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

Proceeding no.	91274162
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Date	07/12/2022
Attachments	2022.07.12.2 Reply Motion to Consolidate Wrangler.pdf(451710 bytes)

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

WRANGLER APPAREL CORP., Opposers, v. BALANCE ATHLETICA, LLC, Applicant.	Opposition Nos. 91274162 Mark:  Serial No.: 90/332,530 Filing Date: November 20, 2020

BALANCE ATHELTICA LLC'S REPLY IN SUPPORT OF MOTION TO CONSOLIDATE OPPOSITION NOS. 91274162, 91274163, AND 91274167 UNDER FRCP 42(a)

For its reply in support of its motion to consolidate opposition numbers 91274162, 91274163, and 91274167 to its trademark application, Serial No. 90/332,530, filed on November 20, 2020 ("Reply"), Balance Athletica, LLC ("Applicant") respectfully submits the following:

I. INTRODUCTION

Applicant filed for trademark protection of its signature glute contour seam, 

(the "Mark") on November 20, 2020. On September 28, 2021, the Mark published in the Trademark Official Gazette. On January 26, 2022, three oppositions were filed against the Mark by three different parties in proceeding numbers 91274162, 91274163, and 91274167 (the "Oppositions"). Wrangler Apparel Corp. ("Wrangler") filed Opposition No. 91274162, Retail Royalty Company ("Retail") filed Opposition No. 91274163, and The North Face Apparel Corp. ("North Face") filed Opposition No. 91274167. Applicant answered Wrangler's Opposition on March 7, 2022, *see* 4 TTABVUE 1-4, Retail's

Opposition on March 7, 2022, *see* 4 TTABVUE 1-4, and North Face's Opposition on March 7, 2022, *see* 4 TTABVUE 1-4.

On May 31, 2022, Applicant moved to consolidate the Oppositions pursuant to FRCP 42(a) and TBMP 511 (the "Motion to Consolidate"). On June 22, 2022, Retail and The North Face filed identical responses in opposition to Applicant's Motion to Consolidate. Wrangler likewise filed an opposition that mirrors Retail's and The North Face's identical submissions (collectively, the "Responses"). Yet these responses fail to rebut the arguments in the Motion to Consolidate and they ignore the fact that consolidation of the three almost identical Oppositions would prevent inconsistent decisions by the Board. Applicant maintains that interests of economy and efficiency dictate that the Oppositions be consolidated, and therefore requests that the Court grant the Motion to Consolidate.

II. ARGUMENT

The Oppositions should be consolidated because (1) each proceeding contains the same set of legal issues and facts, (2) consolidation will yield significant savings in time, effort, and expense, and (3) consolidation will not prejudice the opposers.[1] In its Response, Wrangler focuses on the fact that the three Opposers are distinct parties and argues that it would be prejudiced by such consolidation. Yet it completely disregards the obvious similarities in the Oppositions. Further, Wrangler's conclusory arguments plainly ignore the text of Rule 511, which states the identity of parties "is not always necessary." Rule 511 expressly contemplates "actions by different plaintiffs [that] are consolidated[.]" Indeed, when multiple oppositions brought by different opposers are at the same stage of litigation and plead the same claims, consolidation is appropriate for purposes of consistency and economy. *New Orleans Louisiana Saints LLC v. Who Dat? Inc.*, 99 USPQ2d 1550, 1551 (TTAB 2011). Moreover, the

[1] Applicant addresses the first two reasons its in Motion to Consolidate. For the sake of efficiency, Applicant refers back to its Motion to Consolidate for analysis on these two points. *See* 5 TTABVUE 1-6. Applicant will address the third reason in this Reply.

Board encourages parties to promptly inform the Board of any other related proceedings or cases involving questions of law or fact in common. *See, e.g.*, *Wisconsin Cheese Group, LLC v. Comercializadora de Lacteos y Derivados*, 11 U.S.P.Q.2d 1262, 1264 n.5 (TTAB 2016).

As Wrangler admits, each consolidated proceeding would retain its separate character and require the filing of separate pleadings and entry of separate judgments. TBMP § 511. Moreover, a principal goal of consolidation is to serve the interests of judicial economy and promote efficiency by saving time during pretrial discovery and motion practice – consolidation here would achieve those very results. *See, e.g.*, *In re Oreck Corp. Halo Vacuum & Air Purifiers Mktg. & Sales Practices Litig.*, 282 F.R.D. 486, 490 (C.D. Cal. 2012). The discovery overlaps significantly and it is highly foreseeable that the motions practice will overlap as well. Further, judicial economy and efficiency are served when multiple oppositions against the same application are at the same stage of litigation and plead the same claims – even if the opposers are different parties. *See Stuart Spector Designs Ltd. v. Fender Musical Instruments Corp.*, 94 U.S.P.Q.2d 1549 (TTAB 2009); *DataNational Corp. v. BellSouth Corp.*, 18 U.S.P.Q.2d 1862 (TTAB 1991). That is exactly the case here.

Logically, when the proceedings that are proposed for consolidation involve the same facts and arguments, the purpose of consolidation is more easily achieved. Here, other than a different introductory paragraph and different product photographs, Retail's Opposition is an exact replica of North Face's Opposition. They both bring four identical counts – Functionality, Ornamental, Nondistinctive (Failure to Prove Acquired Distinctiveness), and Nondistinctive (Incapable of Acquiring Distinctiveness). Their discovery is likewise practically identical. And while formatted differently, Wrangler's opposition raises the same issues and requests the same relief sought by North Face and Retail. It argues that the Mark has no distinctiveness (either inherent or acquired), does not serve to identify the goods or services, and that the Mark is functional and ornamental. Its discovery requests are

subsumed within North Face's and Retail's requests. Thus, consolidation here would be advantageous because it would avoid "duplication of effort concerning the factual issues in common and will thereby avoid unnecessary costs and delays." *S. Industries Inc. v. Lamb-Weston Inc.*, 45 U.S.P.Q.2d 1293, 1298 (TTAB 1997).

Given this clear overlap of facts and issues between Wrangler's Opposition and the identical oppositions of Retail and North Face, the Opposers are unlikely to pursue distinct or contradictory strategies. Regardless, nothing in the relief that Applicant seeks in the Motion to Consolidate would impinge on Wrangler's ability to hire its own expert, and Wrangler would remain free to develop and pursue its own, separate strategy as it sees fit. *Wisconsin Cheese Group,* 11 U.S.P.Q.2d at 1264 (noting that "each [consolidated] proceeding retains its separate character and requires entry of a separate judgment" and that the Board's "decision on the consolidated cases shall take into account any differences in the issues by the respective pleadings"). There is no reason to suspect that Wrangler would be prejudiced by consolidation. In contrast, Applicant will be prejudiced if consolidation is not permitted, and the ideals of judicial economy and efficiency would be thwarted.

III. CONCLUSION

Consolidation would not serve to delay any proceeding and would reduce the risk of inconsistent decisions or confusion by streamlining the issues before the Board. Based on the foregoing, Applicant respectfully requests that the Board grants this Motion and consolidates the Oppositions.

Dated: July 12, 2022

Respectfully submitted,

Milgrom & Daskam

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 12, 2022, a true and correct copy of the foregoing **BALANCE ATHELTICA LLC'S REPLY IN SUPPORT OF MOTION TO CONSOLIDATE OPPOSITION NOS. 91274162, 91274163, AND 91274167 UNDER FRCP 42(a)** was served upon counsel for Opposer by email as follows:

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