Proskauer

newsletter

Three Point Shot

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in this issue

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Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. We will attempt to both inform and entertain you by highlighting three sports law-related items and providing you with links to related materials. We hope you enjoy this and future issues. Any feedback, thoughts or comments you may have are both encouraged and welcome.

Oh, the Weather Outside Is Frightful, But the Artificial Snow Makes Environmentalists Spiteful!

When a ski resort in Flagstaff, Arizona announced plans to expand its property and extend the ski season, it was met with a chilly reception. The plan by the ski resort, Arizona Snowball, was to clear 100 acres of forest and spray man-made snow to keep the season going as long as possible. When it was revealed that the snow would be made with recycled wastewater, several groups quickly mounted legal challenges in an effort to push Snowball's plans downhill.

The first challenge to the expansion plan was led by Navajo Nation. In a lawsuit seeking to overturn the approval by the U.S. Forest Service of Snowball's plan, this group of Indian tribes claimed that the land held spiritual significance. A federal district court agreed, but, on appeal to the Ninth Circuit, a three-judge panel rejected the spiritual significance argument. The panel, however, did agree that the Forest Service had not provided a "reasonably thorough discussion" of the risks associated with eating artificial snow created from wastewater. Following an *en banc* rehearing, however, the Ninth Circuit overturned the panel decision, finding that Navajo Nation had not properly raised that particular issue at the district court level, and that the artificial snowmaking would not interfere with the religious ceremonies conducted on the mountain. In June, the U.S. Supreme Court denied the plaintiffs' appeal, deciding not to weigh in on whether the use of treated sewage constituted a "substantial burden" on the exercise of the tribes' religion.

Unfortunately for those looking forward to schussing down the modified wastewater-laden slopes some time soon, following the denial of the tribes' petition for certiorari, a new set of plaintiffs emerged who took a different approach to putting the freeze on the ski resort's expansion plans. Raising strictly environmental concerns, the Save the Peaks Coalition and others quickly filed suit in the U.S. District Court in Arizona. The suit claims that the Forest Service failed to study the health risks of the planned snowmaking process or to conduct an analysis of the dangers associated with ingesting snow created

from treated sewage. The plaintiffs seek an injunction from the court to stop the snowmaking.

In many ski areas in the United States, wastewater is blended with fresh water to make snow; however, the snowmaking system intended to be used by Arizona Snowball would be the first to use reclaimed wastewater alone. The plaintiffs in the *Save the Peaks* case allege that the treated wastewater will contain pharmaceuticals, hepatitis, pollutants, and other harmful drugs, and that the use of such wastewater would violate the National Environmental Policy Act and other federal laws. The attorney for Save the Peaks Coalition has argued that "by approving treated sewage effluent for snow making without adequate analysis, the government essentially turns the ski area into a test facility with our children as the laboratory rats."

In response to the media attention and adverse publicity surrounding the potential dangers of using wastewater at the resort, Snowball recently revealed its intent to post signs informing skiers of the origin of the artificial snow and cautioning them to refrain from eating it. Additionally, those thirsty for a longer ski season have formed a coalition called Reclaim the Peaks, comprised of members of the local ski club and the local Chamber of Commerce, which is in favor of Snowball's expansion and snowmaking plans. Observers interested in this case are advised to put their goggles on, because as both sides dig their poles deeper into their respective positions, it is likely that the resulting legal battle will be filled with bumps.

Shirts Versus Skins? Agent Seeks To Take Shirts off Back of Visiting European Team

With King James and Shaq on the hardwood for the Cleveland Cavaliers, suffering an embarrassing defeat is a risk faced by any team visiting The Q. For Olympiakos, a competitive Greek team from the Euroleague, more was at stake than its morale when it arrived in Ohio to play the Cavs in an exhibition game last month.

Among the folks eagerly awaiting the arrival of the Olmpiakos team was sports agent Tom McLaughlin. McLaughlin was hoping to execute on a nearly five-year-old $400,000 default judgment that he had obtained against the team in 2004 in the U.S. District Court for the District of Massachusetts. The judgment was for fees owed to McLaughlin in connection with his representation of Chris Morris, a former Olympiakos player and retired NBA small forward. McLaughlin had been unable to collect on the judgment because the team had been outside the jurisdiction of U.S. courts since the judgment was rendered. Leading up to Olmpiakos' arrival, McLaughlin filed a proposed writ of execution and court order in the U.S. District Court for the Northern District of Ohio seeking to enforce the judgment.

In the writ, McLaughlin requested that federal marshals seize everything in the possession of the Olympiakos team when it arrived in the U.S., including money, cell phones, cameras, uniforms and possibly even the aircraft scheduled to land on the tar-strip at Hopkins International Airport in Cleveland. Initially, Judge Christopher Boyko granted McLaughlin's request and ordered the marshal to seize and sell the club's property. But the club bounced back with a motion to cancel registration and to quash execution of the judgment, stating that McLaughlin's request to seize all property in the club's possession was "fatally flawed" and a "gross overreach [that] appears to be a media stunt designed to try to harass and embarrass the visiting international basketball

team." Judge Boyko denied the club's motion, but did order further proceedings before permitting the marshal to proceed with the asset seizure.

Pursuant to Judge Boyko's order, Christos Stavropoulos, the General Manager of the Olympiakos, was deposed by the plaintiff's counsel. Stavropoulos informed the court that the team travels light, bringing with it not much of its own when visiting the U.S. According to Stavropoulos, the team was expected to arrive in Ohio on a Delta Airlines charter, not a private aircraft owned by the team; the team does not travel with any currency, traveler's checks or electronics, and the team uniforms and apparel are owned by Nike and lent to the club pursuant to a sponsorship and licensing agreement. The lack of luxury items carried by a club that just last year dished out $20 million for a 3-year deal for former Atlanta Hawk Josh Childress might seem incongruous, but ultimately both the court and even McLaughlin's counsel agreed. McLaughlin's lawyer admitted to the court that the most that could be seized from the club would be between $5,000 and $10,000. Since it would cost approximately $10,000 for the marshal to embark on the seizure procedure, Judge Boyko decided that the scale tipped in the club's favor and vacated the original writ.

The game went on as scheduled, and, when the buzzer sounded at the end of the 4th quarter, the Olympiakos team found itself on the losing end of a 111 to 94 score, but at least were able to walk off the floor with their uniforms on their backs.

Does "Muscle Milk" or "Muscle Shake" Do a Body Good?

The world of sports drinks can be just as tough a place as the world of competitive sports. This was demonstrated recently when two drink manufacturers – CytoSport, Inc. ("CytoSport") and Vital Pharmaceuticals, Inc. ("VPX") – squared off in an action involving trademark rights, trade dress infringement and allegations of unfair competition and false advertising.

In recent years, sport drinks containing protein powder that claim to fuel an individual's metabolism and build lean muscle have become increasingly popular. These drinks are marketed to bodybuilders and professional athletes and are sold in health stores, specialty stores, convenience stores, vending machines and supermarkets. Among those competing for shelf space are CytoSport's Muscle Milk and VPX's Muscle Power. As the debate continues over the effectiveness of such beverages, companies spend millions of dollars manufacturing and marketing these products and promoting their health benefits. The packaging of these drinks often features bright colors, big, bold, block letters and catchy slogans. With the wide variety of protein drinks on the market, branding appears to be the key to attracting new customers and staying ahead of the competition.

Muscle Milk and Muscle Power are both ready-to-drink protein beverages that claim to boost energy and increase athletic performance. Muscle Milk was introduced in the late 1990s and Muscle Power in 2009. In November 2008, after learning that VPX filed a registration for the trademark "Muscle Shake" and intended to launch a protein drink using this trademark, CytoSport brought an action against VPX seeking to enjoin it from marketing, selling or promoting the product. CytoSport alleged in its complaint that it had spent over $100 million dollars advertising the Muscle Milk brand, and that the similarities between the products could result in possible consumer confusion and the potential loss of Muscle Milk's goodwill and reputation. The products were similar in basic bottle design

elements of shape, packaging, text layout and use of design and colors. Additionally, both products cost between $3 and $5 per bottle, and were targeted to the same class of consumers in the same markets.

In response to the suit, VPX argued that, although Muscle Milk and Muscle Power were both sold in connection with a trademark using the word "muscle," there were several other nutritional supplement companies that used the same word in their name. The United States District Court for the Eastern District of California dismissed VPX's argument and delivered a knockout punch, ruling that Muscle Power's name and packing infringed on Muscle Milk's product. The court held that "VPX has many other options for trademarks and trade dress of its product, the product has been on the market for a relatively short period, and VPX could make changes to the product name and packaging to prevent customer confusion." On appeal, the Ninth Circuit denied VPX's request for a stay of the preliminary injunction issued by the district court and held that the lower court had not abused its discretion in awarding CytoSport the preliminary injunction and enjoining VPX from marketing, selling, advertising, or promoting Muscle Power or any products confusingly similar to Muscle Milk.

VPX has not given up the fight, however, as the battle between these two "muscle-y" companies apparently will rage on through early discovery proceedings at the district court level.

Postscript: Supreme Court Denies Petition for Cert in Redskins Name Dispute

In our August 2008 edition we highlighted the protracted dispute between representatives of Native Americans and the Washington Redskins football organization over the use of the name "Redskins" to identify the Washington team. At that time, an attempt to revive trademark claims made by the Native American representatives against the team had been rejected by the United States District Court for the District of Columbia on grounds of laches. That ruling was upheld by the federal appeals court in May of this year, and on November 16, the U.S. Supreme Court denied the plaintiffs' petition for certiorari.

For more than 45 years, Proskauer has represented sports leagues and sports teams in all aspects of their operations.

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