UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: November 20, 2017

Concurrent Use No. 94002776

Elevator Brewing Co., LLC

v.

Coop Ale Works, LLC

Before Ritchie, Hightower, and Pologeorgis,
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Elevator Brewing Co., LLC ("Applicant") filed an application, as amended, for concurrent use registration of the mark ELEVATOR[1] (in standard characters) for "beer" in International Class 32 and "restaurant services," in International Class 43, and a second application, as amended, for concurrent use registration of the mark ELEVATOR E, and design,[2] as shown below for "beer" in International Class 32 and "restaurant services," in International Class 43:

[1] Application Serial No. 86821052 was filed on November 16, 2015, reciting dates of first use and first use in commerce in both classes in September 1999.
[2] Application Serial No. 86820968 was filed on November 16, 2015, reciting dates of first use and first use in commerce in both classes in September 1999.

With its concurrent use applications, Applicant claims the exclusive right to use its marks in "the geographic region including: Ohio, Michigan, Pennsylvania, West Virginia, Kentucky, Indiana, Illinois and Wisconsin."[3] Applicant names as the excepted user Coop Ale Works, LLC ("Registrant"), which owns geographically unrestricted registrations on the Principal Register for the mark ELEVATOR WHEAT,[4] in standard character format, for "beer," in International Class 32, and COOP ALEWORKS ELEVATOR WHEAT, and design, [5] as shown below, for "beer," in International Class 32:

[3] Application Serial No. 86820968 was published without naming Illinois as a restricted territory. Based on the Concurrent Use Statement in the April 6, 2017 Amendment and the agreement filed by the parties, we accept that this was an inadvertent oversight by Applicant, and since it does not broaden the scope of its application, we include Illinois as a restricted territory in both applications, as noted herein.

[4] Registration No. 4602708, issued on September 9. 2014, and disclaiming the exclusive right to use the term "WHEAT" apart from the mark as shown.

[5] Registration No. 4602688, issued on September 9, 2014, and disclaiming the exclusive right to use the terms "ALEWORKS" and "WHEAT" apart from the mark as shown.

On May 2, 2017, and June 13, 2017, respectively, the concurrent use applications were published for opposition, and on September 11, 2017, the Board instituted this concurrent use proceeding.

On October 27, 2017, the parties filed a Concurrent Use/Consent Agreement (the "Concurrent Use Agreement"), signed by the parties, and dated August 20, 2016. Applicant and Registrant have noted, *inter alia*, that they have been using their respective marks in connection with their identified goods and services in their respective geographical areas without any evidence of actual consumer confusion despite "coexistence in the marketplace for over three years."[6] The parties agree to take "reasonable measures to continue to avoid confusion" and "to correct any instances" should they arise.[7]

The parties have agreed that Applicant will use its marks exclusively in "Applicant's Geographic Territory" and "shall neither distribute nor advertise" outside such territory, which "shall be limited to Ohio, Michigan,

[6] 6 TTABVUE 3.
[7] 6 TTABVUE 3-4.

Pennsylvania, West Virginia, Kentucky, Indiana, Illinois and Wisconsin."[8] The parties further agree that Registrant shall use its marks exclusively outside Applicant's Geographic Territory and "will neither distribute, nor advertise" in Applicant's Geographic Territory.[9]

Concurrent use agreements that include information as to why the parties believe confusion is unlikely, evidencing the parties' business-driven belief that there is no likelihood of confusion, and providing provisions to avoid any potential confusion, are entitled to great weight in favor of a finding that confusion is not likely. *In re Four Seasons Hotels Ltd.*, 987 F.2d 1565, 26 USPQ2d 1071 (Fed. Cir. 1993); *Bongrain Int'l (Am.) Corp. v. Delice de France Inc.*, 811 F.2d 1479, 1 USPQ2d 1775 (Fed. Cir. 1987). Based upon the foregoing, we find that concurrent use of the involved marks is not likely to cause confusion, mistake or deception in accordance with Section 2(d) of the Trademark Act. *See* Trademark Trial and Appeal Board Manual of Procedure § 1110 (June 2017) and cases cited therein. Accordingly, Applicant is entitled to the concurrent use registrations it seeks, and Registrant's registrations will be restricted geographically as agreed upon by the parties.

DECISION:

Accordingly, the parties are adjudged entitled to the following concurrent use registrations:

[8] 6 TTABVUE 4.
[9] 6 TTABVUE 4.

Applicant is entitled to registrations based on its Application Serial Nos. 86821052 and 86820968 for the territory comprising "Ohio, Michigan, Pennsylvania, West Virginia, Kentucky, Indiana, Illinois and Wisconsin."

Registrant's Registration Nos. 4602708 and 4602688 are geographically restricted to the territory comprising "the entire United States except the states of Ohio, Michigan, Pennsylvania, West Virginia, Kentucky, Indiana, Illinois and Wisconsin."