

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

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Mailed: June 15, 2015

Opposition No. 91218363

*New Wave Innovations, Inc.*

*v.*

*Mr. Foamer, Inc.*

**Elizabeth A. Dunn, Attorney (571-272-4267):**

Following review of the orders in the civil litigation between the parties, the Board finds that the suspension pending disposition of the civil litigation is not appropriate. Accordingly, proceedings herein are resumed, and dates are reset at the end of this order.

DISCUSSION

On April 27, 2015, pursuant to the Board's order, Opposer filed documents from the civil action between the parties.<sup>1</sup> In this proceeding, Opposer claims priority of use and likelihood of confusion between its marks MR. FOAMER (standard characters) and CHRISTMAS WISHES FROM MR. FOAMER and design, for car washing services and Applicant's mark MR. FOAMER (standard

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<sup>1</sup> Although also submitted, the Board has not reviewed Opposer's brief in support of its appeal of the district court order.

**Opposition No. 91218363**

characters) for car washing goods and services, MR. FOAMER (standard characters), and fraud based on Applicant's asserted failure to use the mark with the listed services (but not the goods) at the time the application was filed.

On July 16, 2013, Opposer filed a complaint in the United States District Court for the Southern District of Florida, pleading, among other claims, trademark infringement by three defendants, including Applicant, and seeking enjoinder of any use of the MR. FOAMER mark. *New Wave Innovations, Inc., v. James (Jim) Mcclimond, Mr. Foamer, Inc. and Car Wash Experts, Inc.*, Case 1:13-cv-22541-MGC. On March 28, 2014, the District Court adopted the Magistrate Report & Recommendation, and denied Opposer's motion for a preliminary injunction based on its trademark rights in the mark MR. FOAMER, because Opposer established only token use in 2011, and not the actual and continual prior use necessary to assert trademark rights.<sup>2</sup> On September 30, 2014, the district court granted Opposer's motion to stay litigation pending disposition of its appeal to the United States Court of Appeals for the Eleventh Circuit (hereafter, the appellate court) and this opposition, and issued an administrative close to the civil action, with proceedings only to be reopened if necessary when the stay was lifted. On January 21, 2015, the appellate court affirmed the district court's denial of the injunction.

The findings by the district court and the appellate court regarding opposer's motion for a preliminary injunction were not a final judgment, so res judicata principles do not apply. While the findings of a federal court may be binding on the

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<sup>2</sup> Opposer did not submit the Magistrate Report & Recommendation .

**Opposition No. 91218363**

Board, inasmuch as Opposer's burden of proof for obtaining a preliminary injunction in a civil action differs from the Opposer's burden of proof with respect to its claim of priority of use and likelihood of confusion in this opposition, the district court's findings, affirmed by the appellate court, are not binding on the Board, and do not preclude Opposer going forward with its claims in this opposition.

**ORDER**

Proceedings herein are resumed, and dates are reset below:

Time to Answer	<b>7/13/2015</b>
Deadline for Discovery Conference	<b>8/12/2015</b>
Discovery Opens	<b>8/12/2015</b>
Initial Disclosures Due	<b>9/11/2015</b>
Expert Disclosures Due	<b>1/9/2016</b>
Discovery Closes	<b>2/8/2016</b>
Plaintiff's Pretrial Disclosures	<b>3/24/2016</b>
Plaintiff's 30-day Trial Period Ends	<b>5/8/2016</b>
Defendant's Pretrial Disclosures	<b>5/23/2016</b>
Defendant's 30-day Trial Period Ends	<b>7/7/2016</b>
Plaintiff's Rebuttal Disclosures	<b>7/22/2016</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>8/21/2016</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. 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.