THIS ORDER IS NOT A PRECEDENT OF THE TTAB

WINTER

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
General Email: TTABInfo@uspto.gov

August 28, 2018

Opposition No. 91238574

Grinnell Mutual Reinsurance Company

v.

Protective Insurance Company

Before Bergsman, Wellington, and Heasley,
Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of Opposer's motion (filed April 3, 2018) for summary judgment on its claim of likelihood of confusion, 5 TTABVUE, and of Applicant's cross-motion for discovery under Fed. R. Civ. P. 56(d). 6 TTABVUE. Both motions are fully briefed.

For purposes of this order, we presume the parties' familiarity with the pleadings and with the arguments and evidence submitted in support of the subject motions.

Applicant's Motion for Discovery under Fed. R. Civ. P. 56(d)

In response to Opposer's motion for summary judgment, Applicant submitted concurrently a response to that motion and a separate motion for discovery under Fed. R. Civ. P. 56(d). A nonmovant that believes that it cannot effectively oppose a

motion for summary judgment without first taking discovery may file a motion under Rule 56(d) for time to take the needed discovery. *See* Trademark Rule 2.127(e)(1); Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 528.06 (June 2018). A nonmovant should not concurrently respond on the merits to a motion for summary judgment and seek Rule 56(d) discovery. When a summary judgment nonmovant concurrently files both a motion for Fed. R. Civ. P. 56(d) discovery and a brief in response to the motion for summary judgment, the Board's general practice is to deem the Rule 56(d) motion moot, and decide the summary judgment motion. *See Bad Boys Bail Bonds, Inc. v. Yowell*, 115 USPQ2d 1925, 1930 (TTAB 2015); *Ava Ruha Corp. v. Mother's Nutritional Ctr., Inc.*, 113 USPQ2d 1575, 1578 (TTAB 2015); TBMP § 528.06. The circumstances in this case do not warrant diverting from the Board's general practice. Because Applicant filed its brief in response to the motion for summary judgment concurrently with its Rule 56(d) motion, the motion for Rule 56(d) discovery is moot and will not be given any further consideration.

Opposer's Motion for Summary Judgment

Summary judgment is an appropriate method of disposing of cases in which there is no genuine dispute with respect to any material fact, thus allowing the case to be resolved as a matter of law. *See* Fed. R. Civ. P. 56(a). A party moving for summary judgment has the burden of demonstrating the absence of any genuine dispute as to a material fact, and that it is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Sweats Fashions, Inc. v. Pannill Knitting*

Co. Inc., 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987). A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-moving party. *See Opryland USA Inc. v. Great Am. Music Show Inc.,* 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992).

Additionally, the evidence of record must be viewed in the light most favorable to the non-moving party, and all justifiable inferences must be drawn from the undisputed facts in favor of the non-moving party. *See Lloyd's Food Prods. Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Opryland USA,* 23 USPQ2d at 1472. We may not resolve genuine disputes as to material facts and, based thereon, decide the merits of the opposition. Rather, we may only ascertain whether any material fact is genuinely disputed. *See Lloyd's Food Prods.*, 25 USPQ2d at 2029; *Olde Tyme Foods*, 22 USPQ2d at 1542; *Meyers v. Brooks Shoe Inc.*, 912 F.2d 1459, 16 USPQ2d 1055, 1056 (Fed. Cir. 1990) ("If there is a real dispute about a material fact or factual inference, summary judgment is inappropriate; the factual dispute should be reserved for trial").

Based on our review of the parties' arguments and supporting evidence, and drawing all inferences in favor of Applicant, the non-movant, we find that Opposer has not met its burden of establishing that there is no genuine dispute as to material facts and that it is entitled to judgment as a matter of law on its likelihood of confusion claim under 15 U.S.C. § 1052(d), Section 2(d) of the Trademark Act. At a

minimum,[1] there is a genuine dispute regarding whether the parties' respective marks convey similar overall commercial impressions. Accordingly, Opposer's motion for summary judgment on its likelihood of confusion claim is **DENIED**.[2]

Accelerated Case Resolution (ACR)

This case appears to be suitable for resolution via the Board's Accelerated Case Resolution (ACR) procedure. After or near the close of discovery, the parties may wish to consider supplementing their respective submissions related to Opposer's motion for summary judgment and providing the Board with a stipulation allowing the Board to decide disputed issues of fact in a final decision on the merits based on such record. Pursuing resolution by ACR will require the parties to stipulate, at a minimum, (1) that the Board will treat Opposer's motion for summary judgment and evidence, Applicant's response and evidence, Opposer's reply brief, and any supplementation thereto filed within an agreed-upon period, as the final record and briefs herein; (2) to forego trial; and (3) that the Board may make determinations of genuine disputes of material fact on the basis of the final record, and may issue a final ruling based thereon in accordance with the evidentiary burden at trial, that is, by a preponderance of the evidence.

---

[1] The fact that we have identified in this order only one material fact that is genuinely in dispute should not be construed as a finding that this is necessarily the only issue that remains for trial.

[2] The parties are reminded that, unless they stipulate to Accelerated Case Resolution (ACR), discussed *infra*, evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. To be considered at final hearing, any such evidence must be properly introduced during the appropriate trial period. *See, e.g., Levi Strauss & Co. v. R. Joseph Sportswear Inc.,* 28 USPQ2d 1464 (TTAB 1993); TBMP § 528.05(a).

Information concerning use of ACR in Board proceedings is available online at https://tbmp.uspto.gov/RDMS/TBMP/current.[3] Should the parties need assistance with their ACR stipulation, they are urged to promptly contact the assigned Interlocutory Attorney.[4]

Proceeding Resumed; Trial Dates Reset

This proceeding is resumed. Trial dates are reset as shown in the following schedule:

Expert Disclosures Due	**12/29/2018**
Discovery Closes	**1/28/2019**
Plaintiff's Pretrial Disclosures Due	**3/14/2019**
Plaintiff's 30-day Trial Period Ends	**4/28/2019**
Defendant's Pretrial Disclosures Due	**5/13/2019**
Defendant's 30-day Trial Period Ends	**6/27/2019**
Plaintiff's Rebuttal Disclosures Due	**7/12/2019**
Plaintiff's 15-day Rebuttal Period Ends	**8/11/2019**
Plaintiff's Opening Brief Due	**10/10/2019**
Defendant's Brief Due	**11/9/2019**
Plaintiff's Reply Brief Due	**11/24/2019**
Request for Oral Hearing (optional) Due	**12/4/2019**

[3] By way of example only, the parties may view ACR related stipulations and orders in the following cases: Opposition No. 91222612 (14 TTABVUE); Opposition No. 91227798 (8 TTABVUE); 91219403 (34 TTABVUE); 91214266 (5 TTABVUE, 7 TTABVUE, and 13 TTABVUE); 92054446 (20 TTABVUE); and 91199733 (12 TTABVUE and 18 TTABVUE). The parties may also review *Fiserv, Inc. v. Electronic Transaction Systems Corp.*, 113 USPQ2d 1913 (TTAB 2015) (Opposition No. 91214266, 5 TTABVUE and 21 TTABVUE).

[4] Elizabeth Winter, elizabeth.winter@uspto.gov, 571-272-9240. The parties may also inform the assigned Interlocutory Attorney that they intend to submit an ACR stipulation, at which time the Board would suspend the proceeding for a brief period to allow the parties time to prepare such a stipulation.

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125, 37 C.F.R. §§ 2.121-2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b), 37 C.F.R. §§ 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a), 37 C.F.R. § 2.129(a).

☼☼☼