

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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January 22, 2019

Opposition No. 91242728 (parent)
Opposition No. 91242944

Louisiana Spirits, LLC

v.

Serio Southern Spirits, LLC

Geoffrey M. McNutt, Interlocutory Attorney:

On September 4, 2018, Applicant filed an unconsented motion to extend by ninety days its time to file and serve an answer to the notice of opposition. The Board suspended proceedings on September 4, 2018. Opposer filed its opposition to Applicant's motion on September 24, 2018.¹ Applicant filed its answer on December 4, 2018.²

¹ Opposer served its response on Applicant via U.S. Mail. Opposer is reminded that under Trademark Rule 2.119(b) service must be made by email, unless the parties stipulate otherwise, or unless the serving party can show that service by email was attempted but could not be made due to technical problems or extraordinary circumstance. Going forward, strict compliance with Trademark Rule 2.119 is required of the parties.

² Applicant's answer fails to indicate proof of service on Opposer via email as required by Trademark Rule 2.119. In order to expedite this matter, Opposer is directed to the following URL where it may view a copy of the filing:

<http://ttabvue.uspto.gov/ttabvue/v?pno=91242944&pty=OPP&eno=7>.

Strict compliance with Trademark Rule 2.119 is required by Applicant in all future papers filed with the Board. The Board further notes Applicant's December 14, 2018 filing which

1. Motion to Extend

The Board's July 31, 2018, institution order notified Applicant of its September 9, 2018 deadline to file and serve an answer to Opposer's notice of opposition. Applicant argues that the Board's institution order was "sent to an erroneous email address" and Applicant needs a ninety day extension of time "to prepare [its] documents."³ In response, Opposer argues that the Board served notice of the proceeding on Applicant's email and correspondence address of record, and Applicant fails to explain why its email address of record was erroneous or why it did not file a change of address.⁴

The standard for allowing an extension of time prior to the expiration of the term is good cause. *See* Fed. R. Civ. P. 6(b); TBMP § 509 (2018). Generally, the Board is liberal in granting extensions of time before the period to act has elapsed, so long as the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. *See Am. Vitamin Products, Inc. v. Dowbrands Inc.*, 22 USPQ2d 1313, 1314 (TTAB 1992). The moving party, however, retains the burden of persuading the Board that it was diligent in meeting its responsibilities and should therefore be awarded additional time. *See Sunkist Growers, Inc. v. Benjamin Ansehl Co.*, 229 USPQ 147, 149-50 (1985).

appears to include a certificate of service with Applicant's answer originally filed on December 4, 2018. *See* 9 TTABVUE 3.

³ 4 TTABVUE 2.

⁴ 6 TTABVUE 5, ¶ 17. While Opposer is correct that Applicant did not serve the motion to extend on Opposer, the Board provided a copy of the motion to Opposer via the suspension order issued on September 4, 2018.

The law strongly favors determination of cases on their merits. *See Delorme Publ'g Co., Inc. v. Eartha's, Inc.*, 60 USPQ2d 1222, 1223 (TTAB 2000) (citing *CTRL Sys. Inc. v. Ultraphonics of N. Am. Inc.*, 52 USPQ2d 1300, 1301 (TTAB 1999)). Inasmuch as Applicant claims it only just retrieved the Board's notice of institution order as of September 4, 2018, is not currently represented by counsel in this proceeding, this is its first unconsented motion to extend, and Opposer has pointed to no specific harm or prejudice which would result to Opposer,⁵ Applicant's motion is **granted**.⁶ Applicant's answer, which consists of a general denial of the allegations in Opposer's notice of opposition, is accepted. *See* Fed. R. Civ. P. 8(b)(3); TBMP § 311.02(a) and authorities cited therein.

2. Consolidation

It has come to the Board's attention that the parties to this Opposition Proceeding No. 91242728 also are involved in Opposition No. 91242944. Opposition Nos. 91242728 and 91242944 involve the same parties, similar applied-for marks containing the common wording "POPSYS BAYOU TEA," the same pleaded registrations and marks, and common claims and questions of law and fact. In view

⁵ *See Sunkist Growers*, 229 USPQ at 149.

⁶ Applicant is reminded, however, that if a party to a Board proceeding or its attorney or other authorized representative moves or changes its postal address or email address, a separate notice of the change of address or email address should be filed with the Board using ESTTA, and should reference the proceeding number. It is the responsibility of a party to a proceeding before the Board to ensure that the Board has the party's current correspondence address, including an email address. If a party fails to notify the Board of a change of address, with the result that the Board is unable to serve correspondence on the party, default judgment may be entered against the party. *See* TBMP § 117.01.

Opposition Nos. 91242728 and 91242944 (consolidated)

thereof, Opposition Nos. 91242728 and 91242944 are hereby consolidated.⁷ See Fed. R. Civ. P. 42(a); *Wise F&I, LLC v. Allstate Ins. Co.*, 120 USPQ2d 1103, 1105 (TTAB 2016).

The consolidated proceedings may be presented on the same record and briefs. *Wise F&I, LLC*, 120 USPQ2d at 1105; *Hilson Research Inc. v. Soc’y for Human Resource Mgmt.*, 27 USPQ2d 1423, 1424 n.2 (TTAB 1993); see also TBMP § 511. The Board file will be maintained in **Opposition No. 91242728** as the “parent case.” From this point on, only a single copy of all motions and papers should be filed, and each such motion or paper should be filed in the parent case only; however the caption of each motion or paper filed should reference the individual proceeding numbers with the “parent case” listed first.⁸

Consolidated cases do not lose their separate identity because of consolidation. Each proceeding retains its separate character and requires the filing of separate pleadings and entry of a separate judgment. *Dating DNA LLC v. Imagini Holdings Ltd.*, 94 USPQ2d 1889, 1893 (TTAB 2010); see also TBMP § 511(2018).

⁷ Consolidation is discretionary with the Board and may be ordered sua sponte. *Wise F&I, LLC*, 120 USPQ2d at 1105; *Venture Out Props. LLC v. Wynn Resorts Holdings LLC*, 81 USPQ2d 1887, 1889 (TTAB 2007).

⁸ The parties must promptly inform the Board of any other Board proceedings or related cases within the meaning of Fed. R. Civ. P. 42, so that the Board can consider whether further consolidation is appropriate. The parties should also inform the Board if they become involved in any civil litigation that may have a bearing on the Board proceedings, so that the Board can consider whether suspension of the Board proceedings would be appropriate. See Trademark Rule 2.117(a).

3. Consolidated Case Schedule

Proceedings are resumed. In view of the consolidation of Opposition Nos. 91242728 and 91242944, all disclosure, discovery, and trial dates are reset as follows:

Deadline for Discovery Conference	2/22/2019
Expert Disclosures Due	3/8/2019
Discovery Closes	4/7/2019
Plaintiff's Pretrial Disclosures Due	5/22/2019
Plaintiff's 30-day Trial Period Ends	7/6/2019
Defendant's Pretrial Disclosures Due	7/21/2019
Defendant's 30-day Trial Period Ends	9/4/2019
Plaintiff's Rebuttal Disclosures Due	9/19/2019
Plaintiff's 15-day Rebuttal Period Ends	10/19/2019
Plaintiff's Opening Brief Due	12/18/2019
Defendant's Brief Due	1/17/2020
Plaintiff's Reply Brief Due	2/1/2020
Request for Oral Hearing (optional) Due	2/11/2020

The Federal Rules of Evidence generally 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, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be 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).

❖ Information for a Pro Se Litigant

The Board notes that Applicant currently is representing itself in this proceeding. While Patent and Trademark Rule 11.14 permits a party to represent itself, it is strongly advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in inter partes proceedings before the Board to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney. *See* TBMP § 114.02.

Trademark Rules 2.119(a) and (b) require that except for the original notice of opposition (as opposed to any amended notice of opposition), every submission filed in an opposition proceeding before the Board must be served upon the other party or parties, and proper proof of such service must be made before the submission will be considered by the Board. Accordingly, all submissions filed in this proceeding must be accompanied by a statement, signed by the attorney or other authorized representative, attached to or appearing on the original submission when filed, clearly stating the date and manner in which service was made, the name of each party or person upon whom service was made, and the email address or address. *See* TBMP § 113.03. Service must be made by email unless otherwise stipulated, or unless the filing party has satisfied the requirements for another method of service as set forth in Trademark Rule 2.119(b). The statement will be accepted as prima facie proof of service, must be signed and dated, and should take the form of a Certificate of Service as follows:

I hereby certify that a true and complete copy of the
foregoing (insert title of submission) has been served on

(insert name of opposing counsel or party) by forwarding said copy on (insert date of mailing), via email (or insert other appropriate method of delivery) to: (set out name, address, and email address of opposing counsel or party).

Signature_____

Date_____

Submissions in Board proceedings must be made via ESTTA, the Electronic System for Trademark Trials and Appeals, and must be in compliance with Trademark Rules 2.126(a) and (b). *See* TBMP § 110.01. The ESTTA user manual, ESTTA forms, and instructions for their use are at <http://estta.uspto.gov/>.

It is recommended that any pro se party be familiar with the latest edition of Chapter 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice. Parties should also be familiar with the Trademark Trial and Appeal Board Manual of Procedure (TBMP), available at <http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>, the TTABVUE system for viewing the record for all Board proceedings, available at <http://ttabvue.uspto.gov/ttabvue/>, and the Standard Protective Order, available at <https://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/standard-documents-and-guidelines-0>.

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is required of all parties, whether or not they are represented by counsel. *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, n.2 (TTAB 2006), *aff'd unpub'd*, 240 Fed. Appx.865 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1109 (2008).

This inter partes proceeding is similar to a civil action in a federal district court. The parties file pleadings and a range of possible motions. This proceeding includes designated times for disclosures, discovery (discovery depositions, interrogatories, requests for production of documents and things, and requests for admission, to ascertain the facts underlying an adversary's case), a trial period, and the filing of briefs. Trademark Rules §§ 2.122–2.125 govern the trial evidence and testimony. The Board does not preside at the taking of testimony; all testimony is taken out of the presence of the Board during the assigned testimony, or trial, periods, and the written transcripts thereof, together with any exhibits thereto, are then filed with the Board. Additionally, the testimony of witnesses in inter partes cases may be submitted in the form of an affidavit or a declaration pursuant to 37 C.F.R. § 2.20 and in conformance with the Federal Rules of Evidence, filed during the proffering party's testimony period, subject to the right of any adverse party to elect to take and bear the expense of oral cross-examination of that witness. *See* Trademark Rule 2.123(a)(1), 37 C.F.R. § 2.123(a)(1). No paper, document, or exhibit will be considered as evidence unless it has been introduced in evidence in accordance with the applicable rules.