

THIS OPINION
IS NOT A PRECEDENT
OF THE TTAB

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

CME

Mailed: September 13, 2013

Opposition No. 91206251

Elevation Management, LLC

v.

Finish Strong Ventures, Inc.

Before Zervas, Lykos, and Adlin, Administrative Trademark Judges

By the Board:

Applicant seeks registration of the mark THE ELEVATION GROUP, in standard characters and with GROUP disclaimed, for "Online educational services, namely, providing web seminars, temporary use of non-downloadable videos and books, live events, namely, seminars and conferences, and on-line journals, namely, blogs all in the field of financial strategies and techniques employed by highly successful wealth administrators, entrepreneurs, and asset managers in the areas of taxation, investment, personal finance management, charitable giving, and business

growth.”¹ In its notice of opposition, opposer alleges two claims, namely: (1) likelihood of confusion based on opposer’s prior use and registration² of the mark ELEVATION PARTNERS and prior use of the trade names ELEVATION and ELEVATION PARTNERS, all for investment and financing services; and (2) that the involved application is *void ab initio* on the ground that the mark was not in use in commerce in connection with the involved services as of the filing date of the use-based application. In its answer, applicant denies the salient allegations in the notice of opposition.

This case now comes up for consideration of opposer’s motion for summary judgment, filed April 23, 2013, and applicant’s cross-motion, filed May 23, 2013, for a three-week extension of time to respond to the motion for summary judgment. Applicant’s cross-motion is granted as conceded, Trademark Rule 2.127(a), and applicant’s response to opposer’s motion filed on June 11, 2013 is accepted and made of record. Opposer has moved for summary judgment only on the ground that the involved use-based application is *void ab initio*.

¹ Application Serial No. 85171899, filed on November 8, 2010, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging first use dates of October 22, 2010.

² Registration No. 3093992, issued on May 16, 2006; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

Before turning to the merits of the motion, we address the length of opposer's summary judgment reply brief. Trademark Rule 2.127(a) provides that:

"Neither the brief in support of a motion nor the brief in response to a motion shall exceed twenty-five pages in length in its entirety, including table of contents, index of cases, description of the record, statement of the issues, recitation of the facts, argument, and summary. A reply brief *shall not* exceed ten pages in length *in its entirety*." (emphasis added).

The main body of opposer's reply brief is ten pages long and includes evidentiary objections, but it is accompanied by a seven-page "appendix" setting forth opposer's additional objections to the evidence that applicant submitted in support of its response brief. When the Board does not intend for evidentiary objections to count towards the page limit, it makes this clear, as illustrated by TBMP § 801.03 (3d ed. rev.2 2013), indicating that in the context of trial briefs, evidentiary objections are not included within the page limitation. Here, however, we are not dealing with a trial brief, but a motion for summary judgment. See Notice of Final Rulemaking, 63 Fed. Reg. 48081, 48094 (September 9, 1998) ("It is believed that 25 and 10 pages are sufficient for the main brief and reply brief, respectively, of any motion that arises in a Board *inter partes* proceeding."); see also *Saint-Gobain Corp. v.*

Minnesota Mining and Manufacturing Co., 66 USPQ2d 1220, 1222 (TTAB 2003) (explaining that "the page limitation for briefs on motions is for the convenience of the Board and is intended to prevent the filing of unduly long briefs."). Moreover, the appendix includes not just evidentiary objections, but also arguments concerning the probative value of applicant's evidence. For these reasons, the Board includes the appendix in the page-count for opposer's reply brief, and because the reply brief "in its entirety" exceeds the page limit, we will give no consideration to opposer's appendix and will consider only opposer's ten-page reply brief and the evidentiary objections raised therein.³

We next consider the evidentiary objections raised in opposer's reply brief. Opposer argues that the website screenshots attached as Exhibit B to applicant's response have not been properly authenticated because they have "typewritten (not electronic) dates and/or no URLs" and the sworn declaration of applicant's president, Michael Dillard, "broadly" states that the "screens appeared in 2010" such that none of the screenshots are "authenticated as in use on or before [the application filing date]."

³ However, even if we were to consider the appendix, it would not change the decision set forth herein for the reasons discussed on pages 8 and 9.

Reply, pp. 2 and 7-8. We disagree. Mr. Dillard has authenticated the documents sufficiently identifying the nature, source and date of the materials in his declaration. See TBMP § 528.05(e) (noting that documents that are not self-authenticating "may, on summary judgment, be introduced by the affidavit or declaration of a person who can clearly and properly authenticate the materials, including identifying the nature, source and date of the materials."). Accordingly, opposer's objections are **OVERRULED**. However, we consider the documents only for what Mr. Dillard has identified them to be, and based on Mr. Dillard's statements, and the fact that the Board will not consider any statements in the documents that are hearsay, the documents have limited probative value.

We turn now to the merits of opposer's motion for summary judgment. Opposer argues that the specimen of use submitted with the involved application "on its face ... describes no services, makes no reference to [applicant] and only states that as of [the filing date of the involved application], a description would be '**coming soon.**'" *Id.* at p. 4 (emphasis in original).

In response, applicant argues that even if its specimen is flawed, this does "not in any way establish or require a finding that [applicant] wasn't actually using

its mark [as of the filing date of the involved application], or that no evidence of such use exists or might be probative." Response, p. 8. To this end, applicant points out that opposer has not "introduce[d] a single piece of additional evidence to demonstrate that [applicant] was not actually making use of its mark [as of the application filing date]." Response, p. 2. In addition, applicant's president has stated in a sworn declaration that: (i) "[t]he idea behind The Elevation Group was, and is to conduct webinars, and host and provide other educational services to persons interested in the financial industry, investing or starting a home business..."; (ii) applicant "constructed and introduced a website ... to host, promote, advertise, and provide the webinars and services ...;" (iii) "[t]he beta test of The Elevation Group website was launched and operational on the Internet and made available on or before [the application filing date] to those members of the public who had subscribed prior to a cut-off date to access the site"; and (iv) "[s]ince we were using our [m]ark THE ELEVATION GROUP on and in connection with the beta test website as of the filing date [of the application], [applicant] filed its [a]pplication as a 'use-based' application." Dillard Declaration, ¶¶ 4-5 and 11.

In its reply brief, opposer argues that applicant has not demonstrated a genuine dispute of material fact because it has "not come forth with a screenshot of any website educational services offering on or before [the filing date of the involved application]..." Reply, p. 2. Opposer elaborates that the evidence applicant has submitted "demonstrate[s] only advertising, promotional and/or preparatory uses of the applied-for designation without showing any use in connection with any *offered* applied-for services." *Id.* at p. 6. (emphasis added).

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 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). This burden is greater than the evidentiary burden at trial. TBMP § 528.01. 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 Am. Music Show Inc.*,

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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). 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 Prods., 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 Prods.*, 25 USPQ2d at 2029; *Olde Tyme Foods*, 22 USPQ2d at 1542.

In support of its motion, opposer has not submitted any evidence other than applicant's specimen to establish that applicant was not using its involved mark as of the application filing date. However, the sufficiency of applicant's specimen is an examination issue and cannot establish a basis for refusing registration of applicant's mark. See, e.g., *General Mills Inc. v. Health Valley Foods*, 24 USPQ2d 1270, 1273 n. 6 (TTAB 1992); *Marshall Field & Co. v. Mrs. Fields Cookies*, 11 USPQ2d 1355, 1358 (TTAB 1989) ("the insufficiency of the specimens, per se, is not a ground for cancellation"); *Century 21 Real Estate Corp. v. Century Life of America*, 10 USPQ2d 2034, 2035

(TTAB 1989) ("it is not the adequacy of the specimens, but the underlying question of service mark usage which would constitute a proper ground for opposition"). Accordingly, opposer has failed to satisfy its burden of demonstrating the absence of any genuine dispute of material fact regarding whether applicant was using its mark in commerce as of the filing date of the involved application. But even if opposer had met its burden, the declaration of applicant's president stating that applicant was using the involved mark "on or in connection with the beta test website as of the [application] filing date," Dillard Declaration ¶ 11, is sufficient to raise a genuine dispute of material fact as to opposer's claim that applicant's mark was not in use in commerce as of the filing date of its application. See *Paris Glove of Canada Ltd. v. SBC/Sporto Corp.*, 84 USPQ2d 1856, 1864, n.8 (TTAB 2007) ("[D]eclarations are permissible on summary judgment even though they are self-serving in nature and there is no opportunity for cross-examination of the declarant."); see also TMEP § 1301.03(a) (recognizing that use of a mark in connection with a beta test of services made available to consumers may be sufficient to demonstrate actual use in commerce).

Accordingly, opposer's motion for summary judgment is hereby **DENIED**.⁴ Proceedings herein are resumed and disclosure, trial and other dates are reset as follows:

Plaintiff's Pretrial Disclosures	10/10/2013
Plaintiff's 30-day Trial Period Ends	11/24/2013
Defendant's Pretrial Disclosures	12/9/2013
Defendant's 30-day Trial Period Ends	1/23/2014
Plaintiff's Rebuttal Disclosures	2/7/2014
Plaintiff's 15-day Rebuttal Period Ends	3/9/2014

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

⁴ 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 a genuine dispute of material fact should not be construed as a finding that this is necessarily the only dispute which remain for trial.

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upon request filed as provided by Trademark Rule 2.129.
