

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

Mailed: June 29, 2015

Opposition No. 91203928

Opposition No. 91207867

Opposition No. 91207868

E. & J. Gallo Winery

v.

Grenade Beverage LLC

**George C. Pologeorgis,
Interlocutory Attorney:**

The above-captioned proceedings now come before the Board for consideration of (1) Applicant's combined motion (filed February 24, 2015) to consolidate the above-identified proceedings and suspend the consolidated cases pending the final disposition of a civil action between the parties; (2) Opposer's motion to compel filed on January 27, 2015 in Opposition No. 91203928; (3) the Board's default notice issued in Opposition No. 91207868; and (4) Applicant's revocation of power of attorney filed in April 8, 2014.

Applicant's Revocation Of Power Of Attorney

Applicant's revocation of power of attorney and statement that Applicant intends to represent itself filed in each of the above-identified proceedings is noted. Board

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records have been updated accordingly to reflect this change of representation in each of the above-captioned cases.

Board's Default Notice in Opposition No. 91207868

On October 7, 2014, the Board issued a notice of default to Applicant in Opposition No. 91207868 because no answer had been filed.

No response to the notice of default has been filed.

Accordingly, judgment by default is hereby entered against Applicant, Opposition No. 91207868 is sustained, and registration of Applicant's application Serial No. 85419031 for the mark EL GALLITO for "Beverages, namely, carbonated and non-carbonated energy or sports drinks" in International Class 32 is refused. *See* Fed. R. Civ. P. 55(b), and Trademark Rule 2.106(a).

Applicant's Combined Motion To Consolidate And To Suspend For Civil Action

The Board next turns to Applicant's combined motion to consolidate and to suspend for civil action. In support thereof, Applicant maintains that Opposition Nos. 91203928, 91207867, and 91207868 should be consolidated because the proceedings are related and that the Board, in turn, should suspend the consolidated proceedings pending the final disposition of a civil action between the parties herein.

In response, Opposer argues that consolidation and suspension pending the disposition of the civil action is improper and without basis because (1) Applicant failed to respond to the Board's default notice in Opposition No. 91207868 and

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therefore judgment should be entered against Applicant in this proceeding; and (2) the district court found that Applicant's EL GALLITO mark (which is involved in Opposition Nos. 91203928 an 91207868) was not subject to the district court case and, therefore, the pending appeal has no bearing on the issues in Opposition Nos. 91203928 an 91207868.

The Board finds that the consolidation of Opposition Nos. 91203928, 91207867 and 91207868 would be appropriate under normal circumstances since the parties are identical and there are common issues of law and fact with regard to each opposition. However, as noted above, the Board issued a notice of default in Opposition No. 91207868 to which Applicant failed to respond. Accordingly, it would be futile to consolidate Opposition No. 91207868 with either Opposition No. 91203928 inasmuch as default judgment has been entered against Applicant in Opposition No. 91207868 by this order.

Similarly, consolidation of Opposition Nos. 91203928 and 91207867 would normally be appropriate in light of the fact that the parties are identical in each proceeding and the cases involve common issues of law and fact. However, the Board finds that it would not serve the interests of judicial economy to consolidate these two cases and then suspend the consolidated case pending the final disposition of the civil action between the parties because, as argued by Opposer, the pending appeal of the district court action will have no bearing on the issues in Opposition No. 91203928 since the mark subject to Opposition No. 91203928, i.e.,

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EL GALLITO, was specifically held by the district court not to be at issue in the civil action between the parties.¹

In view thereof, Applicant's combined motion to consolidate and to suspend for civil action is **DENIED** (1) to the extent the motion seeks to consolidate Opposition Nos. 91203928, 91207867, and 91207867, or any combination thereof; and (2) to the extent the motion seeks to suspend either Opposition No. 91203928 or Opposition No. 91207868 pending the final disposition of the civil action between the parties. Applicant's combined motion, however, is **GRANTED** to the extent it seeks to suspend Opposition No. 91207867 pending the final disposition of the civil action between the parties.

Opposer's Motion To Compel Filed In Opposition No. 91203928

Opposer's motion to compel filed in Opposition No. 91203928 is **GRANTED** as conceded. Trademark Rule 2.127(a).

Applicant is allowed until **thirty (30) days** from the mailing date of this order in which to (1) provide full and complete responses to Opposer's First Set of Interrogatory Requests **without objection** (except for objections based on privilege); and (2) provide verification of the interrogatory responses compelled by this order, if it already has not done so. *See* Fed. R. Civ. P. 33(b)(5) and TBMP § 405.04(c).

¹ The Board notes that the record demonstrates that Applicant has filed an appeal of the decision of the district court. The Board assumes, however, that Applicant did not appeal the portion of the district court's decision which held in Applicant's favor that Applicant's EL GALLITO mark was not subject to the district court action.

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Applicant is also allowed until **thirty (30) days** from the mailing date of this order to copy and to produce non-privileged documents responsive to each of Opposer's First Set of Document Requests **without objection** (except objections based on privilege).² Applicant must organize and label, by bates stamp number, the documents responsive to each of the document requests.

If there are no responsive, non-privileged documents in Applicant's possession, custody or control which are responsive to any of the above-identified document requests, Applicant must so state affirmatively in its response to the corresponding document request.

To the extent Applicant has already **fully** produced documents responsive to any of Opposer's first request for document production in accordance with this order, Applicant must so state in its response to the particular document request and **identify, by bates number, the documents which are responsive to each request.**

Applicant is also allowed the same **thirty (30) days** provided above to serve its initial disclosures on Opposer, if it has not already done so. Additionally, Applicant is required to provide Opposer a privilege log within the same **thirty (30) days** provided above to the extent that Applicant claims privilege to **any** of Opposer's written discovery requests, if it has not already done so.

² To the extent the production of documents to any of the document requests is voluminous in nature, Applicant may produce a representative sampling of documents responsive to the corresponding document request. Such representative sampling, however, must be sufficient to meet Opposer's discovery needs.

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In the event Applicant fails to provide Opposer with full and complete responses to the outstanding discovery, as required by this order, Applicant will be barred from relying upon or later producing documents or facts at trial withheld from such discovery.³ *See* Fed. R. Civ. P. 37(c)(1).

Summary

1. Applicant's combined motion to consolidate and suspend pending disposition of civil action between the parties is (i) **DENIED** to the extent the motion seeks to consolidate Opposition Nos. 91203928, 91207867, and 91207867, or any combination thereof; (ii) **DENIED** to the extent the motion seeks to suspend Opposition Nos. 91203928 and 91207868 pending the final disposition of the civil action between the parties; and (iii) **GRANTED** to the extent the motion seeks to suspend Opposition No. 91207867 pending the final disposition of the civil action between the parties, including all appeals;
2. Opposer's motion to compel filed in Opposition No. 91203928 is **GRANTED** to the extent indicated herein;
3. Default judgment is entered against Applicant in Opposition No. 91207868;
and
4. Opposition No. 91207867 remains suspended pending the final disposition of the civil action between the parties, including all appeals.

³ If Applicant fails to comply with this order, Opposer's remedy lies in a motion for sanctions, pursuant to Trademark Rule 2.120(g)(1). Furthermore, the parties are reminded that a party that has responded to a discovery request has a duty to supplement or correct that response. *See* Fed. R. Civ. P. 26(e).

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Trial Schedule for Opposition No. 91203928

Proceedings in Opposition No. 91203928 are hereby resumed. Trial dates for this opposition proceeding are reset as follows:

Expert Disclosures Due	9/4/2015
Discovery Closes	10/4/2015
Plaintiff's Pretrial Disclosures	11/18/2015
Plaintiff's 30-day Trial Period Ends	1/2/2016
Defendant's Pretrial Disclosures	1/17/2016
Defendant's 30-day Trial Period Ends	3/2/2016
Plaintiff's Rebuttal Disclosures	3/17/2016
Plaintiff's 15-day Rebuttal Period Ends	4/16/2016

Trial Schedule for Opposition No. 91207867

Opposition No. 91207867 **remains suspended** pending the final disposition of the civil action between the parties herein, including the final disposition of all appeals.

Within twenty days after the final determination of the civil action, the parties shall so notify the Board so that this proceeding may be called up for appropriate action.⁴ Such notification to the Board should include a copy of any final order or final judgment which issued in the civil action.

During the suspension period, the parties must notify the Board of any address changes for the parties or their attorneys.

⁴ A proceeding is considered to have been finally determined when a decision on the merits of the case (*i.e.*, a dispositive ruling that ends litigation on the merits) has been rendered, and no appeal has been filed therefrom, or all appeals filed have been decided. *See* TBMP § 510.02(b).