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January 7, 2020

Opposition No. 91250374
Opposition No. 91250592

Constellation Brands U.S. Operations, Inc.

v.

To Kalon Stock Farm, LLC

By the Trademark Trial and Appeal Board:

Constellation Brands U.S. Operations, Inc. (Opposer) opposes registration of seven applications owned by To Kalon Stock Farm, LLC (Applicant) for various TO KALON formative marks for various real estate services in Classes 36 and 37.[1] Opposer claims common law rights in and ownership of two incontestable registrations for TO KALON[2] and TO KALON VINEYARD[3] for wine in Class 33 and alleges grounds of likelihood of confusion under Trademark Act § 2(d). Opposer attached status and title copies of its two registrations to the pleadings.

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[1] Application Serial Nos. 87920664, 87939232, 87939235, 87939239, 87939241, 87939243, 87939246 all based on Trademark Act § 1(b).

[2] Registration No. 1489619 in standard character form, registered May 24, 1988 claiming dates of first use anywhere and in commerce of May 7, 1987.

[3] Registration No. 1857851 in typed form, registered October 11, 1994 claiming dates of first use anywhere of August 1988 and first use in commerce of December 1989. A disclaimer of "vineyard" is of record.

Now before the Board are the following fully-briefed motions:

1) Applicant's motions to dismiss, filed September 5, and October 7, 2019; and

2) Opposer's motions, filed September 16, 2019, to suspend for a civil action.

A. Consolidation

Inasmuch as the above-captioned proceedings involve the same parties, common questions of law and fact, and the Board is capable of weighing any differences in the pleadings, evidence or defenses for each case, the Board consolidates these proceedings. *See* Fed. R. Civ. P. 42(a); *see also Wise F&I, LLC, et al. v. Allstate Ins. Co.,* 120 USPQ2d 1103, 1105 (TTAB 2016) (sua sponte consolidation due to common questions of law and fact).

The consolidated cases may be presented on the same record and briefs. *See Dating DNA LLC v. Imagini Holdings Ltd.*, 94 USPQ2d 1889, 1893 (TTAB 2010).

The Board file will be maintained in Opposition No. 91250374 as the "parent" case. As a general rule, from this point onward, only one copy of any submission should be filed in the parent case; but that copy should include both proceeding numbers in its caption in ascending order. Because the involved proceedings, however, are consolidated prior to joinder of the issues, **Applicant should file a separate answer for each opposition** before commencing the practice of filing a single copy of any paper in the parent case.

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; and a copy of the decision shall be placed in each proceeding file.

Upon consolidation, the Board will reset dates for the consolidated proceeding, usually by adopting the dates as set in the most recently instituted of the cases being consolidated. Answer, discovery and trial dates for these consolidated proceedings are reset as set forth below.

B. Motion to Dismiss

To withstand a motion to dismiss for failure to state a claim upon which relief can be granted, a plaintiff need only allege sufficient factual matter that, if proved, would allow the Board to conclude, or to draw a reasonable inference, that (1) the plaintiff has standing to maintain the proceeding, and (2) a valid ground exists for opposing or cancelling the mark. *Doyle v. Al Johnson's Swed. Rest. & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) (*citing Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998)); *see also* TBMP § 503.02 (2015). Specifically, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Doyle*, 101 USPQ2d at 1782 (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In particular, the claimant must allege well-pleaded factual matter and more than "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678 (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

For purposes of determining such motion, all of the plaintiff's well-pleaded allegations must be accepted as true, and the complaint must be construed in the

light most favorable to the plaintiff. *See Advanced Cardiovascular Sys. Inc. v. SciMed Life Sys. Inc.*, 988 F.2d 1157, 26 USPQ2d 1038 (Fed. Cir. 1993). Dismissal for insufficiency is appropriate only if it appears certain that the plaintiff is entitled to no relief under any set of facts which could be proved in support of its claim. *See Stanspec Co. v. Am. Chain & Cable Co., Inc.*, 531 F.2d 563, 189 USPQ 420 (CCPA 1976).

It is within the Board's discretion to decide a potentially dispositive motion prior to deciding a motion to suspend for civil action. *See* 37 C.F.R. § 2.117(b). *See also Boyds Collection Ltd. v. Herrington & Co.*, 65 USPQ2d 2017, 2018-19 (TTAB 2003) (motion to strike petitioner's notice of reliance, its only evidence in the case, decided before motion to suspend, and granted).

C. Standing and the Ground of Likelihood of Confusion

To sufficiently allege standing within the meaning of Section 14 of the Trademark Act, 15 U.S.C. § 1064, an Opposer must plead facts sufficient to show that it has a direct and personal stake in the outcome of the opposition and a reasonable basis for its belief that it will be damaged. *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025-26 (Fed. Cir. 1999). A sufficient pleading of a "real interest" in the case requires allegations of a "direct and personal stake" in the outcome of the proceeding, coupled with allegations in support of a party's belief of damage that must have a reasonable basis in fact. *See Id.,* 50 USPQ2d at 1027.

To allege a valid ground of opposition for likelihood of confusion under Trademark Act § 2(d), 15 U.S.C. § 1052(d). A plaintiff need only allege it has priority of use and

that defendant's mark so resembles plaintiff's mark as to be likely, when used in connection with the goods or services of the defendant, to cause confusion, or to cause mistake, or to deceive. *See* 15 U.S.C. § 1052(d); *Otto Roth & Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981).

In this case, Opposer has pleaded that it owns two incontestable registrations of allegedly similar marks registered prior to Applicant's filing dates of its intent to use applications and that Applicant's marks, when used with the services in the applications, are likely to be confused with Opposer's marks. Opposer therefore has sufficiently alleged its standing and the ground of likelihood of confusion. *See Ritchie,* 170 F.3d 1092, 50 USPQ2d at 1025.

Applicant's arguments focus on whether Opposer can prove its likelihood of confusion allegations, rather than the sufficiency of the pleading. It is well established that proof of the relatedness of the goods or services is not a matter for determination on a motion to dismiss. *Nike, Inc. v. Palm Beach Crossfit, Inc.*, 116 USPQ2d 1025, 1030 (TTAB 2015).

Opposer has sufficiently alleged its standing and the ground of priority and likelihood of confusion. *See Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009). Proof is left to final disposition. *See Boswell v. Mavety Media Group Ltd.*, 52 USPQ2d 1600, 1605 (TTAB 1999) (at final decision, inquiry is not whether pleading of standing is sufficient, but whether allegations have been proven).

Accordingly, Applicant's motions to dismiss are **denied**.

D. Opposer's Motions to Suspend for Civil Action

Opposer seeks to suspend these two oppositions pending final determination of a civil action filed in the United States District Court for the Northern District of California between Opposer and a third party styled as *The Vineyard House, LLC v. Constellation Brands U.S. Operations, Inc.* Opposer provided a copy of the pleadings.

The Board has reviewed the pleadings filed with Opposer's motions and notes that the civil action seeks, inter alia, to cancel Opposer's pleaded registrations. In its pleadings and its motions to suspend, Opposer alleges that Applicant is affiliated with The Vineyard House, LLC (TVH) and that TVH is a "Sponsor" of Applicant. In its responses, Applicant argues it is not a party to the civil action, TVH and Applicant are not the same entity, do not provide the same goods or services, and that the civil action will not have a bearing on these Board proceedings between Opposer and Applicant.

The Board will normally suspend proceedings when the *parties* in a proceeding are involved in a civil action which may be dispositive of, or have a bearing on the Board case, however, the Board seldom suspends its proceedings pending disposition of proceedings with unrelated third parties against the same application or registration. *See New Orleans La. Saints LLC v. Who Dat? Inc.*, 99 USPQ2d 1550, 1552 (TTAB 2011) (civil action must have bearing on issues before Board). Applicant denies that it is related to the third party to the California litigation. *Compare B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 U.S. 1293, 113 USPQ2d 2045, 2056 (2015) "So long as the other ordinary elements of issue preclusion are met, when the usages

adjudicated by the TTAB are materially the same as those before the district court, issue preclusion should apply.").

Accordingly, Opposer's motion to suspend is **denied**.

The Board should be notified if there is any change in the status of Opposer's pleaded registrations, or if there is any change to the named parties in the California litigation.

E. Schedule

Dates for this consolidated proceeding are reset as set out below. **Applicant should file a separate answer by February 6, 2020 in each opposition** prior to commencing the practice of filing a single copy of any paper in the parent case.

Time to Answer	2/6/2020
Deadline for Discovery Conference	3/7/2020
Discovery Opens	3/7/2020
Initial Disclosures Due	4/6/2020
Expert Disclosures Due	8/4/2020
Discovery Closes	9/3/2020
Plaintiff's Pretrial Disclosures Due	10/18/2020
Plaintiff's 30-day Trial Period Ends	12/2/2020
Defendant's Pretrial Disclosures Due	12/17/2020
Defendant's 30-day Trial Period Ends	1/31/2021
Plaintiff's Rebuttal Disclosures Due	2/15/2021
Plaintiff's 15-day Rebuttal Period Ends	3/17/2021
Plaintiff's Opening Brief Due	5/16/2021
Defendant's Brief Due	6/15/2021
Plaintiff's Reply Brief Due	6/30/2021
Request for Oral Hearing (optional) Due	7/10/2021

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, 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).

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