THIS OPINION IS NOT A PRECEDENT OF THE T.T.A.B.

Mailed: October 22, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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DBC, LLC

v.

Renaissance Herbs, Inc.

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Opposition No. 91161992
to application Serial No. 78262554
filed on 6/14/03

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Ronald Spuhler of McAndrews, Held & Malloy, Ltd. for DBC, LLC.

Richard Sybert of Gordon & Rees LLP for Renaissance Herbs, Inc.

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Before Walters, Bucher and Cataldo,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

On June 14, 2003, applicant, Renaissance Herbs, Inc., filed an application to register on the Principal Register the mark shown below based upon an allegation of use of the mark in commerce since October 15, 2003 for the following goods: "process herbal extract, namely, standardized garcinia mangostana for use in dietary and nutritional supplements and food and beverages, for diet and appetite

suppression and not for the direct treatment of anxiety disorder" in International Class 5.[1]

XanoMax

Registration has been opposed by DBC, LLC ("opposer"). As grounds for opposition, opposer asserts that it has made prior use through its licensees in interstate commerce of the mark XANGO for, *inter alia*, juice containing garcinia mangostana fruit extract. Opposer further asserts that it is the owner of applications for the mark XANGO for "liquid dietary supplements"[2] in International Class 5; and "skin care preparations and hair care preparations"[3] in International Class 3. Opposer argues that applicant's mark XANOMAX when used on applicant's goods so resembles opposer's previously used mark XANGO for its goods as to be likely to cause confusion, to cause mistake, or to deceive; and that opposer will be damaged thereby.

Applicant's answer consists of a general denial of the allegations in the opposition, although applicant admits that opposer's pleaded applications were filed. In addition, applicant asserts certain affirmative defenses.

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[1] Application Serial No. 78262554.

[2] Application Serial No. 76403891 was filed on May 6, 2002.

[3] Application Serial No. 78172743 was filed on October 9, 2002.

Opposer's Standing

In view of applicant's admission of the filing of opposer's pleaded applications, and in view of opposer's pleading of a reasonable claim of likelihood of confusion, we consider there to be no issue regarding opposer's standing. *See Ritchie v. Simpson*, 170 F.3d 1902, 50 USPQ2d 1023 (Fed. Cir. 1999). *See also Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Evidentiary Matters

However, prior to our consideration of opposer's pleaded claim of priority and likelihood of confusion, we must first address various motions directed toward the timeliness and admissibility of certain materials offered into the record by opposer.

Opposer's Motion to Extend

As last reset in a Board interlocutory order issued on January 19, 2006, opposer's testimony period closed May 9, 2006. On May 4, 2006, opposer filed a motion to extend its testimony period by eight days "for the sole purpose of obtaining the deposition testimony of [opposer's officer] Bryan Davis" (motion to extend, p. 2) and by sixty (60) days "for the sole purpose that DBC can properly file its Notices of Reliance" (*Id.* at 3) upon registrations resulting from its pleaded applications.

The standard for allowing an extension of a prescribed period prior to the expiration of that period is "good cause."[4] *See* Fed. R. Civ. P. 6(b) and TBMP §509.01(a) (2d ed. rev. 2004) and authorities cited therein. It is settled that the Board generally is liberal in granting extensions of time so long as the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. *See, e.g., Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710 (Fed. Cir. 1991*); American Vitamin Products, Inc. v. DowBrands Inc.*, 22 USPQ2d 1313 (TTAB 1992); and *Sunkist Growers, Inc. v. Benjamin Ansehl Co.*, 229 USPQ 147 (TTAB 1985).

Applicant's arguments in opposition to the motion to extend are noted. In addition, we note the observation in the above-referenced January 19, 2006 interlocutory order regarding opposer's dilatory conduct earlier in this proceeding with respect to its request for enlargement of the discovery period. Nonetheless, given the totality of the circumstances in this case, we find good cause for opposer's motion to extend. Specifically, it appears that opposer's witness Mr. Davis was unavailable for deposition during opposer's assigned testimony period; that opposer's pleaded applications were allowed for registration during its testimony period; and that it was anticipated that both applications would mature to registration

[4] As noted above, opposer filed its motion to extend five days prior to the close of its reset testimony period.

promptly. Moreover, we find no evidence of bad faith by opposer or significant prejudice to applicant. Further, we do not find that opposer's conduct amounts to abuse of its privilege of extensions.

In view thereof, opposer's motion to extend its trial periods is granted solely to the extent that it is allowed until sixty (60) days from the May 9, 2006 close of its testimony period – that is, until July 8, 2006 - in which to take the testimony deposition of Mr. Bryan Davis and submit notices of reliance upon the registrations resulting from its pleaded applications.[5] Trial dates otherwise remain as indicated in the Board's interlocutory order issued on January 19, 2006.

Opposer's Notices of Reliance Upon Its Resulting Registrations

Opposer's pleaded application Serial No. 76403891 issued on June 13, 2006 as Registration No. 3104280. Opposer's application Serial No. 78976950, a division of opposer's pleaded application Serial No. 78172743, also issued on June 13, 2006 as Registration No. 3105298. As a result of our granting opposer's above motion to extend, opposer was allowed until July 8, 2006 in which to file notices of reliance upon these registrations.

[5] It is noted that opposer did not take the testimony deposition of Mr. Davis.

However, opposer filed its notice of reliance upon Registration No. 3105298 on July 21, 2006, and thereafter filed its notice of reliance upon Registration No. 3104280 on August 23, 2006. Opposer provides no explanation for its failure to file such notices of reliance within the requested sixty-day extension of its testimony period. Similarly, opposer fails to request further enlargement of its testimony period in order to render these filings timely. As a result, we find that opposer's notices of reliance upon its resulting registrations are untimely and will be given no further consideration.[6]

In consequence thereof, opposer's motion to amend its notice of opposition to plead ownership of its resulting registrations, as well as applicant's motion to strike opposer's untimely notices of reliance thereupon, are moot and will be given no consideration.

Applicant's Motion to Strike Exhibits 7-9 from Opposer's Remaining Notice of Reliance

In addition, applicant moves to strike exhibits 7-9 from opposer's remaining, timely filed, notice of reliance. The exhibits in question are identified as Internet advertisements and examination thereof confirms that each is

[6] We note that the Board does not take judicial notice of files of applications or registrations, where no copies thereof are filed, and where they are not the subject of the proceeding. *See Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290 (TTAB 1986).

a printout from the Internet. The Board has held that such printouts may only be introduced by proper testimony of the individual that conducted the search for the documents. *See Raccioppi v. Apogee, Inc.*, 47 USPQ2d 1368 (TTAB 1998). Accordingly, the Internet printouts comprising Exhibits 7-9 of opposer's notice of reliance have not been considered.

Applicant's Further Evidentiary Objections

In addition, applicant has filed objections against certain exhibits introduced by opposer in its testimony deposition of Mr. Russell Wood. We note, however, that none of the exhibits sought to be excluded is outcome determinative. Given this fact, we see no compelling reason to discuss the objections in a detailed fashion. Suffice it to say, we have considered the exhibits in question, keeping in mind the various objections raised by applicant, and we have accorded whatever probative value the subject testimony and exhibits merit.

The Record

In consequence of the foregoing, the record in this case includes the pleadings and the file of the involved application. In addition, during its assigned testimony period opposer filed the testimony deposition of Mr. Russell Wood, an employee of Xango LLC, with accompanying exhibits; and a notice of reliance upon answers from applicant's responses and supplemental responses to opposer's first set

of interrogatories, and applicant's responses to opposer's first set of request for production of documents and things.

During its assigned testimony period, applicant filed a notice of reliance upon various third-party registrations and printed publications.

Opposer and applicant filed main briefs on the case, and opposer filed a reply brief.

Priority of Use

Opposer argues in its brief that it commenced use of its mark in November 2002. However, opposer has failed to properly introduce any admissible testimony or evidence that its asserted mark XANGO was used prior to the June 14, 2003 filing date of the involved application. As noted above, opposer's notices of reliance upon the registrations resulting from its pleaded applications were untimely filed. Further, while opposer asserts in its brief that it is the owner of an additional registration and several applications for various XANGO and XANGO formative marks, neither the additional registration nor any of the applications are of record.[7]

Moreover, opposer has failed to introduce any testimony or evidence of use of its asserted mark. Opposer's witness,

[7] We note that, even if opposer's asserted applications were of record, neither the dates of use alleged in the applications nor the statements made in the applications' declarations can serve to prove the date of first use of opposer's asserted mark. *See* TBMP §704.07 (2d ed. rev. 2004).

Mr. Russell Wood, testified to use of the mark by an entity known as Xango. Evidence introduced by Mr. Wood with his testimony show use of the XANGO mark by an entity identified as XanGo LLC. However, on cross-examination opposer's witness did not testify as to what relationship, if any, exists between XanGo, LLC and opposer (testimony of Russell Wood, p. 19).

Q. I shouldn't be too long. First of all, let's talk about you worked [sic] for Xango for approximately four years, almost three and a half years; is that correct?

A. Yes.

Q. And you worked for Xango and not for DBC; is that correct?

A. Yes, that is correct.

Q. Okay. So Xango is a licensee of DBC; is that correct?

A. I am not sure what DBC is.

Opposer asserts in its notice of opposition that opposer has used the XANGO mark through its licensees. In its brief (p. 2) opposer asserts that XanGo LLC is a wholly owned subsidiary of opposer. However, opposer has failed to introduce any evidence of either a relationship between itself and XanGo LLC or evidence of use by a licensee that would inure to the benefit of opposer. In short, opposer has failed to introduce any admissible testimony or evidence

that it has made any use of its asserted XANGO mark. Finally, neither applicant's admissions in its answer nor its discovery responses provide any proof that opposer made prior use of the XANGO mark.

Accordingly, inasmuch as we find that opposer has not established its priority, opposer cannot prevail on its claim of likelihood of confusion.

Decision: The opposition is dismissed.