1) of the Act, unregistrable, if it immediately conveys knowledge of a significant quality, characteristic, function, feature or purpose of the products or services it identifies. On the other hand, a suggestive mark, which is registrable without evidence of acquired distinctiveness, is one for which "imagination, thought, or perception is required to reach a conclusion on the nature of the goods." *In re Gyulay*, 3 USPQ2d at 1009, citing *In re Qwik-Print Copy Shops, Inc.*, 616 F.2d 523, 205 USPQ 505, 507 (CCPA 1980). Whether a particular term is merely descriptive is determined in relation to the goods for which registration is sought and the context in which the term is used, not in the abstract or on the basis of guesswork. *Chamber of Commerce*, 102 USPQ2d at

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face under Fed. R. Evid. 801. To the extent respondent objects to the Internet evidence as hearsay, respondent is correct that the Board considers the Internet evidence for what it shows on its face, and not as evidence of the truth of the statements made therein. For that reason, hearsay is not an issue with regard to the evidence submitted in connection with this summary judgment motion, as the articles introduced by both parties are considered for what they show on their face, e.g., dictionary definitions, or the context within which consumers encounter the terms "wine" and "naughty girl." The reliability of the information becomes a matter of weight or probative value to be given to the proffered evidence by the Board. *See Raccioppi v. Apogee, Inc.*, 47 USPQ2d 1368, 1372 (TTAB 1998).

1219. The Board's determination of whether a mark is merely descriptive is a factual finding. *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed.Cir. 2007).

The evidence presented shows that the mark is at most suggestive, not descriptive of the goods. The record evidence of dictionary definitions, articles, and respondent's response to the Office action do not establish any direct connection between the terms, "naughty," "girl," or "NAUGHTY GIRL" and wine. In view of respondent's evidence showing that NAUGHTY GIRL is not descriptive of wine, the burden shifts to petitioner to show that a genuine dispute of material fact exists. Petitioner has not met its burden, as petitioner has not presented any competent evidence to support its allegations. Petitioner's evidence shows only that one blogger appreciates respondent's product, not that there is anything about the term that is descriptive.

Moreover, even if one could conclude from petitioner's evidence that some altered state of behavior may follow ingesting the goods, there is no evidence to show that the term NAUGHTY GIRL or its constituent words, conveys any information about an ingredient, quality, characteristic, function, feature, purpose or use of wine. Rather, a multi-stage thought process would be necessary: 1) respondent's wine has a higher alcohol content; 2) drinking fortified wine may make one inebriated; 3) inebriated people act inappropriately; 4) people who act inappropriately may be

considered naughty; 5) NAUGHTY GIRL describes the result on the drinker of using the wine. Even if one were to follow that thought process, because it obviously takes a multi-stage reasoning process, the mark is not merely descriptive but is at most suggestive.

After careful review of the record, we find that respondent has met its burden in establishing the absence of any genuine disputes of material fact, and that the mark NAUGHTY GIRL is not merely descriptive of wine. The evidence submitted by respondent shows that the ordinary meaning of the term is a "young woman who misbehaves," and this does not convey any meaning with regard to wine. Petitioner did not rebut this evidence and, thus, failed to raise any genuine disputes of material fact.

Accordingly, respondent's motion for summary judgment is ***granted***. The petition for cancellation is dismissed with prejudice.

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