

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Opposition No. 91210416
Opposition No. 91216686
Opposition No. 91216691
Opposition No. 91225309

Krave Pure Foods, Inc. (substituted for Krave
Pure Eats, Inc. as party plaintiff in
Opposition No. 91210416)

v.

Kellogg North America Company

(as consolidated)

Andrew P. Baxley, Interlocutory Attorney:

The following motions are pending in the above-captioned proceedings: (1) Opposer's motion (filed December 10, 2015) to substitute Krave Pure Foods, Inc. as the party plaintiff in Opposition No. 91210416; (2) Opposer's motion (filed December 11, 2015) to consolidate the above-captioned proceedings and to suspend proceedings pending the Board's decision on the motion to consolidate; (3) Opposer's amended motion (filed December 14, 2015) to consolidate the above-captioned proceedings and to suspend proceedings pending the Board's decision on the amended motion to consolidate; (4) Applicant's motion (filed December 31, 2015) to compel discovery in Opposition No. 91210416; (5) Applicant's motion (filed February 17, 2016) to compel discovery in Opposition No. 91216686; and (6) Applicant's motion (filed February 17, 2016) to compel discovery in Opposition No. 91216691.

The Board turns first to the Opposer's motion to substitute Krave Pure Foods, Inc. as the party plaintiff in Opposition No. 91210416.¹ In view of the recordation with the USPTO's Assignment Division of a document reflecting the merger, effective December 21, 2012, of Krave Pure Eats, Inc. into Krave Pure Foods, Inc. at Reel 5234/Frame 0402, the Board finds that substitution of Krave Pure Foods, Inc. as the party plaintiff in Opposition No. 91210416 is warranted. *See* Patent and Trademark Rule 3.73(b); TBMP § 512.01 (2015). Accordingly, the motion to substitute is hereby granted. Krave Pure Foods, Inc. is hereby substituted as the party plaintiff in Opposition No. 91210416.

Turning to the amended motion to consolidate and suspend,² the filing of a motion to consolidate does not, by itself, warrant suspension of Board proceedings. *Cf.* Trademark Rules 2.120(e)(2) (suspension for motion to compel), 2.120(h)(2) (suspension for motion to test the sufficiency of responses to requests for admission), and 2.127(d) (suspension for potentially dispositive motion). However, the Board finds that, in this instance, the filing of the motion to consolidate constitutes good cause to suspend proceedings.³ *See* Trademark Rule 2.117(c).

¹ In a January 27, 2016 order, the Board granted as conceded a motion to substitute Krave Pure Foods, Inc. as the party plaintiff in Opposition No. 91216691.

² The Board construes the filing of the amended motion to consolidate and suspend as a withdrawal of the original motion to consolidate and suspend. Accordingly, the original motion to consolidate and suspend will receive no consideration.

³ Under the circumstances, the parties could have, and should have, requested that the motion to consolidate be resolved by telephone conference prior to the holiday season. *See* Trademark Rule 2.120(i)(1); TBMP § 502.06(a). Early resolution of the motion to consolidate may have eliminated the need for Applicant's motions to compel.

The Board notes that, in view of the similarity of the claims at issue in these consolidated proceedings, discovery in the above-captioned proceedings will be highly similar, if not essentially identical.⁴ As such, a determination regarding whether or not to consolidate these proceedings will decide whether Opposer must respond to separate sets of discovery requests for each of the above-captioned proceedings or a single omnibus set of discovery requests for the consolidated proceedings. In addition, a decision on the motion to consolidate will determine whether these proceedings will go forward on a common schedule that allows them to be decide in a single trial or will continue under the three separate schedules under which the four proceedings have been moving forward.⁵ In view thereof, Opposer's amended motion to suspend is granted to the extent that the Board, in exercising its inherent authority to control the scheduling of cases on its docket, deems the filing of the original motion to consolidate and suspend on December 11,

⁴ Opposition Nos. 91210416, 91216686, and 91216691 have been ripe for consolidation since at least as early as September 4, 2015, when Applicant filed its answers in Opposition Nos. 91216686 and 91216691. *See* TBMP § 511. The record in the above-captioned proceedings indicates that, instead of notifying the Board that the parties were involved in multiple Board proceedings involving related marks and other overlapping issues of law and fact so that the Board could consider consolidation at that time (*see* institution notices at 4), Applicant served separate, largely overlapping sets of discovery requests in Opposition No. 91210416 on November 23, 2015, in Opposition No. 91216686 on October 8, 2015, and in Opposition No. 91216691 on October 8, 2015. Had Opposition Nos. 91210416, 91216686, and 91216691 been consolidated earlier, Applicant could have saved time and expense by addressing its discovery needs in a single omnibus set of discovery requests. Although Applicant complains in its brief in response to the amended motion to consolidate and suspend that Opposer ignored its efforts to discuss consolidation of these proceedings, Applicant could have moved to consolidate without Opposer's consent.

⁵ Although Opposition Nos. 91216686 and 91216691 were not previously consolidated, they were going forward under identical schedules.

Opposition Nos. 91210416, 91216686, 91216691, and 91225309

2015 to have tolled the running of dates in Opposition Nos. 91210416, 91216686, and 91216691. *See* TBMP § 510.01.

The Board finds, however, that the circumstances herein do not constitute good cause to suspend Opposition No. 91225309. Accordingly, the motion to suspend is denied with regard to that proceeding and dates have continued to run therein.

Regarding the motion to consolidate, the Board finds that, notwithstanding differences in the bases for Opposer's claims and in the identified goods in Applicant's involved applications, the above-captioned proceedings involve the same parties and sufficiently common questions of law and fact to warrant their consolidation. *See* Fed. R. Civ. P. 42(a); *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154 (TTAB 1991); *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382 (TTAB 1991); TBMP § 511. Applicant correctly notes that, when Opposer sought consolidation, Opposition No. 91210416 had been pending for nearly three years and was in the waning days of the discovery period, while Opposition No. 91225309 was newly commenced. However, the Board, in exercising its sole discretion to consolidate proceedings on its docket, finds that any prejudice to Applicant is outweighed by the savings in the overall amount of time, effort and expense that is likely to be saved and the consistency of decisions that is likely to be gained from consolidation. *See* TBMP § 511. Accordingly, the motion to consolidate is granted. The Board hereby orders the consolidation of the above-captioned proceedings.

The consolidated cases may be presented on the same record and briefs. *See Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989);

Hilson Research Inc. v. Society for Human Resource Management, 26 USPQ2d 1423 (TTAB 1993). The Board file will be maintained in Opposition No. 91210416 as the “parent” case. As a general rule, from this point onward, only a single copy of any submission should be filed herein. That copy, however, should include all of the consolidated proceeding numbers in the caption thereof.

Despite being consolidated, each proceeding retains its separate character. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleading; a copy of the decision shall be placed in each proceeding file.

In view of the foregoing, Applicant’s three motions to compel will receive no consideration. Opposer need not respond further to Applicant’s pending discovery requests. Rather, once Applicant has served its initial disclosures in Opposition No. 91225309, Applicant may serve a new set of omnibus discovery requests that encompasses all of the newly consolidated proceedings.

Proceedings in Opposition Nos. 91210416, 91216686, and 91216691 are hereby resumed.⁶ In keeping with Board practice, the Board will adopt the discovery and trial schedule for Opposition No. 91225309, the most recently instituted of the newly consolidated proceedings. *See* TBMP § 511. For the parties’ and the Board’s convenience those dates are as follows.⁷

Initial Disclosures Due	3/19/2016
Expert Disclosures Due	7/17/2016

⁶ As noted *supra*, dates had continued to run in Opposition No. 91225309.

⁷ The parties are reminded that “**the Board will not entertain any further requests to extend or suspend for settlement, whether consented to or not.**” Opposition No. 91210416, August 21, 2015 order at 2 (emphasis in original).

Discovery Closes	8/16/2016
Plaintiff's Pretrial Disclosures Due	9/30/2016
Plaintiff's 30-day Trial Period Ends	11/14/2016
Defendant's Pretrial Disclosures Due	11/29/2016
Defendant's 30-day Trial Period Ends	1/13/2017
Plaintiff's Rebuttal Disclosures Due	1/28/2017
Plaintiff's 15-day Rebuttal Period Ends	2/27/2017

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 the taking of testimony. Trademark Rule 2.125. Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129. If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.