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

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Mailed: April 1, 2015

Opposition Nos. **91215208 (parent)**
91215212
91215216
91215246
91215247
91215415

LVGV, LLC

v.

Empire Resorts, Inc.

Before Bergsman, Wolfson and Shaw,
Administrative Trademark Judges

By the Board:

These proceedings come up on Opposer's motions (filed July 22, 2014) to consolidate six opposition proceedings and Applicant's motions (filed September 15-24, 2014) for full or partial judgment on the pleadings. The motions are fully briefed.[1]

Motion to Consolidate

The Board may consolidate pending cases that involve common questions of law or fact since consolidation will avoid duplication of effort concerning

[1] The Board presumes the parties' familiarity with the issues herein. Therefore, for the sake of efficiency, this order does not summarize the parties' arguments raised in the briefs.

the factual issues and will thereby avoid unnecessary costs and delays. *See* Fed. R. Civ. P. 42(a); *see also M.C.I. Foods Inc. v. Bunte,* 86 USPQ2d 1044, 1046 (TTAB 2008) and *Estate of Biro v. Bic Corp.,* 18 USPQ2d 1382, 1384 n.3 (TTAB 1991).

In reviewing the oppositions, it is noted that all six proceedings have the same parties and involve similar marks as well as common questions of law and fact. Although Applicant contends that neither time nor expense will be saved by consolidation and that its ability to differentiate and distinguishing its six applications will be severely hindered, its position is belied by the six motions for judgment on the pleadings filed by Applicant wherein the arguments are largely redundant and large swaths of each motion are repeated verbatim. Indeed, it is plainly evident that these six oppositions will benefit from consolidation and that the savings gained in time, effort and expense outweigh any prejudice or inconvenience that may be caused thereby. *See, e.g., Dating DNA LLC v. Imagini Holdings Ltd.*, 94 USPQ2d 1889, 1893 (TTAB 2010).

In view thereof, **Opposition Nos. 91215208, 91215212, 91215216, 91215246, 91215247 and 91215415, are hereby CONSOLIDATED** and may be presented on the same record and briefs.[2] The record will be maintained in **Opposition No. 91215208 as the "parent" case**. The parties should no longer file separate papers in connection with each proceeding, but

[2] The parties are instructed to promptly inform the Board of any other related cases within the meaning of Fed. R. Civ. P. 42.

file only a single copy of each paper in the parent case. Each paper filed should bear the numbers of all consolidated proceedings in ascending order, and the parent case should be designated as such in the case caption as set forth above.[3]

Applicant's Motions for Judgment on the Pleadings

A motion for judgment on the pleadings is a test solely of the undisputed facts appearing in all the pleadings, supplemented by any facts of which the Board will take judicial notice. For purposes of the motion, all well-pleaded factual allegations of the nonmoving party must be accepted as true while those allegations of the moving party which have been denied (or which are taken as denied, pursuant to Fed. R. Civ. P. 8(b)(6), because no responsive pleading thereto is required or permitted) are deemed false. Conclusions of law are not taken as admitted. *Baroid Drilling Fluids Inc. v. Sun Drilling Products,* 24 USPQ2d 1048, 1049 (TTAB 1992). All reasonable inferences from the pleadings are drawn in favor of the nonmoving party. *Id.* A judgment on the pleadings may be granted only where, on the facts as deemed admitted, there is no genuine issue of material fact to be resolved, and the moving party is entitled to judgment on the substantive merits of the controversy as a matter of law. *Id.*; *see also Kraft Group LLC v. Harpole*, 90

[3] Consolidated cases do not lose their separate identity because of consolidation. Each proceeding retains its separate character and requires entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings and a copy of the final decision shall be placed in each proceeding file. *See* Wright, Miller, Kane, Marcus & Steinman, 9A *Fed. Prac. & Proc. Civ.* § 2382 (3d ed.).

USPQ2d 1837, 1840 (TTAB 2009). A party may not obtain a judgment on the pleadings if the nonmoving party's pleading raises issues of fact, which, if proved, would establish the nonmoving party's entitlement to judgment. *Baroid Drilling Fluids*, 24 USPQ2d at 1049.

Preliminarily, we note that the motions were timely filed, i.e., after the close of pleadings but prior to the opening of testimony. *See* Fed. R. Civ. P. 12(c); *cf*. Trademark Rule 2.127(e)(1).

The notices of opposition all assert a single claim of priority and likelihood of confusion under Section 2(d) of the Trademark Act. In its motions, Applicant contends that it is entitled to judgment as to most or all of Opposer's pleaded registrations (depending on the nature of the involved mark) because either the parties' "goods/services are so unrelated" or the "marks are so disparate in appearance, sound and connotation" that there could not possibly be a likelihood of confusion between the parties' marks. *See, e.g., Motion for Partial Judgment on the Pleadings*, 13 TTABVUE 9-10 (Opposition No. 91215208). On a motion for judgment on the pleadings, we do not weigh any evidence regarding the likelihood of confusion factors outlined in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Rather, we focus solely on the allegations in the pleadings and accept as true Opposer's factual allegations.

Opposer has sufficiently set forth its claim of priority and likelihood of confusion in each case. While Applicant has denied the salient allegations of

that claim, genuine issues of material fact remain to be resolved. Upon careful consideration, we find, at a minimum, genuine issues as to the strength of the marks and their commercial impressions, the similarities of the marks, and the relatedness of the goods and services. Accordingly, Applicant's motions for judgment on the pleadings are hereby **DENIED**.

Submission of Appendix Ordered

To allay Applicant's concerns of differentiating and distinguishing its marks in the six applications at issue and minimizing any purported confusion engendered by consolidation, the parties are hereby ordered to submit as part of their final briefs, an appendix with respect to each mark listing the specific testimony and evidence upon which they intend to rely to support a claim or defense.[4] The parties are to cite to the record using the TTABVUE prosecution history entries, identifying the docket entry number and PDF page number, e.g., 130 TTABVUE 54-59. With respect to confidential information, if any, since the parties will not be able to identify the confidential entries through TTABVUE, the parties are to cite to the record in the traditional manner, e.g., Jones Dep., p.3, Applicant's response to Interrogatory No. 2. **If testimony and evidence is not listed in the appendix, it will not be considered by the Board**.[5] A sample appendix follows:

[4] The appendix will not count as part of the page limit for the parties' briefs.

[5] We acknowledge that Applicant, as a defendant, is not required to introduce any testimony or evidence. As such, if Applicant does not intend to introduce any

Opposer's Testimony and Evidence
Likelihood of Confusion Claim
As Against Application Serial No. *********
Opposition No. **********

Source	Probative Value	TTABVUE Entry and Page
Jones Dep., p.23	Date of first use on X services	35 TTABVUE 25
3rd notice of reliance	Newspaper articles demonstrating commercial impression of Y mark	44 TTABVUE 157
Smith Dep., p.45	Reported instances of actual confusion	37 TTABVUE 133

Trial Schedule

Proceedings herein are **RESUMED**[6] and this consolidated matter will proceed under the following schedule:

Expert Disclosures Due	**6/26/2015**
Discovery Closes	**7/26/2015**
Plaintiff's Pretrial Disclosures Due	**9/9/2015**
Plaintiff's 30-day Trial Period Ends	**10/24/2015**
Defendant's Pretrial Disclosures Due	**11/8/2015**
Defendant's 30-day Trial Period Ends	**12/23/2015**
Plaintiff's Rebuttal Disclosures Due	**1/7/2016**
Plaintiff's 15-day Rebuttal Period Ends	**2/6/2016**

testimony or evidence in defense of Opposer's claims, then it should expressly state as such in its appendix.

[6] Applicant's amended answers (filed with consent on September 15, 2014) in Opposition Nos. 91215246 and 91215415 are accepted as the operative pleadings in those proceedings.

IN EACH INSTANCE, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

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