

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

Mailed: March 5, 2010

Opposition No. 91188736

Anastasia Beverly Hills,
Inc.

v.

Anastasia Marie
Laboratories, Inc.

**M. Catherine Faint,
Interlocutory Attorney:**

On January 14, 2010 opposer/counterclaim defendant (hereinafter "ABH") filed a motion to dismiss the counterclaims. ABH asks in the alternative that its motion be considered one for judgment on the pleadings. As a motion to dismiss, ABH's motion is untimely because its answer to the counterclaims was filed June 25, 2009. TBMP Section 503.01 (2d ed. rev. 2004); *see also* Fed. R. Civ. P. 12(b).¹ Such motion may be considered as one for judgment on the pleadings. TBMP Section 504.01.

¹ The time for filing a motion to dismiss is prior to or with the answer. TBMP §503.01 (2d ed. rev. 2004).

The Board notes that ABH's motion is accompanied by exhibits, including the declaration of Anastasia Soare. A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board may take judicial notice. TBMP Section 504.02. When matter outside the pleadings is introduced and not excluded, the motion is considered one for summary judgment under Fed. R. Civ. P. 56. TBMP Section 504.03. The Board will not exclude the evidence, therefore ABH's motion is considered one for summary judgment. Applicant/counterclaim defendant's (hereinafter "AML") response thereto, and cross-motion for summary judgment filed February 12, 2010 is noted.

The Board notes that ABH's motion to amend its registrations, filed January 14, 2010, appears germane to the matters presented on its motion for summary judgment. AML appears to have responded by its cross-motion for summary judgment.

On January 27, 2010 AML filed a consented motion to extend its time to respond to ABH's motion to dismiss, now styled as a motion for summary judgment. The motion is granted, and AML has since filed its response on February 12, 2010 as noted above.

On February 12, 2010 AML filed a motion to amend its counterclaims for fraud in order to plead fraud with more particularity in light of recent Board rulings on this subject. ABH may respond to this motion in line with its consented motion to extend time to respond (discussed below), or by March 15, 2010.

On February 18, 2010 ABH filed a motion with consent to extend time to respond to AML's cross-motion for summary judgment and for filing reply briefs to AML's responses to ABH's motions for summary judgment and to amend.

The motion to extend time is granted to the extent that ABH may have until March 15, 2010 to file its response to AML's cross-motion for summary judgment. Reply briefs, if any, are due in accordance with Trademark Rule 2.127(e)(1).²

Proceedings herein otherwise remain suspended pending disposition of the motions for summary judgment, and to amend. Any paper filed during the pendency of the motions which is not relevant thereto will be given no consideration. See Trademark Rule 2.127(d).

² The time for filing a reply brief will not be extended. Trademark Rule 2.127(e)(1).