

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: August 25, 2015

Opposition No. 91215542

ConSeal International, Inc.

v.

Biosensory, Inc.

**Robert H. Coggins,
Interlocutory Attorney:**

On August 24, 2015, Applicant filed a motion to dismiss the notice of opposition for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).¹ Specifically, the motion seeks dismissal of this proceeding on the ground that Opposer's claim of priority and likelihood of confusion is barred under *Morehouse Mfg. Corp. V. J. Strickland and Co.*, 407 F.2d 881, 160 USPQ 715 (CCPA 1969), based on Applicant's incontestable Registration No. 3292890.

Because Applicant argues that the opposition is barred under *Morehouse*, the motion relies on matters outside of the pleadings and is, therefore, one for summary judgment. See TBMP § 504.03 (2015). Applicant's motion was filed two months prior to the due date for initial disclosures, but Applicant did not indicate that it has

¹ Applicant's answer, also filed August 24, 2015, is noted.

served its initial disclosures. Prior to service of initial disclosures, parties to Board *inter partes* proceedings may file motions for summary judgment based only on claim preclusion, issue preclusion, and lack of Board jurisdiction. See Trademark Rule 2.127(e)(1). Inasmuch as Applicant's motion for summary judgment is not based on any of those grounds, the motion is premature. In view thereof, the motion will be given **no consideration**. See *Compagnie Gervais Danone v. Precision Formulations, LLC*, 89 USPQ2d 1251, 1255-56 (TTAB 2009) (Board will not convert a motion to dismiss that refers to matters outside the pleadings into motion for summary judgment if such motion is filed before moving party serves initial disclosures).

Dates remain as set.