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

Proceeding	91225053
Party	Plaintiff Wonderland Brewing Company, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Wonderland Brewing Company, LLC,

Opposer,

- v -

Rhinegeist, LLC,

Applicant.

Cancellation. No.: 91225053

Registration Nos.: 86/556,178

Trademark: ALICE

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**Opposer's Response to Applicant's Motion to Amend its Application**

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Opposer, Wonderland Brewing Company, LLC, does not consent to and opposes Applicant Rhinegeist, LLC's motion to amend its application to seek concurrent registration.

Rhinegeist's motion is an untimely attempt to delay resolution of this dispute.

**I. Background**

Rhinegeist filed its 86/556,178 application on March 6, 2015. The application was published for opposition on July 28, 2015. On November 25, 2015 Wonderland timely opposed the application. On January 4, 2016, Rhinegeist answered. Its answer does not plead or otherwise assert that it is at least entitled to a registration with a geographic restriction.

In November of 2015 the parties discussed the potential for settlement including the potential for a geographically-restricted concurrent registration. The parties were not able to reach a settlement.

The parties made timely initial disclosures. Wonderland timely served discovery requests on Rhinegeist. Discovery has closed and Rhinegeist did not serve any discovery requests on Wonderland. Rhinegeist's responses to Wonderland's discovery requests

were due September 6, 2016. Those deadlines have passed and Rhinegeist has not responded to the discovery requests.

On August 25, 2016, nine months after the filing of this opposition, more than three weeks after the close of discovery, and less than a month before Opposer’s pretrial disclosures are due, Applicant moved to amend its application to seek a concurrent use registration.

The remaining trial schedule is as follows:

Plaintiff's Pretrial Disclosures	9/15/2016
Plaintiff's 30-day Trial Period Ends	10/30/2016
Defendant's Pretrial Disclosures	11/14/2016
Defendant's 30-day Trial Period Ends	12/29/2016
Plaintiff's Rebuttal Disclosures	1/13/2017
Plaintiff's 15-day Rebuttal Period Ends	2/12/2017

## **II. Legal standard**

Requests to amend an application to seek a concurrent register should be made promptly, preferably in the applicant’s answer. *See* TBMP §514.03 (“If a defendant, whose application or registration is the subject of a Board inter partes proceeding, wishes to defend by asserting that it is at least entitled to a registration with a particular restriction, the defense should be raised either in the defendant’s answer to the complaint, or by way of a timely motion to amend the application...”). “The proposed [or alternative] restriction should be described in sufficient detail to give the plaintiff fair notice thereof.” *Id.* (internal citations omitted); *see also Embarcadero Technologies Inc. v. RStudio Inc.*, 105 USPQ2d 1825, 1828-29 (TTAB 2013) (Section 18 affirmative defense, and corresponding motion to amend the application or registration, should be made early to put plaintiff on notice).

When an applicant moves to amend its application and the Opposer has not consented to the amendment and the amendment “would affect the issues involved in the proceeding, normally [the motion to amend] will be denied by the Board...” TBMP §514.03 (internal citations omitted). If an untimely motion “would affect the issues involved in the proceeding” granting is will necessarily prejudice the opposer and waste judicial resources. It will prejudice the Opposer by forcing it to conduct additional discover into the “affected issues.” It will waste judicial resources by requiring the Board to consider additional motion practice, reopen discovery, and delay the trial period. *PolyJohn Enterprises Corp. v. 1-800-TOILETS, Inc.*, 61 U.S.P.Q.2d 1860 (P.T.O. Jan. 31, 2002). (“the Board’s growing docket of active cases, and the resulting, inevitable increase in motion practice before the Board, increasingly strains the Board’s limited resources.”)

### **III. Argument**

Applicant has inexcusably delayed its motion to amend its application to see concurrent registration. It has failed to put Opposer on notice of this potential amendment by failing to plead it in its answer or to move for the amendment prior to the close of discovery. Applicant has offered no explanation or excuse for its delay. Moreover, this motion must now be resolved prior to this matter continuing because it directly effects the issues to be tried.

Applicant, in its answer, could have and should have pleaded the possibility that it would seek a geographic restriction. Even before filing its answer Applicant and Opposer had explored the possibility of a settlement that would have allowed the parties to use their marks in their respective territories. Applicant could have requested the amendment

it its answer or moved to amend its application any time between answering and the close of discovery. Its delay is an inexcusable mistake.

If the Board denies the Applicant's motion to amend, the trial on the merits of this opposition can proceed as scheduled. However, if the Applicant's motion to amend is granted, this proceeding must be terminated and an entirely new proceeding must commence. That new proceeding will require a new discovery period to deal with the new issues. Applicant missed the discovery deadline in this action, and may be filing this belated motion in an attempt to rectify that error.

#### **IV. Conclusion**

Opposer respectfully requests the Board deny Applicant's motion to amend its application. Applicant has made no argument or presented any evidence explaining its long delay in moving to amend its application. Nor has it offered any justification for the severe prejudice that will be caused to Opposer in the form substantial time wasted, additional discovery and motion practice; or the waste of judicial resources.

Submitted this 9<sup>th</sup> day of September, 2016.

/ Thomas P. Howard /  
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Certificate of Service

I hereby certify that on September 9, 2015, I served a copy of the preceding **Response to Applicant's Motion to Amend its Application** on the following parties by email to the addresses listed below:

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