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December 12, 2024

Cancellation No. 92083154

Metabev LLC

v.

VSWC LLC

Before Greenbaum, Lynch, and Elgin,
Administrative Trademark Judges.

By the Board:

This proceeding comes before us on Petitioner Metabev LLC's August 21, 2024 motion for summary judgment on its claims of abandonment and fraud as bases for cancellation of Respondent's VSWC LLC's subject registration.[1] The motion is fully briefed.[2]

[1] 15 TTABVUE. Citations to the Board record refer to TTABVUE, the Board's online docketing system. *See Turdin v. Trilobite, Ltd.,* Conc. Use No. 94002505, 2014 TTAB LEXIS 17, at *6 n.6 (TTAB 2014). The number preceding "TTABVUE" corresponds to the docket entry number, and any number following "TTABVUE" refers to the page number of the docket entry where the cited materials appear.

Citations in this order are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 101.03 (2024). This order cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this order employs citations to the LEXIS legal database.

[2] *See* 17 TTABVUE (Respondent's response); 18 TTABVUE (Petitioner's reply).

The Board has fully considered the parties' briefs and evidence, and addresses the parties' arguments and the record only to the extent necessary to set forth the Board's analysis and conclusions. *Guess? IP Holder LP v. Knowluxe LLC*, Can. No. 92060707, 2015 TTAB LEXIS 482, at *4-5 (TTAB 2015).

I. Relevant Background

Respondent is the record owner of Registration No. 5617930 for the standard character mark META WINE ("Respondent's Mark") for use in connection with "wine" in International Class 33 and "custom production of wine for others" in International Class 40 ("Respondent's Registration"). Respondent filed the underlying application on August 23, 2016, and Respondent's Registration issued on November 27, 2018, pursuant to Trademark Act Section 1(a), 15 U.S.C. § 1051(a).[3]

In its amended petition for cancellation, Petitioner alleges the following claims: (1) fraud on the United States Patent and Trademark Office ("USPTO") under Trademark Act Section 14(3), 15 U.S.C. § 1064(3); (2) nonuse under Section 1(a); and (3) abandonment under Trademark Act Section 45, 15 U.S.C. § 1127.[4] In support of its entitlement to a statutory cause of action, Petitioner alleges that its applications to register the standard character marks META, META VODKA, METABEV, and META HARD ELIXIR for use in connection with "hard seltzer," "beer," "vodka,"

[3] The registration includes claimed dates of first use anywhere and first use in commerce of June 9, 2017, for the goods in International Class 33 and November 2, 2017, for the services in International Class 40. "WINE" is disclaimed.

[4] 11 TTABVUE.

and/or "hard seltzer" in International Class 33 have been refused based on a likelihood of confusion with the mark in Respondent's Registration.[5]

Respondent filed an answer denying the salient allegations of the amended petition for cancellation.[6]

Pursuant to the schedule set by the Board in its institution order, discovery opened on November 17, 2023.[7] Following Board participation in the parties' discovery conference, the close of discovery was reset to July 24, 2024.[8]

On November 17, 2023, Petitioner served its first requests for admission ("Petitioner's First RFAs").[9] The deadline for Respondent to respond to Petitioner's First RFAs was reset to January 24, 2024, by the Board in its order following the discovery conference.[10] On January 8, 2024, Petitioner served its second requests for admission ("Petitioner's Second RFAs").[11] Respondent's responses to Petitioner's Second RFAs were due by February 7, 2024.[12] Respondent, however, did not serve responses to any of Petitioner's admission requests.[13]

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[5] *Id.* at 4 ¶ 3.

[6] 12 TTABVUE.

[7] 2 TTABVUE 3.

[8] 10 TTABVUE 22.

[9] 15 TTABVUE 14, 26.

[10] *Id.* at 15; 10 TTABVUE 22.

[11] 15 TTABVUE 15, 26.

[12] In its motion for summary judgment, Petitioner states that Respondent's responses were due by February 14, 2024. *See id.* However, thirty days from January 8, 2024, is February 7, 2024. *See* Trademark Rule 2.120(a)(3), 37 C.F.R. § 2.120(a)(3).

[13] 15 TTABVUE 15, 26.

Accordingly, Petitioner took its requests for admission as admitted under Fed. R. Civ. P. 36(a)(3)[14] and, based on the admissions, has moved for summary judgment on its fraud and abandonment claims.[15]

II. Legal Standard

Summary judgment is an appropriate method of disposing of cases in which there are no genuine disputes as to any material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In reviewing a motion for summary judgment, the evidentiary record must be viewed in the light most favorable to the non-moving party, and all justifiable inferences to be drawn from the undisputed facts must be drawn in favor of the non-moving party. *See Mayer/Berkshire Corp. v. Berkshire Fashions, Inc.*, 424 F.3d 1229, 1234 (Fed. Cir. 2005); *Lloyd's Food Prods., Inc. v. Eli's, Inc.*, 987 F.2d 766, 767 (Fed. Cir. 1993); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 202 (Fed. Cir. 1992). We may not resolve disputes of material fact; we may only ascertain whether a genuine dispute regarding a material fact exists. *See Lloyd's Food Prods.*, 987 F.2d at 767-69; *Olde Tyme Foods*, 961 F.2d at 202-03.

The movant's burden at summary judgment is greater than the burden of proof at trial, which is a preponderance of the evidence, and which permits appropriate inferences to be drawn from the evidence of record. *See, e.g., Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 773 (Fed. Cir. 1995); *see also* TBMP § 528.01.

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[14] The Federal Rules of Civil Procedure are made applicable to Board proceedings under Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a).

[15] 15 TTABVUE 15.

Where, as here, the party moving for summary judgment on a claim bears the burden of proof at trial on that claim, the moving party "must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing." 10A CHARLES ALAN WRIGHT, ARTHUR MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE CIVIL § 2727.1 (4th ed. 2024 update). Only when the movant has supported its motion with sufficient evidence that, if unopposed, indicates there is no genuine dispute of material fact and that the moving party is entitled to judgment as a matter of law, does the burden then shift to the non-movant to demonstrate the existence of a genuine dispute of material fact to be resolved at trial. *Enbridge, Inc. v. Excelerate Energy LP*, Opp. No. 91170364, 2009 TTAB LEXIS 642, at *6-7 (TTAB 2009).

The party moving for summary judgment has the burden of demonstrating that the material facts are not genuinely in dispute by:

1. citing to the record, including affidavits or declarations, admissions, or interrogatory answers, and showing the cited materials do not establish a genuine dispute; or,

2. showing that the non-moving party cannot produce admissible evidence sufficient to create a genuine dispute.

Monster Energy Co. v. Tom & Martha LLC, Opp. No. 91250710, 2021 TTAB LEXIS 458, at *6-7 (TTAB 2021) (citing Fed. R. Civ. P. 56(c)(1)). If the moving party carries this part of its burden, the nonmoving party may not rest on mere allegations, but must designate specific portions of the record or produce additional evidence showing the existence of a genuine dispute of material fact for trial. *See, e.g., id.* at *7; *Venture*

Out Props. LLC v. Wynn Resort Holdings, LLC, Opp. No. 91167237, 2007 TTAB LEXIS, at *10-11 (TTAB 2007).

III. Analysis and Order

A. Respondent's Deemed Admissions

Fed. R. Civ. P. 36(a)(3) provides that "[a] matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." Respondent did not serve responses to either of Petitioner's admission requests and does not dispute that it failed to timely do so. Consequently, the requests are deemed admitted by operation of law. *See Giersch v. Scripps Networks, Inc.*, Can. No. 92045576, 2007 TTAB LEXIS 64, at *2-3 (TTAB 2007). The effect of such admissions is that the subject matter of the requests is "conclusively established unless the [Board], on motion, permits the admission[s] to be withdrawn or amended" under Fed. R. Civ. P. 36(b), or reopens the time to respond to the admission requests "so that the admissions would not be deemed admitted as put." *Id.*

Notwithstanding these guidelines for relief from deemed admissions, which admissions are relied on by Petitioner to support its motion for summary judgment, Respondent makes no mention of the deemed admissions let alone provides any argument for why it is entitled to such relief.[16]

> While the Board generally takes a liberal approach in construing responses to motions based on deemed admissions as motions to

[16] *See generally* 17 TTABVUE.

> withdraw or amend the admissions or, to a lesser degree, to reopen time, Respondent has made no showing that we can construe as going to the two-part test prescribed under Rule 36(b) or to a showing of excusable neglect as required under Rule 6(b)(1)(B).

Learning Journey Int'l, L.L.C. v. Yongfu, Can. No. 92082654, 2024 TTAB LEXIS 326, at *9-10 (TTAB 2024).

Because Respondent did not move to amend or withdraw its admissions, or to reopen its time to respond to Petitioner's admission requests, and there is nothing in Respondent's response to the motion for summary judgment that we could reasonably construe as such, Petitioner's requests for admission stand admitted, and the matters admitted under the requests are conclusively established. *See id.* at *10 (citing Fed. R. Civ. P. 36(b); *Stine Seed Co. v. A & W Agribusiness, LLC*, 862 F.3d 1094, 1102 (8th Cir. 2017) ("[W]hen a party has made no filing that could be construed as a motion to withdraw or amend an admission, the court is required to give the admission conclusive effect."); and *Fram Trak Indus., Inc. v. WireTracks LLC*, Can. No. 92043947, 2006 TTAB LEXIS 21, at *15 (TTAB 2006) ("Respondent failed to respond to petitioner's requests for admission and failed to file a motion to amend or withdraw those admissions. Accordingly, those requests for admission are deemed admitted and conclusively established.")).

Deemed admissions are competent to demonstrate that there is no genuine dispute of material fact on a motion for summary judgment. *See* Fed. R. Civ. P. 56(c)(1)(A) ("[a] party asserting that a fact cannot be . . . genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including . . . admissions."); *see also Kaliannan v. Liang*, 2 F.4th 727, 736 (8th Cir.

2021) ("the deemed-admitted Requests for Admission alone demonstrate that Plaintiffs were entitled to summary judgment"); *Batyukova v. Doege*, 994 F.3d 717, 724 (5th Cir. 2021) (facts deemed admitted by a party's failure to respond to requests for admissions are conclusive as to matters admitted for purposes of summary judgment).

We turn now to the merits of Petitioner's motion for summary judgment.

B. Entitlement to a Statutory Cause of Action

A plaintiff's entitlement to a statutory cause of action must be proven in every inter partes case. *See Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 1373-74 (Fed. Cir. 2020). In a cancellation proceeding, a party may petition to cancel the registrant's registration of a mark where such action is within the zone of interests protected by the statute, 15 U.S.C. § 1064, and the petitioner's reasonable belief in damage is proximately caused by continued registration of the registrant's mark. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 1304-07 (Fed. Cir. 2020).

Entitlement to a statutory cause of action is generally conferred on a plaintiff whose pleaded pending application has been refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). *See, e.g., Great Seats Ltd. v. Great Seats, Inc.*, Can. No. 92032524, 2007 TTAB LEXIS 68, at *5-6 1237 (TTAB 2007); *Cerveceria Modelo S.A. de C.V. v. R.B. Marco & Sons, Inc.*, Can. No. 92022137, 2000 TTAB LEXIS 394, at *3-4 (TTAB 2000).

Petitioner has supported its motion for summary judgment with Trademark Status and Document Retrieval ("TSDR") printouts of its pleaded pending applications for marks that are arguably similar to Respondent's mark, as well as copies of the Office Actions refusing registration of Petitioner's marks in light of Respondent's Registration.[17] Thus, we find that, for purposes of this motion, there exist no genuine disputes of material fact that Petitioner is entitled to a statutory cause of action under Section 2(d) to petition to cancel Respondent's Registration. *See, e.g., Great Seats*, 2007 TTAB LEXIS 68, at *5-6 (finding petitioner's ownership of application for mark and services related to registrant's mark and services and refusal of application sufficient to establish entitlement to bring Section 2(d) claim); *Cerveceria Modelo*, 2000 TTAB LEXIS 394, at *3-4; TBMP § 309.03(b) and authorities cited therein. Accordingly, Petitioner may rely on any statutory ground for cancellation. *See Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1031 (CCPA 1982).

C. Abandonment

To prevail on a claim of abandonment, a plaintiff must show that the party against whom the claim is made "is not using the mark with its goods and services, and has no intent to resume use." *Lewis Silkin LLP v. Firebrand LLC*, Can. No. 92067378, 2018 TTAB LEXIS 436, at *16-17 (TTAB 2018). A showing of three consecutive years of nonuse is sufficient to establish a prima facie case of abandonment. *See* Trademark

[17] 15 TTABVUE 25, 29-80.

Act Section 45, 15 U.S.C. § 1127; *Double Coin Holdings Ltd. v. Tru Dev.*, Can. No. 92063808, 2019 TTAB LEXIS 347, at *34 (TTAB 2019).

By way of the deemed admissions, Respondent has admitted, inter alia, that it "ha[s] not used [Respondent's] Mark in connection with any goods or services after June 30, 2020"[18] and that it "ha[s] no current plans to use or resume the use of the [Respondent's] Mark in connection with 'wine' or 'custom production of wine for others' in the future."[19] These deemed admissions are sufficient for Petitioner to demonstrate that there is no genuine dispute of material fact on its claim of abandonment.

Respondent argues that various pieces of counter-evidence attached to its brief establish that "Petitioner has failed to meet its burden."[20] When matter has been conclusively established under Rule 36, it is taken as a judicial, rather than an evidential, admission that "cannot be rebutted by contrary testimony or ignored by the [Board] simply because it finds the evidence presented by the party against whom the admission operates more credible," and this "applies equally to those admissions made affirmatively and those established by default, even if the matters admitted relate to material facts that defeat a party's claim." *Learning Journey*, 2024 TTAB LEXIS 326, at *11 (citing *Am. Auto. Ass'n (Inc.) v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1120 (5th Cir. 1991)); *see also* Fed. R. Civ. P. 36 Advisory

[18] Petitioner's First RFA No. 12. *Id.* at 87.

[19] Petitioner's First RFA No. 29. *Id.* at 89.

[20] *Id.*

Committee Notes (1970 amendment) ("In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party."); *Fabriko Acquisition Corp. v. Prokos*, 536 F.3d 605, 608 (7th Cir. 2008) (facts conclusively established through deemed admissions cannot be rebutted with other evidence); *Made in Nature, LLC v. Pharmavite LLC*, Opp. No. 91223352, 2022 TTAB LEXIS 228, at *27 (TTAB 2022) (in contrast to an evidentiary admission, "a judicial admission . . . is incapable of refutation"). "[S]uch evidence cannot raise a genuine dispute as to the material facts that have been conclusively established through Respondent's deemed admissions." *Learning Journey*, 2024 TTAB LEXIS 326, at *15-16 (citing *In re Carney*, 258 F.3d 415, 420 (5th Cir. 2001) ("Since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, they cannot be overcome at the summary judg[]ment stage by contradictory affidavit testimony or other evidence in the summary judgment record.")).

IV. Decision

In view of the foregoing, Petitioner's motion for summary judgment on its claim of abandonment is **granted** and Registration No. 5617930 will be cancelled in due course.[21]

[21] Because the petition for cancellation has been granted on the ground of abandonment, we need not reach Petitioner's other claims of fraud or nonuse. *See Learning Journey*, 2024 TTAB LEXIS 326, at *16-17 n.21 (citing, inter alia, *Multisorb Techs., Inc. v. Pactiv Corp.*, Can. No. 92054730, 2013 TTAB LEXIS 616, at *3 (TTAB 2013) ("Like the federal courts, the Board has generally used its discretion to decide only those claims necessary to enter judgment and dispose of the case. [Thus,] the Board's determination of registrability does not require, in every instance, decision on every pleaded claim.")).