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

Proceeding no.	91245800
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Constellation Brands U.S. Operations, Inc. Opposer, v. The Vineyard House LLC, Applicant.	Opposition No.: 91245800 (consolidated with 91246515) Serial Nos.: 87/945310 (**HENRY WALKER CRABB**) 87/944993 (**HENRY WALKER (H.W.) CRABB**) 87/944990 (**HENRY WALKER(H.W.)**) 87/944988 (**HENRY WALKER**) 87/945312 (**H.W. CRABB**) 87/945302 (**HENRY W. CRABB**) 87/944923 (**CRABB'S HALTER VALLEY OAKVILLE)** 87/944916 (**CRABB'S HALTER VALLEY**)

OPPOSITION TO OPPOSER'S MOTION FOR LEAVE TO AMEND

I. INTRODUCTION

On July 19, 2021, the Trademark Trial and Appeal Board (the "Board") issued an order concerning the subject cases, ruling on motions that had been filed by the parties and resetting dates. Discovery is currently set to close on April 18, 2022. Now, at the 11th hour, Opposer is attempting to add entirely new claims in order to extend and maintain its ill-fated Opposition. The proposed new claim is based on allegations that were never before raised in the subject opposition and could have easily been raised in the three (3) years during which this opposition has been pending. Opposer should not be permitted to add new claims at this late stage and needlessly prolong this matter.

This motion should be denied for numerous reasons, primarily because it is futile. Applicant and Opposer have already exchanged discovery and are nearing the end of the discovery period.

Opposer has now realized that it does not have a successful claim and is now, therefore, trying to further delay the proceedings and waste the time of the Board by introducing additional futile claims in order to extend the proceedings. Opposer does not have any basis to oppose Applicant's mark and the motion is being filed so late in the process (over 3 years after the opposition was first filed and less than 2 months before the end of discovery) rendering it untimely and prejudicial.

II. OPPOSER'S REQUEST TO ADD A NEW CLAIM SHOULD BE DENIED

"A court considers five factors in determining whether to grant leave to amend: '"(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint." *Spitzer v. Aljoe* (N.D. Cal. Apr. 6, 2015, No. 13-cv-05442-MEJ) 2015 U.S.Dist. LEXIS 45471, at *12 (quoting *In re W. States Wholesale Nat. Gas Antitrust Litig*., 715 F.3d 716, 738 (9th Cir. 2013)." Here, all the factors favor denying the motion for leave to amend as does the futility of the proposed amendment.

A. Proposed Amendment Is Untimely and Would Prejudice Applicant

The Notice of Opposition in the subject case was filed on January 12, 2019 alleging the following bases for the opposition – 1) Fraud in the USPTO and 2) No Bona fide Intent to Use. On February 20, 2019, Opposer filed a second opposition, No. 91264515 on the same bases. Each of these oppositions included marks filed by Applicant which include the term CRABB. Opposer filed a Motion to Suspend the proceedings pending a decision in a litigation in Federal Court between the parties based on the trademark TO KALON. Applicant opposed such motions on the basis that TO KALON and CRABB are two different marks and the decision in the federal litigation would not have any effect on the CRABB trademark. On June 25, 2019 and September 10, 2019, the Board suspended the proceedings pending the federal litigation [TTABVUE 15 – Opp. No. 91245800 and TTABVUE 18 – Opp. No. 91246515].

During the pendency of several oppositions filed by Opposer against Applicant for marks which include the term CRABB, the Board consolidated the proceedings under Opp. No. 91244817 which included Opposer's TO KALON trademarks. After the decision was issued in the Federal Litigation, the parties filed papers with the Board regarding several of the oppositions and

requested dismissal of the TO KALON oppositions and the Cancellation filed by Applicant against Opposer's TO KALON registrations.

Applicant filed a Motion to Dismiss the subject opposition on February 13, 2019 [TTABVUE 4] which was denied on June 24, 2019 as the Board simultaneously granted Opposer's Motion to Suspend pending the federal litigation. [TTABVUE 15]. On July 19, 2021, the Board issued an order adjudicating the outstanding motions that had been filed but not decided due to the suspension. [TTABVUE 18]. In its order, the Board ordered Applicant to file its Answer to the Notice of Opposition in connection with this Opposition, No. 91245800. Applicant filed an Answer to the Notice of Opposition on July 26, 2021 [TTABVUE 21].

In the same July 19, 2021 order [TTABVUE 18], the Board granted Applicant's Motion to Dismiss in connection with Opposition No. 91246515 which also included several trademarks which include the term CRABB and which included the same bases of opposition as the subject opposition. Opposer filed an Amended Notice of Opposition in connection with Opposition No. 91264515 on August 18, 2021 [Opp. No. 91264515 TTABVUE 24]. The amended opposition included additional claims that were not included in the first opposition filed in Opposition No. 91264515, and include the claims that Opposer is now trying to include in Opposition No. 91245800.

At the time Opposer filed its Amended Opposition in connection with Opposition No. 91264515, which originally included the same bases as the subject opposition, Opposer could have easily requested to amend the Notice of Opposition in this proceeding as well. However, Opposer did not do so and did not state or indicate that it had any plans to do so. Had Opposer filed the Amended Opposition in August, 2021, Applicant would have had plenty of time to prepare and send out discovery in connection therewith. However, discovery requests must currently be sent out by March 18, 2022, which is only 1 week away.

Opposer, in its Motion, claims that there is "more than two months of discovery" remaining. This is completely untrue. Discovery requests must be sent out a month before the end of the discovery period in order to be timely. Discovery ends on April 18, 2022. Therefore, all

discovery must be sent out by March 18, 2022. This is not "more than two months" away – it is only 1 week away. This simply is not enough time for Applicant to re-draft all of the discovery requests it has already prepared, serve such discovery and send out deposition notices.

Moreover, Applicant filed this Opposition in January, 2019. While Applicant admits that the proceedings were suspended for quite some time, the suspension of the proceedings was lifted on July 19, 2021 [TTABVUE 18]. Opposer has waited **seven months** to bring this Motion. Opposer claims that it had "only a limited opportunity" to plead the additional grounds. However, Opposer already plead these additional grounds in the Amended Notice of Opposition filed in Opp. No. 91245615 which it filed on August 18, 2021 and could have easily done so in this case as well instead of waiting until the eleventh hour. In fact, Opposer provides no reason for its seven (7) month delay, which clearly shows that Opposer is acting in bad faith to further delay these proceedings or prejudice Applicant as Applicant prepares to send out its discovery requests.

Applicant is not "on notice" as suggested by Opposer. Instead, Applicant is aware of the bases that were alleged in the current Notice of Opposition and has been working to address these issues separately from the remaining oppositions. In fact, Applicant has prepared and was ready to send out its discovery requests based on the current Notice of Opposition. Opposer's nonchalant attitude in stating that its amendment will not prejudice Applicant's rights appears to be extremely narcissistic and contrary to the established tenants of the law. Amendment of the Opposition at this stage will absolutely be an undue burden on Applicant as Applicant has already prepared discovery requests, and commenced preparation of its strategy and supporting documents for the opposition based on the controlling Notice of Opposition. There is no need to delay the proceedings or to extend discovery when Applicant has already commenced its preparation. *Watson v. Ford Motor Co.*, (N.D.Cal. Aug. 15, 2018, No. 18-cv-00928-SI), 2018 U.S. Dist. LEXIS 138324, at *6 (citing *Solomon v. N. Am. Life & Cas. Ins. Co*., 151 F.3d 1132, 1139 (9th Cir. 1998) [denying motion to amend on the eve of discovery deadline because it would require reopening discovery and delaying proceedings]). Also, increased litigation expenses by the proposed amendment may be deemed prejudicial. *Id.* Here, there is no question that expanding the Opposition to include additional claims will inequitably increase Applicant's

litigation expenses.

Courts presume prejudice where a motion to amend is brought late in litigation. The "longer the delay, the greater the presumption against granting leave to amend." *C2 Educ. Sys. v. Lee* (N.D.Cal. Apr. 16, 2019, No. 18-cv-02920-SI) 2019 U.S.Dist.LEXIS 65201, at *7 (quoting *Johnson v. Cypress Hill*, 641 F.3d 867, 872 (7th Cir. 2011)). In *Johnson* (music copyright infringement action), the court found that introducing new claims, after discovery closed, would significantly prejudice defendant. *Id.* at 872-73 (stating "there must be a point at which a plaintiff makes a commitment to the theory of [his] case" ("Johnson's request to change his claims on the eve of summary judgment is exactly the sort of switcheroo we have counseled against."). See also *Feldman v. Am. Memorial Life Ins. Co.*, 196 F.3d 783 (7th Cir. 1999) (finding that the prejudice that would result from amendment that would have added a new claim "well after the close of discovery and on the eve of summary judgment proceedings" was so apparent that the district court was not required to articulate the basis for its decision).

Given the above facts, it is clear that Applicant's Motion is untimely and prejudicial to Applicant and should be denied.

B. Other Factors Also Favor Denial

As noted above, Opposer could have easily amended the Notice of Opposition in the subject case when it amended the Notice of Opposition in Opp. No. 91264515 on August 18, 2021 [Opp. No. 91264515 TTABVUE 24]. The fact that Opposer did not file the Notice of Opposition at that time shows that Opposer was not diligent in seeking modification and therefore, the inquiry should end and the Motion should be denied. Federal Rules of Civil Procedure Rule 16(b); *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 715 F2d 716, 738 (9th Cir. 2013). Here, Opposer clearly should have known whether it had a basis to amend the subject Notice of Opposition in August, 2021 and should have taken action at that time instead of waiting seven (7) months to do so. Opposer's delay shows that its proposed Amendment is untimely, prejudicial and in bad faith, as a means to continue to delay these proceedings and an ultimate conclusion of the same.

Opposer's new proposed claims are futile, given that Opposer does not have any rights to the CRABB mark. Opposer's discovery responses in other proceedings between the parties which include the term CRABB do not include any evidence of Opposer's alleged use of the trademark CRABB or any other rights to the same. Extending the Opposition on a baseless claim that Opposer has alleged rights in the CRABB mark, which it clearly cannot prove, will severely prejudice Applicant who has already spent significant time in preparation for the case as it currently stands. Opposer is clearly acting in bad faith and knows that its additional claims are futile, and will cause an undue burden and additional litigation costs on Applicant. *Watson v. Ford Motor Co.* (N.D.Cal. Aug. 15, 2018, No. 18-cv-00928-SI) 2018 U.S.Dist.LEXIS 138324, at *6 (citing *Solomon v. N. Am. Life & Cas. Ins. Co*., 151 F.3d 1132, 1139 (9th Cir. 1998) [denying motion to amend on the eve of discovery deadline because it would require reopening discovery and delaying proceedings]). Moreover, "the longer the delay, the greater the presumption against granting leave to amend." *Johnson v. Cypress Hill*, 641 F.3d 867, 872 (7th Cir. 2011).

In addition, granting Opposer's Motion will lead to increased cost of litigation as Applicant will need to re-draft its discovery requests and reconsider its approach and strategy to this Opposition where it has already expended considerable time and expense on the case as it currently stands. Had Opposer filed the Motion to Amend in August, 2021 along with the Motion to Amend Opposition No. 91264515, and not waited until 2 weeks until discovery requests need to be served, Applicant would not have expended such time and expense only to have to change its approach. The increased litigation expenses by the proposed amendment should be deemed prejudicial. *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir, 1990) (affirming denial of leave to amend complaint in light of the radical shift in direction posed by new claims, their tenuous nature, and the inordinate delay).

III. CONCLUSION

In light of the above, Opposer's Motion for Leave to Amend should be denied.

Date: March 10, 2022

Respectfully Submitted,

By: /fbhatti/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Applicant's **OPPOSITION TO OPPOSER'S MOTION FOR LEAVE TO AMEND** was served on March 10, 2022 via e-mail on counsel for Opposer as follows:

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