

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

mw/kk

Mailed: November 3, 2017

Cancellation No. 92062423

*The Icelandic Milk and Skyr Corporation*

*v.*

*Saga Dairy, Inc.*

**Michael Webster, Interlocutory Attorney:**

On October 26, 2017, Petitioner filed a motion for summary judgment.<sup>1</sup> The motion is timely pursuant to Trademark Rule 2.127(e)(1). By its motion, Petitioner seeks summary judgment on the grounds that (1) the involved registrations are merely informational and incapable of functioning as trademarks; (2) the registrations are so highly descriptive that they are incapable of functioning as trademarks; and (3) Respondent's use of the wording "More Protein Than Sugar" was not exclusive and, therefore, not lawful use in commerce at the time of the application filing date.

Pursuant to Fed. R. Civ. P. 56(a) a party may move for summary judgment on a claim or defense or a part of a claim or defense. However, a party may not obtain summary judgment on an issue that has not been pleaded. *Asian and Western*

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<sup>1</sup> Petitioner's amended certificate of service filed October 27, 2017 is noted.

*Classics B.V. v. Lynne Selkow*, 92 USPQ2d 1478, 1480 (TTAB 2009); *Bausch & Lomb Inc. v. Karl Storz GmbH & Co. KG*, 87 USPQ2d 1526, 1528 n.3 (TTAB 2008); *Drive Trademark Holdings LP v. Inofin*, 83 USPQ2d 1433, 1438 n.12 (TTAB 2007).

In this case, the petition for cancellation does not include allegations that Respondent's use of the mark in commerce was not lawful because its use was not exclusive. Accordingly, the Board will not consider the claim in the motion for summary judgment.<sup>2</sup> However, inasmuch as Petitioner properly alleged priority of use in the petition for cancellation, the Board may consider the issue of priority on summary judgment.

When a party timely files a potentially dispositive motion, the proceeding is suspended with respect to all matters not germane to the motion, and no party should file any paper which is not germane to the motion except as otherwise may be specified in a Board order. *See* Trademark Rule 2.127(d). Accordingly, as of the filing date of the motion for summary judgment, proceedings are suspended pending disposition of the motion. Any paper filed during the pendency of this motion which is not germane thereto will be given no consideration. *See* Trademark Rule 2.127(d).

In addition to tolling the time to respond to outstanding discovery requests, suspension of proceedings tolls the time for parties to make required disclosures. *See* TBMP § 528.03 (June 2017).

The motion for summary judgment will be decided in due course.

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<sup>2</sup> The Board notes that the claim that the mark was not in lawful use does not appear to identify a plausible claim for relief.