

UNITED STATES DEPARTMENT OF COMMERCE  
Patent and Trademark Office  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

RLS/Johnson

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB

Opposition No. 99,709

JUNE 29, 99

Rudolf Wild GMBH & Co.

v.

The Coca-Cola Company

Before Simms, Hohein and Hairston, Administrative Trademark  
Judges.

Opinion by Simms, Administrative Trademark Judge:

This case now comes up on a number of matters including  
opposer's motion to strike parts of applicant's answer,  
applicant's motion for summary judgment and opposer's  
attempt to amend the notice of opposition.<sup>1</sup>

In the notice of opposition against applicant's intent-  
to-use application to register the mark MINUTE POUCH for  
fruit drinks, fruit juices and concentrates ("POUCH"  
disclaimed), opposer, a German limited partnership, asserts  
that, through licensees, it has sold juice drinks in single-  
serving packages unique to the juice and fruit drinks  
category, which packages it has called "pouches." Opposer  
asserts that both the package and word "pouch" have come to

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<sup>1</sup> The delay in acting upon the foregoing matters is regretted.

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be associated in the minds of consumers with opposer and its licensed juice drinks. Opposer further asserts that either the term "pouch" is suggestive for the container for its juice drinks or that it is descriptive thereof and has acquired secondary meaning. In any event, opposer asserts that applicant's mark so resembles opposer's "previously-used mark" as to be likely to cause confusion, to cause mistake or to deceive. As a separate "ground" for opposition, opposer asserts that:

Applicant intends and is attempting to genericize [sic] the word "pouch" in connection with packaging for juice or fruit drinks, causing it no longer to be exclusively associated with Opposer, and thus damaging Opposer and its marketing of its juice drinks in competition with Applicant.

Finally, opposer asserts that applicant has no intention of using the word "pouch" for any of the fruit drink products for which it seeks registration of the mark but instead intends to identify only its packaging for such products with the word "pouch." On this basis, opposer alleges that the application is void *ab initio*.

In its answer to the opposition applicant has denied the essential allegations of the opposition but has admitted that the term "POUCH" is descriptive of containers for fruit juices of the types used by opposer and its licensees. As defenses, applicant asserts that the opposition fails to state a claim upon which relief can be granted; that the

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notice of opposition was not timely filed;<sup>2</sup> that opposer lacks standing; that opposer will not be damaged by issuance of a registration for the mark MINUTE POUCH; that opposer and its licensees have used the word "pouch" as a common descriptive and/or generic term; and that to the extent that opposer has any trademark rights in connection with juice drink products, those trademark rights are not superior to those of applicant.

Turning first to opposer's motion to strike, opposer seeks to strike applicant's first four defenses (that the opposition fails to state a claim, that the notice of opposition was not timely filed, that opposer lacks standing and that opposer will not be damaged by issuance of a registration to applicant). It is opposer's position that it has pleaded its standing and grounds for opposition. More particularly opposer asserts that it has a real interest in the outcome of this proceeding because it has pleaded that it is engaged in the production and sale of juice drinks which are sold in packages called "pouches." These "pouches" have, according to opposer's pleading, come to be associated in the minds of consumers with opposer and its juice drinks.

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<sup>2</sup> Applicant has subsequently withdrawn this defense after learning that a second request for an extension of time in which to oppose was granted after the notice of opposition was filed. Such defense is accordingly stricken from applicant's answer.

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When a party moves to strike an affirmative defense, such as that the notice of opposition fails to state a claim, the question to be determined is whether the notice of opposition does indeed set forth facts which, if proved, would entitle opposer to the relief it is seeking. A plainiff may utilize the defendant's assertion of failure to state a claim to test the sufficiency of its pleading by moving under Rule 12(f) of the Federal Rules of Civil Procedure to strike this defense from the answer. S.C. Johnson & Sons, Inc. v. GAF Corp., 177 USPQ 720 (TTAB 1973).

Because the essence of the issues presented by opposer's motion to strike are at the heart of applicant's motion for summary judgment, we shall turn to that motion before resolving the motion to strike.

In its motion for summary judgment, applicant argues that, because opposer has never used "pouch" as a trademark and because the term is generic, opposer does not have a sufficient commercial interest to demonstrate standing; that opposer's claim that applicant is attempting to "genericize" the term "pouch" is not a recognizable basis for opposing registration; and that the undisputed facts show that applicant is using its asserted mark in commerce for the goods specified in the application, so that opposer's claim that applicant lacks a bona fide intent to use the mark for its goods is without merit.

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In particular, applicant maintains that opposer or its licensees have never used the term "pouch" as a trademark but rather have used it in a non-trademark manner. Applicant points to the numerous appearances of this term on the licensee's packaging wherein the term is used generically. See below. For example, "10 POUCHES" and "...frozen Capri Sun® All Natural™ pouches...", "Fun pouch... Capri Sun® All Natural™ pouches..." Applicant points out that while the brand name CAPRI SUN appears with the registration symbol, the term "pouch" is generally in lower case lettering without any indication of trademark significance. Applicant argues, therefore, that even opposer uses the term "pouch" as the name of a type of container.

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As further evidence of the generic nature of the term "pouch," applicant points to various third-party uses made of record with its motion for summary judgment (see pages 9 and 10 of applicant's brief), various patents showing pouch technology where the term is used generically, media usage and dictionaries. With respect to opposer's trade dress design, which is the subject of a registration, applicant argues essentially that that trade dress is irrelevant to the issues in this proceeding. (The use of that trade dress is licensed to the maker of the CAPRI SUN fruit juice drink.)

With respect to the "genericization" claim, applicant argues that this is not a recognized ground for opposition. Concerning the last ground for opposition (lack of bona fide intent to use the mark on the goods), applicant asserts that it uses its mark as a mark for the concentrate and that there is no merit to this allegation.<sup>3</sup>

Opposer filed a brief in opposition to the motion as well as a proposed amended notice of opposition which pleads that applicant's mark is merely descriptive (in that it may mean "small pouch") of applicant's concentrate packaged in bag-like containers for the food service industry. With respect to the motion for summary judgment, opposer argues

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<sup>3</sup> The record on summary judgment shows that applicant began selling its goods in July 1995 and that the mark MINUTE POUCH

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that there are several disputes which prevent the entry of summary judgment. These include whether the term "Pouch" is generic, whether the relevant field for consideration is juice beverages, and whether opposer has exclusive rights to use "Pouch" for its goods as a result of long use and ownership of the trade dress of a pouch and its registration for that trade dress. Opposer argues that its licensee is the only entity authorized to use this trade dress for juice beverages; that opposer has substantially exclusive use of this term in connection with its goods and that this term has become distinctive of its goods. With respect to the "genericization" claim, it is opposer's position that this claim is within the scope of a Lanham Act Section 2(d) claim of likelihood of confusion. Finally, opposer argues that it is entitled to Rule 56(f) discovery concerning applicant's intent to use its asserted mark at the time the application was filed, in view of the evidence submitted by applicant on summary judgment. Opposer also argues that the question of intent is particularly unsuited to disposition by summary judgment.

In reply, applicant argues, among other things, that opposer has offered no evidence of the alleged acquired distinctiveness of the term "Pouch," that applicant submitted its own evidence of use of MINUTE POUCH with its

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appears on containers of MINUTE MAID brand frozen fruit juice

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summary judgment motion before it was required to make such use under intent-to-use procedures in order to rebut opposer's claim of lack of intent to use, and that there is no issue of fact concerning applicant's intent to use the mark. Accordingly, applicant argues that opposer is not entitled to Rule 56(f) discovery.

Upon careful consideration of the materials of record and the arguments of the parties, we deny opposer's Rule 56(f) request for discovery for the reasons indicated by applicant. We also agree with applicant that there are no genuine issues of fact in dispute and that summary judgment should be entered in favor of applicant. Specifically, concerning the motion for summary judgment itself, while opposer has listed what it regards as some alleged issues in dispute, we do not believe that those issues are genuinely in dispute. Although it is a fact that opposer has trade dress rights in a configuration which one may call a "pouch," it does not follow that opposer has rights to the generic term ("pouch") which may be used to describe that trade dress. There is no genuine issue that this term is in fact generic, inasmuch as opposer itself is using this term generically, and other evidence submitted by applicant clearly shows that this term is generic.<sup>4</sup> Suffice it to say

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concentrate sold to commercial vendors.

<sup>4</sup> The Board may determine that a term is not proprietary on summary judgment. *Teleflora, Inc. v. Florists Transworld*

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that there is no genuine issue concerning opposer's lack of proprietary rights in the term "pouch." Whether one views this case in terms of the lack of standing on the part of opposer (as does applicant) or as a failure to present a claim of likelihood of confusion (there can logically be no likelihood of confusion unless opposer has some rights in an asserted term), applicant's motion is well taken.

We also agree with applicant that opposer's "genericization" claim is not a cognizable claim for the Board. Opposer has pointed to no authority recognizing this alleged claim as a ground for opposition. Also, we agree with applicant that there is no genuine issue with respect to applicant's intent to use its mark, for the reasons stated by applicant. Applicant has in fact demonstrated trademark use of its asserted mark for its concentrate. See, for example, Exhibits A and G attached to the Taylor affidavit submitted with applicant's motion.

Finally, opposer's belated attempt to avoid summary judgment by its pleading of mere descriptiveness is of no avail. We see no reason why this ground could not have been asserted earlier since there was no evidence which applicant submitted on summary judgment which would give rise to this claim. A party should not be able to avoid the entry of

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Delivery Association, 217 USPQ 1081 (C.D.Cal. 1981) and Data National Corporation v. Bell South Corporation, 18 USPQ2d 1862 (TTAB 1994), *aff'd.*, 60 F.3d 1565 (Fed. Cir. 1995).

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summary judgment by an amendment which is asserted after undue delay, as the result of a dilatory motion or because of its futility. See *Moldea v. New York Times Co.*, 793 F. Supp. 338 (D.D.C. 1982), *Waldoboro Bank F.S.B. v. American Casualty Co.*, 775 F. Supp. 432 (D.Me. 1991) and *Martinez v. Junta de Planificacion*, 736 F. Supp. 413 (D.P.R. 1993).

In sum, opposer's motion to strike is denied, applicant's motion for summary judgment is granted, and opposer's motion to amend is denied. The opposition is dismissed.

R. L. Simms

G. D. Hohein

P. T. Hairston  
Administrative Trademark Judges,  
Trademark Trial and Appeal  
Board