

**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

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Mailed: March 22, 2013

Opposition No. 91194218 (parent)
Opposition No. 91194219
Cancellation No. 92053479
Cancellation No. 92053482

Illumina, Inc.

v.

Meridian Bioscience, Inc.

**Before Zervas, Wellington, and Shaw,
Administrative Trademark Judges.**

By the Board:

These consolidated cases comes up on Illumina, Inc.'s (hereinafter "Illumina") motion for summary judgment (filed May 30, 2012, in parent Opposition No. 91194218) on the ground of priority and likelihood of confusion.¹ Meridian

¹ Illumina did not move for summary judgment on the ground of false suggestion of a connection. This is just as well since that claim is insufficiently pleaded in each case. See *Asian and Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1480 (TTAB 2009) (summary judgment moot on insufficiently pleaded claim). See also *Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581 (TTAB 2008); and *Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428 (TTAB 1985) (false suggestion of a connection).

Bioscience, Inc. (hereinafter "Meridian") filed a brief in opposition thereto, and Illumina filed a reply brief.

Meridian's Brief

As noted by Illumina in its reply brief (see reply, pp. 9-10), Meridian's brief in opposition to the motion for summary judgment is overlength. Trademark Rule 2.127(a) provides in relevant part:

Neither the brief in support of a motion nor the brief in response to a motion shall exceed twenty-five pages in length in its entirety, including table of contents, index of cases, description of the record, statement of the issues, recitation of the facts, argument, and summary.

Illumina's brief is comprised of a table of contents page, a two-page table of authorities, and twenty-five pages of text. As such it exceeds the twenty-five page limit for a brief in opposition to a motion and has therefore received no consideration. See TBMP § 528.01 (3d ed. rev. 2012). However, inasmuch as the brief was timely filed and Illumina's motion is potentially dispositive of the consolidated cases, we have exercised our discretion and considered the evidence attached to Meridian's brief. See *Mattel Inc. v. Brainy Baby Co.*, 101 USPQ2d 1140, 1141-42 (TTAB 2011) (Board may consider evidence submitted with a timely filed, but overlength brief).

Motion for Summary Judgment

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to any material facts, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of demonstrating that there is no genuine dispute of material fact remaining for trial and that it is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1987); and *Sweats Fashions Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793 (Fed. Cir. 1987). The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. See *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

The Board presumes familiarity with the issues, and for the sake of efficiency this order does not summarize Illumina's arguments which were raised in the motion or reply. Upon careful consideration of Illumina's arguments and the evidence presented by the parties, and drawing all inferences with respect to Illumina's motion in favor of Meridian as the nonmoving party, we find that Illumina has

not demonstrated the absence of a genuine dispute of material fact for trial. Genuine disputes of material fact remain, at a minimum, as to the full extent of Illumina's priority; the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; the similarity or dissimilarity and nature of the goods or services, including whether Meridian's goods are within Illumina's zone of natural expansion; the similarity or dissimilarity of trade channels; the conditions under which and buyers to whom sales are made; and the strength and fame of opposer's pleaded marks. In view thereof, Illumina's motion for summary judgment is denied.

The fact that we have identified genuine disputes as to material facts as a sufficient basis for denying Illumina's motion for summary judgment should not be construed as a finding that these are necessarily the only issues which remain for trial with regard to priority and likelihood of confusion. *See, for example, Am. Express Mktg. & Dev. Corp. v. Gilad Dev. Corp.*, 94 USPQ2d 1294, 1301 n.5 (TTAB 2010).

The parties are reminded that evidence submitted in support of or in opposition to a motion for 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, for example, Levi Strauss & Co. v. R. Joseph Sportswear Inc., 28 USPQ2d 1464 (TTAB 1993).

Schedule

Proceedings are resumed. Dates are reset on the following schedule.

Expert Disclosures Due	5/15/2013
Discovery Closes	6/14/2013
Plaintiff's Pretrial Disclosures	7/29/2013
Plaintiff's 30-day Trial Period Ends	9/12/2013
Defendant's Pretrial Disclosures	9/27/2013
Defendant's 30-day Trial Period Ends	11/11/2013
Plaintiff's Rebuttal Disclosures	11/26/2013
Plaintiff's 15-day Rebuttal Period Ends	12/26/2013

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125. Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.