

UNITED STATES PATENT AND TRADEMARK OFFICE

U. S. APPLICATION SERIAL NUMBER: 85/642549

U. S. REGISTRATION NUMBER:



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MARK:
ATLAS

ISSUE/MAILING DATE:
October 24, 2014

APPLICANT/REGISTRANT:
ATLAS BEER WORKS LLC

CORRESPONDENT'S REFERENCE/DOCKET NO:

CORRESPONDENT'S EMAIL ADDRESS:

PETITION TO DIRECTOR DECISION

Dear Mr. Carroll,

This letter acknowledges receipt of Atlas Brewing Company, LLC's (petitioner's) July 18, 2014 petition to the Director of the United States Patent & Trademark Office (the Director) to reverse the June 18, 2014 order of the Trademark Trial and Appeal Board (TTAB) denying a motion for summary judgment. Petitioner requests that the Director grant the motion for summary and suspend the TTAB proceedings pending a decision on the petition.

The petition is DISMISSED.

The above identified application is the subject of an opposition proceeding that commenced on April 24, 2013 as Opposition No. 9120379.¹ Petitioner, opposer in that opposition proceeding, alleged that the mark ATLAS for beer in the above application, U.S. Application Serial No. 85642549, was likely to cause confusion with its use of the mark ATLAS BREWING COMPANY and ATLAS GOLDEN ALE for "beer." On February 12, 2014, petitioner filed a motion to amend the opposition to add claims that the mark ATLAS is primarily geographically descriptive and that applicant did not have a bona fide intent to use the mark in commerce when the application was filed. Petitioner also moved for summary judgment on those two grounds. Applicant opposed the motion for summary judgment on March 19, 2014. On June 18, 2014, the TTAB granted petitioner's request to amend the pleadings to add two additional claims, but

¹ The facts discussed here are those relevant to the instant petition.

denied the motion for summary judgment. The TTAB found that “the evidence presented by Applicant raises genuine disputes of material facts as to Applicant’s intent at the time of filing its application and whether ATLAS is primarily geographically descriptive as applied to Applicant’s goods.” June 18 Order 9. This petition followed.²

Petitioner argues that the decision of the TTAB is erroneous setting forth its arguments, based on discovery taken in the opposition proceeding, why the mark is primarily geographically descriptive and why the applicant did not have the requisite intent to use the mark in commerce. On July 25, 2014, applicant responded to the petition arguing that it should be denied as petitioner is not raising a procedural issue regarding the TTAB’s decision, but requesting that the Director review the merits of petitioner’s motion for summary judgment.

Standard for Review

Pursuant to 35 U.S.C. §2 and 37 C.F.R. §2.146(a)(3), the Director may invoke supervisory authority in appropriate circumstances. However, a petition to the Director to review a decision by the TTAB is appropriate only where the TTAB’s decision is interlocutory in nature and concerns **matters of procedure**, rather than the central issues before the TTAB, and does not put an end to the litigation before the TTAB. *Chesebrough-Pond's Inc. v. Faberge, Inc.*, 618 F.2d 776, 205 USPQ 888 (C.C.P.A. 1980); *Miss Nude Florida, Inc. v. Drost*, 198 USPQ 485 (Comm'r Pats. 1977); *Scovill Manufacturing Co. v. Stocko Metallwarenfabriken Henkels und Sohn KG*, 191 USPQ 124 (Comm'r Pats. 1976); *Outdoor Sports Industries, Inc. v. Joseph & Feiss Co.*, 177 USPQ 533 (Comm'r Pats. 1973); *Trademark Trial and Appeal Board Manual of Procedure (TBMP) §905*; *Trademark Manual of Examining Procedure (TMEP) §1704*.

Petition Does Not Involve Petitionable Subject Matter

The TTAB denied petitioner’s motion for summary judgment on issues relating to whether applicant had a bona fide intent to use the mark in commerce at the time the application was filed and whether the mark was primarily geographically descriptive. The TTAB found that there were genuine issues of material fact concerning applicant’s intent to use the mark in commerce and as to whether the mark was geographically descriptive. On petition, petitioner does not identify any **procedural error** by the TTAB in rendering its decision. Rather, petitioner argues the substance and merits of its motion for summary judgment arguing that the TTAB decision denying its motion is in error. Specifically, petitioner states that based on the discovery in the opposition, petitioner is entitled to judgment as a matter of law. Petition 5. Petitioner requests that the Director grant summary judgment in petitioner’s favor “sustaining Opposer’s Opposition and refusing registration for Application Serial No. 85642549.” Petition 10-11.

Petitioner is requesting the Director to review a decision relating to **substantive issues** that are central to the opposition. As such, the review of the denial of a motion for summary judgment in this case, it is not appropriate for review by the Director. *Federal Bureau of Investigation v. Societe: “M. Bril & Co.”*, 167 USPQ 56, 57 (Comm’r Pats 1973). As the Commissioner in *Federal Bureau of Investigation* stated, for orderly practice and procedure to be maintained, it is imperative that issues raised in summary judgment “be left to the

² A petition to the Director must include: (1) a petition fee and (2) a statement of the facts relevant to the petition, verified by an affidavit or declaration under Trademark Rule 2.20. See 37 C.F.R. §§2.20, 2.146(c); *Trademark Manual of Examining Procedure (TMEP) §§1705.02, 1705.03*. No petition fee was included, therefore the petition is incomplete. However, since the petition is being dismissed for the reasons set forth below, no petition fee is necessary as it would have been refunded when the petition was dismissed.

determination of the Board and the courts, and that the supervisory authority of the Commissioner not be interposed.” *Id.*

Petitioner’s proper remedy is to seek review of that denial of its motion after a final ruling on the merits of the opposition has been rendered. *Id.* Specifically, under 15 U.S.C. §1071, petitioner should seek review during any appeal it may take to the Court of Appeals for the Federal Circuit or through a civil action brought in an appropriate federal court. *Federal Bureau of Investigation*, 167 USPQ at 57.

For all the above noted reasons, petitioner’s request for review of the denial of a motion for summary judgment is inappropriate subject matter for petition to the Director. As such, the petition is dismissed.

The file will be returned to the TTAB for the opposition proceeding to resume.

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