

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

October 31, 2019

Opposition No. 91247175 (parent)
Opposition No. 91247177

Atara Biotherapeutics, Inc.

v.

Allogene Therapeutics, Inc.

Opposition No. 91247245 (parent)
Opposition No. 91247247

CRISPR Therapeutics AG

v.

*Allogene Therapeutics, Inc.*¹

Jill McCormack, Interlocutory Attorney:

These cases come before the Board for consideration of Applicant's (i) motion to consolidate Opposition Nos. 91247175 and 91247245, and (ii) motion to consolidate Opposition Nos. 91247177 and 91247247. The motions are fully briefed.

¹ To minimize the number of orders issued in each of the above-captioned proceedings, the Board herein issues a single order addressing all of Applicant's motions to consolidate. However, for the avoidance of doubt, and as discussed in detail below, the proceedings filed by Opposer, *Atara Biotherapeutics, Inc.* (Opposition Nos. 91247175 and 91247177) are **not** consolidated with the proceedings filed by Opposer, *CRISPR Therapeutics AG* (Opposition Nos. 91247245 and 91247247). When filing documents moving forward, the parties should use only the case caption for the relevant consolidated proceeding.

We have carefully considered the parties' arguments and submissions and do not recount the facts or arguments here except as necessary to explain this decision. *See Guess? IP Holder LP v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

I. Background

Applicant, Allogene Therapeutics, Inc., seeks registration of the standard-character marks ALLOCAR T and AUTOCAR T for “pharmaceutical preparations, namely, preparations for use in the treatment of cancer and tumors; pharmaceutical and biological preparations for immunotherapy, including T Cell therapy” in International Class 5.²

A. Opposition Nos. 91247175 and 91247177

On March 25, 2019, Atara Biotherapeutics, Inc. (“Atara”) filed a notice of opposition against both applications on the grounds of mere descriptiveness pursuant to Trademark Act Section 2(e)(1), 15 U.S.C. 1052(e)(1), and genericness pursuant to Trademark Act Sections 1, 2, and 45, 15 U.S.C. §§ 1051-52, 1127.³ In its answers, Applicant denies the salient allegations in the notices of opposition.

² Application Serial Nos. 88117993 and 88117972, filed September 14, 2018, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based on a bona fide intent to use the marks in commerce; disclaimer of “T”.

³ The Board notes that, on the ESTTA filing forms that comprise part of Atara's notices of opposition, Atara identified as grounds for opposition genericness under Trademark Act Sections 1, 2, and 45 and mere descriptiveness under Trademark Act Section 2(e)(1). However, in the numbered paragraphs attached to the ESTTA filing forms, Atara refers to genericness under Trademark Act Section 23. Because Applicant has applied to register its marks on the Principal Register, Atara's claims of genericness fall within Sections 1, 2, and 45, not Section 23, which governs registrability on the Supplemental Register. In view thereof, the references to Section 23 are sua sponte stricken. Nevertheless, because the ESTTA filing forms are part of the notices of opposition, and because the legal analysis on the question of genericness is the same under Section 23 and Sections 1, 2 and 45, the Board will not require Atara to file amended notices of opposition.

B. Opposition Nos. 91247245 and 91247247

On March 27, 2019, CRISPR Therapeutics AG (“CRISPR”) filed a notice of opposition against both applications on the ground of mere descriptiveness pursuant to Trademark Act Section 2(e)(1). In its answers, Applicant denies the salient allegations in the notices of opposition.

II. Applicable Legal Principles

When cases involving common questions of law or fact are pending before the Board, the Board may order consolidation. Fed. R. Civ. P. 42(a); *Wis. Cheese Grp., LLC v. Comercializadora de Lacteos y Derivados S.A. de C.V.*, 118 USPQ2d 1262, 1265 (TTAB 2016). Consolidation is discretionary with the Board, and may be ordered upon motion granted by the Board, or upon stipulation of the parties approved by the Board, or upon the Board’s own initiative. *World Hockey Ass’n v. Tudor Metal Prods. Corp.*, 185 USPQ 246, 248 (TTAB 1975); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 511 (2019). In determining whether to consolidate proceedings, the Board will weigh the savings in time, effort and expense that may be gained from consolidation against any prejudice or inconvenience that may be caused thereby. *Wis. Cheese Grp., LLC*, 118 USPQ2d at 1265.

On occasion, one application is the subject of multiple oppositions, unrelated except insofar as they address the same application. *See Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549 (TTAB 2009); *DataNational Corp. v. BellSouth Corp.*, 18 USPQ2d 1862 (TTAB 1991); *Vaughn Russell Candy Co. v. Cookies in Bloom Inc.*, 47 USPQ2d 1635, 1636 (TTAB 1998). Because the Board

and the parties are interested in the prompt disposition of pleaded claims and defenses, separate oppositions against the same application typically proceed simultaneously. Any amendments to the opposed application must be made with the consent of all opposers. Trademark Rule 2.133(a), 37 C.F.R. § 2.133(a). Likewise, any voluntary abandonment of the application must be made with the written consent of all opposers, or judgment will be entered for each opposer who has not consented to the abandonment. Trademark Rule 2.135, 37 C.F.R. § 2.135.⁴

“If the multiple oppositions against the same application are at the same stage of litigation and plead the same claims, the Board may order consolidation.” *New Orleans La. Saints LLC*, 99 USPQ2d at 1551. “If oppositions or petitions for cancellation filed by different opposers or petitioners against the same application or registration are consolidated . . . and the different plaintiffs are represented by different attorneys or other authorized representatives, rather than by the same one(s), the plaintiffs must appoint one lead counsel, to whom the Board may send postal correspondence intended for the plaintiffs.” TBMP § 117.02. Furthermore, because consolidated proceedings may be presented on the same record and briefs,

⁴ When an application that is the subject of multiple oppositions is voluntarily abandoned, each opposition will necessarily be sustained or dismissed, depending on whether the opposer has consented to the abandonment. In contrast, when the Board sustains one opposition on its merits, either on summary judgment or at final hearing, this will result in abandonment of the application, but the other oppositions will remain pending. In such cases, the Board generally issues an order to each opposer for the remaining oppositions, requiring notice from each such opposer as to whether it wishes to go forward to obtain judgment on the merits, failing which the opposition will be dismissed as moot. Where the Board dismisses one opposition to an application, the entry of judgment for applicant has no bearing on the other pending oppositions, and the opposed application will not go forward to issue until a final order has been entered in all pending oppositions. *New Orleans La. Saints LLC v. Who Dat? Inc.*, 99 USPQ2d 1550, 1551 n.3 (TTAB 2011).

Helene Curtis Indus. Inc. v. Suave Shoe Corp., 13 USPQ2d 1618, 1619 n.1 (TTAB 1989), the parties in consolidated proceedings are generally still bound by the Board's discovery limitations set forth in Trademark Rule 2.120, 37 C.F.R. § 2.120, and the page limitations set forth in Trademark Rules 2.127(a) and 2.128(b), 37 C.F.R. §§ 2.127(a) and 2.128(b).

III. Applicant's Motions To Consolidate Denied

On June 10, 2019, Applicant filed nearly identical motions to consolidate in all four of the above-captioned opposition proceedings. Specifically, Applicant requests that Opposition No. 91247175 be consolidated with No. 91247245 (the Atara and CRISPR oppositions involving the mark ALLOCAR T), and that Opposition No. 91247177 be consolidated with No. 91247247 (the Atara and CRISPR oppositions involving the mark AUTOCAR T). Applicant contends that "the Oppositions involve, not only common, but identical questions of law, fact, and asserted harm," because "Atara and CRISPR alleged the same claims" against Applicant's respective marks. (Opposition No. 91247175, 9 TTABVUE 4; Opposition No. 91247247, 9 TTABVUE 4). In addition, Applicant argues that the oppositions are at similar stages, and consolidation will save the parties and the Board considerable time and resources. (Opposition No. 91247175, 9 TTABVUE 5; Opposition No. 91247247, 9 TTABVUE 5).

Both Atara and CRISPR oppose Applicant's motions to consolidate. Atara contends that, by consolidating Opposition No. 91247175 with No. 91247245 (ALLOCAR T) and Opposition No. 91247177 with No. 91247247 (AUTOCAR T), the Board would be consolidating proceedings involving different parties and facts that

are at different stages of the proceeding. In addition, Atara argues that such consolidation would “unduly prejudice” Atara by unnecessarily delaying the trial schedule in the Atara oppositions to coincide with the “delayed trial” schedule of the CRISPR oppositions. (Opposition No. 91247175, 10 TTABVUE 4). CRISPR also contends that the Atara and CRISPR oppositions involve separate and distinct parties. (Opposition No. 91247247, 10 TTABVUE 4). In addition, CRISPR argues that because the CRISPR oppositions do not include a claim of genericness, consolidation could unduly delay resolution of CRISPR’s mere descriptiveness claim. (*Id.*).

In reply, Applicant argues that the Atara and CRISPR oppositions involving the same marks involve common questions of law and fact because (1) Atara and CRISPR are both Applicant’s competitors; (2) Atara and CRISPR both research and develop immuno-oncology therapy treatments; (3) Atara and CRISPR both would like to use the terms ALLOCAR T and AUTOCAR T, or similar variations; (4) Atara and CRISPR both argue that Applicant’s ALLOCAR T and AUTOCAR T marks are merely descriptive, and (5) Atara and CRISPR both contend that they will be harmed by Applicant’s registration of the marks ALLOCAR T and AUTOCAR T. (Opposition No. 91247175, 13 TTABVUE 4; Opposition No. 91247247, 10 TTABVUE 4). In addition, Applicant contends that the savings in time, effort, and expense to the parties and the Board outweighs any speculative harm that could be caused in terms of delay to either opposer. (Opposition No. 91247175, 13 TTABVUE 9; Opposition No. 91247247, 10 TTABVUE 4).

The Board is not persuaded by Applicant's claim that the savings in time, effort and expense that may be gained from consolidation in this instance outweigh any prejudice or inconvenience to the opposers. Although the respective oppositions filed by Atara and CRISPR are at similar stages of the proceeding, they do not have identical claims, as CRISPR has not asserted a claim of genericness. In addition, if Applicant successfully defends against Atara's claims of mere descriptiveness and genericness, this will have no bearing on the ability of CRISPR to assert its claim that the marks are merely descriptive (and vice versa). *See New Orleans La. Saints LLC*, 99 USPQ2d at 1551. Furthermore, the opposers are not represented by the same counsel. As a result, counsel for only one of the opposers would be allowed to act as lead counsel in the consolidated proceeding, and counsel for both opposers would be required to coordinate to with respect to their discovery and trial obligations. While the Board acknowledges that consolidation here would result in some savings in time and resources for Applicant and the Board, notwithstanding the similarity of the claims at issue, the Board is unwilling to consolidate in the manner requested by Applicant without the opposers' consent.

In view thereof, Applicant's motions to consolidate are denied.

IV. Opposition Nos. 91247175 and 91247177 Hereby Consolidated

In Opposition Nos. 91247175 and 91247177, Atara has asserted claims of mere descriptiveness and genericness against related marks covering identical goods. Inasmuch as Opposition Nos. 91247175 and 91247177 involve the same parties and common questions of law and fact, the Board finds that judicial economy can be found

in consolidation, and hereby consolidates these proceedings. *See* Fed. R. Civ. P. 42(a); *Wis. Cheese Grp., LLC*, 118 USPQ2d at 1265.

The consolidated cases may be presented on the same record and briefs. *Helene Curtis Indus. Inc.*, 13 USPQ2d at 1619 n.1. The Board file will be maintained in Opposition No. 91247175 as the “parent case.” Except as discussed below, the parties shall file a single copy of all motions and papers in the parent case only. Each such filing must caption both oppositions, identifying the parent case first (as in the Atara-specific caption above).

Despite being consolidated, each proceeding retains its separate character and requires entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings; a copy of the decision shall be placed in each proceeding file.⁵

Proceedings in Opposition Nos. 91247175 and 91247177 herein are resumed. Dates for Opposition Nos. 91247175 and 91247177 are reset as follows⁶:

Initial Disclosures Due	11/25/2019
Expert Disclosures Due	3/24/2020
Discovery Closes	4/23/2020
Plaintiff’s Pretrial Disclosures Due	6/7/2020
Plaintiff’s 30-day Trial Period Ends	7/22/2020
Defendant’s Pretrial Disclosures Due	8/6/2020
Defendant’s 30-day Trial Period Ends	9/20/2020

⁵ The parties should promptly inform the Board of any other Board proceedings or related cases involving questions of law or fact in common with the present proceedings within the meaning of Fed. R. Civ. P. 42, so that the Board can consider whether further consolidation is appropriate.

⁶ The dates here apply only to Opposition Nos. 91247175 and 91247177 (Atara). The dates for Opposition Nos. 91247245 and 91247247 (CRISPR) are set forth at the end of this order.

Plaintiff's Rebuttal Disclosures Due	10/5/2020
Plaintiff's 15-day Rebuttal Period Ends	11/4/2020
Plaintiff's Opening Brief Due	1/3/2021
Defendant's Brief Due	2/2/2021
Plaintiff's Reply Brief Due	2/17/2021
Request for Oral Hearing (optional) Due	2/27/2021

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. 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).

V. Opposition Nos. 91247245 and 91247247 Hereby Consolidated

In Opposition Nos. 91247245 and 91247247, CRISPR has asserted a claim of mere descriptiveness against related marks covering identical goods. Inasmuch as Opposition Nos. 91247245 and 91247247 involve the same parties and common questions of law and fact, the Board finds that judicial economy can be found in consolidation, and hereby consolidates these proceedings. *See* Fed. R. Civ. P. 42(a); *Wis. Cheese Grp., LLC*, 118 USPQ2d at 1265. The consolidated cases may be

presented on the same record and briefs. *Helene Curtis Indus. Inc.*, 13 USPQ2d at 1619 n.1. The Board file will be maintained in Opposition No. 91247245 as the “parent case.” Except as discussed below, the parties shall file a single copy of all motions and papers in the parent case only. Each such filing must caption both oppositions, identifying the parent case first (as in the CRISPR-specific caption above).

Despite being consolidated, each proceeding retains its separate character and requires entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings; a copy of the decision shall be placed in each proceeding file.⁷

Proceedings in Opposition Nos. 91247245 and 91247247 herein are resumed. Dates for Opposition Nos. 91247245 and 91247247 are reset as follows:

Deadline for Discovery Conference	11/25/2019
Discovery Opens	11/25/2019
Initial Disclosures Due	12/25/2019
Expert Disclosures Due	4/23/2020
Discovery Closes	5/23/2020
Plaintiff's Pretrial Disclosures Due	7/7/2020
Plaintiff's 30-day Trial Period Ends	8/21/2020
Defendant's Pretrial Disclosures Due	9/5/2020
Defendant's 30-day Trial Period Ends	10/20/2020
Plaintiff's Rebuttal Disclosures Due	11/4/2020
Plaintiff's 15-day Rebuttal Period Ends	12/4/2020
Plaintiff's Opening Brief Due	2/2/2021
Defendant's Brief Due	3/4/2021
Plaintiff's Reply Brief Due	3/19/2021

⁷ The parties should promptly inform the Board of any other Board proceedings or related cases involving questions of law or fact in common with the present proceedings within the meaning of Fed. R. Civ. P. 42, so that the Board can consider whether further consolidation is appropriate.

Request for Oral Hearing (optional) Due	3/29/2021
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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. 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).