

UNITED STATES PATENT AND TRADEMARK OFFICE
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mbm

December 29, 2022

Opposition No. 91245800 (**Parent**)
Opposition No. 91246515
Opposition No. 91264970
Opposition No. 91264972

Constellation Brands U.S. Operations Inc.

v.

The Vineyard House LLC

Mary Beth Myles, Interlocutory Attorney:

These consolidated proceedings now come before the Board for consideration of Opposer's timely August 1, 2022 request for partial reconsideration of the Board's July 1, 2022 order denying Opposer's February 19, 2022 motion to amend its pleading in Opposition No. 91245800 to add claims of false suggestion of a connection, likelihood of confusion, and deceptive misdescriptiveness. The motion is fully briefed.

For purposes of this order, the Board presumes the parties' familiarity with the pleadings, the history of the proceedings, and the arguments made in connection with Opposer's request for reconsideration, and does not repeat them herein except as necessary to explain the Board's decision. *Guess? IP Holder LP v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

I. Opposer's Request for Reconsideration

The premise underlying a request for reconsideration under Trademark Rule 2.127(b) is that, based on the evidence of record and the prevailing authorities, the Board erred in reaching the decision it issued. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 518 (2022) and authorities cited therein. The request may not be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in the requesting party's brief. *See* TBMP § 519 and authorities cited therein. Rather, the request normally should be limited to a demonstration that, based on the evidence properly of record and the applicable law, the Board's ruling is in error and requires appropriate changes. *See Steiger Tractor Inc. v. Steiner Corp.*, 221 USPQ 165 (TTAB 1984), *different results reached on reh'g*, 3 USPQ2d 1708 (TTAB 1984).

In its request for reconsideration, Opposer argues that the Board erred in denying its motion to amend its pleading, because the Board did not find that Applicant would actually be prejudiced by the amendment, but only that prejudice to Applicant was "hypothetical" or "may" result.¹ Opposer argues that in the absence of a finding of prejudice, a motion to amend cannot be denied based solely on mere delay.² Opposer also argues that it is not possible for Applicant to be prejudiced by the amendment, because the proposed claims arise from the same facts and involve similar marks as those in the child proceedings and would therefore not require additional discovery.³

¹ 33 TTABVUE 3, 6.

² *Id.*

³ *Id.* at 7-11.

Opposer has failed to show that the Board erred in denying its motion to amend. First, contrary to Opposer's argument, the Board's July 1, 2022 order specifically found that Opposer's arguments that Applicant would not be prejudiced were not persuasive.⁴ Rather, the Board found that Opposer unduly delayed in seeking to assert three additional claims against six applications until over three years after the proceeding was instituted and seven months after proceedings were resumed after suspension for civil action.⁵ Board precedent is clear that a long, unexplained delay when there is no question of newly discovered evidence may render an amendment untimely, because such "piecemeal prosecution" results in prejudice to the defendant by "increasing the time, effort, and money that [the defendant] would be required to expend to defend against [the claims.]" *Media Online Inc. v. El Clasificado Inc.*, 88 USPQ2d 1285, 1286 (TTAB 2008). The Board's finding that Applicant would be prejudiced was therefore not "hypothetical," but based on Opposer's piecemeal prosecution of claims in these consolidated proceedings.

Opposer also argues that its delay does not constitute "piecemeal prosecution," because each of the marks in these consolidated proceedings consists of or contains "variations of the name of a nineteenth century vintner, H.W. Crabb" and therefore is based on the same set of facts and legal theories, and will not require additional discovery.⁶ Opposer's arguments are nothing more than a reargument of points already made and addressed in Opposer's brief on its motion to amend. Moreover,

⁴ 31 TTABVUE 6-7.

⁵ Opposer also asserted the same claims in the child proceedings at least one year prior to Opposer's motion to amend its pleading in the parent proceeding.

⁶ 33 TTABVUE 8.

Opposer's argument overlooks the nature of the consolidated notice of opposition and consolidated proceedings. Despite being consolidated, each proceeding retains its separate character and the Board's decision on the consolidated cases will necessarily take into account any differences in the issues or marks. Applicant would therefore be required to defend against three additional claims against six different applications for different marks.

In any event, it is not necessary that a defendant establish actual prejudice to its ability to defend against the proposed claims for the Board to find undue delay.⁷ See *Trek Bicycle Corp. v. StyleTrek Ltd.*, 64 USPQ2d 1540, 1541 (TTAB 2001) (denying motion to amend, even where there was no showing of prejudice, because Opposer provided no explanation for its failure to move to amend its pleading to assert a dilution claim until eight months after the original notice of opposition); *Capital Speakers Inc. v. Capital Speakers Club of Washington D.C. Inc.*, 41 USPQ2d 1030, 1033 (TTAB 1996) ("This Board will simply not grant petitioner's ... motion to amend to add a claim of fraud when petitioner was fully aware of all the facts that it needed to add such a claim ... well over 3 years earlier."). Here, Opposer provided no explanation for its failure to assert the proposed claims for over three years, apart

⁷ Opposer cites *Foman v. Davis*, 371 U.S. 178 (1962) for the principal that "there must be a finding of prejudice to justify denial," because "denying amendment based on delay alone is 'inconsistent with the spirit of the Federal Rules.'" 33 TTABVUE 4. *Foman* states that "[i]n the absence of **any** apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Id.* at 182 (emphasis added). *Foman* does not stand for the broad principal that actual prejudice is required, but rather only that denial of an amendment "without **any justifying reason**" is an abuse of discretion. *Id.* (emphasis added).

from the existence of settlement discussions, which were insufficient to explain Opposer's long delay.⁸ See *Media Online Inc.*, 88 USPQ2d at 1286-87. Therefore, even assuming that Opposer is correct that no additional discovery would be needed, the Board did not err in denying Opposer's motion based, in part, on its failure to provide any justifiable reason for its delay.

Based on a careful review, the Board did not err in denying Opposer's motion to amend its pleading. Accordingly, Opposer's request for reconsideration is **denied** and the Board's July 1, 2022 order stands as issued.

II. Schedule

Proceedings are resumed. Remaining dates are reset as follows:

Expert Disclosures Due	2/23/2023
Discovery Closes	3/25/2023
Plaintiff's Pretrial Disclosures Due	5/9/2023
Plaintiff's 30-day Trial Period Ends	6/23/2023
Defendant's Pretrial Disclosures Due	7/8/2023
Defendant's 30-day Trial Period Ends	8/22/2023
Plaintiff's Rebuttal Disclosures Due	9/6/2023
Plaintiff's 15-day Rebuttal Period Ends	10/6/2023
Plaintiff's Opening Brief Due	12/5/2023
Defendant's Brief Due	1/4/2024
Plaintiff's Reply Brief Due	1/19/2024
Request for Oral Hearing (optional) Due	1/29/2024

⁸ Nor do any settlement discussions, which occurred after proceedings were resumed from the suspension for civil action, explain Opposer's failure to plead the claims in its original notice of opposition. Indeed, Opposer specifically argued in its response to Applicant's motion to dismiss the original notice of opposition that it was not pleading—and was not required to plead—a claim of likelihood of confusion. 6 TTABVue 4-5. The facts giving rise to Opposer's claims were presumably within Opposer's knowledge at the time it filed its notices of opposition, yet Opposer decided to assert the claims against only some of Applicant's involved marks. Opposer has provided no explanation for its failure to raise the claims initially or its decision to argue that it should not be required to plead a claim of likelihood of confusion in its response to the motion to dismiss.

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).

TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing. **Note:**

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Parties are strongly encouraged to check the entire document before filing.⁹ The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the [ESTTA help](#) webpage.

⁹ To facilitate accuracy, ESTTA provides previews of each page before submitting.