

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

MC

Mailed: September 5, 2015

Opposition No. 91215896

Bells Brewery, Inc.

v.

Innovation Brewing

**Elizabeth A. Dunn, Attorney (571-272-4267):**

This case comes up on Opposer's motions to add the claim that the mark INNOVATION BREWING is descriptive based on newly discovered evidence, and to compel a supplemental Fed. R. Civ. P. 30(b)(6) deposition and responses to two interrogatories. The motions are fully briefed.

**FACTS**

On May 12, 2013, Innovation Brewing filed an application based on its allegation of a bona fide intent to use in commerce the mark INNOVATION BREWING (BREWING disclaimed) for beer (application Serial No. 85929587).

On April 14, 2014, Bells Brewery, Inc. filed a notice of opposition pleading common law rights in the mark BOTTLING INNOVATION SINCE 1985 since 2009, and the mark INSPIRED BREWING since 2003, both for alcoholic beverages, and pleading two registrations for INSPIRED BREWING (BREWING disclaimed) for

“Beer, porter, ale, stout and malt liquor”, with Registration No. 3122464 including only those goods and Registration No. 4098319 also including a variety of goods in six classes; and claims of priority of use and likelihood of confusion. Applicant’s answer denied the salient allegations of the notice of opposition and pleaded various affirmative defenses. Pursuant to the Board’s order approving the parties’ stipulation, discovery was scheduled to close March 20, 2015, the day that the motion to add the new claim was filed.

#### MOTION TO AMEND BASED ON NEWLY DISCOVERED EVIDENCE

Under Fed. R. Civ. P. 15(a), leave to amend pleadings shall be freely given when justice so requires. Consistent therewith, the Board liberally grants leave to amend pleadings at any stage of the proceeding when justice requires, unless entry of the proposed amendment would violate settled law or be prejudicial to the rights of the adverse party or parties. *Karsten Manufacturing Corp. v. Editoy AG*, 79 USPQ2d 1783, 1785 (TTAB 2006).

The timing of the motion for leave to amend is a major factor in determining whether Applicant would be prejudiced by allowance of the proposed amendment. See TBMP Section 507.02 (3d ed. rev. 2012) and cases cited therein. A motion for leave to amend should be filed as soon as any ground for such amendment, e.g., newly discovered evidence, becomes apparent. A long delay in filing a motion for leave to amend may render the amendment untimely. *See Int’l Finance Company v. Bravo Co.*, 64 USPQ2d 1597, 1604 (TTAB 2002). Any party who delays filing a motion for leave to amend its pleading and, in so delaying, causes prejudice to its

adversary, is acting contrary to the spirit of Rule 15(a) and risks denial of that motion. *See Media Online Inc. v. El Clasificado Inc.*, 88 USPQ2d 1285, 1286 (TTAB 2008) (motion for leave to amend denied where proposed new claims were based on facts within petitioner's knowledge at the time petition to cancel was filed). Thus, in the present case, the Board must determine whether Opposer knew of the grounds for the mere descriptiveness claim at the time it filed its notice of opposition.

In support of its motion Opposer asserts that the following evidence that the term INNOVATION is merely descriptive of beer was not available when it filed the notice of opposition<sup>1</sup>:

- January 19, 2015 article in which one of Applicant's founders attributed Applicant's success to their "unique beer";
- March 11, 2015 newspaper articles in which one of Applicant's founders remembered suggesting the mark INNOVATION BREWING after assembling a cooler and commenting "everything we've had to do to start this place has been innovative" and Applicant's other founder stating "Innovation is what we had to do to make everything work";
- March 19, 2015 Brewers Association press release with footnote defining a traditional brewer as one whose beer derives from fermentation of traditional or innovative brewing ingredients;
- March 19, 2015 testimony of Applicant founder Nicole Dexter that "we are very innovative in our whole respect to getting the brewing together."

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<sup>1</sup> The Board disagrees that Opposer's 2015 Google® search for the phrase "the hallmark of craft beer and craft brewers is innovation" is new evidence that the term INNOVATION is merely descriptive of beer. The identical phrase was attributed to the Brewer's Association in a July 6, 2010 online article "Mother Earth Brewing", and then in the December 10, 2011 online article in The Coloradoan, and was reprinted verbatim in later excerpted Google search results and online articles.

The Board also finds that the July 5, 2012 online article referring to "innovative beer" was not newly discovered evidence.

The most that can be said for this evidence is that it bears a date after the notice of opposition was filed and in most cases includes the term innovation in connection with beer. The statements by Applicant quoted in the articles are not admissions that the term INNOVATION is descriptive for beer.<sup>2</sup> Opposer has presented no new evidence of descriptive use.

Further, Opposer pleaded its mark BOTTLING INNOVATION SINCE 1985 as a basis for likelihood of confusion in the notice of opposition, and in doing so specifically considered (paragraph 15) the “sight, sound, appearance and commercial impression [of] Opposer’s BOTTLING INNOVATION trademark. That is, Opposer considered the descriptive significance of the related term INNOVATION which appears in its own BOTTLING INNOVATION mark before pleading that mark was likely to be confused with Applicant’s mark INNOVATION BREWING.

In sum, the Board finds that Opposer does not rely on newly discovered evidence that the term INNOVATION is descriptive of beer. Accordingly, because it does not demonstrate that the motion is timely, Opposer’s motion to amend the petition to cancel to add a claim of mere descriptiveness is DENIED.

#### MOTION TO COMPEL SUPPLEMENTAL DEPOSITION AND RESPONSES’

Pursuant to Trademark Rule 2.120(e)(1), “If a party ... fails to attend a deposition or fails to answer any question propounded in a discovery deposition, or any interrogatory, ...the party .. seeking discovery may file a motion to compel ...

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<sup>2</sup> Nor is Applicant’s use of the hashtag #innovative for marketing purposes evidence that the term is descriptive of beer. Opposer’s reply brief, fn 8.

attendance at a deposition, or an answer, ... [which] must be supported by a written statement from the moving party that such party or the attorney therefor has made a good faith effort, by conference or correspondence, to resolve with the other party or the attorney therefor the issues presented in the motion but the parties were unable to resolve their differences.” *See Amazon Technologies Inc. v. Wax*, 93 USPQ2d 1702, 1705 (TTAB 2009).

a. sufficiency of Fed. R. Civ. P. 30(b)(6) testimony

Opposer moves the Board to compel Applicant to produce a supplementary Fed. R. Civ. P. 30(b)(6) witness because the March 19 and 20, 2015 testimony of Applicant’s founder Nicole Dexter was inadequate. More specifically, Opposer contends that the Fed. R. Civ. P. 30(b)(6) testimony did not address 6, or almost half, of the 13 topics listed in the notice of deposition, and submits ten instances of deficient testimony (transcript pages 32-33, 50, 77-79, 81-83, 85, 110-111, 113, 173, 222-223, and 234-236). The Board has reviewed the relevant testimony and finds that the witness was knowledgeable and prepared, and, as shown in a few examples below, that Opposer grossly exaggerates the alleged deficiencies of the testimony.

The witness being unable to recall, for example, why there were variations in a logo which is not part of the opposed mark or why she could not recall the exact names of the files she searched when seeking responsive discovery documents falls far short of any reasonable standard for compelling additional testimony. As another example, Opposer’s motion contends that Opposer has been deprived of testimony regarding advertising and planned use of the mark, and cites in support

the testimony that the witness arranged for a free ad in a college show ad, but did not follow up to make sure that the ad appeared, and was not aware of a change in Applicant's Twitter handle and domain name. Opposer is reminded that each party and its attorney has a duty to make a good faith effort to seek only such discovery as is proper and relevant to the issues in the case. See TBMP 408.01 and cases cited therein. Opposer's motion seeking additional testimony is a waste of its money and the Board's time.

b. sufficiency of responses to interrogatories

On October 2, 2014, Opposer served discovery requests, including the two interrogatories set forth below.

36. Identify all individuals and/or organizations with whom or which Applicant has consulted in connection with Opposer's claims against Applicant and/or this Opposition.

38. Identify all opinions and/or other advice received by Applicant concerning the likelihood of confusion between Applicant's Mark and Opposer's Marks and/or the merits of Opposer's claims against Applicant and/or this Opposition.

On October 29, 2014, Applicant served its responses, and with respect to interrogatory No. 36, identified individuals connected with other brewing companies, and privileged communications with two attorneys. With respect to interrogatory No. 38, Applicant consulted with counsel, and objected on the grounds of privilege with respect to the opinions of counsel, and otherwise consulted with the individuals listed in its response to interrogatory No. 36, "as well as friends, family, acquaintances", all of whom expressed the opinion that there was no likelihood of confusion, and that Applicant should defend its application. Thereafter Applicant

supplemented its response to interrogatory No. 36 to object that the interrogatory was overly broad, and then, following Opposer's communication indicating that the objection was late, withdrew the objection, and supplemented its response to interrogatory No. 36 to also identify "Miscellaneous friends, family, acquaintances."

Opposer now insists that it must have the names and addresses for those in the personal circle of the co-founders who have expressed the opinion that there is no likelihood of confusion.<sup>3</sup> The Board disagrees, and views with disfavor Opposer's over-reaching and frankly threatening approach to discovery. The Board will not be party to Opposer seeking a subpoena to depose family members who offered a laymen's opinion on likelihood of confusion, and who have not been identified in Applicant's initial disclosures as potential witnesses. Opposer requested, and received from Applicant, information regarding the opinions of legal counsel and others in the brewing industry regarding the merits of this opposition. No more is necessary. Because Applicant's responses to interrogatory Nos. 36 and 38 are sufficient, Opposer's motion to compel supplemental responses is DENIED.

#### CASE MANAGEMENT

For the duration of this proceeding, Opposer must obtain the Board's permission before filing any unconsented motion.<sup>4</sup>

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<sup>3</sup> It would have been better practice for Applicant to have objected initially that the requests were overly broad, an objection which the Board would have sustained. Moreover, Applicant reasonably could have construed the requests as seeking the opinion of those with a background in trademark law or the brewing industry, and not listed family, friends and acquaintances with a laymen's knowledge of the issues in this proceeding.

<sup>4</sup> Permission must be obtained by calling TTAB Attorney Elizabeth Dunn at 571-272-4267.

PROCEEDINGS HEREIN ARE RESUMED

Proceedings herein are resumed and dates are reset below.

Discovery	<b>closed</b>
Plaintiff's Pretrial Disclosures	<b>10/18/2015</b>
Plaintiff's 30-day Trial Period Ends	<b>12/2/2015</b>
Defendant's Pretrial Disclosures	<b>12/17/2015</b>
Defendant's 30-day Trial Period Ends	<b>1/31/2016</b>
Plaintiff's Rebuttal Disclosures	<b>2/15/2016</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>3/16/2016</b>

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.