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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA. SOUTHERN DIVISION

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Plaintiff, vs. KEN GRODY MANAGEMENT, INC. d/b/a KEN GRODY FORD; VINCE DIXON FORD, INC.; and DOES 1-10, Defendants.	Case No. 8:18-cv-00153-JVS (ASx) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS KEN GRODY MANAGEMENT, INC. AND VINCE DIXON FORD, INC.'S MOTION TO DISMISS OR STAY COMPLAINT PURSUANT TO FRCP 12(B)(1), 12(B)(3) ET SEQ.** Date: April 1, 2018 Time: 1:30 p.m. Courtroom: 10C The Honorable James V. Selna Complaint Filed: January 26, 2018

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This suit should be dismissed or stayed because it is a violation of judicial efficiency and seeks to usurp a TTAB proceeding that is already through trial and in closing arguments. Having been proceeding before the TTAB for almost 3 years, the TTAB should finish its proceeding and decide whether Defendants' MARKDOWN MADNESS trademark registration for automobile-related goods and services is likely to be confused with the NCAA's MARCH MADNESS mark.

This lawsuit concerns matters already being litigated between the parties in a Petition for Cancellation pending for years before the Trademark Trial and Appeals Board ("TTAB") since April 3, 2015 ("Cancellation Proceedings"). The Plaintiff National Collegiate Athletics Association ("NCAA") failed to show up for trial in that proceeding, which the TTAB found to be inexcusable neglect. Trial was closed and closing arguments in the form of trial briefs were due beginning January 30, 2018. Instead of filing a brief before the TTAB, the NCAA filed this suit for a do-over of the entire case, asking the TTAB to let the parties start over, proceeding in this District Court instead.

This is a clear violation of the first-to-file rule and judicial efficiency. This suit is an end-run in a second forum of improper venue given the late stage of the first proceedings. It also implicates the Court's inherent power to control its docket for judicial efficiency. The Central District of California has rightly rejected such a gambit in *Lodestar Anstalt v. Bacardi & Co.*, 2016 U.S. Dist. LEXIS 167983, *11 (C.D. Cal. Nov. 16. 2016), a case in which the plaintiff there took the same maneuver – only that plaintiff filed suit just before the dispositive motion deadline, whereas here, the TTAB proceeding was much later with the trial period having already closed. That case outcome is indistinguishable here.

The TTAB on average rules within 3 months of the close of proceedings, which clock will begin on either March 16, 2018 (the NCAA's deadline for its reply trial brief) or the date of oral argument (if oral argument is requested and scheduled).

This case should be dismissed without prejudice to refiling upon a final ruling of the TTAB. Alternatively, the case should be stayed until a final ruling of the TTAB.

I. PLAINTIFF'S ATTEMPT TO GARNER DEFAULT BASED ON A MISUNDERSTANDING IS MOOT

There are two Defendants in this case, Vince Dixon Ford (the registrant in the Cancellation Proceeding) and Ken Grody Management, Inc. In the same email chain, Defendants' counsel agreed to accept service for both Defendants and, later, the parties agreed to a brief extension of the time for responsive pleading to allow for informal discussions. *See* Declaration of Ben L. Wagner ("Wagner Decl.") at ¶¶ 2-5 & Ex. 1 thereto.

As a preliminary matter, the Court may have noted that the NCAA filed a Request for Clerk to Enter Default against Vince Dixon Ford but not Ken Grody Management. ECF No. 21. The parties disagree about whether Vince Dixon Ford is in default, with Defendants relying on the clear agreement to extend for 14 days the responsive pleadings deadline for all Defendants and Plaintiff relying on a typographical secretarial error resulting in the Stipulation filed with the Court erroneously listing only Ken Grody Ford. Wagner Decl. Ex. 2.[1]

However, the filing of this Motion moots this disagreement. Default has not been entered as of the filing of this Motion to Dismiss under Rule 12(b)(1) and 12(b)(3) *et seq*. *See* ECF Docket. As noted in the 2007 amendments to Federal Rule of Civil Procedure, even an untimely responsive pleading procedurally bars entry of default under F.R.C.P. 55, making the dispute over this misunderstanding moot.

In *In re Clark*, 2010 U.S. Dist. LEXIS 76123 (W.D. Wash. Jun. 28, 2010), the district court on appeal from default entered in the bankruptcy court, held that the

[1] After the error was brought to the attention of Defendants by Plaintiff, it was noted by Defendants that this was a typographical error. Plaintiff noted it was considering withdrawing the notice of default, but had not yet decided as of the filing of this motion. Regardless, as noted above, the filing of this motion before entry of default moots Plaintiff's request for entry default.

clerk had improperly entered default when an untimely responsive pleading had been filed just hours before its entry. *Id.* at *7. The Federal Rules of Civil Procedure 55(a) were amended in 2007 to eliminate any arguable timing requirement for a filing that prevents entry of default. *Id.* Thus "any act that 'show[s] an intent to defend,' even if that act was not authorized by a specific rule" is "sufficient [] to bar entry of default." *Id.* **7-8. This includes an untimely responsive pleading. *Id.* Thus, even if the clerk enters default in such situation, it is erroneous and cannot stand, and the court lacks discretion to deny relief from such erroneous default. *Id.* (reversing entry of default and refusal to provide relief from default).

Thus, the dispute over default is moot and of no moment on this Motion.

II. BACKGROUND

On April 3, 2015, The National Collegiate Athletic Association ("NCAA") filed a Petition for Cancellation with the Trademark Trial & Appeals Board ("TTAB") against Vince Dixon Ford, Inc.'s ("VD Ford") U.S. Trademark Registration No. 4,662,773 for MARKDOWN MADNESS, issued on May 2, 2014 in International Class ("IC Class") 35 for: "Automobile dealership services; promoting the sale of automotive goods of others by dissemination of promotional materials and product information; retail store services in the field of automobiles, automobile parts and accessories." Wagner Decl. Ex. 3.

The Petition for Cancellation is based on the NCAA's following U.S. Registrations for MARCH MADNESS: 1,571,340; 2,425,958; 2,425,962; 2,478,254; 2,485,443; 3,025,527; 3,303,263; 4,430,117 (collectively the "NCAA Registrations"). *Id.* As listed in the Petition, the NCAA Registrations are for IC Classes 9, 16, 21, 25, 28, 32, 41 (not IC Class 25) and cover college basketball tournaments; basketballs, basketball backboards, cups and mugs, various apparel, and carbonated soft drinks; various methods of sports casting, such as panel forums of athletic and entertainment personalities sporting event video cassettes and web casts, sports information via internet, programs, folders, handbooks, magazine and trading cards related to

interscholastic activities, telecommunications services, e-mail, voice mail and internet access services. Wagner Decl. Ex. 3.

The original trial date was set by an April 6, 2015 scheduling order to begin February 9, 2016 and close June 24, 2016. Wagner Decl. Ex. 4.

The Petition for Cancellation alleges that the NCAA has trademark rights in MARCH MADNESS based on its 25 years of use, the NCAA Registrations, millions of dollars offered or sold in connection with the registered marks, significant sums spent promoting or advertising the marks, popularity of the marks, and resulting goodwill. Wagner Decl. Ex. 3 ¶¶ 2-7. The Petition states as its grounds for cancellation that: "Use by Registrant of MARKDOWN MADNESS for the services set forth in its application, including as depicted in its specimens of use, is likely to result in confusion with Petitioner, or in the belief that Registrant or its services are in some way legitimately connected with, sponsored by, or licensed or approved by, Petitioner" and that VD Ford's MARKDOWN MADNESS registration should be cancelled on this basis. *Id.* ¶13 & Prayer.

A. TTAB Procedure

In TTAB cancellation proceedings, the TTAB procedure largely follows the Federal Rules of Civil Procedure for discovery and motion practice. Wagner Decl. ¶ 9. Parties may conduct depositions and written discovery, designate and depose expert witnesses, file motions to compel, make pleadings challenges, seek summary judgment and even seek discovery sanctions. *Id.*

In TTAB cancellation proceedings, following the close of discovery and resolution of dispositive motions, trial is conducted by written submissions. Wagner Decl. ¶ 10. What would normally be the case-in-chief is presented in the form of a 30-day trial period where Petitioner/Plaintiff files evidence in writing (including documentary evidence, trial deposition testimony, etc.). Defendant/Respondent then has a 30-day trial period to file evidence for its case-in-chief, which for example can include (like cross examination) discovery or trial deposition testimony. *Id.* This is

followed by a rebuttal trial period for Petitioner/Plaintiff to put on rebuttal evidence. *Id.*

Once the evidence is closed, what would normally be closing arguments, jury instructions and trial briefs in a federal action are all combined into trial briefs submitted following the trial periods. Wagner Decl. ¶ 11. Petitioner/Plaintiff has the first deadline to submit its opening trial brief, Defendant/Respondent than has a deadline to submit its opening trial brief, and Petitioner/Respondent is given the final deadline to submit a reply trial brief for rebuttal. *Id.* In addition to the trial briefs, the parties may elect (but are not requited) to have oral argument before a panel of 3 administrative judges of the TTAB who are assigned to the Cancellation Proceeding. Wagner Decl. ¶ 12.

Following this trial procedure, the 3-judge TTAB panel issues its decision. Measured from the end of the period (either the reply trial brief if no oral argument or from oral argument if elected) the TTAB averages three months (93 days) to issue its final decision on the cancellation petition. Wagner Decl. ¶ 13.

B. The TTAB Proceedings and their current Procedural Posture

Following VD Ford's Answer in the Cancellation Proceedings, the NCAA moved on August 28, 2015 to strike certain affirmative defenses asserted by VD Ford, which was granted on September 17, 2015, along with a resetting of dates. Wagner Decl. ¶ 14. The new trial periods extended from May 26, 2016 to October 10, 2016. *Id.*

After discovery closed and the NCAA failed to affirmatively submit any evidence during its trial period, on August 4, 2016, VD Ford filed a motion to dismiss the case based on failure of proof (the equivalent of a motion for directed verdict) and, on August 10, 2016, the NCAA filed a counter-motion seeking to reopen its trial period. Wagner Decl. ¶ 15. In the TTAB's ruling on the motions, the TTAB refused to reopen the NCAA's trial period, finding that the NCAA had failed to show "that its failure to submit any evidence or take any testimony during its assigned testimony

period is excusable" and instead "Petitioner's failure to take testimony or submit evidence during its assigned testimony period was wholly within its control and establishes that its neglect of this proceeding is **not** excusable[.]" Wagner Decl. ¶ 15 & Ex. 6 pp. 2-3 (emphasis added). The TTAB's Order declined dismissal at that point in the proceeding and reset remaining trial and trial brief dates. *Id.* & Ex. 6 p.4.

VD Ford stood on the NCAA's failure to submit trial proof and the Board ordered that the NCAA had no right to introduce additional evidence during its rebuttal period. Wagner Decl. ¶ 16 & Ex. 7.

With trial periods closed and only trial briefs remaining, the TTAB advised the parties in granting a further extension on November 18, 2017 to the parties: "because the parties have enjoyed a significant period of extensions already, **no further extensions and/or suspensions** (whether consented to or not) for settlement purposes will be granted absent a showing of extraordinary circumstances." Wagner Decl. ¶ 17 & Ex. 8 (emphasis in original). The trial briefs were due January 30, 2018 (Plaintiff's opening trial brief), March 1, 2108 (Defendant's trial brief), and March 16, 2018 (Plaintiff's reply trial brief). *Id.*

On January 29, 2018, having filed this lawsuit on January 26, 2018, the NCAA filed a motion requesting suspension of the Cancellation Proceeding. Wagner Decl. ¶ 18. The TTAB has not yet ruled on that Motion. *Id.* However, VD Ford timely filed both its Opposition to this Motion to Suspend and (although the NCAA failed to submit an opening trial brief) its own opening trial brief. *Id.* & Exs. 9-10.

The Complaint in this action seeks cancellation of VD Ford's Registration based on the alleged likelihood of confusion between VD Ford's Registration for MARKDOWN MADNESS and a subset of the Registrations relied upon in the Petition for Cancellation (U.S. Reg. Nos. 1,571,340; 2,485,443; 3,025,527). *See* Complaint at Count Four, ¶¶ 14 & 55. The Complaint relies on this same alleged likelihood of confusion to assert claims for trademark infringement, false designation of origin and unfair competition. *Id.* at Counts One through Three, ¶¶ 40, 45, 50.

III. LEGAL STANDARD

Dismissal or stay in light of an earlier-filed related case (sometimes called the "first to file" rule) is properly considered under Rule 12(b)(1) for lack of jurisdiction or Rule 12(b)(3) for improper venue. *AGCS Marine Ins. Co. v. Am. Truck & Trailer Body Co.*, 2013 U.S. Dist. LEXIS 3598, *4-5, 2013 WL 211196 (E.D. Cal. Jan. 8, 2013) (either Rule 12(b)(1) or (3)); *Widjaja v. Yum! Brands, Inc.*, 2009 U.S. Dist. LEXIS 135943, *4-5 (C.D. Cal. Jun. 8, 2009) (Rule 12(b)(3)); *Ervin v. Kelly*, 2010 U.S. Dist. LEXIS 74459, 2010 WL 2985675 (W.D. Wash. 2010) (same). Further, the Court has inherent power to stay proceedings in light of another proceeding in the interest of judicial efficiency and the orderly administration of justice. *Lodestar Anstalt v. Bacardi & Co.*, 2016 U.S. Dist. LEXIS 167983, *11 (C.D. Cal. Nov. 16. 2016).

"A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Lodestar Anstalt v. Bacardi & Co.*, 2016 U.S. Dist. LEXIS 167983, *11 quoting *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). "This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court." *Id.* quoting *id.* at 863-64.

In considering whether to dismiss the second-filed proceeding involving similar parties and issues that have previously been filed in another tribunal, three factors are considered: (1) the chronology of the actions, (2) the similarity of the parties, and (3) the similarity of the issues. *Widjaja v. Yum! Brands, Inc.*, 2009 U.S. Dist. LEXIS 135943, *4-5. "The first-to-file rule requires substantial similarity of parties and is satisfied whether or not there are additional unmatched parties, as long as some of the parties in one matter are also in the other matter." *Id.* *8. Also, "[t]he

first-to-file rule does not require that actions are identical; instead the issues must be sufficiently similar." *Id.* *10.

The power to stay is even broader, and a stay may issue considering (1) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay; (2) the possible damage which may result from the granting of a stay; and (3) the hardship or inequity which a party may suffer in being required to go forward. *Lodestar Anstalt v. Bacardi & Co.*, 2016 U.S. Dist. LEXIS 167983, *11.

In resolving this Motion, the Court is not limited to the pleadings and may consider and rely upon evidence submitted by the parties. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (Rule 12(b)(3)); *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 943 (S.D. Cal. 2007) (Rule 12(b)(1) motion); *Fossum v. Northwestern Mut. Life Ins. Co.*, 2010 U.S. Dist. LEXIS 99904, *2-3 (N.D. Cal. Sept. 16, 2010) (motion under first-to-file rule).

Similarly, judicial notice of the filings in those proceedings is appropriate (Wagner Decl. Exhibits 3 to 10 here). *Taylor v. AlliedBarton Sec. Servs. LP*, 2014 U.S. Dist. LEXIS 45754, *18 (E.D. Cal. Apr. 1, 2014) (judicial notice of order in other proceeding granted). This is because documents "pertaining to the [other] action are proper subjects of judicial notice [] if those proceedings have a direct relation to matters in issue." *See Granillo v. FCA United States LLC*, 2016 U.S. Dist. LEXIS 189900, *3 (C.D. Cal. Jan. 11, 2016) (citing *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992)).

IV. ARGUMENT

The Courts in this Circuit hold that a trademark lawsuit instituted late in the TTAB proceeding warrants a dismissal or stay of the lawsuit (not the TTAB proceeding). *See e.g. V.V.V. & Sons Edible Oils, Ltd. v. Meenakshi Overseas LLC*, 2016 U.S. Dist. LEXIS 44197, *16 (E.D. Cal. Mar. 31, 2016) (stay of claims relating to trademark that had pending appeal on TTAB decision); *Lodestar Anstalt v.*

Bacardi & Co., 2016 U.S. Dist. LEXIS 167983, *11 (C.D. Cal. Nov. 16. 2016) (stay of infringement case filed day before TTAB dispositive motions were due); *Unitek Solvent Servs. v. Chrysler Group LLC*, 2014 U.S. Dist. LEXIS 156248, *19-20, 2014 WL 5528234 (D. Haw. Oct. 31, 2014) (dismissing cancellation claim when TTAB cancellation proceeding pending, even though TTAB had already issued stay order).

The TTAB agrees, denying stays of TTAB proceedings when such forum shopping is attempted late in the proceedings. *Boyds Collection, Ltd. v. Herrington & Co.*, 65 U.S.P.Q.2D (BNA) 2017 (TTAB 2003); *Ortho Pharm. Corp. v. Hudson Pharm. Corp.*, 178 U.S.P.Q. (BNA) 429, 430 (T.T.A.B. 1973) (denying motion to suspend brought after party failed to submit additional evidence during trial period and indicated intent to file additional related proceeding; also denying motion to reopen trial period because no excusable neglect shown); 7 C.F.R. § 2.117(b) (dispositive motions may be resolved before taking up stay request based on pending civil action).

The first-filed TTAB proceeding warrants dismissal of the present action. The parties here are substantially similar, involving the same plaintiff (NCAA) and defendant (VD Ford), with the addition of Defendant Ken Grody Ford, who the Complaint alleges VD Ford's registration exists for the benefit of. Complaint ¶¶ 24. The Petition seeks cancellation of VD Ford's registration based on a likelihood of confusion, the exact same relief on the exact same grounds as Count Four of this Complaint. *Compare* Wagner Decl. Ex. 3 ¶13 and Complaint at Count Four, ¶¶ 14 & 55. The Complaint seeks additional claims for trademark infringement, false designation of origin and unfair competition, but again these allegations are based on there being a likelihood of confusion between the marks, an essential element of each claim. Complaint Counts One through Three, ¶¶ 40, 45, 50; *Rexel, Inc. v. Rexel Int'l Trading Corp.*, 540 F. Supp. 2d 1154, 1160 (C.D. Cal. 2007) (the issue of the likelihood of consumer confusion effectively resolves claims for trademark infringement, false designation and unfair competition).

Thus, the first-to-file rule is readily invoked and Plaintiff can offer no reason for why this case – filed years into the first proceeding – should not be dismissed. This federal court is the improper venue and subject matter jurisdiction will not properly attach unless and until a final judgment is entered by the TTAB. At that time, should the NCAA wish to appeal, it may do so pursuant to the procedures for such timely appeal at that time. *See* 37 CFR 2.145.

Similarly, the considerations under the Court's inherent power to stay are equally met as dictated by the indistinguishable recent Central District of California case of *Lodestar Anstalt v. Bacardi & Co.*, 2016 U.S. Dist. LEXIS 167983. There, Lodestar had filed a petition in opposition to Bacardi's trademark application to which Bacardi responded by petitioning to cancel Lodestar's trademark registrations. *Id.* **4-5. Over two years into the TTAB proceedings, the deadline for dispositive motions (the last act before trial periods got under way) was set to expire. *Id.* The day before the deadline for dispositive motions, Bacardi filed a lawsuit in this District asserting claims for trademark infringement and unfair competition based on the same marks and then filed a motion to suspend with the TTAB in light of the pending lawsuit. *Id.* at *5.

The Court found each of the three relevant factors warranted a stay pending resolution of the TTAB proceedings, factors equally or more favorable to a stay here:

First, efficiency and orderly process support a stay. The standard for likelihood of confusion is the same for the registration proceedings and infringement. *Lodestar Anstalt v. Bacardi & Co.*, 2016 U.S. Dist. LEXIS 167983 *8 (quoting *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1306 (2015)). Thus, the TTAB's final ruling "on the issue of likelihood-of-confusion will be highly persuasive authority" and "might even have preclusive effect." *Id.* Thus, the Court was "convinced that a stay would be the most efficient course." *Id.* *11. The Court distinguished a Ninth Circuit holding finding a stay inappropriate in *Rhoades v. Avon Products, Inc.*, 504 F.3d 1151 (9th Cir. 2007), because the suit in *Rhoades* was filed

while the TTAB proceedings were still in the discovery stages as compared with the day before dispositive motions. Thus, applying the rationale from *Rhoades*, the Court found: "that 'defer[ring] to . . . TTAB . . . would be the more efficient course of action.'" *Id.* quoting *Rhoades*, 504 F.3d at 1164, n.13 (alterations in original).

Similarly, the TTAB's Cancellation Proceedings here have proceeded well beyond discovery and the dispositive motion cut-off – the trial has already been completed and the deadlines for closing brief have largely passed (or are about to). *See* Wagner Decl. Exs. 8-10. As noted above, the same likelihood of confusion issues are being decided by the TTAB. VD Ford has advanced strong arguments in its Opening Brief before the TTAB as to why the NCAA cannot show a likelihood of confusion, including the deference afforded to the Examining Attorney's finding in issuing a registration for MARCH MADNESS for use with promotion of automobiles. *See* Wagner Ex. 10. In sum, a petitioner advancing a likelihood of confusion argument based on a mark that either has differences or covers different goods cannot sustain its burden of proof on likelihood of confusion grounds where nothing more than the registrations at-issue are submitted. *Id*. *discussing Reg Hyde Park Footwear Co. v. Hampshire-Designers*, 197 U.S.P.Q. (BNA) 639, 641 (TTAB 1977).

And the TTAB ruling is likely not only to be highly persuasive, but issue preclusive. The NCAA essentially failed to show up for trial and the TTAB found this was the result of inexcusable neglect. Wagner Decl. Ex. 6. And although an appeal of a TTAB judgment to a District Court sometimes permits diligent parties to submit additional proof and thus allow a *de novo* review by the District Court, this preclusive finding of inexcusable neglect will likely bar Defendant from doing so. *Daggett & Ramsdell, Inc. v. Marzall*, 128 F. Supp. 906, 908 (D.D.C. 1994) (party may not be able to introduce new evidence on appeal to district court "when the failure to introduce evidence [before the TTAB] is an act of gross negligence, bad faith, or a conscious suppression or willful withholding of available evidence").

Thus, this case presents a circumstance in which the TTAB's findings on likelihood of confusion will be entitled to deference even on appeal, and ultimately issue preclusive effect on any second-filed action asserting claims based on an asserted likelihood of confusion. *Kelley v. Ahern*, 541 B.R. 860, 864 (W.D. Wash. Nov. 23, 2015) ("It would create a perverse incentive to allow a party to avoid issue preclusion by knowingly failing to attend his own trial.").

If there is any distinction between *Lodestar* and here, it is that the efficiency grounds for a stay are even more compelling here, where the TTAB proceedings are much further along in the trial process and the preclusive effect of any TTAB ruling is much more likely. Thus, the potential efficiencies here fall well beyond those necessary to strongly support dismissal or a stay.

Second, no damage would result from a stay. Waiting years to file suit "undermines any argument that these claims require immediate resolution." *Lodestar Anstalt v. Bacardi & Co.*, 2016 U.S. Dist. LEXIS 167983 *8. Here, the TTAB proceeding has been going on for almost three years, the TTAB's trial periods are over, closing briefs are completed as of March 16, 2018 and a ruling will likely issue within three months from the closing of proceedings. Wagner Decl. ¶13 & Ex. 6. This factor also favors dismissal or a stay.

Third, it would be inequitable for the case to proceed right now. Allowing a party to "start all over again in a different forum on the eve of [the] TTAB's decision" would "clearly be inequitable." *Lodestar Anstalt v. Bacardi & Co.*, 2016 U.S. Dist. LEXIS 167983 **12-13. The TTAB found the NCAA's trial failures were the result of inexcusable neglect. *See* Wagner Decl. Ex. 6 pp. 2-3. VD Ford advanced its position on trial submissions and trial briefs in reliance on this failure of proof. *See id.* at Exs. 9-10. To start completely over on the eve of a trial decision would be inequitable. This factor also favors dismissal or a stay.

For these reasons, the Court should dismiss or (in the alternative) stay this second-filed action so that VD Ford is not permitted to proceed against Defendants

until the TTAB's Cancellation Proceedings are resolved.

V. CONCLUSION

This action should be dismissed or stayed pending final resolution of the TTAB's Cancellation Proceedings, which are through trial and just about done with the equivalent of closing argument.

Dated: March 4, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of San Diego, State of California, and am not a party to the above-entitled action.

On March 4, 2018, I filed a copy of the foregoing document by electronically filing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties listed on the courts CM/ECF.

Executed on March 4, 2018, at San Diego, California.

/s/ Ben L. Wagner
Ben L. Wagner