

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: July 21, 2009

Opposition No. **91181448**

Jeff Brown

v.

Patriot Guard Riders, Inc.

Before Quinn, Drost and Mermelstein, Administrative  
Trademark Judges.

By the Board:

This case now comes up on the parties' cross-motions for summary judgment, both filed January 22, 2009, on the priority and likelihood of confusion and fraud claims and opposer's motion to strike applicant's exhibits (nos. 7, 16, 17 and 18), filed February 26, 2009.

We turn first to opposer's motion to strike. Opposer has moved to strike certain exhibits (produced documents) and the internet dictionary definition for "association" as unauthenticated. In response to the motion, applicant has provided the requests for production and written responses for exhibit nos. 7, 16 and 17 in accordance with Trademark Rule 2.127(e)(2) and requested that the Board take judicial notice of the online dictionary definition from [www.merriam-webster.com](http://www.merriam-webster.com).

Applicant has cured the deficiencies with respect to exhibit nos. 7, 16, and 17. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). In view thereof, applicant's request that the Board take judicial notice of the dictionary definition of "association" (exhibit 18) is granted. Accordingly, we deny opposer's motion to strike these exhibits.

In connection with the motions for summary judgment, we have reviewed the pleadings. Our review reveals that opposer's sole reference to likelihood of confusion and Section 2(d) is on the ESTTA filing coversheet as is opposer's reference to his application Serial No. 77041061. Although the ESTTA coversheet and the notice of opposition are "considered a single integrated filing," *PPG Indus. Inc. v. Guardian Indus. Corp.*, 73 USPQ2d 1926, 1928 (TTAB 2005), the simple assertion of "likelihood of confusion" and "Trademark Act Section 2(d)" on the ESTTA filing coversheet would not meet the pleading requirements of Fed. R. Civ. P. 8(a).

In view thereof, opposer is allowed until FIFTEEN DAYS from the mailing date of this order to file and serve an amended notice of opposition to sufficiently allege likelihood of confusion under Fed. R. Civ. P. 8(a) and to allege ownership of application Serial No. 77041061, as well as priority and ownership of the mark in the '061 application.<sup>1</sup> Applicant is allowed until FIFTEEN DAYS from the service of opposer's amended notice of opposition to file an answer thereto.

We now turn to the parties' cross-motions for summary judgment.

A party is entitled to summary judgment when it has demonstrated that there are no genuine issues as to any material facts, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The evidence must be viewed in a light favorable to the nonmoving party, and all justifiable inferences are to be drawn in the nonmovant's favor. *Opryland USA inc. v. The Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). The mere fact that cross-motions for summary judgment have been filed does not necessarily mean that there are no genuine

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<sup>1</sup> Opposer is directed to the following pleading guidelines: All averments should be made in numbered paragraphs, the contents of each of which should be limited as far as practicable to a statement of a single set of circumstances. Each claim founded upon a separate transaction or occurrence should be stated in a separate count whenever a separation would facilitate the clear

issues of material fact, and that trial is unnecessary. See *University Book Store v. University of Wisconsin Board of Regents*, 33 USPQ2d 1385, 1389-1390 (TTAB 1994).

When deciding a motion for summary judgment, the Board may not weigh the evidence in an area of disputed fact or make credibility determinations. See, e.g., *Lemelson v. TRW, Inc.*, 760 F.2d 1254, 225 USPQ 697, 701 (Fed. Cir. 1983) (court cannot engage in fact-finding on a motion for summary judgment); *Metropolitan Life Insurance Co. v. Bancorp Servs. LLC*, 527 F.3d 1330, 87 USPQ2d 1140 (Fed. Cir. 2008) (when resolving conflicting accounts requires ruling on the weight and credibility of the evidence, summary judgment not available). Thus, in deciding a motion for summary judgment, the Board may not resolve an issue of fact; it may only determine whether a genuine issue of material fact exists. See e.g., *Meyers v. Brooks Shoe Inc.*, 912 F.2d 1459, 16 USPQ2d 1055, 1056 (Fed. Cir. 1990) ("If there is a real dispute about a material fact or factual inference, summary judgment is inappropriate; the factual dispute should be reserved for trial").

Upon consideration of the parties' arguments and evidence we find that neither party has demonstrated the absence of genuine issues of material fact for trial or that

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presentation of the matters pleaded. TBMP Section 309.03(a)(2) (2d ed. rev. 2004).

they are entitled to judgment as a matter of law on the grounds of priority and likelihood of confusion or fraud.<sup>2</sup>

With respect to the priority and likelihood of confusion claim, genuine issues of material fact exist, at least, with respect to which party was the first to use PATRIOT GUARD RIDER(s) in connection with the association services, whether opposer licensed PATRIOT GUARD RIDER(s) to applicant, and whether actions by opposer with regard to use of PATRIOT GUARD RIDER(s) were on behalf of himself as an individual rather than on behalf of applicant. With respect to the fraud claim, genuine issues of material fact exist, at least, with respect to whether applicant believed it had the right to use the subject trademark.<sup>3</sup> See *Am. Sec. Bank v. Am. Sec. & Trust Co.*, 571 F.2d 564, 197 USPQ 65, 67 (CCPA 1978) ("Appellant misreads the cited statute and rules. They require the statement of *beliefs* about exclusive rights, not their actual possession. Appellant has produced no evidence impugning appellee's beliefs.").

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<sup>2</sup> Both parties presented extrinsic evidence to support their arguments. However, the extrinsic evidence presented by the parties is ambiguous and/or in conflict on many material issues. Thus, the truth of the matter cannot be resolved on summary judgment.

<sup>3</sup> The fact that we have identified only certain genuine issues of material fact as sufficient bases for denying the cross-motions for summary judgment should not be construed as a finding that these are necessarily the only issues that remain for trial.

In view thereof, the parties' cross-motions for summary judgment are denied.<sup>4</sup>

Proceedings are resumed.

We note that the fraud claim arises out of the same transactional facts as the priority and likelihood of confusion claim, and therefore, the fraud claim is entirely dependent on the success or failure of the likelihood of confusion claim. See e.g., *Intellimedia Sports Inc. v. Intellimedia Corp.*, 43 USPQ2d 1203, 1207 n.3 (TTAB 1997) (issues in the fraud claim of superior rights and likelihood of confusion are also issues to be decided in connection with the Section 2(d) claim). The parties may wish to narrow the issues at trial and focus their energy and resources on the priority and likelihood of confusion claim.<sup>5</sup>

Trial dates are reset as follows<sup>6</sup>:

Plaintiff's 30-day Trial Period Ends	9/20/09
Defendant's Pretrial Disclosures	10/5/09
Defendant's 30-day Trial Period Ends	11/19/09

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<sup>4</sup> The parties should note that evidence submitted in connection with the motions for summary judgment is of record only for consideration of the motions. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).

<sup>5</sup> The Board need not reach the fraud claim if opposer prevails on its likelihood of confusion claim. Cf., *Am. Paging Inc. v. Am. Mobilphone Inc.*, 13 USPQ2d 2036, 2039-40 (TTAB 1989), aff'd mem., 17 USPQ2d 1726 (Fed. Cir. 1990) (determining not to reach the merits of the abandonment claim). On the other hand, if the Board finds that there is no likelihood of confusion, opposer's fraud claim must fail as well, since absent a likelihood of confusion, applicant's declaration is not false.

<sup>6</sup> Opposer served its pretrial disclosures on January 9, 2009.

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Plaintiff's Rebuttal Disclosures

12/4/09

Plaintiff's 15-day Rebuttal Period Ends

1/3/10

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.