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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

MBA

Mailed: May 29, 2012

Opposition No. 91194679

John P. Avlon

v.

DeMarcus J. Freemon

**Before Seeherman, Cataldo and Kuczma, Administrative
Trademark Judges**

By the Board:

This case now comes up for consideration of opposer's motion for summary judgment, filed February 27, 2012, and applicant's cross-motion for summary judgment, filed March 27, 2012.

By way of background, applicant seeks a registration for the mark INDEPENDENT NATION & Design, shown below



for "Publication of electronic magazines, blogs, articles, and interactive literary forums."¹ In his notice of opposition, opposer alleges prior use and ownership of an

application for registration of the mark INDEPENDENT NATION,² for "advertising and promotion" of his book of the same name, as well as for an "Internet news portal" and "on-line community," and a Web site, "online forum" and blog in the fields of news, politics, media, social issues, public affairs and entertainment. Opposer specifically alleges that his mark "has acquired secondary meaning as used in connection with Opposer's book." As grounds for opposition, opposer alleges that use of applicant's mark would be likely to cause confusion with opposer's mark. In his answer, applicant denies the salient allegations in the notice of opposition.

Opposer relies in support of his motion for summary judgment, in part, on applicant's "admissions." Specifically, it appears that applicant failed to timely

¹ Application Serial No. 77514179, filed July 3, 2008, based on an alleged intent to use the mark in commerce.

² Application Serial No. 77891121, filed December 11, 2009, based on dates of first use of February 2004 for "Providing a website featuring information in the field of political issues, political elections, public relations and promoting public awareness in the field of social welfare," "Providing an online forum for transmission of messages among computer users in the fields of politics, social issues, media, news, public affairs and entertainment," "Providing a website featuring information and articles in the field of current event news and entertainment; providing an on-line journal, namely, a blog featuring information in the field of news, politics, media, social issues, public affairs and entertainment; providing an internet news portal featuring links to news stories and articles in the field of current events" and "Computer services, namely, creating an on-line community for registered users to participate in discussions, get feedback from their peers, form virtual communities, and engage in social networking." Declaration of Jeffrey T. Petersen (opposer's counsel) in Support of Opposer's Motion Ex. A.

respond to opposer's requests for admission served on November 23, 2011. Accordingly, by operation of Fed. R. Civ. P. 36(a)(3), the requests are deemed admitted. TBMP § 524.01 (3d ed. 2011).

However, under Fed. R. Civ. P. 36(b), a party may move to have deemed admissions withdrawn or amended, and on January 11, 2012, applicant served untimely responses to the requests for admission, in which applicant denied most of the requests. Furthermore, in his response and cross-motion, applicant indicates that he responded to the requests "believing that the discovery period was extended to the end of March 2012 ... Applicant in no way admits that the marks are identical or that the parties' services are highly related." We generously construe this statement as a motion to withdraw the deemed admissions.³

Withdrawal or amendment of an admission is appropriate when "the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the [Board] that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." Giersch v. Scripps Networks Inc., 85 USPQ2d 1306, 1308 (TTAB 2007) (quoting Fed. R. Civ. P.

³ Motions should not be buried in a response, and instead should be separately filed and appropriately captioned. The parties should ensure that any future filings are in strict compliance with Board rules and procedures.

36(b)). The type of prejudice contemplated by Rule 36(b) "is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth, but rather, relates to the special difficulties [such as the unavailability of key witnesses] a party may face caused by the sudden need to obtain evidence upon withdrawal or amendment of admission." Giersch, 85 USPQ2d at 1308 (citations omitted).

In this case, permitting withdrawal of the admissions will allow consideration of this proceeding on the merits, whereas denying the motion to withdraw would prevent consideration of this case on the merits. Indeed, applicant's proposed responses include denials of certain requests which address important issues on the merits. And opposer has not articulated any specific prejudice, of the type contemplated by Giersch, that he would suffer if the admissions are withdrawn. Specifically, opposer has not identified any witnesses or documents which were available before, but are unavailable now. Finally, applicant's denial of certain of the requests demonstrates "that the supposedly admitted matters are actually disputed. If withdrawal thereof were not permitted, [applicant] would be held to have admitted" allegedly "critical elements" of this proceeding. Giersch, 85 USPQ2d 1308-09. Accordingly, applicant's motion to withdraw the deemed admissions is

hereby **GRANTED**, the deemed admissions are withdrawn and substituted with the proposed responses applicant served on January 11, 2012.

Turning next to the parties' cross-motions for summary judgment, summary judgment is only appropriate where there are no genuine disputes as to any material facts, thus allowing the case to be resolved as a matter of law. Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the burden of demonstrating the absence of any genuine dispute of material fact, and that it is entitled to judgment under the applicable law. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Sweats Fashions, Inc. v. Pannill Knitting Co. Inc., 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. See Opryland USA Inc. v. Great American Music Show Inc., 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); Olde Tyme Foods, Inc. v. Roundy's, Inc., 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

The evidence on summary judgment must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. Lloyd's Food Products, Inc. v. Eli's, Inc., 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); Opryland USA, supra.

The Board may not resolve genuine disputes as to material facts; it may only ascertain whether genuine disputes as to material facts exist. See Lloyd's Food Products, 25 USPQ2d at 2029; Olde Tyme Foods, 22 USPQ2d at 1542.

In this case, on the record presented, we find that there are genuine disputes as to material facts remaining for trial. At a minimum, genuine disputes exist as to whether and to what extent opposer has used INDEPENDENT NATION alone for the identified services,⁴ the similarity or dissimilarity of the parties' marks, and the strength of opposer's mark.

Therefore, the parties' cross-motions are hereby **DENIED**.⁵ Proceedings herein are resumed, and trial dates are reset as follows:

Plaintiff's 30-day Trial Period Ends

⁴ Opposer's declaration is vague with respect to whether and how he has used INDEPENDENT NATION on or to identify his site, blog, community and forum, and the documentary evidence submitted with the declaration does not illuminate opposer's testimony.

⁵ The mere fact that cross-motions for summary judgment have been filed does not necessarily mean that there are no genuine disputes as to material facts, or that a trial is unnecessary. See, University Book Store v. University of Wisconsin Board of Regents, 33 USPQ2d 1385, 1389 (TTAB 1994). The parties should note that the evidence submitted in connection with the cross-motions for summary judgment is of record only for consideration of those 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); Pet Inc. v. Bassetti, 219 USPQ 911 (TTAB (1983); American Meat Institute v. Horace W. Longacre, Inc., 211 USPQ 712 (TTAB 1981). Furthermore, the fact that we have identified certain genuine disputes as to material facts sufficient to deny the parties' cross-motions should not be construed as a finding that these are necessarily the only disputes which remain for trial.

	July 13, 2012
Defendant's Pretrial Disclosures	July 28, 2012
Defendant's 30-day Trial Period Ends	September 11, 2012
Plaintiff's Rebuttal Disclosures	September 26, 2012
Plaintiff's 15-day Rebuttal Period Ends	October 26, 2012

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.
