

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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JLE/kb

December 20, 2021

Cancellation No. 92078181

Neilmed Pharmaceuticals, Inc.

v.

Rhinosystems, Inc.

Jennifer L. Elgin, Interlocutory Attorney:

Pursuant to Fed. R. Civ. P. 26(f) and Trademark Rules 2.120(a)(1) and (2), the parties held a discovery conference on December 16, 2021 at 2:30 p.m. See TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 401.01 (June 2021).¹ At Respondent’s request, a member of the Board participated in the conference. See Trademark Rule 2.120(a)(2)(i). Participating were Kelly Ortega and Patricia Werner, counsel for Petitioner and Carrie Shufflebarger, counsel for Respondent. Interlocutory Attorney Jennifer Elgin participated on behalf of the Board.

This order memorializes what transpired during the conference. Conferences with the Board may not be recorded.

¹ The TBMP is available electronically at the following link: <https://tbmp.uspto.gov/RDMS/TBMP/current#/current>.

I. Settlement

During the discovery conference, the parties advised that their principals engaged in settlement discussions prior to the initiation of the proceeding but no agreement was reached. Counsel for Respondent indicated that it remains interested in discussions. Counsel for Petitioner initially indicated that it is not interested in engaging in further negotiations at this time, but the parties later agreed to a 30-day suspension for the parties to discuss settlement and/or Accelerated Case Resolution.

The Board encouraged the parties to discuss settlement and advised that the Board does entertain, and is liberal in granting, motions to suspend proceedings for settlement discussions. The parties were cautioned, however, that the parties must be actively engaged in settlement discussions to obtain a suspension and that requests to suspend or extend may be denied where there has been protracted suspension or extension without substantial progress towards settlement. *See* TBMP § 605.02. Further, proceedings may only be suspended for settlement with the consent of both parties and either party may request resumption of the proceedings at any time. *Id.*

II. Related Proceedings

The parties informed the Board that they are not involved in any other Board proceedings, civil actions, arbitrations, or other proceedings concerning issues related to the marks involved in the current proceeding. As set forth in the Board's institution order, the parties must notify the Board promptly in writing if they become parties

to another Board proceeding or a civil action involving the same or related marks or issues of law or fact that overlap with this proceeding.

III. Pleadings

The Board sua sponte reviewed the operative pleadings. *See NSM Res. Corp. v. Microsoft Corp.*, 113 USPQ2d 1029, 1039 n.19 (TTAB 2014) (Board may sua sponte dismiss any insufficiently pleaded pleading).

Petitioner seeks to cancel Registration No. 6471245, owned by Respondent, for the mark YOU'LL LOVE THAT CLEAN-NOSE FEELING! in standard characters for “saline formulation for nasal irrigation” in International Class 5 and “nasal irrigation vessel; nasal lavage vessel” in International Class 10.² *See* 1 TTABVUE 1.³ The Board found that the petition to cancel adequately pleads entitlement to a statutory cause of action under Trademark Act Section 14, 15 U.S.C. § 1064,⁴ as well as a claim of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), by virtue of its allegations that Respondent’s use and registration of its mark in connection with the goods identified in the involved registration are likely to cause confusion with Petitioner’s prior common law rights in the mark GET THAT CLEAN NOSE FEELING in connection with the goods and services recited in its pending

² Registered August 31, 2021, alleging first use in commerce of May 21, 2021 as to the goods in International Class 5 and January 19, 2018 as to the goods in International Class 10.

³ Record citations are to TTABVUE, the Board’s publicly available docket history system. *See, e.g., New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020).

⁴ Board 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, the Board’s prior decisions and those of the Federal Circuit interpreting Section 13 and 14 remain applicable. *See Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020).

application.⁵ See *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at *6-7 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021) (well-pleaded allegations of likelihood of confusion sufficient to support entitlement to a statutory cause of action); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Otto Roth & Co. v. Univ. Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981); *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009).

The Board noted that Respondent's answer denies the salient allegations in the petition to cancel. See 4 TTABVUE.

IV. Standard Protective Order

The Board advised the parties of the automatic imposition of the Board's two-tiered standard protective order pursuant to Trademark Rule 2.116(g), and further indicated that the parties would control which tier of confidentiality applies. Because the Board's standard protective order is automatically imposed on this proceeding, the parties are precluded from objecting to any discovery on the ground of confidentiality. The parties agreed that the Standard Protective Order will apply in the proceeding.

The Board advised the parties that, because it is unclear whether the Board can order parties to enter into a contract that will govern the protection of information after the Board proceeding is concluded, it may be advisable for the parties to sign

⁵ Application Serial No. 88193486 for GET THAT CLEAN NOSE FEELING in standard characters, filed November 14, 2018, for goods and services in International Classes 3, 5, 10, and 35, alleging first use in commerce as of July 22, 2009 pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

the stipulated protective order so that it is clear that they are all bound thereby; that they have created a contract that will survive the proceeding; and that there may be a remedy at court for any breach of that contract that occurs after the conclusion of the Board proceeding.⁶ *See* Miscellaneous Changes to Trademark Trial and Appeal Board Rules, 72 Fed. Reg. 42242, 42251 (August 1, 2007). Nonetheless, any determination of whether the agreement establishes contractual rights or is enforceable outside of the Board proceeding is for a court to decide should such matter come before it.

V. Discovery and Motion Practice

The Board advised the parties to consult TBMP § 414 before making or responding to any discovery requests. The Board further advised the parties that if any party plans to file a motion to compel discovery, the moving party must demonstrate a good faith effort has been made to resolve the discovery dispute before filing its motion.⁷ A motion to compel must be filed prior to the day of the deadline for pretrial disclosures for the first testimony period. The parties are advised to consult Chapter 500 of the TBMP for more information on motions practice before the Board.

The parties are further advised of the following matters concerning discovery: (1) all discovery requests must be served early enough in the discovery period so that responses will be due no later than the close of discovery;⁸ (2) interrogatories,

⁶ While it may be advisable for the parties to sign a stipulated protective order, it is not necessary for the Board's protective order to take effect.

⁷ The Board expects the parties to cooperate with one another in the discovery process and looks with disfavor on those who do not so cooperate. *See* TBMP § 408.01.

⁸ Trademark Rule 2.120(a)(3).

requests for production of documents and things and requests for admission are limited to seventy-five, including subparts.⁹

VI. Accelerated Case Resolution and Stipulations

The Board explained the availability and features of the “accelerated case resolution” (ACR) process as well as the wide variety of discovery and fact stipulations that are available in Board proceedings. The parties did not express interest in entering into any stipulations at this time but agreed to explore options for ACR. Accordingly, the parties agreed to suspend the proceeding for 30 days to discuss settlement and ACR options.

For further information, the parties should consult TBMP §§ 528.05(a)(2), 702.04 and 705, as well as the link on the Board’s web page to a vast amount of ACR information and exemplary ACR proceedings. The parties were encouraged to contact the assigned interlocutory attorney to discuss ACR and stipulation options.

VII. Schedule

Because the parties are negotiating for a possible settlement of this case and ACR stipulations, proceedings are **suspended for 30 days**, subject to the right of either party to request resumption at any time. *See* Trademark Rules 2.117(c) and 2.127(a); TBMP § 605.02.

In the event there is no word from either party, proceedings shall resume on without further notice or order from the Board, upon the schedule set forth below:

⁹ Trademark Rules 2.120(d), (e) and (i).

Deadline for Discovery Conference	CLOSED
Discovery Opens	1/15/2022
Initial Disclosures Due	2/14/2022
Expert Disclosures Due	6/14/2022
Discovery Closes	7/14/2022
Plaintiff's Pretrial Disclosures Due	8/28/2022
Plaintiff's 30-day Trial Period Ends	10/12/2022
Defendant's Pretrial Disclosures Due	10/27/2022
Defendant's 30-day Trial Period Ends	12/11/2022
Plaintiff's Rebuttal Disclosures Due	12/26/2022
Plaintiff's 15-day Rebuttal Period Ends	1/25/2023
Plaintiff's Opening Brief Due	3/26/2023
Defendant's Brief Due	4/25/2023
Plaintiff's Reply Brief Due	5/10/2023
Request for Oral Hearing (optional) Due	5/20/2023

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, 37 C.F.R. §§ 2.121-2.125. 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), 37 C.F.R. §§ 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), 37 C.F.R. § 2.129(a).