

**THIS OPINION
IS NOT A PRECEDENT
OF THE TTAB**

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

CME

Mailed: July 30, 2015

Cancellation No. 92058230

Ansell Limited

v.

Custom LeatherCraft Mfg. Co., Inc.

Before Taylor, Wolfson, and Hightower,
Administrative Trademark Judges.

By the Board:

Petitioner has filed a petition to cancel Respondent's Registration No. 4064021 for the mark HI-VIZ, in standard characters, for:

- “tool aprons, tool belts, tool holders, totes, tool suspenders, tool pouches, tool pouches for attachment to tool belts” in International Class 8;
- “worker's non-disposable protective and safety apparel, namely, hats, caps, visors, gloves, mittens, belts, shirts, vests, jackets, coats, jumpsuits, pants and worker's kneepads” in International Class 9;
- “toolbags sold empty” in International Class 18; and
- “weather resistant clothing, namely, wind and water resistant shirts, vests, jackets, pants, hats, caps, visors, and gloves” in International Class 25.¹

¹ Filed March 13, 2010; issued November 29, 2011; based on a claim of first use of February 5, 2010 and first use in commerce of March 8, 2010, in all classes.

In its petition to cancel, Petitioner alleges prior common law use of the mark HI-VIZ for “gloves for protection against accidents, protective gloves for industrial use, protective work gloves for general use as well as protective sleeve products for protection against accidents, industrial use and general work use, among other protective products,” and that its application for the mark HI-VIZ has been refused registration based on a likelihood of confusion with Respondent’s mark. Petition at ¶¶ 3-4 and 6-7. As grounds for cancellation, Petitioner alleges that Respondent’s mark is likely to cause confusion with Petitioner’s previously used mark HI-VIZ. In its answer, Respondent denies the salient allegations in the petition to cancel.

This case now comes up on Petitioner’s amended motion for summary judgment, filed February 23, 2015.² The motion is fully briefed.

Scope of Petitioner’s Motion

The arguments in Petitioner’s motion exceed the scope of the allegations in its petition to cancel. Specifically, in its motion Petitioner asserts prior rights not only in the mark HI-VIZ but also in the variations HIVIZ (without a hyphen) and HI VIZ (with a space) as well as the marks WINTER HIVIZ

² We treat Petitioner’s motion for summary judgment, filed February 20, 2015, and evidence in support thereof, filed February 21, 2015, as superseded by Petitioner’s amended motion for summary judgment and accompanying evidence, filed February 23, 2015. Accordingly, we have given no consideration to Petitioner’s filings of February 20 and 21, 2015.

and POWERFLEX T° HI VIZ YELLOW³ all for work gloves. *See* Amended Motion, pp. 5-6 and 9-10. Petitioner further asserts that Respondent's involved mark is likely to cause confusion with its pleaded mark HI-VIZ as well as its marks WINTER HIVIZ and POWERFLEX T° HI VIZ YELLOW. *See id.* at pp. 11-12. Although Petitioner alleges in the petition to cancel use of "the term HI-VIZ continuously since as early as January 1, 2001, as a trademark, alone, and in conjunction with other terms and symbols, as trademarks," Petitioner has not pleaded ownership of any "other terms" or "symbols" that may incorporate HI-VIZ. Moreover, the allegation that Petitioner uses its mark "in conjunction with other terms and symbols" is insufficient to place Respondent on notice that Petitioner claims common law rights in the particular marks WINTER HIVIZ and POWERFLEX T° HI VIZ YELLOW.

Notwithstanding the foregoing, Respondent has argued the merits of Petitioner's motion with respect to the mark WINTER HIVIZ. Accordingly, for purposes of the motion for summary judgment, we find that priority and likelihood of confusion concerning the mark WINTER HIVIZ has been tried

³ On page 6 of its brief, Petitioner displays its mark as POWERFLEX T° HI-VIZ YELLOW, with a hyphen between "hi" and "viz." For consistency purposes, we refer to the mark herein as POWERFLEX T° HI VIZ YELLOW, with a space between "hi" and "viz," because this is the manner in which the mark appears throughout the remainder of Petitioner's brief.

by implied consent.⁴ We therefore consider Petitioner's motion with respect to both the mark HI-VIZ and the mark WINTER HIVIZ.

Scope of Respondent's Brief in Opposition to Petitioner's Motion

Respondent's responsive brief also raises an unpleaded affirmative defense. Specifically, Respondent argues that a genuine dispute of material fact exists as to whether Petitioner's claim is barred by laches. *See* Response, pp. 11-14. Respondent has not pleaded a laches defense, and Petitioner has objected to Respondent's laches arguments on this basis. *See* Reply, p. 7. Accordingly, we have given no consideration to Respondent's arguments concerning laches.

Leave to Replead

In view of the inconsistencies between the parties' pleadings and arguments on summary judgment, we find it appropriate to allow the parties an opportunity to replead. Petitioner is allowed until **August 24, 2015** to file, if it so chooses, an amended petition to cancel asserting priority and likelihood of confusion with respect to the marks WINTER HIVIZ and POWERFLEX T° HI VIZ YELLOW. Respondent is allowed until **September 14, 2015** to file an amended answer to any amended petition to cancel that Petitioner may file.

⁴ Respondent did not address Petitioner's arguments regarding the mark POWERFLEX T° HI VIZ YELLOW. Accordingly, we have given Petitioner's motion no consideration to the extent that Petitioner has argued priority in and a likelihood of confusion with the mark POWERFLEX T° HI VIZ YELLOW.

In the event the parties do not replead, this proceeding will proceed to trial on the existing pleadings. If the parties replead, discovery will be reopened for sixty days to allow the parties an opportunity to conduct discovery on any newly pleaded claims or defenses.

Merits of Petitioner's Motion for Summary Judgment

Summary judgment is appropriate only where there are no genuine disputes as to any material facts, thus allowing the case to be resolved as a matter of law. Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the burden of demonstrating the absence of any genuine dispute of material fact, and that it is entitled to a judgment under the applicable law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Sweats Fashions, Inc. v. Pannill Knitting*, 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. *See Opryland USA Inc. v. Great Am. Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). Evidence on summary judgment must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Opryland USA*, 23 USPQ2d at 1472. The Board may not resolve genuine disputes as to material facts; it may only ascertain whether genuine

disputes as to material facts exist. *See Lloyd's Food Prods.*, 25 USPQ2d at 2029; *Olde Tyme Foods*, 22 USPQ2d at 1544.

Upon careful consideration of the arguments and evidence presented by the parties,⁵ and drawing all inferences with respect to the motion in favor of Respondent as the non-moving party, we find that Petitioner has failed to meet its burden of establishing the absence of a genuine dispute regarding

⁵ In support of its amended motion for summary judgment, Petitioner filed numerous unnecessary and duplicative documents. Exhibit 1 to Petitioner's amended motion is a copy of the certificate of registration for the involved registration and Exhibit 7 is a copy of the Statement of Use filed in connection with the involved registration. These documents are included in the file history of the involved registration, which is automatically of record in this proceeding. *See* Trademark Rule 2.122(b)(1); *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1628 (Fed. Cir. 2009).

Exhibit 4 is a copy of a consented motion to extend that Petitioner filed in this proceeding on September 26, 2014. *See* 13 TTABVUE. Exhibit 5 is a copy of the petition to cancel in this proceeding and Exhibit 6 is a copy of Respondent's answer thereto. With the exception of Exhibits B and C attached to the petition to cancel and the last page of Exhibit 6, Exhibits 4-6 are automatically of record in this proceeding. *See Rocket Trademarks Pty. Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1070 (TTAB 2010) (record includes the pleadings). Exhibits B and C to the petition to cancel are duplicative of Exhibits 2-3 to Petitioner's amended motion. The last page of Exhibit 6 appears to be a one-page excerpt from a prior version of Petitioner's amended motion for summary judgment. We have given no consideration to this page, which appears to have been attached to Exhibit 6 in error.

Lastly, without any explanation, Petitioner attached to its reply brief what appears to be a nearly identical copy of its amended motion for summary judgment and evidence, filed February 23, 2015. The only differences between the filings appear to be the table of authorities, the page orientation of certain exhibits that had previously appeared upside down or sideways, the deletion of the errant page that had been attached to Exhibit 6, the placement of the lettered exhibits before the Wyatt Declaration, and the placement of Exhibit 7 after Exhibit 6. (As filed with the amended motion on February 23, 2015, Exhibit 7 followed Exhibit 10).

By filing numerous duplicative papers, Petitioner has unnecessarily increased the size of the record in this proceeding and taxed the Board's limited time and resources. Petitioner is advised to refrain from filing duplicative documents in the future and to carefully review all filings prior to submission to ensure that the filings are free of error.

whether it may claim prior common law rights in the marks WINTER HIVIZ and HI-VIZ. Specifically, Mr. Wyatt attests that on August 27, 1991, Ansell Edmont Industrial Inc. (“Ansell Edmont”) applied to register the mark WINTER HIVIZ for “work gloves” and that the resulting registration⁶ was subsequently assigned to Ansell Protective Products, Inc. (“Ansell Protective Products”). See Wyatt Declaration, ¶¶ 7 and 9. However, Mr. Wyatt did not further explain, and the evidence does not demonstrate, how ownership and apparent use of the WINTER HIVIZ mark by Ansell Edmont and Ansell Protective Products benefits Ansell Limited, the named Petitioner in this proceeding. Moreover, the evidence of record does not show clear title to the WINTER HIVIZ mark in Petitioner.⁷ Similarly, there is no evidence of record to demonstrate that named Petitioner Ansell Limited owns prior rights in the particular mark HI-VIZ for work gloves. Accordingly, Petitioner’s motion for summary judgment is **DENIED**.⁸

⁶ The resulting Registration No. 1843695 for the mark WINTER HIVIZ expired on April 9, 2005. See Wyatt Declaration at ¶ 10.

⁷ The unsupported allegation on page 5 of Petitioner’s brief that Ansell Protective Products is a division of Ansell Limited is insufficient to establish Ansell Limited’s chain of title in the mark WINTER HIVIZ. Unless admitted by a party opponent, statements made in briefs and pleadings cannot be considered as evidence on behalf of the party making them; such statements must be established by competent evidence. See *Saul Zaentz Co. v. Bumb*, 95 USPQ2d 1723, 1725 n.7 (TTAB 2010).

⁸ The fact that we have identified issues on which Petitioner has not met its burden should not be construed as a finding that these are necessarily the only issues that remain for trial. In addition, the parties should note that the evidence submitted in connection with Petitioner’s motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993); *Pet Inc.*

Suspension

Proceedings are suspended to allow the parties an opportunity to replead. After the time for the parties to replead has expired, *see supra* p. 4, the Board will issue an order resuming proceedings and resetting dates as appropriate.

v. Bassetti, 219 USPQ 911 (TTAB 1983); *Am. Meat Inst. v. Horace W. Longacre, Inc.*, 211 USPQ 712 (TTAB 1981).