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

Proceeding no.	91264972
Party	Defendant The Vineyard House LLC
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Attachments	Applicants Motion to Suspend . 91264972.pdf(145338 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Constellation Brands U.S. Operations, Inc. <p style="text-align:center">Opposer,</p> <p style="text-align:center">v.</p> The Vineyard House LLC, <p style="text-align:center">Applicant</p>	Opposition No.: 91264972 Mark: Serial No. 88/008025 (CRABB’S BLACK BURGUNDY)
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APPLICANT’S MOTION TO SUSPEND

Applicant The Vineyard House LLC (“Applicant”), by and through its undersigned counsel, submits this motion pursuant to 37 C.F.R. §2.117(c) requesting suspension of the proceedings for a period of six (6) months. For the reasons set forth herein, good cause exists to grant this request given the facts and circumstances.

INTRODUCTION AND FACTUAL BACKGROUND

Applicant and Opposer Constellation Brands U.S. Operations, Inc. (“Opposer”) are currently involved in three pending oppositions pending before the Trademark Trial and Appeal Board. Each opposition is based on Applicant’s pending applications for marks that include the term CRABB.

This specific opposition was filed on September 23, 2020. Applicant filed an Answer on October 16, 2020 [TTABVUE 4]. Applicant then filed an Amended Answer with consent of Opposer on November 8, 2020 [TTABVUE 5]. On November 13, 2020 Opposer and Applicant filed a Consented Motion to Suspend the Opposition Proceedings pending a final determination in a civil action [TTABVUE 6]. On January 14, 2021, the Board issued an order suspending the proceedings. [TTABVUE 7]. On April 28, 2021, the Parties jointly filed a Motion to Resume Proceedings [TTABVUE 8]. On May 4, 2021, the Board resumed proceedings [TTABVUE 9].

The parties have exchanged discovery and are currently engaged in efforts to resolve outstanding discovery issues. Applicant has been diligent in its defense of the oppositions and has been timely in responding to discovery requests from Opposer. Applicant has also timely responded to meet and confer requests received from Opposer.

On or about March 22, 2022, counsel for the Applicant learned that due to sudden and unexpected circumstances outside of the control of Applicant, Applicant’s principal is totally and completely unavailable and unreachable at this time, and as a result is unable to assist, or participate, in Applicant’s prosecution of this matter. Applicant’s counsel is unable to

communicate in any manner with Applicant's principal, and at the present time, it is unclear how long this period of unavailability will last. Moreover, based on its understanding, and while not disclosing the content of privileged communications, counsel for Applicant does not believe that there are any other individuals presently associated with Applicant who could step in and assist in the prosecution of this matter in lieu of Applicant's principal. As a result, and despite Applicant's diligent efforts to participate in this matter to date, Applicant is left without a meaningful ability to continue its prosecution of this matter at this time. If Applicant were forced to continue the prosecution of this matter in spite of the foregoing circumstances, Applicant would be significantly and materially prejudiced. Due to Applicant's right to medical privacy, Applicant's counsel cannot further elaborate on the details of the situation.

On March 23, 2022, the day after counsel learned of the foregoing, counsel for Applicant reached out to counsel for the Opposer (Ken Wilton) and informed him of the above referenced circumstances and that as a result, Applicant was not in a position to provide additional discovery responses, participate in the parties meet and confer efforts or participate in party depositions. In that same email, Applicant's counsel indicated that it would be seeking an extension or suspension of these proceedings for a period of six months, and asked whether Opposer would consent to that request given the extraordinary circumstances. Opposer did not respond, and it appears as if the request was simply being ignored by Opposer.¹ Applicant sent a follow up email to Mr. Wilton on March 25, 2022, again asking if Opposer would consent to the requested relief in light of the existing circumstances. As of the filing of this motion, Opposer has not yet responded to the multiple emails sent by Applicant's counsel. Therefore, Applicant has no choice but to file this Motion with the Board in order to inform the Board of the current situation and seek a suspension of these proceedings.

LEGAL BASIS FOR SUSPENSION

It has been held that scheduling orders can be modified "upon a showing of good cause." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002); see also *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). The "good cause" standard "primarily considers the diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). A party demonstrates good cause for the modification of a scheduling order by showing that, even with the exercise of due diligence, he or she was unable to meet the timetable set forth in the order. See *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002); *Johnson*, *supra*, 975 F.2d at 609. "If the party seeking the modification 'was not diligent, the inquiry should end' and the motion to modify should not be granted." *Zivkovic*, *supra*, 302 F.3d at 1087 (citation omitted). See also *Johnson*, *supra*, 975 F.2d at 609 ("Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification").

Applicant in this case has been diligent in these proceedings. Applicant has timely responded to discovery requests, meet and confer demands, as well as deposition notices. Notwithstanding its

¹ On March 25, 2022, two days after being advised of the sudden and unexpected unavailability of Applicant's principal, Opposer sent Applicant a meet and confer letter seeking to confirm that supplemental discovery responses would be served that day in connection with Opposition No. 91264970.

diligence to date, given the sudden and unexpected unavailability of Applicant's principal, Applicant cannot meet the timetable as currently set forth by the Trademark Trial and Appeal Board.

Because Applicant cannot meet the scheduling deadlines due to its unavailability, good cause can be found. "The district court may modify the pretrial schedule 'if it cannot reasonably be met despite the diligence of the party seeking the extension.' Fed.R.Civ.P. 16 advisory committee's notes (1983 amendment); *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 469 (D.N.J.1990); *Amcast Indus. Corp. v. Detrex Corp.*, 132 F.R.D. 213, 217 (N.D.Ind.1990); Forstmann, 114 F.R.D. at 85; 6A Wright, Miller & Kane, Federal Practice and Procedure § 1522.1 at 231 (2d ed. 1990) ("good cause" means scheduling deadlines cannot be met despite party's diligence). Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief. Cf. *Engleson v. Burlington Northern R.R. Co.*, 972 F.2d 1038, 1043 (9th Cir.1992) (carelessness not a ground for relief under Rule 60(b)); *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir.1971) (same), cert. denied, 405 U.S. 974, 92 S.Ct. 1191, 31 L.Ed.2d 248 (1972); *Smith v. Stone*, 308 F.2d 15, 18 (9th Cir.1962) (same). Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification. See *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D.Me.1985). If that party was not diligent, the inquiry should end." *Johnson, supra*, 975 F.2d at 610.

Applicant's situation is an extraordinary circumstance which amounts to good cause. *Johnson, supra*, 975 F.2d at 610. Applicant has continuously been diligent in its efforts to prosecute these opposition proceedings. Applicant's diligence is further evidenced by its immediate notification of Opposer of the circumstances underlying this request and the timely filing of this motion.

Applicant's unavailability was unforeseen, unexpected and was outside of Applicant's control. Moreover, there do not appear to be any other individuals presently associated with Applicant who could step in and assist in the prosecution of this matter in lieu of Applicant's principal. As a result, and despite Applicant's diligent efforts to participate in this matter to date, Applicant is left without a meaningful ability to continue its prosecution of this matter at this time. Applicant would be materially prejudiced if it was forced to participate in additional discovery activities, depositions, trial preparations and trial in this matter without the benefit of its now unavailable principal. As a result, good cause exists to grant Applicant's motion.

While it is presently unclear how long this period of unavailability will last, given the circumstances, a six month suspension is reasonable. As circumstances develop and change moving forward, Applicant can work with Opposer and the Board to resume these proceedings when appropriate.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Applicant's **MOTION TO SUSPEND** was served on April 1, 2022 via email on counsel for Opposer as follows:

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