

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Opposition No. 91195730
Opposition No. 91195731
Opposition No. 91195732
Opposition No. 91195733
Opposition No. 91195734
Opposition No. 91195735
Opposition No. 91195736

ICU MEDICAL, INC.

v.

RYMED TECHNOLOGIES, INC.

Cheryl Butler, Attorney, Trademark Trial and Appeal Board:

In accordance with the Board's order dated October 5, 2010, the discovery period was set to close on May 4, 2011. This case now comes up on opposer's fully briefed motion, filed April 22, 2011, to add Opposition No. 91199505, which commenced on April 19, 2011, to this consolidated proceeding.

The subject marks in this consolidated proceeding are: ABSOLUTE NEUTRAL; NEUTRAL BENEFIT; NEUTRAL CHOICE; NEUTRAL STANDARD; NEUTRAL INTEGRITY; NEUTRAL EDGE; and NEUTRAL ADVANTAGE, all for "medical devices, namely, intravenous connectors." Opposition Nos. 91195730-91195736, respectively.

The subject mark in Opposition No. 91199505 is THE ADVANTAGE IS CLEAR, also for "medical devices, namely, intravenous connectors."

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and 91195736**

In support of its motion, opposer argues that the parties are the same and that the oppositions raise common questions of law and fact. In particular, opposer argues that one of the applications in the consolidated proceeding contains the word "advantage" (NEUTRAL ADVANTAGE), that the most recently commenced opposition is against an application also made up in part of the word "advantage," and that "advantage" in each case is combined with additional generic or descriptive wording. Opposer expresses its belief that consolidation will save time, effort and expense without causing any prejudice or inconvenience. Opposer also asks that new case management dates be reset upon determination of the motion.

In response, applicant argues that the legal and factual issues associated with Opposition No. 91199505 differ from those associated with the existing consolidated proceeding. Specifically, applicant points out that all the marks involved in the consolidated proceeding consist in part of the generic term NEUTRAL combined with one other term;¹ that the mark which is the subject matter of Opposition No. 91199505 does not contain the term "neutral"; and that the mark THE ADVANTAGE IS CLEAR has a double entendre, is a phrase, and contains a verb, none of which is true for the marks that are the subject matter of the consolidated proceeding. Applicant argues that consolidation is

¹ Opposer, in its moving papers, pointed out that the U.S. District Court for the Central District of California found the term NEUTRAL to be generic when

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prejudicial and would delay a decision in the consolidated proceeding (where discovery was scheduled to close on May 4, 2011); that a reopening of the discovery period would allow opposer time to seek additional discovery; and that opposer has undertaken a course of action against applicant that amounts to harassment and is now seeking to delay proceedings.

In reply, opposer, pointing out that it prevailed in two separate civil cases against applicant,² contends that its actions do not constitute harassment. Opposer argues that, because discovery in the consolidated proceeding had barely begun before it filed its motion to add an opposition to the consolidated proceeding, applicant is not prejudiced by the timing of opposer's motion.

When cases involving common questions of law or fact are pending before the Board, consolidation of such cases may be appropriate. See Fed. R. Civ. P. 42(a); and TBMP § 511 (3d ed. 2011). In determining whether to consolidate proceedings, the Board will weigh the savings in time, effort, and expense which may be gained from consolidation, against any prejudice or inconvenience which may be caused thereby. TBMP § 511. Consolidation is discretionary with the Board. *Id.*

Here, the parties are the same and the goods identified in the applications are the same. However, there are significant

used in connection with medical connectors. *Rymed Technologies, Inc. v. ICU Medical, Inc.*, Case No. 8:07-CV-1199 MRP (VBKx) (April 22, 2009).

² The civil actions were not related to each other.

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differences between the marks that are the subject of the consolidated proceeding, all of which include the term NEUTRAL, and the mark that is the subject of Opposition No. 911995050. Moreover, while opposer asserts that applicant's marks are merely descriptive, the factual bases for opposer's claims in the existing consolidated proceeding differ significantly from the factual bases alleged in Opposition No. 91199505. Very little will be gained by consolidation.

Accordingly, opposer's motion to included Opposition No. 91199505 in the existing consolidated proceeding is denied.³

Opposer's request to reset the schedule is granted. At the time opposer filed its motion, about two weeks remained in discovery. The reset schedule below approximates that amount of time.

Discovery Closes	6/17/2011
Plaintiff's Pretrial Disclosures	8/1/2011
Plaintiff's 30-day Trial Period Ends	9/15/2011
Defendant's Pretrial Disclosures	9/30/2011
Defendant's 30-day Trial Period Ends	11/14/2011
Plaintiff's Rebuttal Disclosures	11/29/2011
Plaintiff's 15-day Rebuttal Period Ends	12/29/2011

In each instance, a copy of the transcript of testimony together, with copies of documentary exhibits, must be served on

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and 91195736

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.

NEWS FROM THE TTAB: The third edition of the TBMP was recently posted on the TTAB's home page:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>.

The parties are directed to this invaluable, updated resource.

³ The Board notes in passing that the parties may utilize discovery exchanged in consolidated Opposition No. 91195730 in Opposition No. 91199505 to realize efficiencies in the discovery process in Opposition No. 91199505.