

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  
General Contact Number: 571-272-8500

WINTER

Mailed: June 11, 2015

Opposition No. 91213057

*Hybrid Athletics, LLC*

*v.*

*Hylete LLC*

**Before Kuhlke, Mermelstein, and Masiello,  
Administrative Trademark Judges.**

**By the Board:**

Applicant seeks to register the following design mark in connection with “athletic apparel, namely, shirts, pants, shorts, jackets, footwear, hats and caps.”<sup>1</sup>



Registration of the applied-for mark is opposed on the ground of likelihood of confusion. In support of said ground, Opposer pleads, *inter alia*, ownership of a trademark registration for the following design mark in connection with “conducting fitness classes; health club services, namely, providing instruction and

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<sup>1</sup> Application Serial No. 85837045, filed January 30, 2013, under Section 1(a) of the Trademark Act, claiming April 9, 2012, as its date of first use. The following description of the mark is included: “The mark consists of [*sic*] stylized ‘H.’”

equipment in the field of physical exercise; personal fitness training services and consultancy; physical fitness instruction,”<sup>2</sup> and common law rights resulting from its use of the same design mark with “athletic apparel, including shirts, hats, shorts and socks” and with the foregoing services since August 1, 2008.



This case now comes up for consideration of Opposer’s fully briefed motion (filed March 2, 2015) for summary judgment on its claim of likelihood of confusion, and on Applicant’s motion (filed January 2, 2015) for an extension of the discovery period. For purposes of this order, we presume the parties’ familiarity with the materials and arguments submitted in connection with the subject motions.

Opposer’s Motion for Summary Judgment

Summary judgment is an appropriate method of disposing of cases in which there is no genuine dispute with respect to any material fact, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c)(1). 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

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<sup>2</sup> U.S. Reg. No. 4480850, registered February 11, 2014. The registration includes the following description of the mark: “The mark consists of the stylized letter ‘H.’”

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). Additionally, the evidence of record and all justifiable inferences that may be drawn from the undisputed facts must be viewed in the light most favorable to the non-moving party. *See Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); and *Opryland USA*, 23 USPQ2d at 1472.

To prevail on summary judgment on its claim of likelihood of confusion, Opposer must establish that there is no genuine dispute that it has standing to maintain this proceeding; that it owns a relevant registration or has priority of use; and that contemporaneous use of the parties' respective marks on their respective goods or services would be likely to cause confusion, mistake or to deceive consumers. *See* 15 U.S.C. § 1052(d); and *Hornblower & Weeks, Inc. v. Hornblower & Weeks, Inc.*, 60 USPQ2d 1733, 1735 (TTAB 2001).

Based on our review of the parties' arguments and supporting evidence,<sup>3</sup> we find that Opposer, as the party moving for summary judgment, has not met its burden of establishing that there is no genuine dispute as to material facts and that it is

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<sup>3</sup> 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, e.g., Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993). *See* TBMP § 528.05(a) (2014).

entitled to judgment as a matter of law on its claim of likelihood of confusion. At a minimum,<sup>4</sup> there exist genuine disputes as to whether the commercial impressions evoked by the parties' respective marks are the same or similar and as to the strength of Opposer's mark. In view thereof, Opposer's motion for summary judgment is **denied**.

Applicant's Motion to Extend Discovery

On November 18, 2014, the Board granted in part Opposer's motion for sanctions and reset the trial schedule, setting the close of the discovery period for January 2, 2015. On January 2nd, Applicant filed a motion seeking a thirty-day extension of the discovery period. Applicant explains that on December 31, 2014, Opposer served on Applicant over 5,000 "discovery documents and images," and that Applicant needs additional time to review them, to serve follow-up discovery as necessary, and to potentially file a motion to compel. Applicant also states that its counsel was retaining additional counsel "to address this workload."

Opposer opposes the proposed extension, asserting that Applicant has failed to argue specifically the nature of the discovery needed, additional discovery requests would be burdensome to Opposer, Opposer has already provided Applicant with proper responses, Applicant has never sought to schedule depositions, and Applicant has thus far not objected to Opposer's discovery responses. Opposer also argues that Applicant has not been diligent during discovery as shown by the

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<sup>4</sup> The fact that 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.

Board's order granting discovery sanctions against Applicant. Finally, Opposer contends that Applicant is merely attempting to delay the matter again.

The appropriate standard for allowing an extension of a prescribed period prior to the expiration of the term is "good cause." *See* Fed. R. Civ. P. 6(b) and TBMP § 509 (2014) and cases cited therein. The Board is generally liberal in granting extensions before the period to act has lapsed, so long as the motion sets forth with particularity facts that constitute good cause for the requested extension, *Fairline Boats plc v. New Howmar Boats Corp.*, 59 USPQd 1479, 1480 (TTAB 2000), and the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. *See, e.g., SFW Licensing Corp. v. Di Pardo Packing Ltd.*, 60 USPQ2d 1372, 1375 (TTAB 2001) (cursory and unsupported statements are insufficient to show good cause); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000); and *American Vitamin Products, Inc. v. DowBrands Inc.*, 22 USPQ2d 1316 (TTAB 1992). The moving party, however, retains the burden of persuading the Board that it was diligent in meeting its responsibilities and should therefore be awarded additional time. *See National Football League v. DNH Management LLC*, 85 USPQ2d 1852, 1854 (TTAB 2008), *citing Sunkist Growers, Inc. v. Benjamin Ansehl Company*, 229 USPQ 147 (TTAB 1985).

We find that Applicant has not shown good cause for an extension of the discovery period. Opposer's copious response to Applicant's discovery requests, which indicates Opposer's cooperation in the discovery process, was apparently

timely, as Applicant does not contend otherwise. A party may not wait until the waning days of the discovery period to serve its discovery requests and then be heard to complain that it needs an extension of the discovery period in order to take additional discovery. Applicant's apparent delay in initiating discovery and consequent inability to serve follow-up discovery does not constitute good cause for an extension of the discovery period. If a party believes that issues in a case are complex and may involve lengthy discovery, it is its responsibility to begin taking discovery early in the discovery period. To allow an extension for all purposes would be to reward Applicant for its delay in initiating discovery, a practice which is to be discouraged. *Luehrmann v. Kwik Kopy Corp.*, 2 USPQ2d 1303, 1305 (TTAB 1987).

Moreover, Applicant has not been diligent in meeting its discovery responsibilities in this case. Specifically, Applicant failed to respond fully to Opposer's discovery requests on the basis of its confidentiality concerns, notwithstanding the Board's standard protective order applicable to this matter; and Applicant's lack of responsiveness resulted in Opposer's submission of its motion to compel and motion for sanctions, both of which delayed this proceeding. In short, it appears that Applicant has not complied with its duty to cooperate in this matter and only became involved in the proceeding after the Board issued its order granting discovery sanctions. In view of the foregoing, we find that Applicant has failed to show good cause for an extended discovery period. Accordingly, Applicant's motion to extend the discovery period is **denied**.

Proceeding Resumed; Trial Dates Reset

This proceeding is resumed. Trial dates are reset in accordance with the following schedule:

<b>Plaintiff's 30-day Trial Period Ends</b>	<b>8/10/2015</b>
<b>Defendant's Pretrial Disclosures Due</b>	<b>8/25/2015</b>
<b>Defendant's 30-day Trial Period Ends</b>	<b>10/9/2015</b>
<b>Plaintiff's Rebuttal Disclosures Due</b>	<b>10/24/2015</b>
<b>Plaintiff's 15-day Rebuttal Period Ends</b>	<b>11/23/2015</b>

**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. *See* Trademark Rule 2.125, 37 C.F.R. § 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129, 37 C.F.R. § 2.129.

