

**THIS OPINION IS NOT CITABLE
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THE T.T.A.B.**

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

Goodman

Mailed: April 5, 2005

Opposition No. 91156975

The American Breeders Co-Op
aka The Alpa

v.

Merelinda Farms L.L.C.

Before Quinn, Chapman and Drost, Administrative Trademark
Judges.

By the Board:

This case now comes up on applicant's motion for summary judgment, filed November 18, 2004, by which, although not entirely clear, applicant appears to seek judgment on both grounds for opposition--(i) non-use of the subject mark in commerce and (ii) priority and likelihood of confusion. Opposer filed a brief in response but opposer had also timely filed a motion for Fed. R. Civ. P. 56(f) discovery. The motions are fully briefed.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). All reasonable inferences must be drawn in favor of the nonmoving party. The burden is on the moving party to

establish its right to summary judgment. See TBMP Section 528.01 (2d Ed. Rev. 2004).

Upon careful consideration of the arguments and evidence presented, we find that applicant has not met the burden to obtain summary judgment. Specifically, at a minimum, there is a genuine issue of material fact as to applicant's prior and continuous use of its mark on its goods.¹

In view thereof, applicant's motion for summary judgment is denied.²

In light of our denial of applicant's motion for summary judgment, opposer's motion for discovery under Fed. R. Civ. P. 56(f) is denied.

Proceedings are resumed. Trial dates are reset as follows:

¹ The fact that we have identified only one genuine issue of material fact as a sufficient basis for denying applicant's motion for summary judgment should not be construed as a finding that this is necessarily the only issue that remains for trial.

² The parties are reminded that any evidence submitted with a motion for summary judgment is only considered of record for purposes of that motion, unless it is properly introduced in evidence during the appropriate testimony period. See TBMP Section 528.05(a) (2d. Ed. Rev. 2004).

DISCOVERY PERIOD TO CLOSE:

CLOSED

30-day testimony period for party in position of plaintiff
to close:

June 10, 2005

30-day testimony period for party in position of defendant
to close:

August 9, 2005

15-day rebuttal testimony period for party in position of
plaintiff to close:

September 23, 2005

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.