

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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October 22, 2020

Opposition No. 91241586

Willamette Valley Vineyards, Inc.

v.

Copper Cane LLC

Ann Linnehan, Interlocutory Attorney

This case now comes up on Opposer's motion, (filed June 9, 2020) to remove Applicant's designations of certain of its produced documents as "Confidential" under the parties' Agreed Protective Order (APO).¹ The motion is fully briefed.

At the outset, the Board notes that in order to adequately determine this motion concerning confidentiality designations, the Board will presume the parties' familiarity with the information and involved facts. The Board discusses only in general terms the relevant documents as appropriate.

I. Documents

¹ On December 12, 2018 the parties executed such agreement which is based on the Board's standard protective order. 40 TTABVUE 9 (For purposes of convenience, any further cites to the APO will refer to the page numbers of the agreement itself). The parties are referred, as appropriate, to TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 412.04 (Filing Confidential Materials with Board), and 412.05 (Handling of Confidential Materials by the Board) (June 2020).

At issue are five documents produced by Applicant in response to the Board's October 2, 2019 order wherein Applicant was directed to produce non-privileged documents concerning Applicant's use of "Willamette" or "Willamette Valley" to label, advertise, or promote its wine under the applied for mark, and whether such use would be false, misleading, or violate any government regulation pertaining to alcoholic beverages.² Specifically, the five challenged documents are as follows:

- 1) CC WV-TTAB 0000930-32 not identified in public record briefs (for purposes of this motion, the Board will refer to this as "Document No. 1")
- 2) CC WV-TTAB 0000950 a 2017 Willameter Journal Tech Sheet
- 3) CC WV-TTAB 0000954 a WJ Shelf Talker 2018
- 4) CC WV-TTAB 0000952 a MP4 video labeled "Willametter Journal – Staff
- 5) CC WV-TTAB 0000953 a MP4 video labeled "Willametter Journal CONSUMER"

In its brief in response to Opposer's present motion, Applicant indicates that it will de-designate all of the challenged documents except for Document No. 1 above if the Board restricts Opposer's use of Document Nos. 2-5 above to the instant proceeding.³ Any determination of whether the protective agreement between the parties establishes contractual rights or is enforceable outside of the Board proceeding is for a court to decide, should such matter come before it. *See* TBMP 412.03 for further information. In view thereof, and to the extent it is unclear

² 25 TTABVUE 2-4.

³ 42 TTABVUE 16; 43 TTABVUE16.

whether the Board can order parties to enter into a contract that will govern the protection of information after the Board proceeding is concluded⁴, the Board will consider this motion with respect to all the challenged documents.

II. Good Faith Effort

Pursuant to § 14 of the parties' Agreed Protective Order⁵, "[i]f the parties or their attorneys disagree as to whether certain information should be protected, they are obligated to negotiate in good faith regarding the designation by the disclosing party. If the parties are unable to resolve their differences, the party challenging the designation may make a motion before the Board seeking a determination of the status of the information."⁶

Opposer's counsel submitted a declaration, which details the parties' negotiations in this matter. The parties reached an impasse concerning the removal

⁴ See MISCELLANEOUS CHANGES TO TRADEMARK TRIAL AND APPEAL BOARD RULES OF PRACTICE, 72 Fed. Reg. 42242, 42251 (August 1, 2007).

⁵ The parties' APO is accepted and is deemed binding as of the date the agreement was signed. The parties are reminded that they may not agree to redefine the Board's definition of what information constitutes "Confidential" and "Confidential – For Attorneys' Eyes Only (trade secret/commercially sensitive)" information. The parties may agree to change who has access to information and materials, but the designations retain the meaning the Board dictated in the Standard Protective Order. Additionally, the parties' agreement may not be used as a means of circumventing paragraphs (d) and (e) of 37 CFR § 2.27, which provide, in essence, that except for matter filed under seal pursuant to a protective order issued by a court or by the Board, the file of a published application or issued registration, and all proceedings relating thereto, are available for public inspection. *Provisions for Protecting Confidentiality of Information Revealed During Board Proceeding*, O.G. Notice (June 20, 2000). See *Amazon Technologies Inc. v. Wax*, 95 USPQ2d 1865, 1867 n.6 (TTAB 2010) (pro se applicant hired outside attorney solely for purpose of reviewing opposer's "trade secret/commercially sensitive" information and documents pursuant to the protective order).

⁶ 38 TTABVUE 12.

of the confidentiality label from the five documents listed above. The Board finds that Opposer has satisfied the good faith effort requirement prior to filing its motion.

III. Applicant's Responsibilities as Designating Party

As the designating party, Applicant bears the burden of demonstrating that its confidentiality designations are appropriate. *See* APO pg. 14; Fed. R. Civ. P. 26(c)(1); *United States Polo Association v. David McLane Enterprises, Inc.*, 2019 USPQ2d 108442, at *2–3 (TTAB 2019) (the designating party “bears the burden of demonstrating that its confidentiality designations are appropriate”); *FMR Corp. v. Alliant Partners*, 51 USPQ2d 1759, 1761 (TTAB 1999). To successfully carry this burden, Applicant “must demonstrate a particular need for protection and that a clearly defined and serious injury will result otherwise.” Fed. R. Civ. P. 26(c)(1). *United States Polo Association*, 2019 USPQ2d 108442, at *3 (the designating party “must demonstrate a particular need for protection and that a clearly defined and serious injury will result otherwise.”). “Stereotyped and conclusory statements” are insufficient. TBMP § 412.01(b); *see FMR Corp. v. Alliant Partners*, 51 USPQ2d 1759, 1761 (TTAB 1999); *In re Bank One Sec. Litig.*, 222 F.R.D. 582, 588 (N.D. Ill. 2004) (“good cause does not permit ‘stereotyped and conclusory statements’”) (*quoting Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981)).

IV. The Confidential Designation in the APO

The specific designation at issue in this motion, namely, the “Confidential” designation in the APO, dictates that such material is to be shielded by the Board from public access.⁷ Under the parties’ agreement, “Attorneys for the parties and officers, directors, and employees of the parties to whom disclosure is reasonably necessary for this proceeding shall have access to information designated as Confidential....”⁸

V. CC WV-TTAB 0000930-32 Document No. 1

With regard to this first document, Opposer argues that nothing in its contents constitutes trade secret or confidential information that is entitled to protection from public disclosure. Opposer further asserts that there has been extensive reporting in the press about the involved incident reflected in the document and that Applicant has repeatedly acknowledged such incident in the press.

In response, Applicant indicates that serious and identifiable harm would be inflicted upon Applicant if de-designation of such document were to occur. Moreover, Applicant asserts that any public interest in such disclosure is strongly outweighed by Applicant’s need for protection.

In reply, Opposer argues that Applicant has not shown that four of the five documents at issue are confidential and that the absence of such showing indicates

⁷ APO, pg. 2.

⁸ APO, pg. 4.

that Applicant designated the involved documents as confidential solely because they do not conveniently fit the narrative Applicant wishes to tell.

After carefully reviewing Document No. 1 and the parties' arguments, the Board finds Applicant has shown "a particular need for protection and that a clearly defined and serious injury will result otherwise." TBMP Section 412.01(b). Applicant has demonstrated the necessary good cause and has shown that it could suffer competitive harm if Document No. 1 is made public. In particular, if competitors have access to the information contained in the document, Applicant could be placed at a competitive disadvantage compared to their current position because of the likely reputational harm. Therefore, Document No. 1 should continue to be designated as "Confidential."

VI. Remaining Documents

The Board turns to consider the remainder of the documents at issue, namely, the following: A) CC WV-TTAB 0000950 a 2017 Willametter Journal Tech Sheet; B) CC WV-TTAB 0000954 a WJ Shelf Talker 2018; C) CC WV-TTAB 00000952 a MP4 video labeled "Willametter Journal – Staff; and D) CC WV-TTAB 00000953 a MP4 video labeled "Willametter Journal CONSUMER."

After carefully reviewing these documents it is clear the Applicant has over-designated these papers. Applicant has not shown that these documentary materials should be protected. To the extent Applicant has not provided any particular and specific demonstrations of fact concerning these challenged

documents, it has not met its burden of establishing good cause for maintaining the confidentiality designations. Fed. R. Civ. P. 26(c)(1). *United States Polo Association*, 2019 USPQ2d at *3 (TTAB 2019) (the designating party “must demonstrate a particular need for protection and that a clearly defined and serious injury will result otherwise.”). *See also, e.g., Deford v. Schmid Products Co.*, 120 F.R.D. 648, 653 (D. Md. 1987) (citing cases); 8 C. WRIGHT, A. MILLER, & R. MARCUS, FEDERAL PRACTICE AND PROCEDURE CIVIL § 2035 (3d ed. 2019).

VII. Summary and Proceedings Resumed

In view of the foregoing, Opposer’s motion to remove the confidentiality designations of Applicant’s produced documents is denied as to Document No. 1, but granted as to A) CC WV-TTAB 0000950 a 2017 Willametter Journal Tech Sheet; B) CC WV-TTAB 0000954 a WJ Shelf Talker 2018; C) CC WV-TTAB 0000952 a MP4 video labeled “Willametter Journal – Staff; and D) CC WV-TTAB 0000953 a MP4 video labeled “Willametter Journal CONSUMER.”

Applicant is allowed until **10 DAYS** from the date set forth in the caption of this order to reproduce copies of the following documents without the “Confidential” designation: A) CC WV-TTAB 0000950 a 2017 Willametter Journal Tech Sheet; B) CC WV-TTAB 0000954 a WJ Shelf Talker 2018; C) CC WV-TTAB 0000952 a MP4 video labeled “Willametter Journal – Staff; and D) CC WV-TTAB 0000953 a MP4 video labeled “Willametter Journal CONSUMER.”

Proceedings are hereby resumed. Discovery remains open. Dates are reset as follows:

Discovery Closes	11/11/2020
Pretrial Disclosures Due for Party in Position of Plaintiff in Original Claim	12/26/2020
30-day Trial Period Ends for Party in Position of Plaintiff in Original Claim	2/9/2021
Pretrial Disclosures Due for Party in Position of Defendant in Original Claim and in Position of Plaintiff in Counterclaim	2/24/2021
30-day Trial Period Ends for Party in Position of Defendant in Original Claim, and in Position of Plaintiff in Counterclaim	4/10/2021
Pretrial Disclosures Due for Rebuttal of Party in Position of Plaintiff in Original Claim and in Position of Defendant in Counterclaim	4/25/2021
30-day Trial Period Ends for Rebuttal of Party in Position of Plaintiff in Original Claim, and in Position of Defendant in Counterclaim	6/9/2021
Pretrial Disclosures Due for Rebuttal of Party in Position of Plaintiff in Counterclaim	6/24/2021
15-day Trial Period Ends for Rebuttal of Party in Position of Plaintiff in Counterclaim	7/24/2021
Opening Brief for Party in Position of Plaintiff in Original Claim Due	9/22/2021
Combined Brief for Party in Position of Defendant in Original Claim and Opening Brief as Plaintiff in Counterclaim Due	10/22/2021
Combined Rebuttal Brief for Party in Position of Plaintiff in Original Claim and Brief as Defendant in Counterclaim Due	11/21/2021
Rebuttal Brief for Party in Position of Plaintiff in Counterclaim Due	12/6/2021
Request for Oral Hearing (optional) Due	12/16/2021

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be

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submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).
