

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

MBA

Mailed: August 23, 2012

Opposition No. 91201070

Anderson Valley Acquisition
Company, LLC

v.

Matthew Harnden and Roger
Scommegna

**Before Kuhlke, Wellington and Wolfson, Administrative
Trademark Judges**

By the Board:

Applicants seek registration of BOONVILLE CIDER HOUSE BITE HARD CIDER, in standard characters and with BOONVILLE, CIDER and HARD CIDER disclaimed, for "Hard cider."¹ In its notice of opposition, opposer alleges prior use of the mark THE LEGENDARY BOONVILLE BEER for "alcoholic beverages, namely beer, ale, lager, stout and porter, and malt liquor," and prior registration of the mark shown below



¹ Application Serial No. 85178395, filed November 16, 2010 based on an alleged intent to use the mark in commerce.

with a color claim and the words BOONVILLE and BEER disclaimed, for "Beer, ale, lager, stout and porter; Malt liquor."² As grounds for opposition, opposer alleges that use of applicants' mark would be likely to cause confusion with opposer's marks. In their answer, applicants deny the salient allegations in the notice of opposition.

This case now comes up for consideration of applicants' fully-briefed motion for summary judgment on the ground that the parties' marks are not confusingly similar, filed November 18, 2011. While applicants, in their reply brief, raise various objections to the Affidavit of Trey White, opposer's President and owner, we have considered and assigned appropriate weight to Mr. White's affidavit and the attached documents, because Mr. White testifies that he "reviewed the records of [opposer] and otherwise ha[s] knowledge of the relevant facts and statements contained [t]herein." White Affidavit ¶ 1. See e.g. Fed. R. Evid. 803(6); The West End Brewing Co. of Utica, N.Y. v. The South Australian Brewing Co. Ltd., 2 USPQ2d 1306, 1308 n. 3 (TTAB 1987).

Summary judgment is only appropriate where there are no genuine disputes as to any material facts, thus allowing the

² Registration No. 3801569, issued June 15, 2010 from an application filed January 31, 2008.

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 a 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, the term BOONVILLE has acquired distinctiveness as used in opposer's marks, the similarity of the parties' marks,³ and the degree, if any, to which the parties' goods are similar or related.⁴

Therefore, applicant's motion for summary judgment is hereby **DENIED**.⁵ Proceedings herein are resumed, and disclosure, discovery, trial and other dates are reset as follows:

Expert Disclosures Due	November 17, 2012
Discovery Closes	December 17, 2012
Plaintiff's Pretrial Disclosures Due	January 31, 2013
Plaintiff's 30-day Trial Period Ends	March 17, 2013

³ In its response to the motion for summary judgment, opposer cites unpleaded registrations. However, opposer may not rely on unpleaded marks or registrations. Herbaceuticals, Inc. v. Xel Herbaceuticals Inc., 86 USPQ2d 1572, 1576 n. 4 (TTAB 2008); Standard Knitting, Ltd. v. Toyota Jidosha Kabushiki Kaisha, 77 USPQ2d 1917, 1929 n. 18 (TTAB 2006).

⁴ Our decision to consider the White Affidavit on summary judgment for whatever evidentiary value it may have does not preclude applicant from exploring the credibility of, or objecting to, the same or any other evidence at trial, when the standards for evaluating evidence may be different.

⁵ The parties should note that the evidence submitted in connection with the motion for summary judgment is of record only for consideration of that motion. 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 should not be construed as a finding that these are necessarily the only disputes which remain for trial.

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Defendant's Pretrial Disclosures Due	April 1, 2013
Defendant's 30-day Trial Period Ends	May 16, 2013
Plaintiff's Rebuttal Disclosures Due	May 31, 2013
Plaintiff's 15-day Rebuttal Period Ends	June 30, 2013

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.
