

THIS OPINION
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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

DUNN

Mailed: September 19, 2012

Opposition No. 91198483

PsyBar LLC

v.

David Mahony, Ph.D., ABPP

**Before Ritchie, Lykos, and Shaw, Administrative Trademark
Judges:**

By the Board:

This case comes up on contested cross-motions for summary judgment on the pleaded claims of likelihood of confusion and false suggestion of a connection.¹

¹ As the parties were informed by the Board's June 18, 2012 order, the Board will not enter judgment on an unpleaded claim. *O.C. Seacrets Inc. v. Hotelplan Italia S.p.A.*, 95 USPQ2d 1327, 1330 (TTAB 2010). Opposer's request for reconsideration of the July 18, 2012 order because the "Pleadings provide more than adequate notice" is denied. The word dilution does not appear in either the original or the amended notice of opposition, and thus the requisite notice has not been provided.

Moreover, because opposer presents no facts upon which the Board could conclude that such an amendment is timely, opposer's motion (reply brief, note 1) to amend the notice of opposition to include a dilution claim is denied. *Trek Bicycle Corporation v. StyleTrek Limited*, 64 USPQ2d 1540, 1541 (TTAB 2001) ("Any party who delays filing a motion for leave to amend its pleading and, in so delaying, causes prejudice to its adversary, is acting contrary to the spirit of Rule 15(a) and risks denial of that motion.").

PsyBar LLC (hereafter, PsyBar) owns Registration No. 1998368, issued September 3, 1996, for the mark PSYBAR for "providing scientific consultation to the legal community, namely providing expert witness testimony, voir dire and scientific jury selection advice, and litigation strategy services."

David Mahony, Ph.D., ABPP (hereafter, Mahoney) seeks to register the mark PSYBARI for "personality testing for psychological purposes; providing psychological profiles and psychological record analysis and assessments via a website that are designed to provide custom tailored outputs about recommended resources and treatments associated with a defined set of symptoms and concerns; psychological assessment services; psychological testing; psychological testing services; psychological tests" alleging first use in 2002 and use in commerce since 2008 (application Serial No. 85095429).

PsyBar's amended notice of opposition filed May 18, 2012 claims priority of use and likelihood of confusion under Trademark Act Sec. 2(d), and false suggestion of a connection under Sec. 2(a). In support of its motion for summary judgment on those claims, opposer submits three articles by applicant which appeared in the September 2012 Bariatric Times, the June 2007 Springer Science and Business publication, and 2010 Journal of Child Sexual Abuse; an

undated independent contractor agreement signed by applicant²; and a listing of participants, including applicant, in opposer's online education program. The Board notes that opposer previously submitted a TARR status and title copy of its registration with its amended notice of opposition.

Opposer also submits the declaration of David Fisher, owner and chairman of the board, averring that opposer has continuously used the PSYBAR mark in commerce since 1995; that opposer is the leading provider of forensic psychological and psychiatric assessment litigation services nationwide; that one of its litigation strategy services is providing psychological and psychiatric evaluations throughout the country; that opposer enters contracts with hundreds of psychologists and psychiatrist nationwide to examine patients and issue reports on opposer's behalf; that in 2003 opposer and applicant entered a contract for applicant to act as an independent contractor of opposer; that in 2010, opposer became aware of "the PSIBARI test developed, advertised and promoted by the applicant"; and that both PsyBar and the Psybari test employ objective psychological assessment methods to provide assessments of patients in the forensic context.

² Opposer is ordered to file, within ten (10) days of the mailing date of this order, a redacted copy of the Fisher affidavit and exhibits (TTABVUE entry #18) for public view to shield any and all personal or confidential information, including applicant's social security number on the contractor agreement. Because opposer included this personal identification information, the Board sua sponte has designated this filing

More specifically, Fisher avers that there is significant overlap in the consumer base for the services of the parties because opposer's services include medical evaluations focusing on bariatric issues, and applicant's test could be performed in connection with opposer's litigation strategy services, such as a legal dispute involving medical coverage for bariatric procedures, victims of sexual abuse, evaluation of fitness for duty, and employer and employee assistance programs involving bariatric patients. Fisher avers that because the services are so closely related, the addition of the vowel "I" to opposer's mark PSYBAR to create PSYBARI is insufficient to preclude prospective consumers believing the services to emanate from the same source.

In support of his own motion for summary judgment on the pleaded claims, as well as in opposition to opposer's motion, applicant submits TESS summary listings of third party applications and registrations with the prefix PSY (thirty nine total with four live registrations) and with the term BARI (fifty total with 21 live registrations)³;

confidential. See Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 120.02 (3rd ed., rev. 2012).

³ Because copies were not submitted, the third party applications and registrations listed in the TESS summary submitted by applicant are not of record. The Board does not take judicial notice of registrations or applications residing in the Office. *Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1550 (TTAB 2012).

Moreover, applicant, who is acting pro se in this matter, is advised that an application made of record in a Board inter partes proceeding, whether owned by a party or not, is generally of very limited probative value. See *Glamorene Products*

printouts from opposer's website, dictionary definitions for "psy" and "bariatric"; and the summary page showing 20 results were produced for "David Mahoney Phd" and "psibari" in a Google® search.

Applicant contends that the marks create different commercial impressions because applicant is a bariatric psychologist and his mark suggests his psychological test for bariatric patients; that there has been no confusion despite years of co-existence, and that opposer has never offered services related to weight loss surgery or obesity, and does not conduct scientific research or create psychological tests, so that the marks and services of the two parties are dissimilar for the purposes of likelihood of confusion and false association.

Opposer's combined opposition to applicant's motion for summary judgment and reply brief presents two additional declarations by Fisher and counsel for opposer disputing contentions made in applicant's brief, and argues that applicant has presented unsworn evidence that cannot rebut opposer's presentation of undisputed facts warranting entry of judgment for opposer.⁴

Corporation. v. Earl Grissmer Company, Inc., 203 USPQ 1090, 1092 n.5 (TTAB 1979) (evidence only of the filing of the application).

⁴ While the Board disagrees with opposer's arguments that submission of a reply brief on the cross-motion for summary judgment was improper and untimely, opposer's contested motion to strike applicant's 14 page reply brief because it exceeds the

Summary judgment is an appropriate method of disposing of cases that present no genuine disputes of material fact, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(a). 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.

Lloyd's Food Products, Inc. v. Eli's, Inc, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); Opryland USA Inc. v. The Great American Music Show, Inc., 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

Each moving party has the burden of demonstrating the absence of any genuine dispute of material fact, and that it is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Sweats Fashions Inc. v. Pannill Knitting Co. Inc., 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). The mere fact that cross-motions for summary judgment have been filed does not necessarily mean that there are no genuine disputes of material fact, and that a trial is unnecessary. See University Book Store v. University of Wisconsin Board of Regents, 33 USPQ2d 1385, 1389-90 (TTAB 1994).

Upon careful consideration of the evidence and arguments presented by the parties, and drawing all

Board's page limit is granted. Trademark Rule 2.127. No consideration was given to applicant's reply brief.

inferences in favor of the non-movant, we find that there are genuine factual disputes that preclude entry of summary judgment on either claim.⁵ As to the likelihood of confusion claim, genuine disputes of material fact exist, at a minimum, as to the similarities and public perception of the parties' respective marks PSYBAR and PSYBARI, including connotation and commercial impression, and the relationship between the parties' respective services.⁶ See *Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1437 (TTAB 2007). As to the false suggestion of a connection claim, there is a genuine dispute as to whether the applied-for mark, i.e., PSYBARI, points uniquely and unmistakably to opposer's persona or identity. See *McDonnell Douglas Corporation v. National Data Corporation*, 228 USPQ 45 (TTAB 1985).

⁵ Contrary to opposer's contention, an affidavit was not necessary to support applicant's opposition or cross-motion for summary judgment, and the Board gave the appropriate weight to the evidence submitted with applicant's filing. TBMP 528.05(A)(1) ("A party need not submit [summary judgment evidence] under a notice of reliance in order to make them of record for purposes of a summary judgment motion. Rather, the materials may be submitted as attachments or exhibits to a party's brief or affidavit in support of the motion.").

⁶ In view of opposer's ownership of a valid and subsisting registration for its pleaded mark, there is no issue with respect to opposer's standing or priority. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Accordingly, the parties' cross motions for summary judgment on the issues of likelihood of confusion and false suggestion of a connection are denied.⁷

Dates are reset below:

Plaintiff's Pretrial Disclosures	10/27/2012
Plaintiff's 30-day Trial Period	12/11/2012
Ends	
Defendant's Pretrial Disclosures	12/26/2012
Defendant's 30-day Trial Period	2/9/2013
Ends	
Plaintiff's Rebuttal Disclosures	2/24/2013
Plaintiff's 15-day Rebuttal Period	3/26/2013
Ends	

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 Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

⁷ Although we have only mentioned a few genuine disputes of material fact in this decision, this is not to say that this is all that would necessarily be at issue for trial. The parties should note that evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period. See *Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).