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TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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RSC

December 19, 2019

Opposition No. 91238874

*NFL Properties LLC, The Oakland Raiders,
and Raiders Football Club, LLC¹*

v.

Joseph Hong

**Before Pologeorgis, Larkin, and English,
Administrative Trademark Judges.**

By the Board:

This case now comes before the Board for consideration of NFL Properties LLC's and The Oakland Raiders' ("Opposers") combined motion (filed April 15, 2019) for leave to amend their notice of opposition to add a claim that Joseph Hong ("Applicant") lacked a bona fide intent to use his involved mark when he filed the

¹ The involved registrations were assigned by The Oakland Raiders to Raiders Football Club, LLC on April 15, 2019, and the assignment was recorded with the Assignment Recordation Branch on April 30, 2019, at Reel/Frame 6633/0033. Because the assignments occurred after the commencement of this proceeding, and to facilitate trial, Raiders Football Club, LLC is joined as a party-plaintiff. The caption of this proceeding has been updated accordingly. *See NSM Res. Corp. v. Microsoft Corp.*, 113 USPQ2d 1029, 1031 (TTAB 2014); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") §512.01 (2019).

involved application, and for summary judgment on this newly proposed claim. Opposers' combined motion is fully briefed.²

We have carefully considered all of the parties' arguments, presume the parties' familiarity with the factual bases for their filings, and do not recount the facts or arguments here except as necessary to explain this decision. *See Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

I. Background

Applicant seeks registration of the standard character mark SILVER & BLACK NATION for "clothing, namely, short-sleeved shirts, long-sleeved shirts, sweatshirts, jackets, pants and shorts" in International Class 25.³ On January 10, 2018, Opposers filed a notice of opposition to registration of Applicant's mark asserting prior use of the marks SILVER & BLACK and RAIDER NATION in connection with The Oakland Raiders' football franchise, and prior use and registration of the following standard character marks:

- RAIDER NATION, for "clothing, namely tee shirts" in International Class 25;⁴
- RAIDER NATION, for "on line retail store featuring sports memorabilia, clothing and souvenirs on a global computer" in International Class 35 and

² Applicant submitted his response to Opposers' motion twice. 22 and 23 TTABVUE. Both submissions are timely, and the only difference appears to be the inclusion of a table of contents and resulting adjustment to formatting in the second submission. Accordingly, Applicant's second response (23 TTABVUE) supersedes his original response (22 TTABVUE), which will be given no further consideration. If Applicant chooses to submit a corrected or revised version of any future submission, he should submit an explanation for the second submission and, if appropriate, withdraw the first submission.

³ Application Serial No. 87439181 was filed on May 5, 2017, based on Applicant's asserted bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

⁴ Registration No. 2716923 issued May 20, 2003; renewed.

“providing statistical information in the field of sports via a global computer network” in International Class 41;⁵

- SILVER & BLACK CLUB, for “paper, cardboard and goods made from these materials; namely, pencils, stationery, memo pads, paper stickers” in International Class 16, and “entertainment services in the nature of live football games; production of radio and television programs featuring live football games” in International Class 41;⁶ and
- SILVER & BLACK SHOW, for “entertainment services, namely, providing a syndicated talk show program featuring perspectives and analysis of the Oakland Raiders football team, rendered through the medium of television and the internet” in International Class 41.⁷

As grounds for opposition, Opposers allege likelihood of confusion and dilution.⁸

In his answer, Applicant denies the salient allegations in the notice of opposition.⁹

II. Motion to Amend

The Board first addresses Opposers’ motion for leave to amend the notice of opposition to include a claim that Applicant lacked a bona fide intent to use the involved mark when he filed his application.

The Board liberally grants leave to amend pleadings at any stage of a proceeding when justice so requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party or parties. Trademark Rule 2.107(a), 37 C.F.R. § 2.107(a); Fed. R. Civ. P. 15; *see also, e.g., Am. Express Mktg. & Dev. Corp. v. Gilad Dev. Corp.*, 94 USPQ2d 1294, 1297 (TTAB 2010); *Polaris Indus. v. DC Comics*, 59 USPQ2d 1798, 1799 (TTAB 2001). This is so even when a plaintiff

⁵ Registration No. 2902616 issued November 16, 2004; renewed.

⁶ Registration No. 2822131 issued March 16, 2004; renewed.

⁷ Registration No. 2683107 issued February 4, 2003; renewed.

⁸ 1 TTABVUE.

⁹ 4 TTABVUE.

seeks to amend its complaint to plead an additional claim. *See Commodore Elecs. Ltd. v. CBM Kabushiki Kaisha*, 26 USPQ2d 1503, 1506–1507 (TTAB 1993); *see also* TBMP § 507.02. In deciding whether to grant leave to amend, the Board may consider undue delay, prejudice to the opposing party, bad faith or a dilatory motive, futility of the amendment, and whether the party has previously amended its pleadings. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A. de C.V.*, 464 F.3d 1339, 80 USPQ2d 1385, 1395 (Fed. Cir. 2006); *Am. Express Mktg. & Dev. Corp.*, 94 USPQ2d at 1297.

In support of their motion for leave to amend, Opposers contend that they confirmed through recent discovery responses that Applicant lacks evidence to support that when he filed his application, he had a bona fide intent to use his applied-for mark. Opposers further contend that Applicant will not be prejudiced by the proposed amendment because he does not require discovery regarding his own bona fide intent to use.¹⁰

Applicant responds that Opposers' proposed amendment contradicts paragraph 22 of the notice of opposition,¹¹ and that since Opposers' allegations in this paragraph

¹⁰ 15 TTABVUE 10-11.

¹¹ Paragraph 22 alleges that “The NFL has approved the Raiders Club to relocate from Oakland, California to Las Vegas, Nevada in 2019. Applicant resides in the city of Las Vegas and, upon information and belief, intends to use Applicant’s SILVER & BLACK NATION Designation in connection with clothing related to the Raiders Club and the team’s move to Las Vegas.” The proposed amendment alleges that “Applicant did not have a bona fide intent to use the SILVER & BLACK NATION Designation in commerce on the specific goods when he filed his application Serial No. 87/439,181 on May 5, 2017. Because Applicant did not possess a bona fide intent to use the SILVER & BLACK NATION Designation, the application is void ab initio.” 15 TTABVUE 99.

and the proposed amendment cannot both be true, Opposers' motion for leave should be denied.¹²

It is well-settled that a plaintiff may state as many separate claims as it has, regardless of consistency, and it may also plead in the alternative. Fed. R. Civ. P. 8(d); *See also Humana Inc. v. Humanomics Inc.*, 3 USPQ2d 1696, 1698 (TTAB 1987) (applicant could have pleaded likelihood of confusion hypothetically in a counterclaim notwithstanding the inconsistency of that pleading with its position in the opposition that the marks are not confusingly similar); TBMP § 309.03(a)(2). Accordingly, any contradiction between Opposers' proposed lack of a bona fide intent claim and their likelihood of confusion and dilution claims would not be fatal. In any event, since paragraph 22 does not include an allegation about when Applicant had any intent to use the involved mark, the two paragraphs are not contradictory.

Applicant has not pointed to any prejudice if leave is granted. In addition, much – if not all – of the information needed to defend the proposed claim is already in Applicant's possession. This is also the first time Opposers have sought to amend their pleadings, and there is no evidence that Opposers acted in bad faith in doing so. Finally, the proposed lack of bona fide intent claim is not futile. An absence of documents evidencing an applicant's claimed bona fide intent to use the mark provides a sufficient basis for pleading a claim of lack of bona fide intent to use. *See Commodore*, 26 USPQ2d at 1506–1507; *see also Swatch AG (Swatch SA) (Swatch Ltd.) v. M. Z. Berger & Co., Inc.*, 108 USPQ2d 1463, 1471 (TTAB 2013), *aff'd*, 787 F.3d

¹² 23 TTABVUE 8-10.

1368, 114 USPQ2d 1892 (Fed. Cir. 2015); *Honda Motor Co. v. Winkelman*, 90 USPQ2d 1660, 1664 (TTAB 2009).

Accordingly, Opposers' motion for leave to amend is **granted**. The first amended notice of opposition filed concurrently as Exhibit B to Opposers' combined motion is accepted and entered as Opposers' operative pleading in this proceeding.

III. Motion for Summary Judgment

A party that seeks summary judgment on an unpleaded claim may simultaneously move to amend its pleading to assert the claim, as Opposers have done here. *Societe des Produits Marnier Lapostolle v. Distillerie Moccia S.R.L.*, 10 USPQ2d 1241, 1242 n.4 (TTAB 1989) (motion to amend to add new ground, filed simultaneously with motion for summary judgment, granted and allegations in new ground deemed denied); TBMP § 528.07(a). Therefore, for purposes of the summary judgment motion, we deem Applicant to have denied the newly-asserted allegations in the amended notice of opposition. *Id.*

A. Standard for Summary Judgment

Summary judgment is appropriate only where the movant shows the absence of any genuine dispute as to any material fact, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987); *Freki Corp. N.V. v. Pinnacle Entm't, Inc.*, 126 USPQ2d 1697, 1700 (TTAB 2018). In deciding a motion for summary judgment, the Board may not resolve any factual dispute; it may only determine whether a genuine

dispute of material fact exists. *See, e.g., Lloyd's Food Prods. Inc. v. Eli's Inc.*, 987 F.2d 766, 25 USPQ2d 2027 (Fed. Cir. 1993); *Meyers v. Brooks Shoe Inc.*, 912 F.2d 1459, 16 USPQ2d 1055, 1056 (Fed. Cir. 1990).

A factual dispute is genuine if, on the evidence of record, a reasonable fact finder could resolve the matter in favor of the non-movant. *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). The non-movant must be given the benefit of all reasonable doubt as to whether a genuine dispute as to a material fact exists, the evidentiary record on summary judgment must be viewed in the light most favorable to the non-movant, and all justifiable inferences must be drawn from the undisputed facts in favor of the non-movant. *Opryland*, 23 USPQ2d at 1472.

B. Summary of the Parties' Evidence and Arguments

To establish their standing, Opposers rely on status and title copies of the pleaded registrations, now owned by Raiders Football Club, LLC, and the declaration of Kathryn Feiereisel, outside counsel for Opposers, who attests that Opposers have used the marks SILVER & BLACK and RAIDER NATION in connection with the football franchise and related goods and services, including clothing.¹³

Opposers contend that because Applicant lacks documentary evidence, there is no genuine dispute that Applicant lacked a bona fide intent to use the involved mark

¹³ 15 TTABVUE 18-19, 21-46.

when the application was filed. In support of their motion, Opposers rely on Applicant's responses to Opposers' discovery requests, including:

- Applicant's interrogatory answer: "To sell clothing to consumers who like the silver and black colors, and provide legal services to those in need of legal representation in Nevada," which was provided in response to Opposers' interrogatories asking Applicant to describe in detail the basis for the statement in his application that he had a bona fide intent to use, and to describe in detail all plans to use his mark;¹⁴
- Applicant's answer that he has taken no efforts to advertise his goods using his involved mark, and has no agreements (contemplated or negotiated) regarding his mark or the goods to be offered under it;¹⁵
- Applicant's response that he has no documents related to his selection or development of his mark, business plans for offering clothing, prototypes or mockups of packaging and labeling, plans to use his mark, plans to advertise or promote clothing in connection with his mark, surveys (or polls, research or studies) relating to his mark, proposed or established arrangements or relationships with any other party for advertising or distribution, or contracts or agreements concerning Applicant's mark;¹⁶ and
- Applicant's response that the only documents he has to show his expenditures, both to date and planned, for advertising or promotion are expenditures related to the involved application.¹⁷

Opposers contend that Applicant's discovery responses show that when he filed his application, other than selecting and applying to register the involved mark, Applicant only had an unsupported, general hope to someday use his mark in commerce with the applied-for goods.

In response to the motion, Applicant argues that Opposers do not use SILVER & BLACK as a trademark on clothing, relying on the declaration of Connie Masters who

¹⁴ *Id.* at 61 and 82, Interrogatory Nos. 4 and 6.

¹⁵ *Id.* at 62 and 83, Interrogatory Nos. 9 and 10.

¹⁶ *Id.* at 74-77 and 87-89, Request Nos. 1, 5, 6, 8, 10, 21, 24, and 31.

¹⁷ *Id.* at 77 and 89, Request No. 28.

asserts she conducted an online search for use of the mark SILVER & BLACK for clothing, which returned no results from Opposers, and attempted to verify the online specimens provided for the SILVER & BLACK CLUB and SILVER & BLACK SHOW registrations.¹⁸ Applicant further attacks the validity of the pleaded registrations.

In regard to his alleged lack of bona fide intent, Applicant argues that while the burden may have shifted to him to show bona fide intent, Applicant can make this showing through three signed declarations submitted with his response. The declarations are from Applicant¹⁹ and two non-party witnesses, Scott Garrison, an independent marketing consultant in field of clothing manufacturing, branding, marketing, distribution and sales,²⁰ and Shayne Hadley, an independent consultant specializing in marketing through social media platforms.²¹ In his declaration, Applicant attests that he began taking steps in January 2017 to establish a clothing brand under his mark, which included meeting with Mr. Garrison “on or about January 9, 2017 to discuss his participation with the ‘Silver & Black Nation’ clothing brand.”²² Applicant further attests that the two met routinely, several times a week in 2017, to discuss and plan manufacturing, branding, marketing, and distribution and that he agreed to compensate Mr. Garrison for his assistance.²³ Applicant further attests that he began meeting with Mr. Hadley in July 2017, and continued to meet with him at least twice a week in 2017, to discuss and formulate marketing strategies

¹⁸ 23 TTABVUE 5-7, and 16-20.

¹⁹ *Id.* at 72-77.

²⁰ *Id.* at 78-82.

²¹ *Id.* at 83-86.

²² *Id.* at 74, Applicant’s Declaration, ¶ 6.

²³ *Id.*

through social media platforms.²⁴ In their declarations, Mr. Garrison and Mr. Hadley corroborate Applicant's statements regarding the timeline and general description of their respective meetings.²⁵

Opposers argue that Applicant never explains his lack of documents, and that the declarations submitted with Applicant's response are inadmissible because the information contained therein: (1) should have been, but was not, provided in Applicant's discovery responses, (2) contradict Applicant's previous interrogatory responses, and/or (3) are inadmissible hearsay. Opposers further argue that Mr. Hadley's declaration is directed to meetings that occurred after Applicant filed the involved application, and therefore is insufficient to create a genuine dispute of material fact as to Applicant's bona fide intent to use his mark at the time he filed his involved application.

C. Evidentiary Objections

Before considering the merits of Opposers' motion for summary judgment, the Board addresses Opposers' objections to the declarations submitted with Applicant's response brief.

Affidavits or declarations may be submitted in support of, or in opposition to, a motion for summary judgment provided that they are "made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4); *see also* TBMP § 528.05(b). To the extent some portions of the declaration may not be

²⁴ *Id.* at 75, ¶ 7.

²⁵ *Id.* at 78-86.

based on personal knowledge, the proper remedy is to simply disregard those portions. *Ava Ruha Corp. v. Mother's Nutritional Ctr., Inc.*, 113 USPQ2d 1575, 1578 (TTAB 2015). Moreover, the Board is capable of weighing the relevance and strength of the evidence in the record, including any inherent limitations, and this precludes the need to strike evidence. *See Hunt Control Sys. Inc. v. Koninkijke Philips Elec. N.V.*, 98 USPQ2d 1558, 1564 (TTAB 2011).

Nevertheless, a party who fails to provide information requested during discovery may, upon motion or objection by his adversary, be precluded from using that information on a motion for summary judgment unless the failure was substantially justified or is harmless. Fed. R. Civ. P. 37(c)(1); *Vignette Corp. v. Marino*, 77 USPQ2d 1408, 1411 (TTAB 2005). As noted above, Opposers served numerous discovery requests in this proceeding, and Applicant's responses thereto formed the basis of Opposers' current motion. Opposers' Interrogatory No. 10 sought the identification of all agreements, including oral agreements, "entered into by Applicant and/or contemplated or negotiated by Applicant but not consummated, regarding or relating to Applicant's Designation or the goods or services intended to be offered and/or sold using Applicant's Designation."²⁶ In contrast to his answer to this interrogatory, which was "none",²⁷ Applicant states in his declaration that he entered into agreements with Messrs. Garrison and Hadley regarding their roles in, and compensation for, assisting Applicant's development, production, and promotion of

²⁶ 15 TTABVUE 62.

²⁷ *Id.* at 83.

clothing identified by the involved mark.²⁸ Messrs. Garrison and Hadley also refer to these agreements in their declarations.²⁹ These referenced agreements are responsive to Opposers' Interrogatory No. 10, and Applicant has not established that his failure to identify the agreements was substantially justified or harmless. Accordingly, Opposers' objection to the declarations in view of Interrogatory No. 10 is sustained to the extent noted below.³⁰

Opposers' objection to the declarations of Messrs. Garrison and Hadley on the basis that neither individual was identified as a witness is overruled. Opposers never moved to compel service of Applicant's initial disclosures, and it is too late for them to do so now. *See* Trademark Rule 2.120(f). Nor was Applicant obliged to identify Messrs. Garrison and Hadley in response to Opposers' Interrogatory No. 16 as "[i]t is settled that a party in a Board proceeding generally has no obligation to identify its fact witnesses or other trial evidence prior to trial." *Time Warner Entm't Co. v. Jones*, 65 USPQ2d 1650, 1656 (TTAB 2002).

In view thereof, for purposes of summary judgment we will not consider the declarations of Applicant, Mr. Garrison, or Mr. Hadley for any testimony regarding

²⁸ 23 TTABVUE at 75-76.

²⁹ *Id.* at 81 and 85-86.

³⁰ Although Opposers only identified Interrogatory No. 10 as the basis for their objection to Applicant's declaration, we reviewed Opposers' other interrogatories and Applicant's responses thereto and determined that the remainder of the disputed declarations do not appear to be responsive to any other interrogatories. Interrogatory Nos. 4, 6, and 9, as drafted, leave room for reasonable interpretations that limit each interrogatory such that Applicant's responses were sufficient. Interrogatory No. 4 does not clearly seek information on any efforts by Applicant, while Interrogatory No. 6 is reasonably interpreted as seeking prospective plans. A reasonable interpretation of Interrogatory No. 9 is that it seeks information on marketing efforts that had occurred, and not discussions regarding potential efforts.

events after their entry into the agreements between Applicant and Messrs. Garrison or Hadley. Since none of Applicant's evidence clearly identifies when these agreements were entered into, we will only consider the testimony from, or Applicant's testimony referencing, Messrs. Garrison and Hadley to the extent it discusses events or information that occurred prior to or at Applicant's first meeting with each individual.

D. Analysis and Determination

For the Board to grant Opposers' motion for summary judgment, Opposers must establish that there is no genuine dispute (1) as to their standing and (2) the necessary elements to establish the claim at issue in their motion; they must also establish that they are entitled to entry of judgment as a matter of law. *See Fram Trak Indus. Inc. v. WireTracks LLC*, 77 USPQ2d 2000, 2004 (TTAB 2006).

We initially note that Applicant disputes any common law use by Opposers of the mark SILVER & BLACK for clothing.³¹ However, Applicant has not disputed the use of the mark SILVER & BLACK for football franchise services, or of the mark RAIDER NATION in any manner. Accordingly, for purposes of this motion only, we assume that Opposers have standing.³²

³¹ Applicant's evidence and arguments directed to the validity of the pleaded registrations for SILVER & BLACK CLUB and SILVER & BLACK SHOW are collateral attacks on the existing registrations, and are impermissible since Applicant has not pleaded any compulsory counterclaims to cancel these registrations. Trademark Rule 2.106(b)(3).

³² Evidentiary support for standing and priority must be provided at trial. In addition, each Opposer's standing must persist throughout trial. *See Gen. Mills, Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1594 n. 12 (TTAB 2011) ("Where there are multiple plaintiffs, each plaintiff must prove its standing ..."), *judgment set aside on other grounds*, 110 USPQ2d 1679 (TTAB 2014) (non-precedential).

Whether an applicant has a bona fide intention to use a mark in commerce is an objective determination based on the totality of the circumstances. *See M.Z. Berger & Co. v. Swatch AG*, 787 F.3d 1368, 114 USPQ2d 1892, 1898 (Fed. Cir. 2015); *Swiss Grill Ltd. v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2008 (TTAB 2015). The evidentiary bar for showing bona fide intent to use is not high, but more is required than “a mere subjective belief.” *M.Z. Berger*, 114 USPQ2d at 1897-98. The objective evidence must indicate an intention to use the mark that is firm and demonstrable. *Id.* at 1897-98; *Swiss Grill*, 115 USPQ2d at 2008; *see also, Bos. Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1587 (TTAB 2008); *Lane Ltd. v. Jackson Int’l Trading Co.*, 33 USPQ2d 1351, 1355 (TTAB 1994). Opposers’ may meet their initial burden of showing that Applicant lacked a bona fide intent to use his mark “by establishing that there is an ‘absence of any documentary evidence on the part of [Applicant] regarding such intent.’” *Swiss Grill*, 115 USPQ2d at 2009 (quoting *Commodore*, 26 USPQ2d at 1507); *see also Honda Motor*, 90 USPQ2d at 1662. In considering Opposers’ motion, we must keep in mind that “[a]s a general rule, the factual question of intent is particularly unsuited to disposition on summary judgment.” *Copelands’ Enters., Inc. v. CNV, Inc.*, 945 F.2d 1563, 20 USPQ2d 1295, 1299 (Fed. Cir. 1991); *Honda Motor*, 90 USPQ2d at 1662; *Commodore*, 26 USPQ2d at 1508.

Here, Opposers carried their initial burden of showing the absence of documentary evidence regarding Applicant’s bona fide intent to use the mark in commerce as of the application filing date. However, “Applicant may ‘elect to try to rebut the opposer[s]’ prima facie case by offering additional evidence concerning the factual

circumstances bearing upon its intent to use its mark in commerce.” *Swiss Grill*, 115 USPQ2d at 2009 (quoting *Commodore*, 26 USPQ2d at 1507 n. 11). “[T]he focus is on the entirety of the circumstances, as revealed by the evidence of record.” *Lane Ltd.*, 33 USPQ2d at 1355.

After a careful review of the parties’ arguments and evidence, and drawing all reasonable inferences in favor of Applicant as the non-moving party, we find that there is a genuine dispute of material fact as to whether Applicant possessed the requisite bona fide intent to use his applied-for mark when he filed his involved application. Although Applicant’s lack of documentary evidence is prima face evidence of a lack of a bona fide intent to use the applied-for mark, Applicant has submitted his own declaration describing his intended use of the mark. Applicant’s declaration is supported by the declarations of Messrs. Garrison and Hadley, which each include information regarding their meetings with Applicant in January and July 2017, respectively, regarding the manufacturing, distribution, branding, and/or marketing of clothing to be offered under Applicant’s mark. These declarations raise genuine disputes as to whether Applicant had a bona fide intention to use the mark in commerce when he filed the involved application. *Cf. Swiss Grill*, 115 USPQ2d at 2009 (“[D]ocumentary evidence of [] intent to use [a] mark need not predate the filing date of the application.”).

Accordingly, Opposers’ motion for summary judgment is **denied**.³³

³³ The fact that we have identified and discussed a certain genuine dispute of material fact as a sufficient basis for denying Opposers’ motion for summary judgment should not be construed as a finding that this is the only dispute that remains for trial. In addition, the parties are reminded that evidence submitted in support of or in opposition to a motion for

IV. Summary and Resumption of Proceedings

Opposers' motion for leave to amend their notice of opposition is **granted**. Applicant is allowed **thirty days** from the date of this order to file and serve his answer or otherwise respond to the amended notice of opposition.

Opposers' motion for summary judgment on the lack of bona fide intent claim is **denied**.

The parties are reminded of their duty to supplement discovery responses in a timely manner. Fed. R. Civ. P. 26(e)(1)(A). The briefing of this motion makes it clear that Applicant has not provided Opposers with complete and accurate responses to all of Opposers' discovery requests. Accordingly, Applicant is allowed until **thirty days** from the date of this order to review all of his discovery responses³⁴ and, if necessary, serve complete supplemental responses to all of Opposers' discovery requests.³⁵

summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced during the appropriate trial period. *See Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464, 1465, n.2 (TTAB 1993).

³⁴ While Applicant did not produce any documents in response to the motion for summary judgment, in view of the statements in his declaration regarding his meetings and agreements with Messrs. Garrison and Hadley, including references to budgets and staffing needs, it strains credulity that Applicant has no responsive documentary evidence. We note that, based on the declarations subsequently submitted by Applicant, his response to Interrogatory No. 9 that there were no agreements regarding or relating to his involved mark, was clearly not accurate. Incomplete or inaccurate statements, including during discovery, tarnish the proceedings and implicate concerns of whether the statements are improper, unwarranted, or otherwise unsupported. *See, generally*, Fed. R. Civ. P. 11; Trademark Rule 11.18.

³⁵ This allotment of time does not constitute a discovery order by the Board compelling Applicant to provide supplemental responses to Opposers' written discovery.

We further note that Applicant has identified himself as appearing pro se on some documents, but as an attorney representing himself on other documents. Accordingly, Applicant is allowed until **thirty days** from the date of this order to file a notice confirming whether he is appearing pro se or as an attorney representing himself.

Additionally, although we have not considered the entireties of their declarations at summary judgment, since it appears that Messrs. Garrison and Hadley, as well as Ms. Masters, may have knowledge relevant to the claims and defenses in this matter, Opposers are allowed time to take discovery of each of the declarants identified in Applicant's response. The Board reopens discovery, as set forth in the reset trial schedule below, for the limited purpose of allowing Opposers to take discovery related to the newly added claim of Applicant's lack of a bona fide intent and any discovery related to Applicant's declarants. Discovery is otherwise closed.

Proceedings are **resumed** and dates are reset as follows:

Answer to Amended Notice of Opposition Due	1/19/2020
Discovery Closes for Opposers Only	3/19/2020
Plaintiffs' Pretrial Disclosures Due	5/3/2020
Plaintiffs' 30-day Trial Period Ends	6/17/2020
Defendant's Pretrial Disclosures Due	7/2/2020
Defendant's 30-day Trial Period Ends	8/16/2020
Plaintiffs' Rebuttal Disclosures Due	8/31/2020
Plaintiffs' 15-day Rebuttal Period Ends	9/30/2020
Plaintiffs' Opening Brief Due	11/29/2020
Defendant's Brief Due	12/29/2020
Plaintiffs' Reply Brief Due	1/13/2021
Request for Oral Hearing (optional) Due	1/23/2021

The Federal Rules of Evidence generally 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. 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). 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).