

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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nmt

December 21, 2020

Cancellation No. 92075086

Black Rifle Coffee Company LLC

v.

Giancarlo Fantappie

Jill M. McCormack, Interlocutory Attorney:

The Board notes Respondent's combined motion to dismiss the petition to cancel and to amend Respondent's involved registration (filed December 15, 2020).

MOTION TO AMEND

Respondent's motion to amend its involved registration was (1) not accompanied by the proper fee under Trademark Rule 2.6; and (2) not verified or supported by a declaration under Trademark Rule 2.20. *See* Trademark Rules 2.6(a)(11), 2.133(a) and 2.173(b). Thus, Respondent's motion to amend will be given no consideration.¹

¹ If appropriate following disposition of Respondent's motion to dismiss, Respondent will be allowed time to resubmit its motion to amend with the required fee and declaration in support of the amendment. However, the amendment of any application or registration which is the subject of an inter partes proceeding before the Board is governed by Trademark Rule 2.133, 37 C.F.R. § 2.133. Trademark Rule 2.133(a) provides that such an application or registration may not be amended in substance, except with the consent of the other party or parties and the approval of the Board, or except upon motion granted by the Board. For that reason, an unconsented motion to amend the involved registration is generally deferred until final decision or until the case is decided upon summary judgment.

MOTION TO DISMISS

When a party timely files a potentially dispositive motion, the proceeding is suspended with respect to all matters not germane to the motion, and no party should file any paper which is not germane to the motion except as otherwise may be specified in a Board order. *See* Trademark Rule 2.127(d). Accordingly, as of the filing date of the motion to dismiss, proceedings are suspended pending disposition of the motion. Any paper filed during the pendency of this motion which is not germane thereto will be given no consideration. *See* Trademark Rule 2.127(d).

The parties should note that the schedule for the discovery conference, initial disclosures and discovery is also suspended by this order and will be reset in the event that the Board resumes proceedings. TBMP § 401.01.

The Board also notes that Respondent's motion to dismiss includes exhibits and argument regarding those exhibits that relate to the merits of Petitioner's claims. Because Respondent's motion to dismiss is not based on issue or claim preclusion or lack of Board jurisdiction, consideration of evidence outside the pleading would result in a premature motion for summary judgment. *See* Trademark Rule 2.127(e)(1), 37 C.F.R. § 2.127(e)(1) (party may not file a motion for summary judgment until the party has made its initial disclosures); *see also Nike, Inc. v. Palm Beach Crossfit Inc.*, 116 USPQ2d 1025, 1028 (TTAB 2015) (motion to dismiss that included matters outside of the pleadings not considered as motion for summary judgment because motion was filed before the parties' initial disclosures were due and initial disclosures had not been served).

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In view of the foregoing, the Board will not construe Respondent's motion as one for summary judgment.

The motion to dismiss will be decided in due course.