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

Baxley

Mailed: March 24, 2009

Opposition No. **91183146**

Stokely-Van Camp, Inc.

v.

William Wooten

Before Holtzman, Cataldo, and Ritchie,
Administrative Trademark Judges.

By the Board:

William Wooten ("applicant") filed an application to register HATER-AID in standard character form for "Aerated water; Mineral water; Sparkling water; Colas; Concentrates, syrups or powders used in the preparation of soft drinks; Fruit-flavored drinks; Isotonic drinks; Pop; Powders used in the preparation of isotonic sports drinks and sports beverages; Soft drinks; Sports drinks; Syrups for making soft drinks; Energy drinks; Fruit drinks; Fruit flavored soft drinks" in International Class 32.[1]

Stokely-Van Camp, Inc. ("opposer") filed a notice of opposition to registration of applicant's mark on grounds of likelihood of confusion with its previously registered marks

[1] Application Serial No. 77210492, filed June 20, 2007, based on an assertion of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. Section 1051(b).

which include the word GATORADE for beverage and food products, including sports energy drinks and soft drinks, and for dilution of those marks.[2]

Applicant, in his answer, admitted, among other things, that opposer has prior use of its pleaded marks "in connection with beverage and food products, including sports energy drinks and soft drinks;" that opposer has registered its GATORADE mark and is the owner of thirteen registrations for marks which include the word GATORADE for beverage products; that, since prior to the filing of his application, opposer's GATORADE mark has been both distinctive and famous; and that applicant adopted his involved mark with the knowledge of opposer's GATORADE marks and products. In the answer, applicant denied only that

---

[2] Opposer's pleaded registrations include:
Registration No. 848245 for the mark GATORADE in typed form for "fruit flavored soft drink and powder for making the same" in International Class 32, issued April 30, 1968, renewed twice;
Registration No. 1410822 for the mark GATORADE THIRST QUENCHER and design in the following form

for "thirst quenching soft drink and powder for making the same" in International Class 32, issued September 23, 1986, renewed; the wording THIRST QUENCHER is disclaimed; and
Registration No. 2637355 for the mark GATORADE PERFORMANCE SERIES in typed form for "non-alcoholic, non-carbonated sports drinks" in International Class 32, issued October 15, 2002, Section 8 affidavit accepted, Section 15 affidavit acknowledged; the wording PERFORMANCE SERIES is disclaimed.

there is a likelihood of confusion between the marks and that use of applicant's mark is likely to dilute the distinctive quality of opposer's GATORADE mark. In addition, applicant asserted affirmative defenses, including that "the intended use of the mark is to parody Opposer's mark" and that "applicant takes care not to use any portion of Opposer's mark or design in [an] effort to ensure that the marks are distinctive from one another so as not to run the risk of diluting Opposer's mark."

This case now comes up for consideration of opposer's motion (filed December 8, 2008) for summary judgment on its pleaded grounds of priority/likelihood of confusion and dilution. The motion has been fully briefed.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of demonstrating that there is no genuine issue of material fact remaining for trial and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1987); *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the

evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. See *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F. 2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

As a party moving for summary judgment in its favor on a Section 2(d) claim, opposer must establish that there is no genuine dispute that (1) it has standing to maintain this proceeding; (2) that it is the prior user of its pleaded marks; and (3) that contemporaneous use of the parties' respective marks on their respective goods would be likely to cause confusion, mistake or to deceive consumers. See *Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001).

With regard to whether opposer has standing to maintain this proceeding, applicant has not challenged opposer's standing to cancel the involved registration. In any event, the copies of opposer's registrations for marks including the word GATORADE that were obtained from the USPTO's Trademark Applications and Registrations Retrieval (TARR) database that were submitted as exhibits to opposer's notice of opposition and which show that the registrations are valid and subsisting and owned by opposer are sufficient to establish opposer's standing in this case. See Trademark Rule 2.122(d)(1); *Cunningham v. Laser Golf Corp.*, 222 F.3d

943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). No genuine issue of material fact exists on this issue.

Furthermore, because opposer's valid and subsisting registrations are of record, priority is not in issue. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). We also note that in his answer, applicant responded to paragraph 2 of the notice of opposition, wherein opposer alleged that, "[s]ince long prior to the filing date of the application opposed herein, opposer has used the mark GATORADE and other GATORADE marks in connection with beverage and food products, including sports energy drinks and soft drinks," and paragraph 3 of the notice of opposition, wherein opposer alleged that it has registered the GATORADE mark and owns thirteen registrations for marks which include the word GATORADE for "beverage products," with admissions of such allegations. These admissions of fact are conclusive as to the issue of priority. See *Brown Company v. American Stencil Manufacturing Company, Inc.*, 180 USPQ 344, 345 n. 5 (TTAB 1973) (admission during pleading results in estoppel precluding ability to prove anything to the contrary).

In determining the issue of likelihood of confusion and, in this case, whether there is any genuine issue of material fact relating thereto, we take under consideration all of the *du Pont* factors which are relevant under the

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.