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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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Stress Less, Inc.
v.
Ekornes ASA

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Opposition No. 91165936
to application Serial No. 78197167
filed on December 22, 2002

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Al D. Kitchen for Stress Less, Inc.

Michael J. Hughes of Intellectual Property Law Offices for Ekornes ASA.

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Before Quinn, Drost and Zervas, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Ekornes ASA to register the mark shown below

for "furniture, chairs, seats, recliner chairs, [and] recliner chairs with footstools" in International Class 20; and "retail outlet and store services in the field of furniture and furnishings" in International Class 35.[1]

Stress Less, Inc. opposed registration in International Class 35 only. As grounds for opposition under Section 2(d) of the Trademark Act, opposer alleges that applicant's mark, when used in connection with applicant's services, so resembles the mark shown below

for goods and services relating to stress reduction and relaxation[2] as to be likely to cause confusion. More specifically, the registration covers the following goods and services:

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[1] Application Serial No. 78197167, filed December 22, 2002, alleging an intention to use the mark in commerce and claiming a right of priority under Section 44(d) of the Trademark Act based on Norwegian application no. 200210613, filed December 11, 2002. Applicant subsequently filed an amendment to allege use indicating that the mark was first used anywhere on January 31, 2003, and in commerce on March 31, 2003.

[2] Registration No. 2299052, issued December 7, 1999; combined affidavit under Sections 8 and 15 filed and accepted. The word "Stress" is disclaimed. The stippling in the drawing is a feature of the mark and is not intended to indicate color.

> videotapes, video and audio recordings and cassettes featuring music; and compact disks and CD ROMs that provide stress information and stress reduction techniques, programs, and tests and exercises (in International Class 9);
>
> newsletters and catalogs that provide stress and stress reduction techniques, programs and practices (in International Class 16);
>
> clothing, namely, t-shirts, sweaters, sports shirts, hats, jump suits, pants [and] robes (in International Class 25); and
>
> retail store services and catalog mail order services featuring goods and services in the field of stress reduction, relaxation, exercise, ergonomics, environment, bio-feedback, medicine, psychology, nutrition, and weight loss (in International Class 42).

Opposer, in the notice of opposition, specifically relies upon its services identified in International Class 42. Opposer alleges that its services include the sale of "furniture items."

Applicant, in its answer, denied the salient allegations of likelihood of confusion.

The Board, in an order dated February 16, 2006, granted applicant's unopposed request to divide out Class 20, that is, the class that was not opposed. Thus, the opposition proceeded against only the services recited in Class 35. Unfortunately, the actual division was never completed; this inaction is regretted. In view of the decision herein, and

so as to avoid any additional delay, the application will proceed as a combined application.

At the outset, we must address the critical problems that exist relative to the evidentiary record in this case. On the last day of opposer's testimony period, opposer submitted its "brief" accompanied by a stack of documents. The brief includes the following preface:

> Due to uncontrollable circumstances, [opposer] has not been able to enlist the services of our previous legal counsel regarding this matter and have undertaken to prepare this case ourselves. Therefore, we pray that the TTAB will consider the merits of our content and supporting arguments and be lenient with our shortcomings in legal protocol.

On the same day, opposer also filed a request to extend its testimony period "due to delay in receiving PTO documented trademark status." Opposer then filed, on May 25, 2006, a status and title copy of its pleaded Registration No. 2299052. Opposer's motion to extend, to which applicant raised no objection, is granted.

Applicant filed, on May 26, 2006, a paper captioned "Applicant's Technical Response to Plaintiff's Case Brief." In this paper, applicant objected to opposer's brief and accompanying documents for two main reasons, namely that a non-attorney filed the papers, and that the papers did not comply with the rules of practice governing the introduction of evidence in Board proceedings. Applicant nevertheless

added that it "is not enamored with undue reliance on 'legal protocol,'" and that it "would actually prefer to present and resolve matters in a minimally formalized manner and without dealing with the technical rules of evidence." Applicant went on to suggest a "reciprocal agreement," which essentially would have allowed the parties to submit evidence in an informal fashion, with applicant's pointing out that it is difficult to take testimony of its principals located in Norway. Applicant stated that, if opposer's submissions were accepted, the Board should provide guidance to applicant regarding its proposal to litigate the case in an informal manner. But, applicant added, "in the event that such an informal procedure is disapproved, then Applicant reluctantly objects to the evidence and submissions of Opposer in this matter."

Applicant, on the last day of its testimony period, submitted the declaration of its group marketing director. Applicant also filed on the same date a paper captioned "Case Presentation" which essentially is its brief on the case. This paper includes the following introductory statement:

> As the documents and evidence submitted by Opposer are not supported by sworn testimony and do not comply with normal rules of evidence, and since the Board has not acted on Applicant's Technical Response dated 25 May 2006, Applicant is submitting this Case Presentation somewhat in a vacuum.

> Applicant elects to present its evidence based on documents and testimony via declaration and to handle the matter in as informal a manner as is feasible.
>
> Further, Opposer's non-attorney representative, Mr. Al Kitchen, has raised numerous matters not at issue before this Board. Applicant will address these issues only in passing and should not be seen as acquiescing in any issues.

Opposer, in its rebuttal brief, made no response to either applicant's evidentiary objections or applicant's suggestion for an agreement covering the informal introduction of evidence in this case.

We first turn our attention to applicant's objection relating to the ability of Mr. Kitchen to represent opposer, a corporation. Rule 10.14(e) provides that if a party electing to represent itself is a corporation, the party may act through any individual who is an officer of the party and who is authorized to represent it. *See* TBMP §114 (2d ed. rev. 2004). In this case, Mr. Kitchen states that he is an officer (president and co-owner) of opposer, and is authorized to represent opposer in that capacity. Thus, although Mr. Kitchen may not be an attorney, the rules do not prohibit him from representing opposer, a corporation, in his capacity as an officer of the corporation.

We next turn to applicant's evidentiary objections and the critical problems, of which there are many, relating to opposer's submissions. Board inter partes proceedings are

governed by, inter alia, the Lanham Trademark Act of 1946, as amended, the Trademark Rules of Practice, the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The Trademark Act and the various rules provide a framework for the orderly conduct of litigation before the Board. Because the Board is an administrative tribunal empowered to determine only the right to register, its rules and procedures necessarily differ in some respects from those prevailing in the Federal district courts. However, within the rules, there are a number of ways to properly introduce evidence into the record of a Board proceeding, none of which opposer utilized.

We initially note that Mr. Kitchen chose to appear on behalf of his corporation. While, as discussed above, this representation is permissible, it is generally advisable for a person not acquainted with the technicalities of the procedural and substantive law involved in an opposition proceeding to secure the services of an attorney who is familiar with such matters. Litigants and their representatives, such as Mr. Kitchen, are obligated to review and become familiar with the Trademark Rules of Practice and the Trademark Manual of Board Procedure, which are readily available on the Internet at http://www.uspto.gov. Strict compliance with the Trademark Rules of Practice is expected of all parties before the

Board, whether or not they are represented by counsel familiar with Board practice. *See* McDermott v. San Francisco Women's Motorcycle Contingent, 81 USPQ2d 1212 (TTAB 2006), *aff'd*, (Fed. Cir., No. 07-1101, July 11, 2007). Failure to follow the Board's well-established and widely-disseminated practice and procedure is at the party's peril.

As noted above, opposer submitted its final brief on the case, accompanied by a stack of documents, on the last day of its testimony period. Applicant objected to the several exhibits attached to the brief as being improperly submitted.

Evidentiary material attached to a brief on the case can be given no consideration unless it was properly made of record during the testimony of the offering party. Plus Products v. Physicians Formula Cosmetics, Inc., 198 USPQ 111, 112 n.3 (TTAB 1978); and TBMP § 539 (2d ed. rev. 2004). Opposer acknowledged that there may be problems with its submission when it invited the Board to "be lenient with our shortcomings in legal protocol." Given the Board's well-established rules and the Board's inherent authority to conduct inter partes proceedings in an orderly fashion, opposer's invitation is declined. Firstly, inasmuch as opposer did not take any testimony, none of the documents were identified and introduced during the taking of testimony. Secondly, the documents were not accompanied by

a notice of reliance and, even if they were, all of the documents, save one, comprise improper subject matter for introduction by a notice of reliance.

Certain types of evidence need not be introduced in connection with the testimony of a witness but may instead be made of record by filing the materials with the Board under cover of one or more notices of reliance during the testimony period of the offering party. TBMP § 704 (2d ed. rev. 2004). In the present case, more specifically, the following documents are not subject to introduction by way of a notice of reliance: a "schedule" of opposer's marks (ex. no. I); a listing of applicant's marks (ex. no. II); a listing of opposer's "furniture type items" (ex. no. III); opposer's catalogs (ex. nos. IV, V, and VII); a listing of a few customer orders (ex. no. VI); an agreement between the parties to settle another Board proceeding (ex. no. VIII); copies of email correspondence between the parties (ex. no. IX); a listing of various URL names obtained by the parties and others (ex. no. X); advertisements of applicant (ex. nos. XI, XI and XIII); opposer's internal documents (ex. no. XIV); promotional materials of a third-party (ex. no. XV); an excerpt from applicant's website (ex. no. XVI); additional email communications between the parties (ex. no. XVII); a listing of opposer's "trademark filings to date" (ex. no. XVIII); an example of opposer's product packaging

(ex. no. XIX); and a side-by-side comparison of the parties' marks, goods and services, slogans, URLs and advertisements (ex. no. XX). So as to be clear, even if a notice of reliance had accompanied these documents, none of them is subject matter for introduction by a notice of reliance. And, as indicated earlier, there is no testimony deposition in which the documents were identified and introduced as exhibits.

That leaves the only other document opposer submitted during its testimony period, namely the status and title copy of opposer's pleaded registration. Trademark Rule 2.122(d)(2) provides that a registration owned by any party to a proceeding may be made of record by that party by appropriate identification and introduction during the taking of testimony **or by filing a notice of reliance**, which shall be accompanied by a copy (original or photocopy) of the registration prepared and issued by the Patent and Trademark Office showing both the current status of and current title to the registration. The status and title copy of opposer's registration, although proper subject matter for introduction into the record by a notice of reliance, was not accompanied by the notice as required by the rules of practice. *See* TBMP 704.02 (2d ed. rev. 2004).

Accordingly, none of the documents submitted by opposer was properly introduced into the record.

Insofar as the pleadings are concerned, statements made in pleadings cannot be considered as evidence in behalf of the party making them; such statements must be established by competent evidence during the time for taking testimony. Times Mirror Magazines, Inc. v. Sutcliff, 205 USPQ 656, 662 (TTAB 1979); and TBMP § 704.06(a) (2d ed. rev. 2004). In applicant's answer, applicant "acknowledges that [opposer] has used its two word version of the mark STRESS LESS for various goods for several years...", but that applicant "first established use of its one word STRESSLESS mark for furniture items in 1971 and has been well known in the retail furniture field for more than 30 years under the STRESSLESS brand." (Answer, ¶ 1). In response to opposer's allegations relating to opposer's Registration No. 2299052, applicant "denies that [opposer] has any trademark rights in class 020 or for furniture, nor has it established rights for sales of furniture." (Answer, ¶ 2). Thus, there is no admission in the answer regarding the status and title of opposer's pleaded registration or any prior common law rights upon which opposer could rely in this proceeding. Rather, allegations relating thereto were subject to proof at trial, an exercise that opposer failed to undertake.

Opposer's brief contains numerous factual allegations relating to the merits of the pleaded claim. Indeed, as correctly pointed out by applicant, certain of opposer's

statements are tantamount to unsworn "testimony." Factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value. Electronic Data Systems Corp. v. EDSA Micro Corp., 23 USPQ2d 1460, 1462 n.5 (TTAB 1992); and TBMP § 704.06(b) (2d ed. rev. 2004).

In sum, inasmuch as opposer did not take any testimony or properly introduce any other evidence, none of opposer's documents has been considered.[3]

To allow opposer's documents into the record would work a substantial injustice to applicant. Although applicant indicated that it shared opposer's view toward "legal protocol," it readily recognized that none of opposer's evidence was properly submitted and, thus, it objected to the improper introduction. Applicant recognized the uncertainty regarding opposer's record, and it would be unfair to expect applicant to have mounted a vigorous defense not knowing the strength of opposer's case. This dilemma made it impossible for applicant to know how to respond when it came to its case in chief.

[3] We agree with applicant's assessment that opposer, in its brief, asks the Board to address numerous issues that are beyond the Board's jurisdiction. Thus, even if opposer's evidence was considered, much of the relief requested by opposer is not available herein.

Applicant's dilemma is evidenced by its "technical response" and later statement that it submitted its "Case Presentation" "somewhat in a vacuum." Indeed, applicant simply was not on notice as to the strength of opposer's case that applicant needed to rebut during its testimony period.

Given the parties' apparent fondness of an informal trial, the parties could have agreed, in advance of the testimony periods, on the parameters of such a trial. As indicated in TBMP § 702 (2d ed. rev. 2004):

> [T]he parties may enter into a wide variety of stipulations concerning the timing and/or introduction of specified matter into evidence. For example, the parties may stipulate that matter otherwise improper for a notice of reliance (such as documents obtained by production under Fed. R. Civ. P. 34) may be introduced in that manner, that testimony may be submitted in the form of an affidavit, that a party may rely on its own discovery responses or that notices of reliance can be filed after the testimony periods have closed. There may also be circumstances where improperly offered or otherwise noncomplying evidence may nevertheless be deemed stipulated into the record where, for example, no objection to the evidence is raised and/or the nonoffering party treats the evidence as being of record.

*See also* TBMP § 705 (2d ed. rev. 2004) ["The use of stipulated evidence normally results in savings of time and expense for all concerned."].

The parties alternatively could have agreed to an accelerated case resolution (ACR) in this case. Parties that file cross motions for summary judgment may stipulate that their summary judgment motions be treated as the final record and briefs. In those cases where the parties so stipulate, the Board will expedite a decision in the case, but decide the merits in accordance with the evidentiary burden at trial, that is, by a preponderance of the evidence.

To effectuate their desire to avoid a formal trial conducted in accordance with the Board's rules of practice, however, it was incumbent upon the parties to stipulate to such action. Here, there is no agreement between the parties. Although applicant appeared willing to participate in some form of an informal trial, applicant clearly objected, in the first instance, to the improper submission of evidence by opposer. Thus, there was no stipulation in place to govern an informal trial in this case.

The burden of proof rests with opposer in this opposition proceeding. In Board proceedings, the plaintiff must establish its pleaded case (in this case, priority and likelihood of confusion), and must do so by a preponderance of the evidence. Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000). In order for a plaintiff to prevail on a claim of likelihood of confusion,

opposer must prove it has proprietary rights in the term it relies upon to demonstrate likelihood of confusion as to source.

As the plaintiff in this proceeding, it was incumbent upon opposer to properly submit evidence to demonstrate its proprietary rights in its claimed mark. Opposer, having the burden of proof herein, failed to meet its burden in this regard, and thus cannot prevail on its claim of likelihood of confusion based on the marks.

**Decision:** The opposition is dismissed.