

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB 10/20/98

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Guiltless Gourmet, Inc.

v.

Sammie Miles

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Opposition No. 95,471  
to application Serial No. 74/452,855  
filed on November 1, 1993

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Roxanne Eades Morgan of Felsman, Bradley, Gunter & Dillion  
for Guiltless Gourmet, Inc.

Sammie Miles, pro se.

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Before Seeherman, Hanak and Wendel, Administrative Trademark  
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Sammie Miles (applicant) seeks to register GUILT FREE GOURMET for "educational services, namely conducting cooking classes and distributing course materials in the form of books and videos on the subject of low fat recipes." The application was filed on November 1, 1993 with a claimed

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first use date of November 10, 1990. Applicant disclaimed the exclusive right to use the word GOURMET apart from the mark in its entirety.

In its amended notice of opposition, Guiltless Gourmet, Inc. (opposer) alleged that it is the owner of registrations of GUILTLESS GOURMET in typed drawing form for "tortilla chips and spicy tomato-based salsa dip" (Registration No. 1,816,047) and for "dairy-based dips and bean-based dips" (Registration No. 1,937,014). In addition, opposer alleged that it is the owner of Registration No. 1,927,843 for the mark GUILTLESS GOURMET'S HEALTHY SNACKING NEWSLETTER in typed drawing form for "periodical newsletter in the fields of health and diet." With regard to this latter registration, opposer disclaimed the exclusive right to use HEALTHY SNACKING NEWSLETTER apart from the mark in its entirety. Opposer alleged that the "continued use" of applicant's mark "is likely to cause confusion, deception and mistake with opposer's marks." (Amended notice of opposition paragraph 13).

Applicant filed a response which this Board construed as a general admission of opposer's ownership of the aforementioned registrations, but also as "a continuing denial of any likelihood of confusion." (Board order of June 12, 1997 at page 2).

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Both parties filed briefs. Neither party requested a hearing.

The record in this case includes the discovery deposition of applicant (made of record by opposer), the testimony deposition of Barton Glaser (opposer's vice president of finance), the testimony deposition of applicant and the testimony deposition of Pauline Cady (an acquaintance of applicant). In addition, opposer properly made of record certified status and title copies of its aforementioned registrations.

At the outset, we note that priority is not an issue in this proceeding because opposer has properly made of record its registrations of GUILTLESS GOURMET and GUILTLESS GOURMET'S HEALTHY SNACKING NEWSLETTER. See King Candy v. Eunice King's Kitchen, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

In 1989 opposer commenced sales of its GUILTLESS GOURMET baked tortilla chips. From the beginning, opposer has promoted its GUILTLESS GOURMET products as non-fat or low-fat. Opposer has employed words such "low fat," "fat free," "baked not fried" and "no oil" in a prominent manner on virtually all of its product packaging and promotional materials for its GUILTLESS GOURMET products. In short, all of opposer's GUILTLESS GOURMET products have been promoted as "healthy" products that are good for consumers. By 1996,

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opposer's GUILTLESS GOURMET tortilla chips had become the second largest selling brand in the better-for-you tortilla chip market. Only BAKED TOSTITOS had a higher market share. Opposer's GUILTLESS GOURMET chips and dips are sold in supermarkets, mass merchandisers (such as K-mart), health food stores and specialty gourmet stores. In 1993 opposer began distributing a newsletter under the mark GUILTLESS GOURMET'S HEALTHY SNACKING NEWSLETTER. This newsletter has been continuously distributed since 1993 not only to consumers, but also to health professionals who are in a position to educate others on healthy eating. GUILTLESS GOURMET'S HEALTHY SNACKING NEWSLETTER contains recipes, educational materials regarding nutrition and health, and product information and coupons for GUILTLESS GOURMET chips and dips.

Applicant refers to herself as SAMMIE MILES, THE GUILT FREE GOURMET. Applicant conducts classes and seminars under the service mark GUILT FREE GOURMET. In addition, applicant has published a cookbook with over 1,200 low-fat recipes which is titled GUILT FREE GOURMET. The title page of this book indicates that it was first printed in 1994. Because priority is not an issue in the proceeding inasmuch as opposer has made of record its aforementioned registrations, we will not dwell on when applicant first used the mark GUILT FREE GOURMET. In her brief, applicant claims that she

first used this mark in 1988 "as proven by the deposition of Pauline Cady." (Applicant's brief page 5, unnumbered). However, Ms. Cady testified that in late 1988 and early 1989, she did not know applicant as the GUILT FREE GOURMET. (Cady deposition pages 8-11). Ms. Cady also testified that at that time, applicant did not have, to Ms. Cady's knowledge, any books or other printed materials which she utilized in conducting her cooking classes. (Id.).

Applicant testified that, in the past, she recommended to others opposer's GUILTLESS GOURMET chips. (Miles discovery deposition page 41). Indeed, applicant even recommended opposer's GUILTLESS GOURMET chips and dips on a television program. (Miles discovery deposition page 45). Finally, applicant testified that when she selected the mark GUILT FREE GOURMET, she believed that the GUILT FREE portion of the mark was unique. (Miles testimony deposition page 27). Indeed, at the time she selected her mark, applicant was unaware of the use by any other company of GUILT FREE, and that subsequently she learned of only one other company using this term, namely, GUILT FREE ICE CREAM COMPANY. (Id.).

Turning to the issue of likelihood of confusion, it appears that it is applicant's position that there is no likelihood of confusion because her services are different from applicant's goods. (Applicant's brief page 3,

unnumbered). As applicant stated at page 42 of her discovery deposition, "you're [opposer] chips and dips and things. I'm an author, a person, a minor educational [sic] and video and things. It's a gourmet book. It's not chips and dips." As for opposer's registration of GUILTLESS GOURMET'S HEALTHY SNACKING NEWSLETTER for "periodical newsletter in the fields of health and diet," applicant dismisses this registration by noting that "opposer started distributing GUILTLESS GOURMET'S HEALTHY SNACKING NEWSLETTER after these proceedings started." (Applicant's brief page 3, unnumbered). See also pages 42-43 of applicant's discovery deposition where applicant stated as follows: "And I know you guys [opposer] have come out lately with a newsletter, but that, too, was after me."

Of course, what applicant fails to understand is that because opposer has properly made of record its Registration No. 1,927,843 for GUILTLESS GOURMET'S HEALTHY SNACKING NEWSLETTER, opposer has superior rights in this mark over applicant's rights in her mark GUILT FREE GOURMET. In comparing the goods set forth in opposer's Registration No. 1,927,843 with the services as set forth in applicant's application, we find that they are clearly related. Opposer's goods consist of a newsletter in the fields of health and diet. Applicant's services include the distribution of course materials (books) on the subject of

low fat recipes. As applicant has noted on numerous occasions, low fat recipes are one important factor contributing to a proper diet and good health. Thus, not only are the goods of opposer's registration (newsletters) similar in form to applicant's course materials (books) in that they are all printed matter, but in addition, both opposer's newsletters and applicant's course materials (books) cover subjects which are closely related and indeed, in part, identical.

In comparing opposer's mark GUILTLESS GOURMET'S HEALTHY SNACKING NEWSLETTER and applicant's mark GUILT FREE GOURMET, it need hardly be said that the marks must be compared in their entireties. However, in making this comparison, it is not improper to give more weight to an arbitrary portion of a mark and less weight to a descriptive or highly suggestive portion of a mark. With regard to opposer's mark, we find that the dominant portion is GUILTLESS GOURMET'S. The remaining portion (HEALTHY SNACKING NEWSLETTER) is descriptive of the contents of opposer's newsletter, and has quite properly been disclaimed. On the other hand, not only is the first portion (i.e. GUILTLESS GOURMET'S) of opposer's mark arbitrary, but in addition, it serves as a clear reference to opposer's GUILTLESS GOURMET chips and dips. As previously noted, opposer's GUILTLESS GOURMET tortilla chips are reasonably well known in that they are the second

leading selling brand of low-fat tortilla chips. Finally, we note that applicant herself has acknowledged the uniqueness of the GUILTLESS GOURMET'S portion of opposer's mark by stating that other than opposer and herself, she is unaware of any other names or marks which include the words "guilt" and "gourmet." (Applicant's testimony deposition page 27).

Obviously, the most prominent portion of opposer's mark (GUILTLESS GOURMET'S) is extremely similar to applicant's mark GUILT FREE GOURMET in terms of visual appearance and pronunciation. Moreover, in terms of meaning, the most prominent portion of opposer's mark and applicant's mark are virtually identical. The word "guiltless" is defined as meaning "free from guilt." Webster's New World Dictionary (2d ed. 1970).

Given the fact that opposer's goods (newsletters in the field of health and diet) are very similar to applicant's services which include the distribution of course materials (books) on the subject of low fat recipes, we find that the use of GUILTLESS GOURMET'S HEALTHY SNACKING NEWSLETTER on the former and GUILT FREE GOURMET on the latter is likely to result in confusion. Moreover, opposer's Registration No. 1,927,843 depicts opposer's mark GUILTLESS GOURMET'S HEALTHY SNACKING NEWSLETTER in typed drawing form. This means that opposer's rights in this mark are "not limited to the mark

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depicted in any special form." Phillips Petroleum v. C. J. Webb, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971).

Accordingly, in our likelihood of confusion analysis, we "must consider all reasonable manners in which those words [in opposer's mark] could be depicted." INB National Bank v. Metrohost, 22 USPQ2d 1585, 1588 (TTAB 1992). Should opposer depict its mark with GUILTLESS GOURMET'S in large lettering on one line and HEALTHY SNACKING NEWSLETTER in smaller lettering on a second line, then the similarities between opposer's mark and applicant's mark GUILT FREE GOURMET would be such that confusion is almost inevitable.

Decision: The opposition is sustained.

E. J. Seeherman

E. W. Hanak

H. R. Wendel  
Administrative Trademark  
Judges, Trademark Trial and  
Appeal Board