

Goodman

**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**

Mailed: September 12, 2008

Opposition No. **91177192**

NAUTICA APPAREL, INC.

v.

Martanna LLC

Before Hairston, Rogers and Bergsman, Administrative
Trademark Judges.

By the Board:

This case now comes up on the applicant's motion for summary judgment, filed March 20, 2008, and opposer's cross-motion for summary judgment, filed April 25, 2008. The motions are fully briefed.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). All reasonable inferences must be drawn in favor of the nonmoving party. The mere fact that cross-motions for summary judgment on an issue have been filed does not necessarily mean that there are no genuine issues of material fact, and that trial is unnecessary. See TBMP Section 528.01 (2d ed. rev. 2004) and cases cited therein.

After careful consideration of the arguments and

evidence presented by the parties, and drawing all reasonable inferences in favor of the nonmoving party with regard to each motion for summary judgment, we find that genuine issues of material fact remain with respect to opposer's likelihood of confusion and dilution claims which preclude entry of summary judgment.

With respect to the likelihood of confusion claim, genuine issues remain, at a minimum, as to the connotation and meaning of the parties marks; and with respect to the dilution claim, genuine issues remain, at least as to whether the parties' marks would be considered substantially identical.¹ *7-Eleven, Inc. v. Lawrence I. Wechsler*, 83 USPQ2d 1715, 1729 (TTAB 2007) ("For purposes of dilution, a party must prove more than confusing similarity; it must show that marks are 'identical or very substantially similar'"); *Carefirst of Maryland Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d 1492, 1514 (TTAB 2005); *Toro Co. v. ToroHead, Inc.*, 61 UPSQ2d 1164, 1183 (TTAB 2001).

In view thereof, the parties' cross-motions for summary judgment are denied.

¹ The fact that we have identified certain genuine issues of material fact as a sufficient basis for denying the parties' cross motions for summary judgment should not be construed as a finding that these are necessarily the only issues that remain for trial. The parties are also advised that evidence submitted in connection with a motion for summary judgment may not form part of the evidentiary record to be considered at final hearing unless properly introduced during the appropriate testimony period.

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Proceedings are resumed. Opposer's motion, filed March 20, 2008, to extend its testimony period is granted.

Trial dates are reset as follows:

30-day testimony period for party in position of plaintiff to close: **December 11, 2008**

30-day testimony period for party in position of defendant to close: **February 9, 2009**

15-day rebuttal testimony period for party in position of plaintiff to close: **March 26, 2009**

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.

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.

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The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

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<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>