

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: April 21, 2023

Concurrent Use No. 94003139

MGM Grand Hotel, LLC
(Application Serial Nos. 87861550,
87861582, 87861631 and 87861661)

v.

Level Up, LLC
(Registration No. 5700182)


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Denise M. DelGizzi,
Chief Clerk of the Board:
571-272-4265

NOTICE OF INSTITUTION

The applicant in application Serial Nos. 87861550, 8786158, 87861631 and 87861661 has applied for a concurrent use registration for the trademark or service mark set forth below.

Name and Address of Applicant	MGM Grand Hotel, LLC 3799 Las Vegas Blvd., South Las Vegas, NV 89109
Application Serial No.	87861550
Filing Date	4/3/2018
Mark	LEVEL UP
Services	Entertainment services in the nature of conducting live, interactive skill-based games; entertainment services in the nature of hosting social entertainment events; video arcade services, in International Class 41
Application Serial No.	87861582
Filing Date	4/9/2018
Mark	LEVEL UP
Services	Providing facilities for social functions, in International Class 43
Application Serial No.	87861631
Mark	
Filing Date	4/3/2018
Services	Entertainment services in the nature of conducting live interactive skill-based games; casino services; entertainment services in the nature of hosting social entertainment events; amusement arcade services; Entertainment in the nature of tournaments for skill-based games, in International Class 41
Application Serial No.	87861661
Filing Date	4/3/2018

Mark	
Services	Restaurant, bar and cocktail lounge services; providing facilities for social functions, in International Class 43
Territory of Use	The area comprising the entire United States with the exception of the states of Oregon, Washington, Idaho, and that portion of California north of 37° latitude.
Attorney	Lauri S. Thompson Greenberg Traurig, LLP 10845 Griffith Peak Drive, Suite 600 Las Vegas, NV 89135 lvpto@gtlaw.com 7029-792-3773

In its application, Applicant (plaintiff in this proceeding) has recited as an exception to its allegation of exclusive use of said mark, use by Level Up, LLC of an identical or very similar mark. This identical or very similar mark, the goods and/or services, and the territory of use, *as acknowledged in* the referenced application, are set out below in a summary of details of the application.

Name and Address of Registrant	Level UP, LLC 1290 Oak Street Eugene, OR 97401
Registration No.	5700182
Mark	Level Up
Date of Registration	3/19/2019
Services	entertainment and gaming services in the nature of amusement arcades and excluding entertainment and gaming

	services offered in facilities that offer and provide casino gaming services, in International Class 41; and bar and cocktail services; restaurant services offered only in facilities that do not offer and provide casino gaming services, in International Class 43
Territory of Use	The area comprising the states of Oregon, Washington, Idaho, and that portion of California north of 37° latitude

The Office has determined that Applicant's mark appears entitled to registration, subject to a concurrent use proceeding with Level Up, LLC (as defendant in this proceeding). Defendant is the owner of Registration Serial No. 5700182. Therefore, a concurrent use proceeding is hereby instituted under the provisions of Section 2(d) of the Trademark Act of 1946. This notice of institution is forwarded pursuant to Trademark Rules 2.99(d)(1), and constitutes service of this proceeding. An electronic version of the proceeding is viewable on TTABVUE at <http://ttabvue.uspto.gov/ttabvue/>. See Trademark Rule 2.99(d)(1). The parties should diligently monitor this proceeding via TTABVUE.

The proceeding will be conducted in accordance with the Rules of Practice in Trademark Cases ("Trademark Rules"), as set out in Title 37 of the Code of Federal Regulations.

The parties to this proceeding must advise the Trademark Trial and Appeal Board of any relevant applications or registrations, other than those already referenced herein, which should be included in this concurrent use proceeding. Any response in this regard should be in writing and should be filed on or before the due date of defendant's answer.

FILING AN ANSWER

Trademark Rule 2.99 provides that:

An answer to the notice is not required in the case of an applicant or registrant whose application or registration is specified in the application to register as a concurrent user in the application, but a statement, if desired, may be filed within forty days after the mailing of the notice; in the case of any other party specified as a concurrent user in the application, an answer must be filed within forty days after the mailing of the notice.

As the owner of Registration No. (REGISTRATION NO. OF DEFENDANT GOES HERE), defendant **is not required to file an answer** but may do so under Trademark Rule 2.99. The Trademark Trial and Appeal Board has set May 31, 2023 as the due date for any such answer. (See Patent and Trademark Rule 2.196 for expiration of this or any deadline falling on a Saturday, Sunday or federal holiday.) If filed, the answer should be directed to the allegations relating to concurrent use recited in the plaintiff's application identified herein.

If defendant chooses to file an answer, the defendant must file the answer through ESTTA (Electronic System for Trademark Trials and Appeals), unless ESTTA is unavailable due to technical problems or extraordinary circumstances are present. An answer filed on paper under these limited circumstances must be accompanied by a Petition to the Director (and the required fee under Trademark Rule 2.6). See Trademark Rule 2.126(b).

DUTY TO MAINTAIN ACCURATE CORRESPONDENCE INFORMATION

Throughout this proceeding, the parties, and their attorneys or representatives, must notify the Board of any correction or update of physical address and email address, and should use the ESTTA change of address form. See Trademark Rule 2.18(b); TBMP § 117.

SERVICE OF ANSWER AND OF ALL SUBMISSIONS

The service of the answer, and all other submissions in this proceeding, and of all matters that are required to be served but not required to be filed in the proceeding record, **must be by email** unless the parties stipulate otherwise. Trademark Rule 2.119(b). In the absence of a stipulation, service may be by other means only under the limited circumstances and in a manner specified in Trademark Rule 2.119(b). Regarding the signing and service of all submissions, see TBMP §§ 113-113.04.

The answer, and all other submissions, must include proof of service. As noted in TBMP § 113.03, proof of service may be in the following certificate of service form:

I hereby certify that a true and complete copy of the foregoing (insert title of submission) has been served on (insert name of counsel or party) by emailing (or insert other stipulated or allowed method of delivery) said copy on (insert date of transmission) to: (insert name and email address(es) of counsel or party).

Signature _____

Date _____

SETTLEMENT NEGOTIATIONS BEFORE FILING ANSWER

It is noted that most concurrent use proceedings result in a negotiated settlement and the parties are encouraged to promptly begin discussion of settlement. If the parties choose to begin settlement talks prior to the due date for the answer, they may stipulate to a suspension to accommodate settlement talks.

SUBMIT ALL FILINGS ONLINE VIA ESTTA

Submissions **must** be filed via ESTTA, the Board's online filing system, unless ESTTA is unavailable due to technical problems or extraordinary circumstances are present. Trademark Rule 2.126(a). Submissions may be filed in paper form **only** under the **limited** circumstances specified in Trademark Rule 2.126(b), with a required written explanation. ESTTA is accessible at the Board's web page: <http://estta.uspto.gov/>. The page has instructions and tips. ESTTA offers various forms, some of which may require attachments and/or a fee. For technical questions, a party may call 571-272-8500 or email ESTTA@uspto.gov. This proceeding involves several deadlines, and due to potential technical issues, parties should not wait until the deadline to submit filings. The Board may **decline to consider** an untimely submission. Moreover, Trademark Rule 2.126 sets forth the required form and format for all submissions (*e.g.*, page limitations), and the Board may **decline to consider** any submission that does not comply with this rule, including, but not limited to motions, briefs, exhibits, and deposition transcripts.

CONFERENCE, DISCOVERY, DISCLOSURE AND TRIAL SCHEDULE

The schedule for this case, including the deadline for the answer, the parties' conference, disclosures, discovery, trial and briefing is set out below and is also viewable in the Board's TTABVUE system at the following web address: <http://ttabvue.uspto.gov/ttabvue/>.

Time to Answer	5/31/2023
Deadline for Discovery Conference	6/30/2023
Discovery Opens	6/30/2023
Initial Disclosures Due	7/30/2023
Expert Disclosures Due	11/27/2023
Discovery Closes	12/27/2023
Plaintiff's Pretrial Disclosures Due	2/10/2024
Plaintiff's 30-day Trial Period Ends	3/26/2024
Defendant's Pretrial Disclosures Due	4/10/2024
Defendant's 30-day Trial Period Ends	5/25/2024
Plaintiff's Rebuttal Disclosures Due	6/9/2024
Plaintiff's 15-day Rebuttal Period Ends	7/9/2024
Plaintiff's Opening Brief Due	9/7/2024
Defendant's Brief Due	10/7/2024
Plaintiff's Reply Brief Due	10/22/2024

PARTIES ARE REQUIRED TO HOLD DISCOVERY CONFERENCE

The parties are required to schedule and hold a discovery conference by the deadline in the schedule of this order, or as reset by the Board. In the conference, the parties are required to discuss, at a minimum, (1) the nature and basis of their claims and defenses, (2) the possibility of settling the case or at least narrowing the scope of claims or defenses, and (3) arrangements for disclosures, discovery, preserving discoverable information, and introduction of evidence at trial. For guidance, *see* Fed. R. Civ. P. 26(f), Trademark Rule 2.120(a)(2)(i) and TBMP §§ 401.01 and 408.01(a).

The parties must hold the conference in person, by telephone or by a means on which they agree. A Board interlocutory attorney or administrative trademark judge will participate in the conference either upon request of any party made no later than ten (10) days prior to the conference deadline, or when the Board deems it useful to have Board involvement. *See* Trademark Rule 2.120(a)(2)(i). A request for Board participation must be made either through ESTTA, or by telephone call to the assigned interlocutory attorney named on the TTABVUE record for this proceeding. A party requesting Board participation should first determine possible dates and times when all parties are available. A conference with the Board attorney's participation will be by telephone in accordance with the Board's instructions.

For efficiency, the parties may stipulate to various procedural and substantive disclosure, discovery and trial matters (e.g., modification of deadlines and obligations) upon written stipulation and approval by the Board. Trademark Rule 2.120(a)(2)(iv) provides a non-exhaustive list of matters to which parties may stipulate. The best practice is to reduce all stipulations to writing. If email service is

not practical, such as for voluminous document production in discovery, the parties should discuss in the conference how production will be made. The parties, and their attorneys or representatives, have a duty to cooperate in the discovery process. TBMP § 408.01.

PROTECTIVE ORDER FOR CONFIDENTIAL INFORMATION

The Board's Standard Protective Order is automatically imposed in all *inter partes* proceedings, and is available at: <http://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/standard-documents-and-guidelines-0>.

During their conference, the parties should discuss whether they will use an alternative or modified protective order, subject to approval by the Board. *See* Trademark Rule 2.116(g) and TBMP § 412. The standard order does not automatically protect confidential information; its provisions for designating confidential information must be utilized as needed by the parties. Trademark Rule 2.126(c) sets forth the procedure for filing confidential submissions.

ACCELERATED CASE RESOLUTION (ACR)

During their conference, the parties are to discuss whether they wish to seek mediation or arbitration, and whether they can stipulate to the Board's Accelerated Case Resolution (ACR) process for a more efficient and cost-effective means of obtaining the Board's determination of the proceeding. For details, and examples of ACR proceedings, *see* TBMP § 528, and the Board's webpage: <http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>.

INITIAL DISCLOSURES AND DISCOVERY

Regarding the deadline for and contents of initial disclosures, *see* Trademark Rules 2.120(a)(1) and (2)(i), and TBMP § 401.02. Regarding deadlines for serving and responding to discovery, *see* Trademark Rule 2.120(a)(3) and TBMP § 403.03. Certain provisions of Fed. R. Civ. P. 26 are applicable in modified form. Note that written discovery (interrogatories, requests for production, requests for admission) must be served early enough so that responses will be due no later than the close of discovery. Regarding the scope and limits of discovery, *see* TBMP 414; discoverable items may include documents, tangible things, and electronically stored information (ESI).

MOTIONS

Certain provisions of Fed. R. Civ. P. 11 apply to all submissions in Board proceedings. *See* TBMP § 527.02. Regarding available motions, *see* TBMP Chapter 500. Regarding applicable deadlines to respond to motions, depending on the motion filed, *see* Trademark Rules 2.127(a) and (e)(1). When a party timely files a potentially dispositive motion the proceeding is suspended with respect to all matters not germane to the motion. *See* Trademark Rule 2.127(d). In addressing motions or other filings, if it appears to the Board that a telephone conference would be beneficial, the Board may, upon its own initiative or upon request made by a party, schedule a telephone conference. *See* Trademark Rule 2.120(j)(1) and TBMP § 502.06(a).

PRETRIAL DISCLOSURES, TRIAL AND BRIEFING

Regarding the procedures and deadlines for pretrial disclosures and trial, and specifically the noticing, taking, serving and submitting of evidence and testimony, *see* Trademark Rules 2.120(k), 2.121, 2.122, 2.123 and 2.125, as well as TBMP Chapter 700. The parties should review these authorities. For example: witness testimony may be submitted in the form of affidavit or declaration subject to the right to oral cross examination; transcripts of testimony depositions, with exhibits, must be served on each adverse party within thirty (30) days after completion of taking the testimony; certified transcripts and exhibits must be filed, with notice of such filing served on each adverse party; and all notices of reliance must be submitted during the submitting party's assigned testimony period and must indicate generally the relevance of the evidence and associate it with one or more issues.

Main briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing is not required, but will be scheduled upon separate notice timely filed pursuant to Trademark Rule 2.129(a). Regarding briefs and oral hearings, *see* TBMP §§ 801-802.

LEGAL RESOURCES AVAILABLE AT WEB PAGE

For a general description of Board proceedings, *see* TBMP §102.03. Proceedings are governed by the Trademark Rules of Practice in Parts 2 and 7 of Title 37 of the Code of Federal Regulations. These rules, the Manual of Procedure (TBMP), information on Accelerated Case Resolution (ACR) and Alternative Dispute Resolution (ADR), and many Frequently Asked Questions, are available on the Board's web page, at: <http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>. The parties should check the web page for important changes, announcements, etc., many of which apply to proceedings already in progress.

PARTIES NOT REPRESENTED BY COUNSEL

This proceeding is similar to a civil action in a federal district court and can be complex. The Board strongly advises all parties to secure the services of an attorney who is familiar with trademark law and Board procedure. The Board cannot aid in

the selection of an attorney. *See* TBMP § 114.02. The Board requires strict compliance with all applicable authorities whether or not the party is represented by counsel.