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

WINTER

Mailed: November 30, 2009

Opposition No. 91169793

Cellco Partnership d/b/a Verizon Wireless

v.

AT&T Intellectual Property II, L.P. (assignee from Cingular Wireless II, LLC)

Before Cataldo, Mermelstein, and Bergsman Administrative Trademark Judges.

By the Board:

AT&T Intellectual Property II, L.P. (hereafter "applicant") seeks to register the mark MORE BARS IN MORE PLACES for a variety of telecommunications goods and services.[1]

Cellco Partnership d/b/a Verizon Wireless (hereafter "opposer") opposes registration of the applied-for mark on the grounds that applicant's alleged mark is deceptive pursuant to Trademark Act Section 2(a), 15 U.S.C. § 1052(a), and is deceptively misdescriptive pursuant to Trademark Act

[1] Application Serial No. 78490750, filed September 28, 2004, based on applicant's alleged *bona fide* intent to use the mark in commerce.

Section 2(e)(1), 15 U.S.C. § 1052(e)(1). In support of its claims, opposer alleges, *inter alia*, that the wording MORE BARS IN MORE PLACES refers to the industry-wide practice of using bars to indicate signal strength; that the involved mark is misdescriptive of and misrepresents the nature, quality and characteristics of applicant's goods and services, and constitutes a claim that applicant offers greater and/or broader signal strength, and/or network strength in more markets than are offered by opposer; that prospective purchasers are likely to understand that the involved mark constitutes a claim of superior signal strength and/or network strength; that signal strength and network reliability are significant factors in consumers' decisions whether to purchase products from or to subscribe to the services of a given telecommunications service provider; and that opposer believes that it will be damaged by registration of the involved mark.

In its answer, applicant denies the essential allegations set forth in the notice of opposition, but has admitted, on information and belief, that signal strength and network reliability are significant factors in consumers' decisions whether to purchase products from or to subscribe to the services of a given telecommunications provider (answer, ¶6).

Motion for Summary Judgment

This case now comes up for consideration of applicant's motion (filed July 15, 2009) for summary judgment on its contention that its alleged mark is "inherently distinctive (and not merely descriptive)" and that opposer's grounds for opposition under Sections 2(a) and 2(e)(1) of the Trademark Act must fail as a matter of law.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(c). A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Additionally, the evidence must be viewed in a light favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. *See Opryland USA, Inc. v. Great American Music Show, Inc.,* 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1993). Further, the Board may only ascertain whether issues of material fact are present, and may not resolve factual issues. *Lloyd's Food Products Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); and *Opryland USA*, *supra*.

Based on our careful consideration of the evidence and arguments submitted by the parties and drawing all inferences in favor of opposer as the non-movant, we find that applicant has failed to meet its burden of establishing that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. At a minimum, there are genuine issues of material fact as to how consumers will perceive the meaning of the involved mark, whether the mark is misleading or inaccurate, and whether it is likely to materially affect the consumers' purchasing decision.[2] *See In re Budge Manufacturing Co., Inc.*, 837 F.2d 77, 8 USPQ2d 1259, 1260 (Fed. Cir. 1988); *U.S. West Inc. v. BellSouth Corp.*, 18 USPQ2d 1307, 1312 (TTAB 1990); and *In re Quady Winery Inc.*, 221 USPQ 1213, 1214 (TTAB 1984). In view thereof, applicant's motion for summary judgment is denied.[3]

Proceeding is Suspended

We note that there is a civil action pending in the United States District Court, Southern District of New

[2] Although we have mentioned only three genuine issues of material fact in this decision, that is not to say that these are the only issues of material fact in dispute.

[3] The parties should note that evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced in evidence during the appropriate trial period. *See, e.g., Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993). *See* TBMP § 528.05(a) (2d ed. rev. 2004).

York,[4] between opposer and AT&T MOBILITY LLC (defendant therein, hereafter "AT&T"), which is apparently a related company to applicant in this proceeding. After reviewing the pleadings in the civil action, we note that plaintiff therein (opposer in this proceeding) similarly alleges, *inter alia*, that AT&T is making false and misleading claims in its advertisements using the slogan MORE BARS IN MORE PLACES (complaint, ¶¶ 2, 20, 60 and 68); that said slogan unequivocally conveys the message that AT&T's network provides a stronger signal within a superior coverage area (complaint, ¶85); that advertisements containing the slogan deceive consumers into believing that AT&T has superior domestic and foreign wireless coverage and network services (complaint, ¶¶ 25 and 98); that such deceptive advertising is material and diverts customers from choosing plaintiff's wireless carrier services (complaint, ¶¶ 28 and 99); that plaintiff therein has been irreparably harmed by AT&T's false advertisements (complaint, ¶103); and that AT&T should be enjoined from running or airing such advertisements, including those using the slogan MORE BARS IN MORE PLACES (complaint, ¶¶ 2, 29, prayer ¶B.1-4).

[4] The civil action is captioned CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, Plaintiff/Counterclaim Defendant v. AT&T MOBILITY LLC, Defendant/Counterclaim Plaintiff, Case No. 1:09-cv-6656 (LTS) (see opposition brief, p. 20, footnote 3).

It is the policy of the Board to suspend proceedings when the parties are involved in a civil action that may be dispositive of or have a bearing on the Board case. *See* Trademark Rule 2.117(a), 37 C.F.R. § 2.117(a). *See also* TBMP § 510.02 (2d ed. rev. 2004) (the Board may in its discretion suspend a proceeding pending disposition of a civil action in which only one of the parties is involved). Inasmuch as the referenced civil action involves the same mark and common issues of law and fact, we find that it may have a direct bearing on this proceeding. Accordingly, this proceeding is **SUSPENDED** pending final disposition of the civil action between opposer and AT&T MOBILITY LLC.

Within **TWENTY DAYS** after the final determination of the civil action, the parties shall so notify the Board and call this case up for any appropriate action. During the suspension period the Board shall be notified of any address changes for the parties or their attorneys.

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