

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Mailed: October 12, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Conopco, Inc. dba Lever Brothers Co.
v.
Karen L. Huff

Cancellation No. 92041392
to Registration No. 2604321
issued on August 6, 2002

Gregory P. Gulia of Duane Morris LLP for Conopco, Inc. dba
Lever Brothers Co.

Karen L. Huff pro se.

Before Hohein, Hairston, and Kuhlke, Administrative
Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Conopco, Inc. dba Lever Brothers Co. (petitioner) has
petitioned to cancel the registration owned by Karen L. Huff
(respondent) for the mark NO MEASURING. NO MESS! (in typed
form) for "laundry detergent in individual water permeable
bags" in International Class 3.¹

¹ Registration No. 2604321, issued August 6, 2002, which sets
forth a date of first use of the mark anywhere and in commerce of
December 14, 1995.

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In the petition to cancel, petitioner asserts that "there are numerous third parties using the phrase 'No Measuring No Mess' and highly similar terminology in connection with all types of products, including laundry detergent and related products"; that the "phrase 'No Measuring No Mess' is inherently non-distinctive and incapable of identifying a single source of goods" because of its descriptive and non-distinctive nature; that the "primary significance of the phrase 'No Measuring No Mess' to the purchasing public is as a description of the attributes and characteristics of the goods and not to identify a product or source of a product"; that respondent "does not use the phrase 'No Measuring No Mess' as a trademark"; and that petitioner is "likely to be damaged by the continuing registration of the mark in the registration because it may interfere with current and future descriptive use by petitioner of the phrase 'No Measuring No Mess' in connection with its laundry detergent products in tablet form."

Respondent, in her answer, has denied the essential allegations of the petition to cancel and has asserted various affirmative defenses. However, inasmuch as respondent did not take any testimony, submit any other

evidence or file a brief on the case, we consider the affirmative defenses to have been waived.²

THE RECORD

The record consists of the pleadings; the file of the subject registration; and the testimony deposition (with exhibits) of Ms. Stephanie Jacobs, a legal assistant with Duane Morris, petitioner's outside counsel. In addition, petitioner submitted a notice of reliance upon respondent's responses to petitioner's requests for admissions (with exhibits), articles from three different printed publications, excerpts from dictionaries of definitions of various words, and copies of papers filed with the Board in connection with an earlier motion for summary judgment. The other documents submitted under the notice of reliance (consisting of excerpts from an "Internet Dilution Report") do not appear to be proper subject matter for submission under a notice of reliance; however, inasmuch as respondent has made no objection to these documents they are deemed to have been stipulated into the record and have been considered for whatever probative value they have. Hunter

² Petitioner also stated in its brief that respondent did not provide responses or objections to petitioner's interrogatories or document requests. Petitioner argues in a footnote that "[t]his alone is reason enough to grant judgment for Petitioner." Br. p. 11 n.1. Petitioner, however, never filed a motion to compel, nor is there a Board order compelling responses to the interrogatories or document requests. See Trademark Rule 2.120(g). Thus, petitioner's request for sanctions in the form of judgment is not well taken.

Publishing Co. v. Caulfield Publishing Ltd., 1 USPQ2d 1996, 1997 n.2 (TTAB 1986). Only petitioner has filed a brief on the case.

STANDING

Petitioner asserts in its brief that it is "a leading manufacturer of household products, including laundry detergents" and that it "received correspondence from [respondent] objecting to petitioner's use of the phrase 'no measuring no mess' in connection with petitioner's laundry detergents in tablet form based on [respondent's] registration of "NO MEASURING. NO MESS!." Br. pp. 9-10. Although petitioner did not submit testimony or other evidence regarding its use of the phrase NO MEASURING NO MESS, in view of respondent's answer to certain allegations in the petition for cancellation, we find that for purposes of this proceeding respondent has admitted that petitioner sells laundry detergent. See, e.g., Answer p. 2 (in which respondent states that: "Notably, the petitioner's tablet product came into being at least 5 years after registrant's product was already in the marketplace using this uniquely identifying mark specific to her product which is one of a kind...As a direct result, Petitioner marketed their laundry tablets 4 years later also using 'no measuring no mess.'") See also, Notice of Reliance exh. F (Declaration of Bridget A. Short and accompanying exhibits). Thus, the record

sufficiently shows that petitioner has a real interest in canceling respondent's registration of the mark so that it may use the allegedly descriptive phrase in describing its product and, therefore, has standing to bring this proceeding. See *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023 (Fed. Cir. 1999); *Astra Pharmaceutical Products, Inc. v. Pharmaton, S.A.*, 345 F.2d 189, 145 USPQ 461 (CCPA 1965).

DESCRIPTIVENESS

Petitioner argues that respondent's mark NO MEASURING. NO MESS! merely describes certain features of respondent's identified goods (laundry detergent in individual water permeable bags) in that respondent's product is designed to eliminate the need for the user to measure laundry detergent and thereby prevent any possible mess caused by measuring. In support of its position, petitioner relies on certain admissions made by respondent in her response to petitioner's requests for admissions. Specifically, petitioner points to the following admissions:

Admission No. 5: Registrant's Product is in the form of a water permeable bag that holds a pre-calculated amount of laundry detergent.

Admission No. 6: Registrant's Product is in the form of a water permeable bag that holds a pre-measured amount of laundry detergent.

Admission No. 30: Registrant's Product eliminates the need for the measuring of detergent.

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Admission No. 48: To make use of Registrant's Product, it is not necessary to transfer detergent from a jug to any type of measuring device.

Admission No. 100: Registrant's Product was designed to eliminate the hassle associated with measuring detergent.

Admission No. 97: The design of Registrant's Product ensures a controlled dosage of laundry detergent.

Admission No. 81: Registrant's Product was designed to help consumers avoid the spilling that can occur with powdered detergents.

Admission No. 84: Registrant designed Registrant's Product to help consumers avoid the spilling that can occur with loose powder detergents.

Admission No. 85: Registrant's Product was designed to help consumers avoid the spilling that can occur with loose powder detergents.

Admission No. 90: Registrant designed Registrant's Product to help consumers avoid the spilling that can occur with liquid detergents.

Admission No. 91: Registrant's Product was designed to help consumers avoid the spilling that can occur with liquid detergents.

Petitioner argues that by respondent's own admissions, respondent's product requires "no measuring" and creates "no mess." Thus, when applied to respondent's goods the phrase "no measuring no mess" "directly describes without conjecture or speculation the qualities, attributes and characteristics of the goods." Br. p. 20.

In addition, petitioner argues that others in the trade routinely use the phrase "no measuring no mess"

to describe their laundry detergent products.

Petitioner submitted examples of this use as exhibits to the requests for admissions. While such documents cannot be submitted for the truth of the matter contained therein, they can be probative, however, of how the phrase is used and thus is perceived in the industry. Specifically, respondent admitted that she had not licensed or otherwise authorized the right to use the phrase "no measuring no mess" in connection with the various examples of third-party use attached as exhibits to the requests for admissions. A few examples are set forth below:

CLEANTEC is tough on dirt soft on the environment...It is convenient, NO measuring, NO mess. Just place the two ceramic discs into your washing machine with your soiled clothes and leave them there for the entire wash, rinse and spin cycles. [http://community-2.webtv.net/essentialhealth/PRODUCTS/;](http://community-2.webtv.net/essentialhealth/PRODUCTS/)

Features: ...No measuring, no mess...When using Purex Tabs, you won't have the hassle of measuring into a small cup from a heavy jug or liquid or mess with clumpy, hard to scoop powder...No matter how many times you wash your clothes, Purex Tabs work hard every time to help keep them looking bright and colorful as the day you bought them. www.dialcorp.com; and

Keep it Clean: Start with Tide Tabs. There's no measuring, no mess and no problem with portability. www.tide.com.

Petitioner also argues that many firms outside the laundry detergent industry use the phrase "no measuring no

mess" "to fairly describe similar features and attributes of their own products." See generally, Stephanie L. Jacobs Deposition and accompanying exhibits. However, this evidence is not particularly probative of the descriptive significance of the phrase as used with respondent's goods.

Finally, petitioner submitted the following dictionary definitions:

Measure: v. *ured, uring* 5b. To allot or distribute as if by measuring. The American Heritage College Dictionary (3rd ed. 1993).

Mess: n. 1. A disorderly or dirty accumulation, heap or jumble. The American Heritage College Dictionary (3rd ed. 1993).

Based on this record, we find that the phrase NO MEASURING. NO MESS! is merely descriptive of laundry detergent in individual water permeable bags in that it describes a significant feature of the product, namely, that respondent's laundry detergent requires no measuring and creates no mess. When applied to respondent's goods, the phrase NO MEASURING. NO MESS! immediately describes, without conjecture or speculation, these significant features of respondent's goods. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for prospective consumers of respondent's goods to perceive readily the merely descriptive significance of the phrase NO MEASURING. NO MESS! as it pertains to respondent's goods. See In re

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Boston Beer Co. L.P., 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (THE BEST BEER IN AMERICA so highly laudatory and descriptive as applied to beer and ale that it is incapable of acquiring distinctiveness); Stromgren Supports, Inc. v. Bike Athletic Co., 43 USPQ2d 1100 (TTAB 1997) (COMPRESSION PERFORMANCE SHORT merely descriptive of elastic athletic garments and outerwear, namely, sports girdles); In re Serv-A-Portion, Inc., 1 USPQ2d 1915 (TTAB 1986) (SQUEEZE N' SERVE merely descriptive of ketchup); and In re Reynolds, 229 USPQ 776 (TTAB 1986) (LOSTA SUDS merely descriptive of liquid dishwashing cleaner).

USE

Petitioner also argues that respondent has not used the phrase "no measuring no mess" as a trademark after 2002. It appears that petitioner is arguing a claim of abandonment rather than claiming that the registration is void based on no bona fide use of such phrase prior to issuance of the registration or the filing date of the underlying application. In any event, petitioner did not provide any evidence to support a claim of no bona fide use prior to filing the underlying application or issuance of the involved registration. To the extent petitioner has instead pleaded abandonment, petitioner did not present sufficient evidence to establish nonuse with an intent not to resume use. Petitioner relies on the following admissions:

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Admission No. 324: Registrant's Product is not currently being sold in any retail outlet.

Admission No. 328: Registrant's Product is not currently being sold outside California.

Admission No. 331: Registrant's Product is not currently available for purchase on the Internet.

Admission No. 332: Registrant's Product is not currently available for purchase in any retail outlet outside California.

These admissions as to "current use" in certain venues are not sufficient to support a prima facie case of abandonment inasmuch as they do not set out nonuse for a period of three consecutive years. 15 U.S.C. § 1127. Petitioner also points to various requests for admissions regarding respondent's gross sales where respondent simply stated in response "unknown." This response does not serve as an admission that respondent had no sales. Petitioner did not present any other evidence to establish abandonment through a showing of nonuse and an intent not to resume use for any period of time. Thus, petitioner has not submitted sufficient evidence to establish abandonment.

Decision: The petition to cancel Registration No. 2604321 on the ground of descriptiveness is granted and the registration will be cancelled in due course.