

THIS OPINION IS NOT A
PRECEDENT OF THE T.T.A.B.

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Wolfson

Mailed: August 10, 2007

Opposition No. 91159885

Schlage Lock Company

v.

Alto Products, Corp.

**Before Hairston, Kuhlke and Bergsman,
Administrative Trademark Judges.**

By the Board:

This case now comes before the Board for consideration of applicant's combined motion (filed June 6, 2005) to compel opposer to produce certain documents its predecessor (Kryptonite Corporation) filed during litigation in federal district court and for summary judgment on opposer's pleaded grounds of likelihood of confusion and dilution and on applicant's affirmative defense that opposer is not the owner of the mark.¹

The combined motion has been fully briefed.

¹ This case was suspended on July 14, 2005 pending final disposition of *D.C. Comics v. Kryptonite Corporation*, Case No. 00-5562, Southern District of New York. All claims and counterclaims in the civil litigation were dismissed with prejudice on March 23, 2006, pursuant to the parties' stipulated settlement and co-existence agreements.

Motion For Summary Judgment Denied

After reviewing the arguments advanced by the parties in their respective briefs, we find that applicant has not met its burden of establishing that no genuine issue of material fact exists as to opposer's ownership of the mark or as to opposer's claims of likelihood of confusion and dilution. At a minimum, genuine issues of material fact exist as to the relationship of the parties' respective goods, the trade channels for the goods, and the classes and relative sophistication of the parties' customers.²

Accordingly, applicant's motion for summary judgment is denied.

Motion To Compel Denied

On August 1, 2007, the Board convened a telephone conference with Lori Meddings, Esq., attorney for opposer, to discuss applicant's motion to compel opposer to produce copies of certain declarations and deposition transcripts from the civil litigation between Kryptonite Corporation and

² The fact that we have identified only a few genuine issues of material fact as sufficient bases for denying the motion for summary judgment should not be construed as a finding that these are necessarily the only issues which remain for trial.

DC Comics. Applicant's attorney was invited but did not attend the telephone conference.³

Before the Board will consider the merits of a motion to compel, the moving party must show that the parties have attempted in good faith to resolve their dispute. See Trademark Rule 2.120(e); *Sentrol, Inc. v. Sentex Systems, Inc.*, 231 USPQ 666, 667 (TTAB 1986). In its brief, applicant indicates that counsel made a single phone call to opposer requesting assistance in obtaining the court documents. Applicant did not follow-up with opposer after its initial telephone call. Had applicant done so, it would have learned that opposer had contacted Kryptonite's attorney and was attempting to obtain the documents for

³ Prior to the phone conference, the undersigned Board attorney attempted to reach Mathew T. Dennehy, Esq., applicant's attorney of record. His office advised the Board that Mr. Dennehy is no longer employed by Stephen E. Feldman P.C. and that applicant's new attorney was Ida Serrano, Esq. A message was left advising Ms. Serrano of the phone conference and inviting Ms. Serrano to attend or call to reschedule. The Board also called Ms. Serrano after the phone conference and left a message inviting comment. Neither call was returned.

Although the Board has been orally apprised of Mr. Dennehy's unavailability, unless and until Mr. Dennehy files a written request to withdraw as applicant's representative, or another attorney makes a written appearance on behalf of applicant, correspondence will continue to be sent to Mr. Dennehy at Stephen E. Feldman, P.C., 12 East 41st Street, New York, NY 10017. See Trademark Rule 2.18(b); TBMP § 116 ("Termination of Representation") and §117 ("Correspondence-With Whom Held") (2d ed. rev. 2004).

applicant.⁴ Applicant has not met its burden to show that it engaged in good faith efforts to obtain the documents before filing its motion to compel.

Accordingly, applicant's motion to compel is denied.

Proceedings herein are resumed and trial dates, including the close of discovery, are reset as follows.

DISCOVERY PERIOD TO CLOSE: **August 20, 2007**

30-day testimony period for party in the position of plaintiff to close: **November 18, 2007**

30-day testimony period for party in the position of the defendant to close: **January 17, 2008**

15-day rebuttal period for party in the position of the plaintiff to close: **March 2, 2008**

IN EACH INSTANCE, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within **thirty days** after completion of the taking of testimony. Trademark Rule 2.125.

⁴ During the phone conference with the Board, Ms. Meddings indicated that she contacted Kryptonite's counsel by e-mail on May 15 and June 5, 2005, in an attempt to obtain the documents. She stated that although counsel e-mailed back the response that he would provide the documents, they were not so provided. She further stated that following receipt of applicant's motion to compel, she did not continue to seek the documents from Kryptonite's counsel.

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Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.