

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Mailed: January 5, 2004

Cancellation No. 92041464

AFX INC.

v.

PACESETTER, INC.

Cindy B. Greenbaum, Attorney:

STIPULATED PROTECTIVE AGREEMENT

The stipulated protective agreement filed on November 5, 2003 is noted. The parties are referred, as appropriate, to TBMP §§ 416.05 (Signature of Protective Order), 416.06 (Filing Confidential Materials With Board), 416.07 (Handling of Confidential Materials by Board).

The parties are advised that only confidential or trade secret information should be filed pursuant to a stipulated protective agreement. Such an agreement may not be used as a means of circumventing paragraphs (d) and (e) of 37 CFR § 2.27, which provide, in essence, that the file of a published application or issued registration, and all proceedings relating thereto, should otherwise be available for public inspection.

PETITIONER'S SUMMARY JUDGMENT MOTION

Petitioner's motion for summary judgment, filed December 16, 2003, is acknowledged. The motion is denied as untimely. Trademark Rule 2.127(e)(1).

Pursuant to the Board's January 22, 2003 institution order, petitioner's testimony period was scheduled to close November 8, 2003. On November 6, 2003, respondent filed a consented motion to extend until January 9, 2004 petitioner's testimony period, and to reset all subsequent trial periods. Petitioner's summary judgment motion bears a certificate of mailing dated December 9, 2003.¹

If testimony periods are reset prior to the opening of a petitioner's testimony period-in-chief, then a motion for summary judgment filed before the opening of that first trial period is timely. Once the first testimony period on a trial schedule opens, however, any summary judgment motion filed thereafter is untimely, even if trial periods are later rescheduled and the motion is filed prior to the opening of the rescheduled testimony period-in-chief for petitioner, and even if no trial evidence was adduced by petitioner while its trial period-in-chief was open. See *La Maur, Inc. v. Bagwells Enterprises, Inc.*, 193 USPQ 234

¹ Pursuant to Trademark Rule 2.197(a)(1)(i)(A), the summary judgment motion is considered to have been filed on December 9, 2003, the day before petitioner's rescheduled testimony period opened.

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(Comm'r Pat. 1976); and T. Jeffrey Quinn, TIPS FROM THE TTAB: Inter Partes Summary Judgment Revisited, 76 Trademark Rep. 73, at 73-74 (1986). Thus, even though petitioner's motion for summary judgment was filed just prior to the opening of its reset testimony period-in-chief, it is nonetheless untimely.

Since Trademark Rule 2.127(d) specifies that the Board will stay proceedings when a motion for summary judgment is filed, petitioner had good cause to refrain from taking testimony or presenting other evidence in support of its case, notwithstanding the untimeliness of the motion itself. Accordingly, trial dates are reset as follows.

DISCOVERY PERIOD TO CLOSE:

CLOSED

Thirty-day testimony period for party in position of plaintiff to close: **February 15, 2004**

Thirty-day testimony period for party in position of defendant to close: **April 15, 2004**

Fifteen-day rebuttal testimony period to close:

May 30, 2004

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 Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.