United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: November 14, 2018

Concurrent Use No. 94002814

Pioneer Sand Company, Inc.

v.

Murfreesboro Mulch Company

and

The Mulch Company

and

Price Farms Organics, Ltd.

and

Indiana Mulch and Stone, LLC

and

Play Soft LLC

and

Green Valley Earth Products

Denise M. DelGizzi,
Chief Clerk of the Board:

A concurrent use proceeding has been instituted between concurrent use applicant, Pioneer Sand Company, Inc., and Murfreesboro Mulch Company. The

Mulch Company, Price Farms Organics, Ltd., Indiana Mulch and Stone, LLC, Play Soft LLC, and Green Valley Earth Products, named as the exceptions to concurrent use applicant's claim of exclusive right to use its mark in commerce. Applicant seeks to register the mark PLAYSOFT for "Mulch; virgin wood fiber mulch for use as playground ground cover", in International Class 31, for the area comprising the states of Arizona, California, Colorado, Idaho, Nevada, New Mexico, Texas, Utah and Wyoming.

In an order issued on September 24, 2018 the Board allowed excepted the users, Murfreesboro Mulch Company. The Mulch Company, Price Farms Organics, Ltd., Indiana Mulch and Stone, LLC, Play Soft LLC, and Green Valley Earth Products until November 3, 2018, in which to file an answer to the concurrent use allegations of applicant, Pioneer Sand Company, Inc.

Pursuant to Trademark Rule 2.99(d)(3), if an answer, when required, is not filed, judgment will be entered precluding the specified user(s) from claiming any rights more extensive than the rights acknowledged in the application for concurrent use registration.

Inasmuch as no answer has been received, judgment is hereby entered against Murfreesboro Mulch Company. The Mulch Company, Price Farms Organics, Ltd., Indiana Mulch and Stone, LLC, Play Soft LLC, and Green Valley Earth Products, to the extent that they are precluded from claiming any rights more extensive than the rights acknowledged in Pioneer Sand Company, Inc's concurrent use application.

Nevertheless, applicant still has the burden of proving its entitlement to the registration sought against the excepted users. That is, applicant still has to prove that there will be no likelihood of confusion by reason of the concurrent use by applicant and users of their respective marks. *See Precision Tune Inc., v. Precision Auto-Tune Inc.*, 4 USPQ2d 1095 (TTAB 1987). Applicant may prove its entitlement to registration as against the defaulting users by an "ex parte" type of showing, that is, by submitting evidence in affidavit form. *See Precision Tune Inc.*, *supra*.

Accordingly, applicant is allowed sixty days from the issue date of this order to submit proof of its entitlement to registration. At that time, the Board will make a final determination of applicant's right to a concurrent use registration on the basis of the evidence so proffered. If applicant fails to respond, judgment will be entered against applicant, the concurrent use proceeding will be dissolved, and registration to applicant will be refused.