

ESTTA Tracking number: **ESTTA616577**

Filing date: **07/18/2014**

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

Proceeding	92059220
Party	Defendant Stockmarket Burger Inc.
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Date	07/18/2014
Attachments	Reply in Support of Respondent's Motion to Suspend Proceeding Pending Disposition of Related Board Proceeding.pdf(67896 bytes )

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

RED BULL GMBH,	)	
	)	Cancellation No. 92059220
Petitioner,	)	Registration No: 4481899
	)	Mark: STOCKMARKET (& Design)
v.	)	
	)	
STOCKMARKET BURGER, INC.,	)	
	)	
	)	
Respondent.	)	
	)	
	)	
	)	
	)	

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**REPLY IN SUPPORT OF RESPONDENT'S MOTION TO SUSPEND PROCEEDING  
PENDING DISPOSITION OF RELATED BOARD PROCEEDING**

Respondent hereby submits its Reply in support of its Motion to Suspend Proceeding Pending Disposition of Related Board Proceeding ("Motion"). As set forth in the Motion, the outcome of the related opposition proceeding no. 91210282 ("Opposition") will likely have a bearing on the outcome of this cancellation proceeding, and therefore, this proceeding should be suspended pending the outcome of the Opposition. In response, Petitioner's opposition brief incorrectly suggests that the two proceedings are "at or near the same stage of litigation":

However, when the multiple proceedings *are at or near the same stage of litigation* and plead the same claims – as Respondent has explained in detail is the case here – judicial economy is best served if the Board orders consolidation rather than a suspension.

Petitioner's Opposition Brief at 1 (emphasis added). To be clear, Respondent has never represented that the proceedings are at or near the same stage of litigation. In fact, these

proceedings are not even close to the same stage of litigation. Consolidation would be inappropriate—and prejudicial—to Applicant in the Opposition.

The discovery period in the Opposition opened on March 28, 2014, and is currently set to close on September 24, 2014, which is just over two (2) months from now. TTABVUE Docket #17, Opposition No. 91210282 (the currently operative scheduling order). Although Applicant filed a Rule 12(c) motion that may be partially or fully dispositive of the Opposition on June 26, 2014, *id.*, Docket #18, the Board has not yet issued a suspension order in that case. Thus, **the close of discovery in the Opposition is approaching in approximately two (2) months, and the parties will begin to prepare for trial shortly thereafter.** Even if the Board denies Applicant's Rule 12(c) motion in whole or in part and issues a new scheduling order with time remaining for discovery, **the Opposition is already half-way through the discovery period,** which opened on March 28, 2014—almost three months before Applicant even filed its Rule 12(c) motion.

Based on the foregoing, **consolidation of the proceedings is inappropriate because they are in completely different stages of litigation.** This cancellation proceeding is currently suspended; Respondent has not even filed its answer, and the issues have not yet been joined. In contrast, the Opposition is already half-way through discovery, and the parties are currently expected to begin preparing for trial after the close of discovery in September of 2014 (approximately two months from now). Consolidation of the proceedings would seemingly require a lengthy extension of the discovery period in the Opposition to accommodate discovery on the particular issues raised in this cancellation proceeding. In fact, the discovery period in the Opposition would need to be extended long enough to allow for Respondent to file an answer and counterclaims, for Petitioner to file an answer to any counterclaims, for the parties to conduct the discovery conference, exchange initial disclosures, and thereafter conduct any necessary

discovery. By the time the parties begin discovery on the cancellation issues, the Opposition may very well be terminated by settlement, dismissal pursuant to Applicant's Rule 12(c) motion, or the parties may have already begun preparing for trial. Consolidation of the proceedings and prolonging the discovery period in the Opposition would prejudice the Applicant by causing unnecessary delay, allow further misuse of discovery procedures by Opposer (Opposer has already served 1193 requests for admission, 15 interrogatories, and 49 requests for production of documents), and would disrupt the trial schedule. Accordingly, because the proceedings are in different stages, consolidation is both impractical and prejudicial to Applicant in the Opposition proceeding. Instead, this cancellation proceeding should simply remain suspended pending the outcome of the Opposition.

Consolidation is also inappropriate because **Applicant's Rule 12(c) motion may be fully dispositive of the Opposition proceeding, rendering the question of consolidation moot.** If Applicant's Rule 12(c) motion is granted and the Opposition is dismissed, the Board will not need to consolidate any proceedings. Instead, the Board should suspend this proceeding pending the outcome of the Opposition, which may be dismissed at any time prior to the Board's decision on Petitioner's instant Motion to suspend. Such a dismissal could also bear on the outcome of this proceeding and may even become grounds for dismissing this cancellation prior to the commencement of any discovery.

Last, consolidation is also inappropriate because Respondent has not yet filed an answer in this proceeding. TMBP § 511 ("Generally, the Board will not consider a motion to consolidate until an answer has been filed (i.e., until issue has been joined) in each case sought to be consolidated"). The Board may, in its discretion, order cases consolidated prior to joinder of issue, *id.*, but the Board should not exercise its discretion to consolidate here, where (1) the proceedings

are at different stages of litigation, and consolidation would cause unnecessary delay in the Opposition proceeding, thereby causing prejudice to the Applicant; (2) where the Opposition may be dismissed pursuant to Applicant's pending Rule 12(c) motion at any time; and (3) where Respondent has not filed an answer, and joinder of the issues is typically required for consolidation. Accordingly, suspension rather than consolidation is appropriate.

Respectfully submitted,

Date: July 18, 2014

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**PROOF OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **REPLY IN SUPPORT OF RESPONDENT'S MOTION TO SUSPEND PROCEEDING PENDING DISPOSITION OF RELATED BOARD PROCEEDING** has been served on Martin R. Greenstein, counsel for Opposer, on July 18, 2014 via First Class U.S. Mail, postage prepaid to:

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/Paulo A. de Almeida  
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