

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Mailed: December 13, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Curve Therapeutics Ltd.*

*v.*

*Shan X. Wang*

—  
Opposition No. 91276501  
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Bruce S. Londa of Norris McLaughlin, P.A.,  
for Curve Therapeutics Ltd.

Michael W. Schroeder of Reyes & Schroeder Associates, P.C.,  
for Shan X. Wang.

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Before Cataldo, Lynch, and Johnson,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Shan X. Wang (“Applicant”) seeks registration on the Principal Register of the mark CURVE BIOSCIENCES (in standard characters, with “BIOSCIENCES” disclaimed) identifying “Diagnostic kits comprised of medical diagnostic reagents and assays for testing of bodily fluids for use in disease detection, namely, cancer,” in International Class 5; and “Diagnostic apparatus for the detection of cancer, namely diagnostic apparatus for testing of bodily fluids for use in cancer detection, and excluding devices and apparatus for computer-assisted surgery, robot-assisted

surgery, radio-surgical and radio-therapeutic applications,” in International Class 10.<sup>1</sup> Curve Therapeutics Ltd. (“Opposer”) filed a notice of opposition<sup>2</sup> to registration of Applicant’s mark, claiming that the term is likely to cause confusion with Opposer’s applied-for mark, CURVE THERAPEUTICS (in standard characters, with “THERAPEUTICS” disclaimed), identifying various medical goods and services in International Classes 1, 5, 42, and 44.<sup>3</sup> 15 U.S.C. § 1052(d).

## **I. Relevant Procedural History**

In a July 21, 2023 order,<sup>4</sup> the Board denied Opposer’s summary judgment motion on its pleaded ground of likelihood of confusion and made, inter alia, the following findings:

The (informal) answer<sup>5</sup> does not explicitly admit or deny each allegation in the notice of opposition.<sup>6</sup>

We construe (the answer) as a general denial of the salient allegations in the notice of opposition.<sup>7</sup>

Opposer submits a declaration of its counsel (7 TTABVUE 19-20), who introduces as evidence (1) a copy of Opposer’s pleaded application/request for extension of protection to the United States that was filed with the USPTO

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<sup>1</sup> Application Serial No. 90668611 was filed on April 23, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s claim of a bona fide intent to use the mark in commerce.

<sup>2</sup> 1 TTABVUE.

<sup>3</sup> Application Serial No. 79335582 was filed on July 13, 2021, under Section 66(a) of the Trademark Act, 15 U.S.C. §1117(a) based upon International Registration 1649648, issued on July 13, 2021 with a Section 67 claimed priority date of April 21, 2021.

<sup>4</sup> 14 TTABVUE.

<sup>5</sup> 4 TTABVUE.

<sup>6</sup> Board’s July 21, 2023 order denying Opposer’s motion for summary judgment. 14 TTABVUE 3 n.5.

<sup>7</sup> 14 TTABVUE 3.

(*id.* at 22-25); (2) a printout of Opposer's International Registration No. 1649648 from the World Intellectual Property Organization's Global Brand Database (*id.* at 27-28); and (3) a printout of Opposer's United Kingdom Trademark Registration No. UK00003629968 from the United Kingdom Intellectual Property Office (*id.* at 30-31).<sup>8</sup>

Opposer has made of record the USPTO Office Action suspending its pleaded application pending a possible refusal to register under Trademark Act Section 2(d), should the mark in the involved application register. 7 TTABVUE 33-42. **For summary judgment only**, we find no genuine dispute of material fact that Opposer is entitled to bring and maintain this opposition proceeding. *See Weatherford/Lamb, Inc. v. C&J Energy Servs., Inc.*, 96 USPQ2d 1834, 1837 (TTAB 2010). Notwithstanding, Opposer "must maintain its entitlement ... throughout the proceeding," and prove it at trial. *Monster Energy*, 2021 USPQ2d 1197, at \*7 n.12.<sup>9</sup>

Opposer's International Registration No. 1649648 issued in July 2021, and is based on underlying application No. UK00003629968 from the United Kingdom filed less than six months earlier on April 21, 2021 and which registered on September 3, 2021. Thus, pursuant to Trademark Act Sections 66(b) and 67, Opposer is entitled to rely on the April 21, 2021 date for priority purposes. *See Gen. Motors Corp. v. Aristide & Co., Antiguaire de Marques*, 87 USPQ2d 1179, 1181 (TTAB 2008). Inasmuch as this date is two days before the April 23, 2021 filing date of Applicant's application, and there is no evidence of Applicant's actual use of his mark prior to April 21, 2021, **for summary judgment only**, we find no genuine dispute of material fact that Opposer has priority. *See Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2011 (TTAB 2015).<sup>10</sup>

Further, the parties are reminded that evidence submitted in support of or in opposition to a 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 during the appropriate trial period. *See, e.g., Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1465 n.2 (TTAB 1993); TBMP § 528.05(a).<sup>11</sup>

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<sup>8</sup> 14 TTABVUE 5-6 n. 6.

<sup>9</sup> 14 TTABVUE 5 (emphasis added).

<sup>10</sup> 14 TTABVUE 7 (emphasis added).

<sup>11</sup> 14 TTABVUE 8 n. 7.

## II. Evidentiary Matters

With his brief, Applicant submitted for the first time a copy of his biography from the Stanford University's website; a dictionary definition of "biosciences;" and copies of third-party registrations of CURVE formative marks.<sup>12</sup> Applicant requests that we take judicial notice of these exhibits.

"The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format or have fixed regular editions." *In re Nextgen Mgmt., LLC*, 2023 USPQ2d 14, at \*9 n.5 (TTAB 2023); *see also Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). However, we need not rely upon Applicant's proffered definition of "biosciences" in order to come to our determination herein, and decline to take judicial notice thereof.

With regard to the third-party registrations, the Board does not take judicial notice of applications or registrations; they must be proved by competent evidence during trial. *See, e.g., In re Jonathan Drew Inc.*, 97 USPQ2d 1640, 1644 n.11 (TTAB 2011) (stating that "the Board's well-established practice is not to take judicial notice of registrations that reside in the USPTO"); *Beech Aircraft Corp. v. Lightning Aircraft Co.*, 1 USPQ2d 1290, 1293 (TTAB 1986) ("[W]e do not take judicial notice of application and registration files that reside in the Patent and Trademark Office on the basis of their mere identification in briefs, pleadings and evidentiary submissions.").

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<sup>12</sup> 26 TTABVUE 57-181.

Nor is Applicant's online biography the type of evidence of which the Board takes judicial notice. Although if timely submitted under notice of reliance, this type of Internet evidence would be admissible for what it shows on its face, *see* Trademark Rule 2.122(e)(2), 37 C.F.R. § 2.122(e)(2), this evidence constitutes hearsay and may not be relied upon for the truth of the matters asserted therein. Fed. R. Evid. 801(c); *Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1040 (TTAB 2010); TBMP §704.08 (2024-06) ("Even if properly made of record, however ... Internet printouts would only be probative of what they show on their face, not for the truth of the matters contained therein, unless a competent witness has testified to the truth of such matters."). Thus, for purposes of judicial notice, the biography is not "generally known," or the type of fact whose accuracy can be readily and reliably determined, as contemplated by Fed. R. Evid. 201(b)(2). *See UMG Recordings, Inc. v. Mattel, Inc.*, 100 USPQ2d 1868, 1874 n.12 (TTAB 2011) (rejecting request for judicial notice of web pages).

In its reply brief,<sup>13</sup> Opposer asserts:

Applicant, as it has previously, asks the Board to adopt a double standard as to the parties, this time with respect to the USPTO's records, asking the Board to ignore them, and the previous, undisputed evidence of record in this proceeding with respect to Opposer's burden, but to accept *thirty-six* sets of records first submitted as an exhibit to Applicant's trial brief (*See* Dkt. 26 at note 5). Given the procedural history of this proceeding, Opposer does not oppose the Board's review of those records to the extent it also takes into account evidence already properly before it, of-record in the proceeding, and part of the TSDR record for Opposer's asserted application.

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<sup>13</sup> 27 TTABVUE 4 n. 1.

In other words, Opposer agrees to the Board's consideration of Applicant's evidence submitted outside of trial with his brief if the Board also considers Opposer's evidence submitted outside of trial with its pleading and summary judgment motion. However, Opposer's condition for agreeing is not satisfied, as Applicant does not offer reciprocal consent to the consideration of Opposer's untimely evidence.

With its notice of opposition, Opposer submitted a printout from the website [trademarks.ipo.uk/ipo-tmcase](https://trademarks.ipo.uk/ipo-tmcase) displaying its UK Registration No. UK00003629968.<sup>14</sup> However, with the exception of a current status and title copy, or photocopy thereof, prepared by the USPTO, of a plaintiff's pleaded registration, or a current copy of information from the USPTO electronic database records showing the current status and title of the registration, exhibits attached to pleadings are not evidence on behalf of the party to whose pleadings they are attached unless they are properly identified and introduced into evidence as exhibits during the time for taking testimony. 37 C.F.R. §2.122(c). *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 317 (2024) and authorities cited therein. As a result, the exhibit to Opposer's pleading is not of record for purposes of trial.

Evidence submitted in connection with a motion for summary judgment is ordinarily of record only for purposes of that motion. If the case goes to trial, the summary judgment evidence may not form part of the evidentiary record to be considered at final hearing unless it is properly introduced in evidence during the appropriate testimony period. *See, e.g., Zoba Int'l Corp. v. DVD Format/LOGO*

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<sup>14</sup> 1 TTABVUE 5, 9-10.

*Licensing Corp.*, 98 USPQ2d 1106, 1115 n.10 (TTAB 2011) (evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of such motion), *appeal dismissed*, 427 F. App'x 892 (Fed. Cir. 2011); *see also* TBMP §528.05(a)(1) and authorities cited therein. Opposer did not introduce its summary judgment evidence at trial.

Nonetheless, the parties may stipulate that any or all of the summary judgment evidence be treated as properly of record for purposes of final decision. *See, e.g., Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 109 USPQ2d 1949, 1951 (TTAB 2014) (parties stipulated that they could rely at trial on materials submitted in support of and against each party's motion for summary judgment), *vacated on other grounds*, 786 F.3d 960, 114 USPQ2d 1827 (Fed. Cir. 2015).

The parties in this case did not so stipulate, and we cannot construe Applicant's request that we take judicial notice of the untimely submitted evidence with his brief, and Opposer's request that we consider evidence submitted with its pleading and summary judgment motion, as amounting to such a stipulation. Applicant in his brief, does not agree to consideration of Opposer's summary judgment evidence and argues that Opposer has failed to introduce such evidence at trial.<sup>15</sup> We thus find no basis for a meeting of the minds of the parties to stipulate the parties' summary judgment evidence into the trial record or otherwise to consider the parties' unilateral submission of untimely evidence outside of their respective trial periods. Neither did

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<sup>15</sup> 26 TTABVUE 22-25.

the parties move for enlargement of their testimony periods to introduce additional testimony or evidence.

Trademark Rule 2.121(a), 37 C.F.R. § 2.121(a), provides that “[n]o testimony shall be taken or evidence presented except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.” Exhibits and other evidentiary materials attached to a party’s brief can be given no consideration unless they were properly made of record during the time for taking testimony. *See, e.g., Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 71345, at \*2 (TTAB 2020) (exhibits attached to brief not considered); Similarly, summary judgment evidence will not be considered at trial unless properly made of record during trial. *See, e.g., Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1465 n.2 (TTAB 1993).

In view thereof, we will give no consideration to the evidence appended to Applicant’s brief, or to the evidence submitted with Opposer’s notice of opposition and summary judgment filings.

### **III. The Record**

The record includes the pleadings and, by operation of Trademark Rule 2.122, 37 CFR § 2.122, the file of the subject application.

Opposer submitted a Notice of Reliance on copies of third-party registrations to show diagnostic and therapeutic goods and services may emanate from a common source.<sup>16</sup>

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<sup>16</sup> 17 TTABVUE.



Opposer further submitted a Notice of Reliance on third-party website screen shots to show the relatedness of the goods and services at issue.<sup>17</sup>

Opposer submitted no testimony. Applicant submitted no testimony or evidence.

#### **IV. Entitlement to a Statutory Cause of Action**

In every inter partes opposition or cancellation proceeding, the party in the position of plaintiff must plead and prove its entitlement to a statutory cause of action. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020). This holds true even if the defendant does not contest the plaintiff's entitlement. *Chutter, Inc. v. Great Mgmt. Grp.*, 2021 USPQ2d 1001, \*10 (TTAB 2021), *rev'd on other grounds, Great Concepts, LLC v. Chutter, Inc.*, 90 F.4th 1333, 2023 USPQ2d 1215 (Fed. Cir. 2023); *Sabhani v. Mirage*, 2021 USPQ2d 1241, at \*13-14 (TTAB 2021).

A party in the position of plaintiff may oppose registration of a mark when opposition is within the zone of interests protected by statute, and the plaintiff has a reasonable belief in damage proximately caused by the prospective registration of the mark. *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \* 6-7 (Fed. Cir. 2020); *Mars Generation, Inc. v. Carson*, 2021 USPQ2d 1057, \* 6 (TTAB 2021). As the Court of Appeals for the Federal Circuit has observed, there is “no meaningful, substantive difference between the analytical frameworks” in the prior “standing” case law, under which an opposer must show a real interest in the proceeding and a reasonable basis for its belief in damage, *see Empresa Cubana Del*

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<sup>17</sup> 18 TTABVUE.

*Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014), and the current “entitlement” case law, under which an opposer must show an interest falling within the zone of interests protected by statute and damage proximately caused by registration. *Corcamore*, 2020 USPQ2d 11277, at \*4.

Thus, “a party that demonstrates a real interest in [opposing registration of] ... a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the statute]. ... Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” *Id.* at \*7; *see also U. Kentucky v. 40-0, LLC*, 2021 USPQ2d 253, \*8-9 (TTAB 2021).

Here, Opposer pleaded its entitlement to assert a statutory cause of action based on an assertion of its ownership of its pleaded application, priority and likelihood of confusion,<sup>18</sup> but “[t]he facts regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading].” *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982). “Mere allegations or arguments in support of standing are insufficient proof thereof. A plaintiff cannot rest on mere allegations in its complaint or arguments in its brief to prove standing.” *WeaponX Performance Prods. Ltd. v. Weapon X Motorsports, Inc.*, 126 USPQ2d 1034, 1039 (TTAB 2018).

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<sup>18</sup> 1 TTABVUE 4-7.

As the Board has declared, and in this case noted in our denial of Opposer's summary judgment motion,<sup>19</sup> a plaintiff "must maintain its entitlement to the statutory cause of action throughout the proceeding and affirmatively prove its existence at the time of trial by introducing evidence to support the allegations in its pleading that relate to such entitlement as an element of its case-in-chief." *Philanthropist.com, Inc. v. General Conf. Corp. of Seventh-Day Adventists*, 2021 USPQ2d 643, \*11-12 (TTAB 2021) *appeal docketed*, Case No. 21-2208 (Fed. Cir. 2021). *See also* TBMP § 309.03(b) (2024-06) ("Allegations in support of standing which may be sufficient for pleading purposes must later be affirmatively proved by the plaintiff at trial....").

As discussed above, we do not take judicial notice of the record of Opposer's pleaded application because it was not properly made of record. *Cf. L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1436 n.6 (TTAB 2012); *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1192 n.6, 1193-94 nn.8 & 9 (TTAB 2007). Opposer otherwise has not submitted any evidence to support its pleaded entitlement to a statutory cause of action.<sup>20</sup>

That leaves Opposer with argument only, but mere attorney argument is of no help. "Factual statements made in a party's brief(s) on the case can be given no consideration unless they are supported by evidence properly introduced at trial." TBMP § 704.06(b) (2024). *See also Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127

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<sup>19</sup> 14 TTABVUE 5.

<sup>20</sup> We do not construe Applicant's non-conforming answer (4 TTABVUE) as containing admissions sufficient to support Opposer's statutory entitlement.

USPQ2d 1797, 1799 (Fed. Cir. 2018) (affirming Board's exclusion of assertions of fact made in a brief and agreeing with the Board that they are not evidence introduced at trial); *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) ("Attorney argument is no substitute for evidence."); *Saul Zaentz Co. v. Bumb*, 95 USPQ2d 1723, 1725 n.7 (TTAB 2010) (assertions in brief carry no weight unless supported by evidence introduced at trial or except as admission against interest).

Consequently, Opposer, bearing the burden of proof, fails to demonstrate an interest falling within the zone of interests protected by the Trademark Act or a reasonable belief of damage proximately caused by the continued registration of Respondent's trademarks. For these reasons, Opposer has not shown its entitlement to the statutory causes of action it asserts here, and this proceeding must be dismissed for failure to prove entitlement.

Opposer's failure to prove its entitlement to a statutory cause of action is a sufficient basis to dismiss this proceeding. *See Lumiere Prods., Inc. v. Int'l Tel. & Tel. Corp.*, 227 USPQ 892, 893 (TTAB 1985). Even if Opposer had established its entitlement (which it did not), the lack of evidence also means that Opposer failed to carry the burden of proof as to its priority. *Sanyo Watch Co. v. Sanyo Elec. Co.*, 691 F.2d 1019, 215 USPQ 833, 834 (Fed. Cir. 1982) ("As the [plaintiff] in this proceeding, appellant bears the burden of proof which encompasses not only the ultimate burden of persuasion, but also the burden of going forward with sufficient

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proof of the material allegations in the [petition to cancel], which, if not countered, negates appellee's right to a registration.”).

## **V. Decision**

The opposition to registration of the proposed mark CURVE BIOSCIENCES in Application Serial No. 90668611 is dismissed.