

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

Baxley

Mailed: April 5, 2010

Opposition No. 91192417

K-2 Corporation

v.

Matthew R. Dallmann

By the Trademark Trial and Appeal Board:

In the motion to amend the identification of goods in applicant's involved application Serial No. 77719913 that applicant filed on April 1, 2010, applicant states that opposer does not consent to the proposed amendment. In keeping with general Board practice, consideration of that motion is deferred until final decision or until this case is decided upon motion for summary judgment.¹ See TBMP Section 514.03 (2d ed. rev. 2004).

In lieu of an answer, applicant filed a "motion to dismiss" under Fed. R. Civ. P. 12(b)(6). Although opposer's time to respond to that motion has not lapsed, the Board, in its discretion, elects to decide that motion at this time.

¹ See, however, *Int'l Harvester Co. v. Int'l Telephone and Telegraph Corp.*, 208 USPQ 940, 941 (TTAB 1980) (unconsented amendment to identification of goods permitted prior to trial where applicant consented to entry of judgment with respect to the broader identification of goods).

A motion to dismiss for failure to state a claim upon which relief can be granted is a test solely of the legal sufficiency of a complaint. See, e.g., *Advanced Cardiovascular Systems Inc. v. SciMed Life Systems Inc.*, 988 F.2d 1157, 26 USPQ2d 1038, 1041 (Fed. Cir. 1993); TBMP Section 503.02 (2d ed. rev. 2004). To withstand such a motion, a pleading need only allege such facts as would, if proved, establish that the plaintiff is entitled to the relief sought, that is, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for denying the registration sought (in the case of an opposition), or for canceling the subject registration (in the case of a cancellation proceeding). See *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998); TBMP Section 503.02. Whether or not a plaintiff can prevail on a particular claim is a matter for resolution on the merits. See *Flatley v. Trump*, 11 USPQ2d 1284 (TTAB 1989).

Instead of arguing that opposer has not pleaded its standing and a valid ground for denying the registration that applicant seeks, applicant argues the merits of opposer's pleaded claim under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d). As such, applicant's motion is more in the nature of a motion for summary judgment and will be treated accordingly.

Except under limited grounds not at issue herein, applicant cannot file a motion for summary judgment until he has served his initial disclosures. See Trademark Rule 2.127(e)(1); *Qualcomm Inc. v. FLO Corp.*, 93 USPQ2d 1768 (TTAB 2010). Applicant filed his motion for summary judgment two months prior to the deadline for service of initial disclosures as last reset and does not indicate that he has served his initial disclosures. Accordingly, that motion is denied as premature.²

The Board deems the filing of applicant's "motion to dismiss" to have tolled the running of dates herein. Accordingly, proceedings herein are resumed, and dates are reset as follows.

Time to Answer	5/3/10
Deadline for Discovery Conference	6/2/10
Discovery Opens	6/2/10
Initial Disclosures Due	7/2/10
Expert Disclosures Due	10/30/10
Discovery Closes	11/29/10
Plaintiff's Pretrial Disclosures	1/13/11
Plaintiff's 30-day Trial Period Ends	2/27/11
Defendant's Pretrial Disclosures	3/14/11
Defendant's 30-day Trial Period Ends	4/28/11
Plaintiff's Rebuttal Disclosures	5/13/11
Plaintiff's 15-day Rebuttal Period Ends	6/12/11

² In any event, opposer has adequately pleaded its standing in paragraphs 2-3 of the notice of opposition. See *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Opposer has also adequately pleaded a Section 2(d) claim in paragraphs 2-6 of the notice of opposition. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

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.

If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.