

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

Faint

Mailed: September 23, 2013

Cancellation No. 92052897

Thomas Sköld

v.

Galderma Laboratories, Inc.

**Before Cataldo, Shaw and Greenbaum,
Administrative Trademark Judges.**

By the Board:

This case now comes up on respondent's second motion for summary judgment,¹ filed April 30, 2013, and petitioner's cross-motion for summary judgment on the issue of priority.² The motions are fully-briefed.³

Analysis

¹ In its order of November 8, 2012, the Board granted respondent's partial motion for summary judgment on the claim of abandonment.

² We note petitioner's July 8, 2013 withdrawal of his motion to strike, which had been included in petitioner's reply in support of his cross-motion. Accordingly, the motion to strike will be given no consideration.

³ In its brief in response to petitioner's cross-motion for summary judgment, respondent argues petitioner's cross-motion was untimely. Petitioner's cross-motion addressing the same subject as respondent's motion is considered germane to respondent's motion for summary judgment, even though it was filed after the opening of the first testimony period. See Trademark Rule 2.127(d). Thus, petitioner's cross-motion for summary judgment is timely. We observe, however, that inasmuch as testimony, although reset below, has already opened, any further pre-trial motions, such as summary judgment motions or motions to compel, would be untimely and given no consideration. See Trademark Rules 2.120(e)(1) and 2.127(e)(1).

Summary judgment is appropriate where the movant shows there is no genuine dispute as to any material fact and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A party asserting that a fact cannot be true or is genuinely disputed must support its assertion by either:

- a) citing to particular parts of materials in the record,... or
- b) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). In deciding a summary judgment motion, the function of the Board is not to try issues of fact, but to determine if there are any genuine disputes of material fact to be tried. See *Dyneer Corp. v. Automotive Products plc*, 37 USPQ2d 1251, 1254 (TTAB 1995).

When the moving party has supported its motion with sufficient evidence which, if unopposed, indicates there is no genuine dispute of material fact, the burden then shifts to the non-moving party to demonstrate the existence of a genuine dispute of material fact to be resolved at trial. *Enbridge, Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537, 1540 (TTAB 2009). Further, merely because both parties have moved for summary judgment does not necessarily mean that there are no genuine disputes of material fact, and does not dictate that judgment should be entered. See *University Book Store v. University of Wisconsin Board of Regents*, 33 USPQ2d 1385, 1389

(TTAB 1994).

The Board presumes that the parties are familiar with the record, and will not list all of the evidence submitted in connection with the motion and cross-motion. Based on our review of the arguments and evidence submitted by the parties, and drawing all inferences in favor of the respective non-moving parties, we find that, at a minimum, there is a genuine dispute as to material facts related to whether petitioner has made common law trademark use, or use analogous to trademark use, prior to respondent's constructive priority dates based on the filing of its trademark applications, or whether respondent could establish any use of the registered marks prior to its application filing date.⁴

Accordingly, the cross-motions for summary judgment are **denied**.⁵

Proceeding Resumed; Trial Dates Reset

⁴ The fact that we have identified only two material facts that are genuinely in dispute as a sufficient basis for denying the cross-motions for summary judgment should not be construed as a finding that these are necessarily the only issues that remains for trial.

⁵ The parties should note that the evidence submitted in connection with the cross-motions for summary judgment is of record only for consideration of those cross-motions. To be considered at final hearing, any such evidence must be properly introduced in evidence during the appropriate trial period. See *Land O' Lakes Inc. v. Hugunin*, 88 USPQ2d 1957, 1960 n.7 (TTAB 2008); *University Games Corp. v. 20Q.net Inc.*, 87 USPQ2d 1465, 1468 n.4 (TTAB 2008); *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993) (declaration of witness submitted in connection with summary judgment motion was part of record for trial where witness identified and attested to accuracy of it during applicant's testimony period).

This proceeding is resumed. Trial dates are reset as set out below.

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| Plaintiff's Pretrial Disclosures Due: | 10/22/2013 |
| Plaintiff's 30-day Trial Period Ends: | 12/6/2013 |
| Defendant's Pretrial Disclosures Due: | 12/21/2013 |
| Defendant's 30-day Trial Period Ends: | 2/4/2014 |
| Plaintiff's Rebuttal Disclosures Due: | 2/19/2014 |
| Plaintiff's 15-day Rebuttal Period Ends: | 3/21/2014 |

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.
