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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91241586
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of the Trademark Application No. 87/750,448
For the Mark: WILLAMETTER JOURNAL
Published on: May 29, 2018

WILLAMETTE VALLEY VINEYARDS, INC.,
an Oregon corporation,

Opposer,

v.

COPPER CANE LLC, a California limited
liability company

Applicant.

Opposition No. 91241586

REDACTED FOR PUBLIC FILING

**OPPOSER’S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OR
RENEWED MOTION TO REMOVE CONFIDENTIALITY DESIGNATION**

Opposer Willamette Valley Vineyards, Inc. (“Opposer”) submits this reply in further support for its motion for reconsideration of that portion of the Board’s October 22, 2020 Order (46 TTABVUE) determining that Applicant Copper Cane LLC (“Applicant”) has shown “good cause” to designate the document produced at CC_WV-TTAB_0000930-32 (hereinafter, “Document No. 1”) as “Confidential” under the Board’s Standard Protective Order.

A. On the Basis of the Facts and Applicable law, the Board’s Ruling was in Error.

Opposer has properly moved for reconsideration of the Board’s Order finding that Document No. 1 could be designated as Confidential. Opposer’s Motion demonstrates that on the basis of the facts—or more precisely, the absence of facts—before the Board and the applicable law, the Board erred in reaching the conclusion that “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.” 54 TTABVUE 2-4. Opposer’s motion is limited to addressing this finding. Specifically, the motion outlines how it was an error to find that Applicant had met its burden to show that a clearly defined and serious injury would result from disclosure based only on stereotyped and conclusory statements of reputations harm unsupported by declaration or fact. *Id.*

Opposer’s motion also accurately summarizes the applicable law regarding the standard for “good cause.” Opposer’s summary of the “good cause” standard relies on various district court cases such as *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D. Md. 1987), 61 TTABVUE 4-5, because many of those cases—including *Deford*—are cited (repeatedly) in the summary of the Board’s standard for such motions, which states:

To establish that a document or other information is entitled to protection from disclosure under Fed. R. Civ. P. 26(c)(1)(G), the producing party must show that the information is trade secret or other confidential information and that the disclosure would cause identifiable and serious harm. Where the producing party seeking protection under Fed. R. Civ. P. 26(c)(1)(G) is a business that seeks to maintain designations related to confidential business information, the producing party must show that disclosure would cause a clearly defined serious injury to its business such as harm to its competitive and financial position. Such a showing of harm to a party’s business requires support, where possible, by affidavits or declarations and concrete, specific examples.

TBMP § 412.01(b) (emphasis added) (footnotes omitted); *see also id.* (party seeking to maintain designation, “must provide particular and specific demonstrations of fact, as distinguished from stereotyped and conclusory statements.”)

Applicant’s suggestion that Federal Circuit authority provides a different standard is without merit. Applicant quotes a footnote from *Apple, Inc. v. Samsung Elecs. Co.*, for the unremarkable proposition that information does not have to rise to the level of a “trade secret” to merit protection under a protective order; documents may also be sealed “if they are ‘sources of business information that might harm a litigant’s competitive standing,’” i.e., upon a showing

they are “confidential.” *Apple, Inc.* 727 F.3d 1214, 1225 n.3 (Fed. Civ. 2013). This proposition is also found in TBMP § 412.01(b) (party propounding designation “must show that the information is trade secret or other confidential information”) and is not disputed by Opposer.

The point of Opposer’s motion is to emphasize that in order for Applicant to carry its burden to maintain the designation of Document No. 1, Applicant must demonstrate that Document No. 1 contains confidential information. Under applicable law, this requires a showing “that disclosure would cause a clearly defined serious injury to its business such as harm to its competitive and financial position” supported “by affidavits or declarations and concrete, specific example” that include “particular and specific demonstrations of fact, as distinguished from stereotyped and conclusory statements.” TBMP § 412.01(b) (emphasis added). In short, the applicable law provides that conclusory statements of “reputational harm” **are not sufficient to establish good cause for designation** and therefore the Board erred in finding Applicant had made a sufficient showing that Applicant would suffer a “clearly defined serious injury to its business” on the record before it.

Applicant fails to come forward with any case that stands for the proposition urged by Applicant, that the “good cause” standard can be met by conclusory claims of reputational harm unsupported by declarations of particularized fact. Indeed, neither *Apple* nor *In re Violation of Rule 28(D)*, 635 F.3d 1352 (Fed. Cir. 2011), involved attempts to preserve a claim of confidentiality based on conclusory claims of reputational harm.¹

Applicant’s claim that the requirement for support by particularized declaration only

¹ To the contrary, the information in *Apple* concerned “detailed product-specific financial information, including costs, sales, profits, and profit margins.” *Apple Inc.*, 727 F.3d at 1223. To support their claims, the parties submitted employee declarations that “explained the measures the two companies take to keep their product-specific financial information confidential” and “described the [competitive] harm they would suffer if their product-specific financial information were made public and therefore available to their competitors and suppliers.” *Id.*

applies in the case of a challenge to information designated “Attorney’s Eyes Only” where “a party sought to withhold a document entirely from the opposing party,” 61 TTABVUE 5, also lacks merit. Applicant cites *U.S. Polo Assn’ v. David McLane Enters., Inc.*, 2019 WL 1349817 (TTAB Mar. 25, 2019), as support because it has a good quote that Applicant has taken out of context to support its position. *Id.* But there was no dispute in *U.S. Polo* that the information at issue in that case was at least “confidential”; thus, the only issue was whether it was also AEO.

Applicant’s suggestion that *U.S. Polo* adopted *sub silentio* a new limitation that the declaration requirement only applies in cases where a party seeks to use an AEO designation to “withhold a document entirely from the opposition party” is also directly refuted by the two cases TBMP § 412.01(b) cites as support for the declaration requirement, *Deford* and *Apple*. Both addressed the issue of whether the challenged information could be shielded from the public, not the opposing party. *See Apple*, 727 F.3d at 1218 (“Neither party opposed the other’s motions to seal, but nonparty Reuters America LLC intervened and filed an opposition.”); *Deford*, 120 F.R.D. at 654 (“The plaintiffs’ primary argument in favor of disclosure is their desire to share information with other litigants and their counsel.”)

Equally baseless is Applicant’s claim that [REDACTED]

[REDACTED] 61 TTABVUE 4. As a threshold matter, [REDACTED] does not say what Applicant claims it says. Rather, [REDACTED]

on a motion to reconsider a final judgment, Applicant articulates no rationale or policy justification for why motions under TBMP § 518 should be treated differently.

Applicant’s proposed “no newly discovered evidence” rule is not grounded on any Federal Rule of Civil Procedure or any of the Trademark Rules.³ The Federal Rules contain two provisions that concern motions for reconsideration: The first is Rule 54(b), which provides that “any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” (Emphasis added.) The second is Rule 60(b), which provides that on motion and just terms, the court may relieve a party from a final judgment or order “for the following reasons: . . . (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial. . . .” (Emphasis added.) The Trademark Rules do not modify the substantive standard set by either Federal Rule; rather, they merely set filing deadlines of one month from issuance, both for a Rule 54(b) motion for reconsideration of an interlocutory order, 37 C.F.R. § 2.127(b), and a Rule 60(b) motion for reconsideration of a final judgment, 37 C.F.R. § 2.129(c).

Instead of addressing the proper standard for considering newly discovered evidence on a reconsideration motion under either Rules 54(b) or 60(b), Applicant relies on the talismanic recitation of a portion of TBMP § 518 stating that a motion for reconsideration “may not be used to introduce additional evidence” (emphasis added) and citations to various Board decisions following this admonition to find that a party could not seek reconsideration based on evidence already in existence and available to the party at the time the original motion was argued. From

³ Except as otherwise provided, and wherever applicable and appropriate, procedure and practice in inter partes proceedings shall be governed by the Federal Rules of Civil Procedure. 37 CFR § 2.116(a); TBMP § 101.02.

there, Applicant makes the leap of logic that “[t]he Trademark Rules and Board precedent are clear that the only permissible basis for a motion for reconsideration . . . is a claim that the Board erred in reaching its conclusion” and that such a motion “may not be based on newly discovered evidence.” 61 TTABVUE 7-9 (emphasis added).

Applicant, however, fails to cite any rule, opinion, or other authority that considers, let alone adopts, such an absolutist position. In contrast, the Federal Circuit expressly rejected such an inflexible approach to motions for reconsideration in *Dixon v. Shinseki*, 741 F.3d 1367 (Fed. Cir. 2014). *Dixon* concerned whether the U.S. Court of Appeals for Veterans Claims properly refused to consider new evidence submissions in view of its rule requiring that motions for reconsiderations “be based on the record at the time of the decision upon which reconsideration or panel review is sought.” *Dixon*, 741 F.3d at 1375. The Federal Circuit found the Claims Court abused its discretion by holding that the rule “imposes an absolute prohibition on the submission of clarifying evidence in support of reconsideration . . .” *Id.*

The existence of an exception for newly discovered evidence has also been acknowledged by the Federal Circuit in *Biery v. U.S.*, 818 F.3d 704, 711 (Fed. Cir. 2016) (“a court, in its discretion, “may grant a motion for reconsideration when there has been an intervening change in the controlling law, newly discovered evidence, or a need to correct clear factual or legal error or prevent manifest injustice.”), as well as by the Board in *Club Amenities, LLC v. Pettenson Cosmetics SNC*, 2005 WL 7054527, at *4 n.1 (TTAB Nov. 29, 2005) (“Where evidence is not newly discovered, a party may not submit that evidence in support of a motion for reconsideration.”). *Cf. Amoco Oil Company v. Amerco, Inc.*, 201 U.S.P.Q. 126, 128 (TTAB 1978) (denying motion for reconsideration based on additional affidavit where “that the evidence is not newly discovered within the meaning of Rule 60(b) (2)”).

[Redacted]

[Redacted]

D. Applicant's Motion to Dismiss in the *Kay* Litigation is Relevant and Material.

[Redacted]

[Redacted]

[REDACTED]

54 TTABVUE 70-71.

Applicant also asserts that the *Kay* filings are not relevant to the issues in this case because that litigation involves different parties, different brands, and different claims.

Applicant, however, does not address the specific reasons Opposer has outlined for why [REDACTED]

[REDACTED]

[REDACTED] Nor does Applicant deny that if the *Kay* court rules in its favor on these issues, Applicant will seek to use that ruling against Opposer in this or other proceedings. Finally, Applicant does not address the key reason Opposer has come back to the Board to seek reconsideration in view of the *Kay* filings: Opposer seeks to be able to share Document No. 1 with counsel for the *Kay* plaintiffs. As Applicant does not dispute, the desire to share information with other litigants and their counsel is not only a proper purpose, but “an appropriate goal under the Federal Rules of Civil Procedure, which are intended ‘to secure the just, speedy, and inexpensive determination of every action’” *Deford*, 120 F.R.D. at 654.

CONCLUSION

Based on the foregoing, the should Board grant Opposer’s motion and direct Applicant to remove the designation from the document produced at CC_WV-TTAB_0000930-32.

DATED this 1st day of February, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing OPPOSER'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OR RENEWED MOTION TO REMOVE CONFIDENTIALITY DESIGNATION has been served upon the following via electronic mail on the 1st day of February, 2021.

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