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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91211873
Party	Defendant Green Ivy Holdings LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

GREEN IVY EDUCATIONAL
CONSULTING, LLC,

Opposer,

-against-

GREEN IVY HOLDINGS LLC,

Applicant.

OPPOSITION NO: 91211873

Serial Nos.: 85775379, 85775380, and
85775382

Marks: GREEN IVY, GREEN IVY
SCHOOLS, and GREEN IVY LEARNING

**APPLICANT’S RESPONSE IN OPPOSITION
TO REQUEST FOR RECONSIDERATION**

Applicant, Green Ivy Holdings LLC (“Applicant”), hereby responds in opposition to Plaintiff’s Request for Reconsideration (D.E. 17)(the “Request for Reconsideration”).

Opposer, Green Ivy Educational Consulting, LLC (“Opposer”) requests the Board reconsider its November 5, 2014 Order denying Opposer’s Motion for Summary Judgment (the “Order”). The Board denied the Motion for Summary Judgment because “Opposer . . . has not met its burden of establishing that there is no genuine dispute as to material facts and that it is entitled to judgment as a matter of law . . .” Order at p. 3. The Order continues to state that “[a]t a minimum” there were at least three issues about which there was a genuine dispute of material fact. *Id.* Continuing, the Order states that “[t]he fact we identify only a few material facts that are genuinely in dispute should not be construed as a finding that these are necessarily the only issues that remain for trial.” *Id.* at fn. 2. Thus, the Order was not limiting and the three issues cited by the Board were “a minimum”. The Request for Reconsideration is nothing more than an attempt to reargue the failed motion for summary judgment, rehashing arguments previously made; it fails to show that the Board made an error of apprehension, and attempts to improperly

introduce evidence that was not presented as part of the motion for summary judgment. For these reasons, the Request for Reconsideration should be denied.

The three primary grounds that justify reconsideration are: “(1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice.” *Degirmenci v. Sapphire–Fort Lauderdale, LLLP*, 642 F.Supp.2d 1344, 1353 (S.D.Fla.2009) (quotation marks and citation omitted). “[W]here a party attempts to introduce previously unsubmitted evidence on a motion to reconsider, the court should not grant the motion absent some showing that the evidence was not available during the pendency of the motion.” *Shuford v. Fid. Nat'l Prop. & Cas. Ins. Co.*, 508 F.3d 1337, 1345 (11th Cir.2007) (quotation marks and citation omitted, alteration in original).

Delaware Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC, 597 F.3d 1374, 1383 (Fed. Cir. 2010). “A motion for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made.” *Z.K. Marine, Inc. v. M/V Archigedis*, 808 F.Supp. 1561, 1563 (S.D.Fla.1992)(quoted by *Delaware Valley Floral Grp., Inc.*, 597 F.3d at 1384). “Rather, it is appropriate where the ‘Court has patently misunderstood a party, or has made a decision outside of the adversarial issues presented to the Court by the parties, or has made an error not of reasoning, but of apprehension . . . Such problems rarely arise and the motion to reconsider should be equally rare.’” *Delaware Valley Floral Grp., Inc.*, 597 F.3d at 1384 (quoting *Ass’n for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 477 (S.D. Fla. 2002)). Opposer has failed to establish any of the foregoing as grounds for the Board to reconsider the Order.

As its ‘preliminary statement’, Opposer states “the Board did not identify any specific evidence set forth by Applicant that gives rise to a material issue of fact.” This statement is an improper shifting of the burden of proof on a motion for summary judgment from Opposer to Applicant. As the Board correctly stated in the Order,

A party moving for summary judgment has the burden of demonstrating the absence of any genuine dispute as to a material fact, and that it is entitled to judgment as a matter of 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).

Order at pp. 1-2. Contrary to Opposer's statement, it is not Applicant's burden to demonstrate the lack of a genuine issue as to a material fact, it is Applicant's burden to so demonstrate. Applicant failed to meet that burden.

The Order accurately states "the exhibits attached to Anahita Homayoun's declaration do not demonstrate, beyond dispute, use of the GREEN IVY mark in connection with all of relevant services on a date prior to the filing date of the opposed applications." Order at p. 3. Opposer's problem throughout this opposition has been that Ms. Homayoun has been unable to understand the difference between, and to separate, herself and Opposer. Ms. Homayoun's declaration in support of the Motion for Summary Judgment is internally inconsistent and, in and of itself, creates genuine disputes of material fact. These genuine issues of material fact cannot be dismissed as collateral issues or 'red herrings' (as Opposer has previously requested the Board do). Rather, they were fatal to Opposer's Motion for Summary Judgment and cannot be rectified through the filing of the Request for Reconsideration.

In the Request for Reconsideration, Opposer again asks the Board to simply ignore these inconsistencies stating "[t]he exhibits have been submitted simply as examples in addition to the sworn testimony of Ms. Homayoun, which is, on its own, sufficient for a grant of summary judgment." Request for Reconsideration at p. 5. However, Opposer cannot now simply

disregard the exhibits to the Declaration of Homayoun. The sworn statements of Ms. Homayoun are not sufficient to for a grant of summary judgment; rather they demonstrate why summary judgment is inappropriate. Throughout her declaration, Ms. Homayoun switches between describing what “I” allegedly did (i.e., Ms. Homayoun) and what GEIC allegedly did. Compare Homayoun Dec. ¶¶ 4, 8 with ¶¶ 5, 12. The most egregious examples of this conflation are Exhibit A to the Homayoun Dec, which are materials copyrighted by Ms. Homayoun, not GEIC, and Exhibit C to the Homayoun Dec., which is information taken from Ms. Homayoun’s personal website that Opposer intentionally misrepresents as “a printout from the Events page of GEIC’s website”. The Board was correct to deny summary judgment where the movant cannot set forth a coherent, consistent set of facts upon which to base summary judgment.

Opposer’s attempts to shirk its burden of proof appear elsewhere in the Request for Reconsideration. At pages 2 and 3 thereof, Opposer simply dismisses the fact it did not establish what, exactly, it claims its mark to be. Opposer tries to dismiss this problem, stating “. . . in either event, “green ivy” is the dominant portion, and there was clearly use in one form or the other, or both. In light of this, which one is immaterial.” Opposer offers no explanation how the facts of this matter can be so crystallized that there is no genuine dispute of material fact and that the Board should summarily rule in favor of Opposer when Opposer cannot clearly articulate what, exactly, it claims as its mark and when that/those mark(s) was/were allegedly used. Again, it is Opposer’s burden of proof, a burden that Opposer failed to meet, a burden that cannot be rectified by filing a request for reconsideration.

The Request for Reconsideration also improperly ‘requests’ the Board belatedly take judicial notice of certain alleged facts. *See* Request for Reconsideration at p. 6. While Applicant does not disagree that TBMP § 704.12 permits the taking of judicial notice, including such a

request in a request to reconsider under TBMP § 518 is improper for two reasons: (1) it is not a proper request to take judicial notice under TBMP § 704.12; and (2) Opposer did not request the Board take judicial notice when moving for summary judgment rendering the current request an impermissible attempt to present the Board with new information in a request for reconsideration that was not plead in the underlying motion.¹

First, party cannot simply tell the Board to take judicial notice of a fact, a motion must be made and the opposing party is entitled to be heard.

The Board will take judicial notice of a relevant fact not subject to reasonable dispute, as defined in Fed. R. Evid. 201(b), if a party (1) requests that the Board do so, and (2) supplies the necessary information. The request should be made during the requesting party's testimony period, by notice of reliance accompanied by the necessary information. The Board, in its discretion, may take judicial notice of a fact not subject to reasonable dispute, as defined in Fed. R. Evid. 201(b), whether or not it is requested to do so.

TBMP § 704.12(b) (notes omitted). Thus, Opposer's statement in the Request for Reconsideration is not a proper attempt to request the Board take judicial notice of dictionary definitions as it was not made as a formal request and did not provide Applicant with an opportunity to respond and provide its own proposed definitions based upon reliable sources. Additionally, and in further violation of the rule, the 'request' was not made during the Opposer's testimony period.

Second, Opposer never requested the Board take judicial notice during the briefing on its motion for summary judgment. Therefore, the new request, made for the first time during the Request for Reconsideration, is improper.

¹ Opposer makes no argument (and could not legitimately make an argument) that it was unaware of the existence of dictionaries at the time it filed its Motion for Summary Judgment.

Generally, the premise underlying a motion for reconsideration, modification or clarification under 37 CFR § 2.127(b) is that, based on the facts before it and the prevailing authorities, the Board erred in reaching the order or decision it issued. Such a motion may not properly be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion. Rather, the motion should be limited to a demonstration that based on the facts before it and the applicable law, the Board's ruling is in error and requires appropriate change.

TMBP § 518 (notes omitted). Encouraging the Board to take judicial notice of anything on a request for reconsideration is an improper attempt to use the request to introduce additional evidence.

Moreover, Opposer's motion is not "limited to a demonstration that based on the facts before it and the applicable law, the Board's ruling is in error and requires appropriate change" (TMBP § 518), the Request for Reconsideration reargues, at length, the same points raised in Opposer's Motion for Summary Judgment. Opposer had its opportunity to argue the *DuPont* factors and the Board disagreed with Opposer's position. Opposer cannot now use the Request for Reconsideration to reargue its position.

The Request for Reconsideration is nothing more than an attempt to reargue Opposer's Motion for Summary Judgment. Opposer has offered no new evidence that was not known at the time of filing, nor demonstrated how the Board had a failure of apprehension of, Opposer's Motion for Summary Judgment. The fact remains that Opposer failed to meet its burden of proof and should not be allowed to use the Request for Reconsideration as a vehicle to attempt to shift that burden to Applicant. The Motion for Summary Judgment was properly denied, and the Board should do the same with the Request for Reconsideration.

