

**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: March 25, 2015

Cancellation No. 92060688

Nodding Head Brewery

v.

Strayhan Investments, Inc. dba  
Rubicon Brewing Company

**Robert H. Coggins,**  
**Interlocutory Attorney:**

Now before the Board is respondent's motion (filed February 23, 2015) to suspend proceedings pending examination of respondent's newly filed concurrent use application. Petitioner has filed a brief in opposition thereto. The Board exercises its discretion to determine the motion prior to the time in which respondent might otherwise file a reply.

Procedural Issues

The appearance of respondent's counsel by way of the motion to suspend is noted and entered. TBMP § 117.03 (2014). However, respondent's motion is procedurally flawed because it (1) does not contain the signatory's telephone number as required by TBMP § 106.02, (2) does not provide the date on which service was effected upon petitioner as required by Trademark

Rule 2.119(a), and (3) contains as page 3 a misleading statement that petitioner consents to suspension, when petitioner does not so consent. In the present circumstances, the multiple flaws do not rise to a level that would affect the Board's determination of the motion; but, respondent is warned that strict compliance with the procedural rules governing this proceeding is expected of respondent. In addition, respondent is warned of its Fed. R. Civ. P. 11(b)(3) obligation that each factual contention (e.g., the statement that petitioner consents to suspension) must have evidentiary support, and respondent must be careful not to submit misleading statements or statements that may appear to be true when they are not.

#### Motion to Suspend

Respondent moves to suspend the cancellation proceeding until respondent's recently filed concurrent use Application Serial No. 86543458 can be examined. Petitioner opposes suspension because, as it argues, the petition for cancellation is based not only priority and likelihood of confusion but also fraud.

There is nothing that would prevent respondent from filing a new concurrent use application if respondent were to receive an adverse decision on the issues of priority or fraud as pleaded in the petition for cancellation. *See* TBMP § 1112 and cases cited in the Note thereto. An adverse decision on the pleaded ground of fraud (i.e., a claim that the declaration or oath in respondent's application for registration was executed fraudulently, in that

there was another use of the same or a confusingly similar mark at the time the oath was signed) would pertain to the subject registration only, and would not prevent respondent from filing a new, concurrent use application (as it has done) reciting an exception; a statement made in the declaration of a new application based on concurrent use would present a different transaction than the statement made in the declaration in the earlier non-concurrent use application. By its argument as to the repeated declaration misstatement, petitioner appears to ignore that Application Serial No. 86543458 was filed as a concurrent use application and that respondent has specifically provided information as to an exception to respondent's use.<sup>1</sup>

As explained in TBMP § 1101.02, a cancellation proceeding may be suspended to allow the respondent time to file a concurrent use application and then terminated (in favor of a concurrent use proceeding, *see* TBMP § 1113.02 (conversion of cancellation proceeding<sup>2</sup>)) when respondent's concurrent use application has been published for opposition purposes and no opposition is filed or all oppositions filed are dismissed or withdrawn.

Accordingly, respondent's motion to suspend is **granted**. Within fifteen days after the date that the concurrent use application publishes for

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<sup>1</sup> Of course, the requirements of such an exception statement have yet to be reviewed by the Examination Operation or determined by the Board.

<sup>2</sup> It is presumed that respondent will agree to entry of judgment against itself in the cancellation proceeding or to voluntarily surrender its registration prior to conversion of the cancellation proceeding into a concurrent use proceeding. *See* TBMP § 1101.02.

opposition purposes and no opposition is filed or all oppositions filed are dismissed or withdrawn, respondent must so notify the Board so that this case may be called up for appropriate action (including, if appropriate, conversion of the cancellation proceeding into a concurrent use proceeding).

During the suspension period the Board should be notified of any address changes for the parties or their attorneys.

Pro Se Information for Petitioner

It appears that petitioner is representing itself. Petitioner may do so; however, it should be noted that while Patent and Trademark Rule 11.14 permits a corporation to represent itself through an officer, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in a Board proceeding to secure the services of an attorney who is familiar with such matters. If petitioner does not retain counsel, then petitioner will have to familiarize itself with the rules governing this proceeding. Strict compliance with the Trademark Rules of Practice and all other applicable rules is expected of all parties, even those representing themselves. The Board's home page at the following URL provides access to several electronic legal resources including the Trademark Rules of Practice and the TTAB Manual of Procedure:

<http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab.html>.