UNITED STATES PATENT AND TRADEMARK OFFICE
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RSC

February 24, 2022

Opposition No. 91250374 (parent)
Opposition No. 91250592
Opposition No. 91253656

Constellation Brands U.S. Operations, Inc.

v.

To Kalon Stock Farm, LLC

Rebecca Stempien Coyle, Interlocutory Attorney:

Now before the Board is Applicant's October 14, 2021 motion to compel the Fed. R. Civ. P. 30(b)(6) discovery deposition of Opposer. The motion is contested.

Applicant served a Fed. R. Civ. P. 30(b)(6) notice of deposition on Opposer on July 20, 2021, noticing the the deposition for August 9, 2021.[1] Applicant contends that Opposer is avoiding scheduling the noticed deposition and unnecessarily delaying these proceedings. Applicant requests that Opposer be ordered to schedule the depositions within ten days, and for an extension of the discovery period solely for Applicant to allow for the orderly taking of the deposition.

In response, Opposer asserts that the delay in scheduling the depositions was occasioned by its reasonable belief that this proceeding was going to be resolved in

[1] 33 TTABVUE 12-22. Under the operative schedule at that time, discovery was scheduled to close on August 20, 2021. 28 and 29 TTABVUE.

conjunction with the resolution of a civil action between Opposer and The Vineyard House LLC ("TVH") (the "civil action").[2] Opposer further asserts that it has recently written to Applicant's counsel to schedule depositions in this proceeding. Additionally, while Opposer agrees to scheduling the depositions as quickly as possible it argues Applicant's requested timeframe is impractical and fails to account for other discovery issues.

As an initial matter, Trademark Rule 2.120(f)(1) requires a party moving to compel to disclose the required good faith efforts in which it engaged to try to resolve the issue when submitting the motion to the tribunal. The Board has reviewed the briefs, arguments, declarations of counsel and attachments. Counsel for the parties conferred during August 2021 regarding the scheduling of both parties' noticed depositions,[3] and subsequently engaged in various communications through early September 2021 regarding suspending these proceedings in view of activity in the civil action and for settlement discussions.[4] Then, on September 9, 2021, Applicant's counsel emailed Opposer's counsel stating that since it did not appear settlement discussions were proceeding in the civil action Applicant did not see a need to suspend

[2] Opposer asserts TVH and Applicant are related entities, they acted in concert with each other, and settlement discussions during the civil action extended to this Board proceeding. 35 TTABVUE 5-7. The Board notes it previously denied a motion to suspend Board proceedings in view of the civil action. 11 TTABVUE. Neither a motion for reconsideration nor a renewed motion to suspend was filed.

[3] Opposer served its own notice of deposition on Applicant on August 6, 2021. 33 TTABVUE 24-32.

[4] 33 TTABVUE 9, Declaration of Farrah P. Bhatti ("Bhatti Decl."), ¶¶ 4-7, *see also* 33 TTABVUE 34, 37-38.

the Board proceedings, although if Opposer took a certain action in the civil action Applicant would "entertain" suspension of the Board proceedings.[5]

Applicant's counsel subsequently sent two emails to Opposer's counsel on September 17 and 23, 2021, asking to confirm the scheduling of the depositions.[6] Opposer's counsel replied on September 24, 2021 stating it was expecting to file a motion to suspend the Board proceedings "early next week" and "it makes sense to allow the Board to decide the motions before spending time and effort addressing deposition scheduling".[7] No motion to suspend was filed with the Board, nor did Opposer confirm, or indicate it would confirm, availability for a deposition until the day Opposer filed its response to Applicant's motion.[8] The Board finds, under the circumstances in this proceeding, that Applicant has satisfied the good faith effort requirement prior to the filing of its motion to compel.

The Board next turns to the merits of the motion. The Board finds that, despite Applicant's efforts to schedule the discovery deposition at issue, Opposer failed to cooperate in the scheduling and taking of the noticed deposition. Opposer's arguments that its delay in scheduling was based on its belief the parties were attempting to resolve this proceeding is not persuasive. As an initial matter, proceedings are not automatically suspended merely because the parties are discussing settlement, rather parties must file the appropriate motion. *See*

[5] 35 TTABVUE 71.
[6] 33 TTABVUE 40, 42.
[7] 33 TTABVUE 44.
[8] On November 3, 2021 Opposer's counsel sent correspondence to Applicant's counsel to discuss scheduling the depositions and other discovery issues. 35 TTABVUE 103-14.

Instruments SA Inc. v. ASI Instruments Inc., 53 USPQ2d 1925, 1927 (TTAB 1999). Moreover, on September 9, 2021 Applicant's counsel stated it would not agree to suspend these proceedings absent a specific action in the civil action. Applicant then twice inquired into the scheduling of the noticed deposition. In view of Applicant's emails of September 17 and 23, 2021 seeking to confirm scheduling of the depositions, it was not reasonable for Opposer to expect that Applicant was not seeking to move forward with discovery, even if there were ongoing settlement negotiations in the civil action.[9] *Cf. Fairline Boats plc v. New Howmar Boats Corp.*, 59 USPQ2d 1479, 1480 (TTAB 2000); *Instruments SA*, 53 USPQ2d at 1927.

Accordingly, Applicant's motion to compel is **granted**. *See HighBeam Marketing, LLC v. Highbeam Research, LLC*, 85 USPQ2d 1902 (TTAB 2008) (motion to compel attendance of employees for depositions granted where moving party made good faith effort to schedule depositions but opposer failed to cooperate); *S. Indus. Inc. v. Lamb-Weston Inc.*, 45 USPQ2d 1293 (TTAB 1997) (motion to compel party's attendance at discovery deposition granted, despite party's contention that other litigations prevented his appearance).

[9] Opposer's September 24, 2021 suggestion that the parties delay scheduling depositions pending the Board's resolution of an unfiled, and never filed, motion is also not well-taken. The Board further notes Opposer's reference to the need to address alleged deficiencies in Applicant's discovery responses. 33 TTABVUE. To the extent Opposer was suggesting it would not schedule its noticed deposition prior to resolving those issues, Opposer is reminded that "a party is not relieved of its discovery obligations in spite of the fact that its adverse party has wrongfully failed to fulfill its own obligations." *Miss Am. Pageant v. Petite Prods. Inc.*, 17 USPQ2d 1067, 1070 (TTAB 1990) (citing Fed. R. Civ. P. 26(d) and *Giant Foods, Inc. v. Standard Terry Mills, Inc.*, 231 USPQ 626 (TTAB 1986)); *see also* TBMP § 403.03.

Opposer is allowed **TEN DAYS** from the date of this order to provide Applicant's counsel with Opposer's 30(b)(6) witness(es)'s availability for deposition, and for that deposition to occur within **TWENTY DAYS** from the date of this order.[10] If Opposer fails to comply with this order, Applicant's remedy may lie in a motion for sanctions. *See* Trademark Rule 2.120(h)(1); Fed. R. Civ. P. 37(b)(2); TBMP § 411.05.

Applicant also requests an extension of time of the discovery period, solely for itself, to allow for the timely taking of Opposer's deposition. Opposer does not contest an extension but argues Applicant's requested extension is too brief to allow for scheduling of the deposition and that there are other discovery issues that need to be addressed.

The standard for allowing an extension of a prescribed period prior to the expiration of that period is good cause. *See* Fed. R. Civ. P. 6(b)(1). Ordinarily, the Board is liberal in granting extensions of time before the period to act as 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 Prod., Inc. v. Dowbrands Inc.*, 22 USPQ2d 1313, 1314 (TTAB 1992).

In this instance the Board finds good cause for an extension of the discovery period. Applicant sought the extension before the close of discovery, there is no evidence it is acting in bad faith, and the Board finds Applicant has not been negligent nor has the privilege of extensions been abused. *See* TBMP §§ 312.02 and 509.01(a).

[10] The Board expects the parties and their attorneys to cooperate in the discovery process, including with the scheduling of depositions, and looks with extreme disfavor on those who do not. *See Sunrider Corp. v. Raats*, 83 USPQ2d 1648, 1654 (TTAB 2007) (parties have a duty to cooperate in resolving conflicts in the scheduling and taking of depositions).

The Board, however, does not find sufficient reason to grant an extension solely for Applicant.

In view of the foregoing, the motion to extend is **granted** to the extent that discovery and all remaining dates, for both parties, is reset as set out below.

In its response brief Opposer requests a telephone conference with the Interlocutory Attorney.[11] It is unclear if the basis for Opposer's request is to discuss Applicant's motion, scheduling difficulties, or other discovery issues. Regardless, Opposer's request is either moot or premature and is accordingly **denied**.

Proceedings are **resumed** and dates reset as follows:

Discovery Closes	3/25/2022
Plaintiff's Pretrial Disclosures Due	5/9/2022
Plaintiff's 30-day Trial Period Ends	6/23/2022
Defendant's Pretrial Disclosures Due	7/8/2022
Defendant's 30-day Trial Period Ends	8/22/2022
Plaintiff's Rebuttal Disclosures Due	9/6/2022
Plaintiff's 15-day Rebuttal Period Ends	10/6/2022
Plaintiff's Opening Brief Due	12/5/2022
Defendant's Brief Due	1/4/2023
Plaintiff's Reply Brief Due	1/19/2023
Request for Oral Hearing (optional) Due	1/29/2023

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

[11] 35 TTABVUE 2, 9.

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).