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TTAB

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

January 18, 2024

Opposition No. 91277497

PayNearMe, Inc.

v.

Substring, LLC

**Before Lynch, Larkin, and Lebow,
Administrative Trademark Judges.**

By the Board:

This proceeding comes before us on PayNearMe, Inc.’s (“Opposer”) motion, filed October 6, 2023, for summary judgment on its claims in opposition to Substring, LLC’s (“Applicant”) application for registration of its trademark.¹ The motion is fully briefed.²

The Board has fully considered the parties’ briefs and evidence, and addresses the parties’ arguments and the record only to the extent necessary to set forth the Board’s

¹ 21 TTABVUE. Citations to the Board record refer to TTABVUE, the Board’s online docketing system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding “TTABVUE” corresponds to the docket entry number, and any number(s) following “TTABVUE” refer to the page number(s) of the docket entry where the cited materials appear.

² *See* 23, 24 TTABVUE.

analysis and conclusions. *Guess? IP Holder LP v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

I. Preliminary Matters: Objections to Evidence and Statements

A. Applicant's Objection to Deposition Transcript

Applicant objects to Opposer's Exhibit O, which consists of "relevant excerpts from [Applicant's] 30(b)(6) deposition,"³ on the grounds that Applicant was allegedly "never provided with a copy of this transcript to review, correct, or amend" which "raises concerns about the completeness and accuracy of the excerpts presented in [Opposer's] motion."⁴ The Board construes this objection as a motion to strike Exhibit O from Opposer's motion for summary judgment.

In response, Opposer argues that Applicant was sufficiently represented at the deposition and "was not denied access to obtain a transcript."⁵ Additionally, Opposer argues that Applicant has waived any objection to the substance of the transcript and, in any case, does not "point to one quote, citation, or excerpt as factually incorrect."⁶

Fed. R. Civ. P. 30(e)(1) states:

(1) *Review; Statement of Changes.* On request by the deponent or a party **before the deposition is completed**, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

³ 21 TTABVUE 30 ¶ 15.

⁴ 23 TTABVUE 4.

⁵ 24 TTABVUE 4.

⁶ *Id.* at 5.

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(Emphasis added).

Applicant does not support its response to the motion for summary judgment with a declaration or verified evidence to indicate that it requested, on the record of the deposition or otherwise, to review the transcript or recording of the deposition.⁷ Furthermore, discovery depositions, or any part thereof, will be considered by the Board when submitted with the party's brief on the summary judgment motion. Trademark Rule 2.127(e)(2).

In view of the foregoing, Applicant's construed motion to strike the deposition transcript attached as Exhibit O to Opposer's motion for summary judgment is **denied**.

B. Opposer's Objections to Applicant's Exhibits and Statements

Opposer moves to strike Exhibits O, 1, and A, as well as the entirety of Section II, from Applicant's response to the motion for summary judgment on the grounds that the exhibits, and discussion thereof, are "improper, violate[] the Federal Rules, and cause[] unfair prejudice" to Opposer.⁸

⁷ See generally 23 TTABVUE.

⁸ 24 TTABVUE 2-4. Opposer also moves to strike Section III of Applicant's response, which consists of Applicant's construed motion to strike Opposer's Exhibit O. *Id.* at 4-5. Inasmuch as the Board has already denied Applicant's construed motion to strike Opposer's Exhibit O, Section III of Applicant's response is moot and has received no further consideration in our decision.

While a party may rely on materials that qualify as printed publications or official records under 37 C.F.R. § 2.122(e) without further evidence of authenticity, materials which are not self-authenticating in nature are only admissible if competent and relevant, provided they are properly authenticated by an affidavit or declaration pursuant to Fed. R. Civ. P. 56(c)(4). *See also* TBMP § 528.05(b). Such materials may, on summary judgment, be introduced by the affidavit or declaration of a person who can properly authenticate the materials, including identifying the nature, source, and date of the materials. *See* Fed. R. Civ. P. 56(c)(1), (4).

With respect to Applicant's response, Exhibits 0 and 1 consist of correspondence between the parties and Exhibit A consists of emails between Applicant and a third party and a Meetup.com event listing.⁹ With the exception of the Meetup.com webpage, the foregoing exhibits are not self-authenticating as printed publications or official records, are not identified or authenticated by an affidavit or declaration, and are not admissible as Internet evidence. Trademark Rule 2.122(e), 37 C.F.R. § 2.122(e); *see also Safer, Inc. v. OMS Invs., Inc.*, 94 USPQ2d 1031 (TTAB 2010); *L.C. Licensing Inc. v. Berman*, 86 USPQ2d 1883, 1886, n.6 (TTAB 2008) (letters and emails not acceptable under notice of reliance); *Mo. Silver Pages Directory Publ'g. Corp. v. Sw. Bell Media, Inc.*, 6 USPQ2d 1028, 1030 n.9 (TTAB 1988) (“[documents] were not specifically identified in the affidavit and cannot be considered as exhibits to the affidavit”); TBMP § 704.08. And with respect to the Meetup.com webpage, the printout does not show the complete URL, which is required under 37 C.F.R.

⁹ 23 TTABVUE 14-27.

§ 2.122(e). *See ARSA Distrib., Inc. v. Salud Nat. Mexicana S.A. de C.V.*, 2022 USPQ2d 887, at *5 (TTAB 2022) (accepting as self-authenticating internet evidence that included “a complete URL address and date”); *Safer*, 94 USPQ2d at 1039.

Additionally, with respect to Exhibits 0 and 1, Opposer argues that these documents comprise “statement[s] made during compromise negotiations.”¹⁰ Fed. R. Evid. 408 generally prohibits any party from using such statements as evidence regarding liability on a disputed claim. Opposer also moves to strike Section II of Applicant’s response because this section, at least in part, makes arguments regarding Exhibits 0 and 1.

We have reviewed the letters attached as Exhibits 0 and 1 to Applicant’s response and the parties’ arguments, and, based thereon, we find that such letters constitute inadmissible settlement discussions between the parties and that Applicant offered such letters to prove the invalidity of Opposer’s claims. Accordingly, Applicant’s reliance upon these letters and arguments regarding the same in Section II of its response is in contravention of Fed. R. Evid. 408.

In view thereof, Opposer’s motion to strike Exhibits 0, 1, and A and Section II from Applicant’s response is hereby **granted**. Exhibits 0, 1, and A and Applicant’s arguments in Section II of its response with regard thereto have received no consideration in our decision on Opposer’s motion for summary judgment. *See TV Azteca, S.A.B. de C.V. v. Martin*, 128 USPQ2d 1786, 1790 n.18 (TTAB 2018).

¹⁰ *Id.* at 2-3.

II. Summary Judgment

A. Relevant Background

On June 2, 2021, Applicant applied to register the standard character mark PAYFORME for “Electronic transfer of funds; Financial transaction services, namely, providing secure commercial transactions and payment options; Financial transaction services, namely, providing secure commercial transactions and payment options using a mobile device at a point of sale; Payment and funds verification services; Payment processing services, namely, credit card and debit card transaction processing services; Payment verification services; Bill payment services; Credit card payment processing services; Electronic payment services involving electronic processing and subsequent transmission of bill payment data; Merchant services, namely, payment transaction processing services; Providing electronic processing of electronic funds transfer, ACH, credit card, debit card, electronic check and electronic payments” in International Class 36 pursuant to Trademark Act Section 1(b), 15 U.S.C. § 1051(b).¹¹ Applicant filed an amendment to allege use (“AAU”) on December 1, 2021, pursuant to Trademark Act Section 1(a), 15 U.S.C. § 1051(a), asserting a date of first use of January 2021 and a date of first use in commerce of June 2021.

In its amended notice of opposition, Opposer asserts the following claims: (1) likelihood of confusion with its registered marks pursuant to Trademark Act Section 2(d), 15 U.S.C. § 1052(d); (2) abandonment; and (3) non-use as of the filing

¹¹ Application Serial No. 907511115.

date of Applicant's AAU.¹² In support of its entitlement to a statutory cause of action and its likelihood of confusion claim, Opposer claims ownership of Registration Nos. 4459424,¹³ 4491967,¹⁴ and 6071245¹⁵ for the standard character mark PAYNEARME and the mark



for various financial services, including, inter alia, payment collection and transaction processing services, electronic funds transfer services, software services featuring non-downloadable software for processing electronic payments and transferring funds, and electronic monitoring of financial transactions services in International Classes 36 and 42 (all together, "Opposer's Registrations").¹⁶

¹² See 16 TTABVUE.

¹³ The underlying application was filed on July 28, 2010. The mark registered on December 31, 2013, pursuant to Section 1(a), with a claimed date of first use and first use in commerce of September 15, 2010. The United States Patent & Trademark Office ("USPTO") accepted and acknowledged Opposer's declarations of use and incontestability pursuant to Trademark Act Sections 8 and 15, 15 U.S.C. §§ 1058, 1065, on February 7, 2020.

¹⁴ The underlying application was filed on September 6, 2012. The mark registered on March 4, 2014, pursuant to Section 1(a), with a claimed date of first use and first use in commerce of April 2019. The USPTO accepted and acknowledged Opposer's declarations of use and incontestability pursuant to Trademark Act Sections 8 and 15, 15 U.S.C. §§ 1058, 1065, on February 19, 2020.

¹⁵ The underlying application was filed on April 5, 2019. The mark registered on June 2, 2020, pursuant to Section 1(a), with a claimed date of first use and first use in commerce of September 15, 2010. The registration includes the following color claim and description of the mark: "Color is not claimed as a feature of the mark." "The mark consists of the stylized wording 'PAYNEARME'. To the left of the wording is a stylized image of a droplet with a transparent center."

¹⁶ 16 TTABVUE 3-11, 27-28, 30-37, 54, 56-61, 90-91.

In its answer to the amended notice of opposition, Applicant denied the salient allegations therein.¹⁷

Opposer now moves for summary judgment on all of its claims.¹⁸

B. Legal Standard

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to any material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In reviewing a motion for summary judgment, the evidentiary record must be viewed in the light most favorable to the non-moving party, and all justifiable inferences to be drawn from the undisputed facts must be drawn in favor of the non-moving party. *See Mayer/Berkshire Corp. v. Berkshire Fashions, Inc.*, 424 F.3d 1229, 76 USPQ2d 1310, 1314 (Fed. Cir. 2005); *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). We may not resolve disputes of material fact; we may only ascertain whether a genuine dispute regarding a material fact exists. *See Lloyd's Food Prods.*, 25 USPQ2d at 2029; *Olde Tyme Foods*, 22 USPQ2d at 1544.

The movant's burden at summary judgment is greater than the burden of proof at trial, which is a preponderance of the evidence, and which permits appropriate inferences to be drawn from the evidence of record. *See, e.g., Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 34 USPQ2d 1822, 1824 (Fed. Cir. 1995); *see*

¹⁷ *See* 17 TTABVUE.

¹⁸ 21 TTABVUE.

also TBMP § 528.01. When a moving party's motion for summary judgment is supported by evidence sufficient to indicate that there is no genuine dispute as to any material fact and the moving party is entitled to judgment, the burden shifts to the non-moving party to demonstrate the existence of a genuine dispute regarding at least one material fact which requires resolution at trial. *Embarcadero Techs., Inc. v. Delphix Corp.*, 117 USPQ2d 1518, 1521 (TTAB 2016).

The non-moving party, however, may not rest on the mere allegations of its pleadings and assertions, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute as to a material fact for trial. *See Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd.*, 731 F.3d 831, 221 USPQ 561, 564 (Fed. Cir. 1984) ("The party opposing the motion must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable affiant."). Consequently, factual assertions, without evidentiary support, are insufficient to defend against a motion for summary judgment. *See Hornblower & Weeks Inc. v. Hornblower & Weeks Inc.*, 60 USPQ2d 1733, 1739 (TTAB 2001) ("applicant has produced no evidence, or raised any expectation that at trial it could produce evidence"); *S & L Acquisition Co. v. Helene Arpels Inc.*, 9 USPQ2d 1221, 1225 n.9 (TTAB 1987).

C. Analysis and Order

For the reasons explained below, we grant Opposer's motion for summary judgment on its non-use claim.

1. Opposer's Entitlement to a Statutory Cause of Action¹⁹

A plaintiff's entitlement to a statutory cause of action must be proven in every inter partes case. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at *3 (Fed. Cir. 2020). In an opposition proceeding, a party may oppose the applicant's application to register its mark where such action is within the zone of interests protected by the statute, 15 U.S.C. § 1063, and the opposer's reasonable belief in damage is proximately caused by registration of the applicant's mark. *See Corcamore, LLC*, 2020 USPQ2d 11277, at *6-7.

Opposer has supported its motion for summary judgment with evidence in the form of a declaration from its attorney which authenticates and includes printouts from the Trademark Status & Document Retrieval ("TSDR") electronic database records of the USPTO showing the current status and title of its pleaded registrations (i.e., Opposer's Registrations, as defined above).²⁰ Additionally, Applicant does not dispute Opposer's ownership of these pleaded registrations or Opposer's entitlement

¹⁹ Our decisions have previously analyzed the requirements of Sections 13 and 14 of the Trademark Act, 15 U.S.C. §§ 1063-64, under the rubric of "standing." Despite the change in nomenclature, our prior decisions and those of the Federal Circuit interpreting Sections 13 and 14 remain applicable. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *7-8 (Fed. Cir. 2020); *Spanishtown Enters., Inc. v. Transcend Res., Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

²⁰ *See* 21 TTABVUE 29-42, 60-61, 158-166, 225-230. The Board notes that the evidence attached to Opposer's motion includes documents that are largely irrelevant and cumulative. For example, submission of the entire application and registration record of each of Opposer's registrations was not necessary to establish their current status and title—the TSDR records are sufficient for this purpose. *See* TBMP § 528.05(d) and authorities cited therein. For future reference, Opposer and its counsel should review TBMP § 702.05 regarding the avoidance of overly large records.

to a statutory cause of action.²¹ Based on this evidence, we find there is no genuine dispute of material fact regarding Opposer's entitlement to oppose registration of Applicant's mark. See Trademark Rule 2.122(d)(1), 37 C.F.R. § 2.122(d)(1); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Bausch & Lomb Inc. v. Karl Storz GmbH & Co. KG*, 87 USPQ2d 1526, 1530 n.4 (TTAB 2008).

2. Non-Use

To prevail on its claim of non-use, Opposer must establish that there is no genuine dispute of material fact that Applicant had not used the mark PAYFORME in commerce in connection with the services identified in its application as of December 1, 2021, the date that Applicant filed its AAU. See *Aycock Eng'g Inc. v. Airflite Inc.*, 560 F.3d 1350, 90 USPQ2d 1301, 1305 (Fed. Cir. 2009) (a registration of a mark that was not used in commerce is void ab initio); *United Glob. Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1044-46 (TTAB 2014) (application void ab initio for non-use in connection with services); *Paramount Pictures Corp. v. White*, 31 USPQ2d 1768, 1769 (TTAB 1994) ("use in commerce" involves the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark), *aff'd unpub'd*, 108 F.3d 1392 (Fed. Cir. 1997).

Section 45 of the Trademark Act defines "use in commerce" for services as:

the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. . . . [A] mark shall be deemed to be in use in commerce . . . on services when it is used or displayed in the sale or advertising of services and the services are rendered in

²¹ See 23 TTABVUE.

commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.

15 U.S.C. § 1127. Accordingly, two requirements must be satisfied for use in commerce with respect to services: (1) display of a mark in a manner to associate it with the services; **and** (2) rendering of the services in commerce. *Id.*

Opposer relies on Applicant's discovery responses and document production (or lack thereof) to argue that Applicant had not used its mark in commerce as of December 1, 2021.²² In response to Opposer's interrogatory asking Applicant to "identify and describe all expenditures incurred . . . in connection with the promotion, advertisement, and sale of any goods or services under the Applicant's Trademark, including by identifying the nature and amount of each expenditure," Applicant initially responded that it is "a pre-revenue startup," with only expenses in the nature of "employee back pay wages" and "product development, research and promotion valued at over \$50,000."²³ Applicant then amended its response to state that

[u]pon thorough review of our records and internal accounts, we can now categorically affirm that the Applicant has not incurred any expenditures, resulting in a total of \$0, specifically in connection with the promotion, advertisement, or sale of its services under the Applicant's Trademark. The previously referenced expenditures pertained solely to employee back pay wages and product development activities, which upon further consideration, are outside the scope of marketing expenditures.²⁴

²² See 21 TTABVUE 7-15, 455-469, 471-483, 492-529.

²³ *Id.* at 458.

²⁴ *Id.* at 472-73.

Additionally, in response to Opposer's interrogatory asking Applicant to "state the actual sales, by calendar year from the date [of] Applicant's first use of Applicant's Trademark to the present," Applicant stated that it "is a pre-revenue company, and has not recorded any sales."²⁵

In response to Opposer's deposition question asking Applicant's owner, Oji Ofong, what the "June 2021 [first use in commerce] date represent[s]," Mr. Ofong responded that it is the "public launch and availability of our product on our website."²⁶ Also, in response to Opposer's deposition question regarding the amount of revenue Applicant has realized, Mr. Ofong stated that Applicant "did not realize [any] revenue."²⁷ Similarly, when asked "how many transactions were processed, or what was . . . the dollar amount of the transactions processed prior to December 1st, 2021, not in a sandbox environment,"²⁸ Mr. Ofong responded: "None, to the best of my knowledge."²⁹ Finally, when asked about the specimens submitted with Applicant's AAU, Mr. Ofong

²⁵ *Id.* at 462.

²⁶ *Id.* at 519.

²⁷ *Id.* at 520.

²⁸ The parties use the term "sandbox" to refer to a testing or demonstration environment as opposed to a publicly accessible environment. *See, e.g., id.* at 12-14; 23 TTABVUE 9. Similarly, "sandbox" is defined as "an isolated environment on an electronic device (such as a computer) within which applications cannot affect other programs or data on the device." Merriam-Webster Dictionary (2024) (<https://www.merriam-webster.com/dictionary/sandbox>) (last accessed Jan. 16, 2024). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010). We take judicial notice of this definition.

²⁹ 21 TTABVUE 521.

stated that the specimens purporting to show the rendering of Applicant's services were "all [him] trying to demonstrate" Applicant's services.³⁰

Opposer argues that the specimens of use submitted by Applicant in connection with its AAU do not demonstrate actual use in commerce, as evidenced by the fact that the specimens consist of demonstration transactions "created [by Applicant] for the purposes of submitting [its] AAU."³¹ Opposer further states that Applicant produced no documents evidencing sales or the rendering of the recited services prior to December 1, 2021, even though these documents would have been responsive to Opposer's discovery requests.³²

In response, Applicant argues that the specimens submitted with its AAU "are not mockups[,] but represent actual use of the product in commerce."³³ Applicant further states that "it has never claimed Besties Pet Store or The Cookie Shop as a real store or an active partner. **The creation of these merchant profiles was executed with the explicit and sole purpose of demonstrating the use of the Applicant's product in commerce.**"³⁴ Applicant argues that it "is not possible to provide an actual screenshot of an external customer's authenticated screen, as it would constitute a serious security and privacy breach."³⁵ Applicant further argues

³⁰ *Id.* at 523-525.

³¹ *Id.* at 13-14.

³² *Id.* at 11, 13.

³³ 23 TTABVUE 5. The Board notes that Applicant uses the term "product" to refer to its deliverable even though the application covers services rather than goods.

³⁴ *Id.* (emphasis added).

³⁵ *Id.*

that it “did the appropriate thing, created a demo merchant profile within its publicly launched and functional product to demonstrate its use in commerce within parts of its product protected by authentication.”³⁶

Additionally, Applicant contends that it has provided documents demonstrating Applicant’s integration of its services with a third-party provider and the purchase of Applicant’s website domain, both prior to December 1, 2021.³⁷ Finally, Applicant argues that it had at least two exchanges with potential merchants “to build a business relationship,” which demonstrates that “Applicant wasn’t simply reserving rights in the mark, but actively using it in commerce, linked to a fully developed service before December 2021.”³⁸ As previously stated, however, Applicant did not submit a verified declaration in support of its response.³⁹ *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) (citation omitted).

On this record, there is no evidence, documentary or otherwise, showing that Applicant used the mark in commerce in connection with any of the services identified in its application prior to December 1, 2021. *See In re Quantum Foods, Inc.*, 94 USPQ2d 1375, 1378-79 (TTAB 2010). None of the activities described by Applicant in its discovery responses, including meeting with potential merchants, partnering with a third-party payment processing entity, and testing its services, constitute rendering

³⁶ *Id.*

³⁷ *Id.* at 11, 29-30.

³⁸ *Id.* at 11-12.

³⁹ *See id.*

of the services specified in the application, and consequently do not show use in commerce. *Cf. Stawski v. Lawson*, 129 USPQ2d 1036, 1045 (TTAB 2018) (use of term as an assumed business name, as a domain name, and to advertise the goods does not demonstrate use in commerce sufficient to support registration); *Quantum Foods*, 94 USPQ2d at 1378-79 (“It long has been held that mere advertising is not sufficient to show trademark use.”). Further, and notwithstanding Applicant’s contrary assertion, Applicant’s specimens of use filed on December 1, 2021, do include mockup transactions used to merely “demonstrate” Applicant’s services, and Applicant admits as much in its discovery responses and its summary judgment response. *See Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1055 (TTAB 2017) (no bona fide use in the ordinary course of trade where the respondent’s action involved “merely exploring such use” and where labelled products were “used as a demonstration of what we were intending to do”). Additionally, Applicant stated in its discovery responses, and Mr. Ofong testified, that Applicant did not have any advertising expenditures and that it did not produce any evidence of any actual transactions demonstrating actual rendering of its services.

In view of the totality of Applicant’s discovery responses and Mr. Ofong’s testimony—and in particular the absence of any testimony regarding activities that constitute actual use in commerce as of the relevant date—the sole reasonable inference is that prior to December 1, 2021, Applicant at best used the mark for promotional and corporate organizational activities only. *See id.* (internal use of a mark that does “not constitute a public use of the mark” does not reflect use in

commerce). In view thereof, accepting all of Applicant's concrete factual assertions as true, and giving Applicant the benefit of all justifiable inferences from the undisputed facts, Applicant has failed to raise a genuine dispute of material fact regarding its use of the mark in commerce in connection with any of the services included in its application on or before December 1, 2021. *See Octocom Sys., Inc. v. Hous. Comp. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1786 (Fed. Cir. 1990); *Hornblower & Weeks Inc.*, 60 USPQ2d at 1739 (factual assertions, without evidentiary support, are insufficient to defend against a motion for summary judgment).

Accordingly, we find that there is no genuine dispute of material fact that Opposer established its entitlement to a statutory cause of action and that application Serial No. 90751115 is void ab initio due to non-use of the involved mark prior to the filing of the AAU. *See* 15 U.S.C. § 1127. *See also Barbara's Bakery, Inc. v. Landesman*, 82 USPQ2d 1283, 1289-90 (TTAB 2007). We therefore **grant** Opposer's motion for summary judgment on its claim that application Serial No. 90751115 is void ab initio due to non-use. In view of this determination, we need not decide Opposer's claims of likelihood of confusion or abandonment. *Yazhong Investing Ltd. v. Multi-Media Tech. Ventures, Ltd.*, 126 USPQ2d 1526, 1540 n.52 (TTAB 2018) (Board has the "discretion to decide only those claims necessary to enter judgment and dispose of the case").

The opposition is sustained, judgment is entered against Applicant on the ground of non-use, and application Serial No. 90751115 will be abandoned in due course.