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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91218627
Party	Defendant Mariner Biomedical, Inc.
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Attachments	Applicant's Motion for Involuntary Dismissal.pdf(298194 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Galderma S.A. Opposer, v. Mariner Biomedical, Inc. Applicant	Opposition No. 91218627

APPLICANT'S MOTION FOR INVOLUNTARY DISMISSAL PURSUANT TO 37 C.F.R. §2.132(a)

Pursuant to Rule 2.132(a) of the Rules of Practice in Trademark Cases, 37 C.F.R. §2.132(a), Applicant Mariner Biomedical, Inc. ("Applicant") hereby moves for involuntary dismissal (the "Motion") of the above-captioned matter, Opposition No. 91218627 (the "Opposition"), on the grounds that Opposer Galderma S.A. ("Opposer") has failed to prosecute the Opposition. This Motion is being timely filed prior to the opening of Applicant's testimony period.

STATEMENT OF FACTS

On October 1, 2014, Opposer, filed a Notice of Opposition against Applicant's Application No. 86/104,014 (the "Application") for KAIDERMA (the "Applied-For Mark") in connection with "Non-medicated skin care preparations; non-medicated skin care products, namely, exfoliating salt scrubs, anti-aging serums, anti-wrinkle gel, bath salts, facial cleansers, massage gels and oils, body oils and lotions, facial and body toners, bath soap, lip balms" in Class 3 and "Medicated skin care preparations; medicated skin care products, namely, sun screens, skin protectant preparations, anti-itch preparations, anti-inflammatory preparations;

dermatological pharmaceutical products; parapharmaceutical products for use in dermatology" in Class 5.

Opposer opposed the Application under Section 2(d) of the Trademark Act, alleging likelihood of confusion with 5 trademark registrations (collectively, the "Cited Registrations") and one pending trademark application (the "Cited Application"), which are set forth below:

- Reg. No. 3,740,054 for GALDERMA;
- Reg. No. 3,532,965 for GALDERMA COMMITTED TO THE FUTURE OF DERMATOLOGY and Design;
- Reg. No. 3,532,964 for GALDERMA COMMITTED TO THE FUTURE OF DERMATOLOGY and Design;
- Reg. No. 2,334,441 for GALDERMA and Design;
- Reg. No. 1,531,542 for GALDERMA; and
- App. Ser. No. 85/957,469 for GALDERMA and Design

As exhibits to the Notice of Opposition, Opposer attached plain copies of the Certificates of Registration for the five Cited Registrations and a copy of the Notice of Allowance issued for the Pending Registration.

Applicant timely filed its Answer to the Notice of Opposition on October 23, 2014, generally and specifically denying Petitioner's allegations.

Pursuant to the Board's scheduling order, issued on October 1, 2014 (the "Scheduling Order"), Opposer's trial period ended on September 6, 2015. Prior to the closing of its trial period, Opposer failed to provide Initial Disclosures, make expert disclosures, request any discovery, offer any evidence or submit any testimony in this Opposition.

Applicant's trial period is scheduled to open on October 5, 2015. However, Applicant submits that this Opposition should be involuntarily dismissed pursuant to Rule 2.132(a) due to Plaintiff's failure to prosecute this case.

ARGUMENT

Rule 2.132(a) provides that a party may obtain an involuntary dismissal for failure to prosecute if the time for taking testimony by the plaintiff has expired and that party has not taken testimony or offered any other evidence.

As set forth above, Opposer's testimony period closed on September 6, 2015. Opposer failed to offer any testimony or offer any evidence during its assigned testimony period. Moreover, the plain copies of the registrations for the Cited Registrations and a copy of the Notice of Allowance for the Cited Application, which were attached as exhibits to the Notice of Opposition, are wholly insufficient to make either the Cited Registrations or the Cited Application of record.

Trademark Rule 2.122(d) provides the manner in which a plaintiff may properly make its pleaded registration(s) of record:

> (1) A registration of the opposer or petitioner pleaded in an opposition or petition to cancel will be received in evidence and made part of the record if the opposition or petition is accompanied by an original or photocopy of the registration prepared and issued by the United States Patent and Trademark Office showing both the current status of and current title to the registration, or by a current printout of information from the electronic database records of the USPTO showing the current status and title of the registration; or
>
> (2) A registration owned by any party to a proceeding may be made of record in the proceeding by that party by appropriate identification and introduction during the taking of testimony or by filing a notice of reliance, which shall be accompanied by a copy (original or photocopy) of the registration prepared and issued by the Patent and Trademark Office showing both the current status of and current title to the registration. The notice of reliance shall be filed during the testimony period of the party that files the notice.

In this case, Opposer has merely attached plain copies of the certificates of registration for the Cited Registrations to its Notice of Opposition, which the Board has consistently held is not in compliance with Rule 2.122(d) and is insufficient to make the cited registrations of record. *See Sterling Jewelers Inc. v. Romance & Co., Inc.*, 110 USPQ2d 1598, 1601 (TTAB 2014) ("The Board has routinely held that the submission of a photocopy of a pleaded registration, by itself, is

insufficient for purposes of establishing a party's current ownership, or the current status, of the registration, and therefore does not suffice to make the registration of record.") (citing TBMP § 704.03(b)(1)(A) (3d ed. rev. 2 2013) and authorities cited therein). Moreover, for purposes of a Rule 2.132(a) motion, the requirements of Rule 2.122(d) must be strictly construed. *Id.* at 1601 n4 ("Strict compliance with Trademark Rule 2.122(d) is necessary if parties defending against claims based on registrations, such as applicant in this case, are to know whether relevant registrations are of record and thus whether to introduce opposing evidence.").

Opposer has similarly failed to introduce the Cited Application as evidence in the Opposition. Merely attaching a Notice of Allowance to the Notice of Opposition is insufficient to make an application of record. Rather, an application must be made of record during the testimony period, either through the taking of testimony or by filing a notice of reliance. *See* TBMP §704.03(b)(2). Moreover, even assuming the application was properly introduced, it has no probative value. Applications are only evidence that an application was filed; they are not evidence of rights or priority of use. *See, e.g., Nike Inc. v. WNBA Enterprises LLC,* 85 USPQ2d 1187, 1193 n.8 (TTAB 2007).

The purpose of Rule 2.132(a) is to relieve the applicant from the burden of having to incur the expense and time of trial where the Opposer has wholly failed to prosecute its case. In this case, Opposer has failed to make the Cited Registrations or the Cited Applications of record and failed to offer any testimony or evidence during its assigned testimony. In fact, Opposer has failed to comply with any of its discovery obligations in this case.

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