

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 MEDICAL EXTRUSION
12 TECHNOLOGIES, INC., a California
13 corporation,

Plaintiff,

14 v.

15 APOLLO MEDICAL EXTRUSION
16 TECHNOLOGIES, INC., a Delaware
17 corporation,

Defendant.
18

Case No.: 17-cv-2150-AJB-KSC

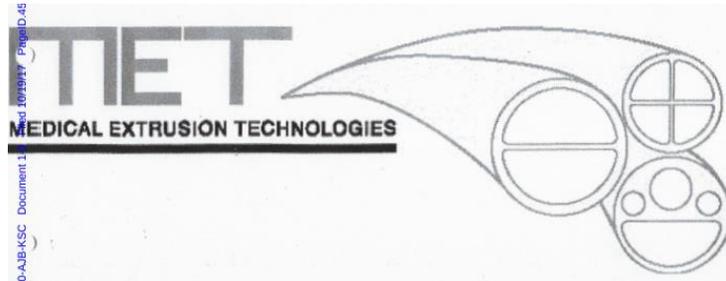
**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS
PLAINTIFF'S COMPLAINT
(Doc. No. 5)**

19 Before the Court is defendant Apollo Medical Extrusion Technologies, Inc.'s motion
20 to dismiss plaintiff Medical Extrusion Technologies, Inc.'s ("MET") complaint.
21 (Doc. No. 5.) MET opposes the motion. (Doc. No. 8.) For the reasons discussed herein, the
22 Court **DENIES** the motion.

23 **I. BACKGROUND**

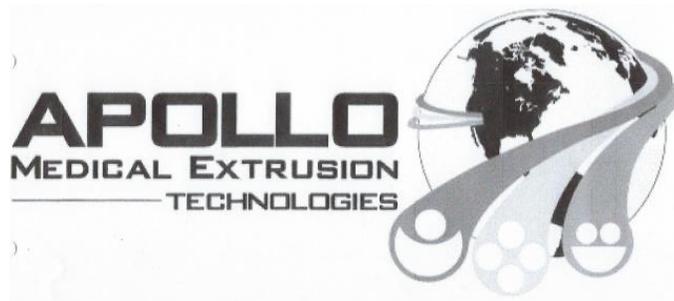
24 The following facts are taken from MET's complaint, (Doc. No. 1), and are
25 construed as true for the limited purpose of resolving the instant motion. *See Brown v. Elec.*
26 *Arts, Inc.*, 724 F.3d 1235, 1247 (9th Cir. 2013) (reasoning that when considering a motion
27 to dismiss, courts presume the facts alleged by the plaintiff are true). Here, MET filed for
28 registration of the mark "Medical Extrusion Technologies" in 2013, which Apollo opposed.

1 (Doc. No. 1 ¶¶ 6–7.) On August 18, 2017, the Trademark Trial and Appeal Board
2 (“TTAB”) issued a final ruling, refusing to register the mark. (Doc. No. 1-2 at 29–30.)
3 Notwithstanding the TTAB decision, MET owns a trademark on its logo, which displays
4 the mark. (Doc. No. 1 ¶ 10.) A typical representation of Applicant’s mark is shown below:



5
6
7
8
9 (Doc. No. 1-2 at 15.)

10 Without MET’s consent, beginning in 2014, Apollo used the mark as part of its name
11 (Apollo *Medical Extrusion Technologies*) and thus, in its advertising. (Doc. No. 1 ¶¶ 16–
12 17.) Further, Apollo’s logo, (Doc. No. 1-4 at 2, shown below), displays the text “Apollo
13 Medical Extrusion Technologies” to the left of three tubes surrounding a globe; MET’s
14 logo, (Doc. No. 1-3 at 2), displays the text “MET Medical Extrusion Technologies” to the
15 left of three tubes. MET demanded that Apollo cease and desist use of the mark and its
16 logo, and in response, Apollo began referring to itself as simply “Apollo Medical
17 Extrusion” at trade shows, on its website, and on social media. (Doc. No. 1 ¶ 21.) However,
18 in the latter half of 2015, Apollo resumed calling itself “Apollo Medical Extrusion
19 Technologies” and using its 2014 logo. (*Id.* ¶ 27.) An example of the allegedly confusing
20 logo is shown below:



21
22
23
24
25
26 (Doc. No. 1-4 at 2.)

27 MET filed its complaint on October 19, 2017, (Doc. No. 1), seeking de novo review
28 of the August 18, 2017 TTAB decision, (Doc. No. 1-2). Additionally, MET alleges

1 trademark infringement and unfair competition under federal law, and unfair trade
2 practices under California law. (Doc. No. 1.)

3 II. LEGAL STANDARDS

4 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
5 sufficiency of a plaintiff's complaint; it allows a court to dismiss a complaint upon a finding
6 that the plaintiff has failed to state a claim upon which relief may be granted. *See Navarro*
7 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

8 "The court may dismiss a complaint as a matter of law for (1) lack of a cognizable
9 legal theory or (2) insufficient facts under a cognizable legal claim." *SmileCare Dental*
10 *Grp. v. Delta Dental Plan of Cal.*, 88 F.3d 780, 783 (9th Cir. 1996) (internal quotations
11 omitted). However, a complaint will survive a motion to dismiss if it contains "enough
12 facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550
13 U.S. 544, 570 (2007). In making this determination, a court reviews the contents of the
14 complaint, accepting all factual allegations as true and drawing all reasonable inferences
15 in favor of the nonmoving party. *See Cedars-Sinai Med. Ctr. v. Nat'l League of*
16 *Postmasters of U.S.*, 497 F.3d 972, 975 (9th Cir. 2007).

17 Notwithstanding this deference, the reviewing court need not accept legal
18 conclusions as true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (reasoning that
19 allegations of material fact are accepted as true and reviewed for plausibility, while
20 conclusory statements are ignored); *Twombly*, 550 U.S. at 555 (reasoning that a complaint
21 does not need detailed factual allegations, but "a plaintiff's obligation to provide the
22 grounds of his entitlement to relief requires more than labels and conclusions, and a
23 formulaic recitation of the elements of a cause of action will not do."); *Pareto v. FDIC*,
24 139 F.3d 696, 699 (9th Cir. 1998) (reasoning that "conclusory allegations of law and
25 unwarranted inferences are not sufficient to defeat a motion to dismiss.").

26 However, "[w]hen there are well-pleaded factual allegations, a court should assume
27 their veracity and then determine whether they plausibly give rise to an entitlement to
28 relief." *Iqbal*, 556 U.S. at 664.

III. DISCUSSION

MET seeks de novo review of TTAB’s decision refusing to register the mark. (Doc. No. 1 ¶ 1.) Further, MET alleges two federal causes of action and one state law claim. (*Id.*) Apollo seeks to dismiss the appeal and each of the other claims, arguing in each instance that MET did not state a claim upon which relief can be granted. (Doc. No. 5-1 at 1–2.) Since Apollo’s arguments for dismissing the federal and state law claims are predicated on dismissing the appeal, the Court will first examine whether MET adequately sought de novo review of the TTAB decision, and then will examine the remaining claims.

A. MET ADEQUATELY PLEADS ITS REQUEST FOR DE NOVO REVIEW OF THE TTAB DECISION

Apollo contends that MET’s appeal of the TTAB decision should be dismissed because MET failed to file its complaint within two calendar months of the TTAB decision, and thus the appeal is time-barred. (Doc. No. 5-1 at 1.) MET argues that the appeal should survive this motion to dismiss because the time limit is 63 days, not two calendar months. (Doc. No. 8 at 2.)

“After the TTAB issues a registration decision, a party ‘who is dissatisfied with the decision’ may either appeal to the Federal Circuit or file a civil action in district court seeking review.” *B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293, 1315 (2015) (citing 15 U.S.C. § 1071(a)(1), (b)(1)). Here, the statute—15 U.S.C. § 1071—lays out broad parameters for such appeals, and the administrative agency—U.S. Patent and Trademark Office (“USPTO”)—promulgates rules and regulations delineating specifics. For example, the statute establishes that the time limit for filing an appeal for de novo review is “not less than sixty days, as the Director appoints[.]” 15 U.S.C. § 1071(b)(1). The USPTO instituted the TTAB Rules of Practice, which clarified that “civil action[s] must be commenced no later than sixty-three (63) days after the date of the final decision of the Trademark Trial and Appeal Board or Director.” 37 C.F.R. § 2.145(d)(3).

The discrepancy in Apollo’s argument arises from its use of the rule as it existed prior to October 7, 2016. The USPTO amended the TTAB Rules of Practice at least nine

1 times since its inception in 1982. On October 7, 2016, “[t]he Office also [changed] the
2 times for filing a notice of appeal or commencing a civil action from two months to sixty-
3 three days (i.e., nine weeks) from the date of the final decision of the Board.”
4 Miscellaneous Changes to Trademark Trial and Appeal Board Rules of Practice, 81 Fed.
5 Reg. 69950, 69969 (Oct. 7, 2016). This change was effective as of January 14, 2017. *Id.* at
6 69988. Thus, though the rule used to delineate two months as the deadline, the rule as it
7 stands today defines a 63 day deadline.

8 Here, the TTAB decision was dated August 18, 2017. (Doc. No. 1-2 at 1.) MET filed
9 its complaint on October 19, 2017. (Doc. No. 1.) In counting the calendar days, MET filed
10 its complaint on the 62nd day. *See* 37 C.F.R. § 2.145(d)(4)(ii) (stating that “the times
11 specified in this section in days are calendar days”). Thus, the appeal was filed within the
12 statutory and regulatory time limit. Thus, upon a finding that MET sought its de novo
13 review within the applicable time period, the Court **DENIES** Apollo’s motion to dismiss
14 the appeal as untimely.

15 **B. MET’S FEDERAL AND STATE LAW CLAIMS**

16 The Court will briefly address MET’s federal and state law claims, each of which
17 Moving Defendants seek to dismiss. Apollo contends that MET’s other claims are
18 precluded by TTAB’s final judgment. (Doc. No. 5-1 at 2.) MET argues that since the TTAB
19 decision is pending appeal, the previous decision does not have preclusive effect.
20 (Doc. No. 8 at 3–4.)

21 The TTAB found that the mark was “highly descriptive” and thus did not have
22 “acquired distinctiveness.” (Doc. No. 1-2 at 29.) Here, issue preclusion would apply when
23 “an issue of fact or law is actually litigated and determined by a valid and final judgment,
24 and the determination is essential to the judgment, the determination is conclusive in a
25 subsequent action. . . .” *See B&B Hardware*, 135 S. Ct. at 1303 (internal quotations
26 omitted); *New Hampshire v. Maine*, 532 U.S. 742, 748–49 (2001).

27 However, Apollo’s reliance on *B&B*’s holding to support its assertion that MET’s
28 claims are issue precluded has been rejected before. *See Hanginout, Inc. v. Google, Inc.*,

1 Case No.13cv2811 AJB (NLS), 2015 WL 11254689, at *3 (S.D. Cal. June 3, 2015). In
2 rejecting the same argument Apollo makes, the Court stated:

3 The holding of *B&B* however, is not as far-reaching as Plaintiff
4 contends. *B&B* involved the application of issue preclusion in the context of
5 trademark law and TTAB opposition proceedings. In *B&B*, the TTAB made
6 a determination that one party argued should have an issue-preclusive effect
7 in a related district court proceeding. The Supreme Court recognized that
8 preclusion was not limited to instances where two *courts* evaluated the same
9 issue, and often applied to agency decisions. *B&B* held that issue preclusion
10 could apply to decisions of an administrative agency where the ordinary
11 elements of issue preclusion are met, and the issue adjudicated by the TTAB is
12 materially the same as that before a district court. Because the TTAB decision
13 in *B&B* was not appealed, the Supreme Court resorted to general principles
14 of issue preclusion in reaching its holding. Plaintiff reads *B&B* to support the
15 conclusion that any decision by the TTAB would be binding on issues pending
16 before this Court. Such reliance neglects to account for the appeal mechanism
17 available to a party unsatisfied with a TTAB decision.

18 *Id.* (internal citations omitted). The Court ultimately held “[r]egardless of how thoroughly
19 an issue is litigated before the TTAB, if the unsuccessful party appeals the decision,
20 deference to the TTAB is no longer efficient.” *Id.* at *4. Thus, this Court continues to hold
21 that the issues before the Court are not precluded by TTAB’s decision.

22 However, with that said, MET’s trademark infringement, unfair competition, and
23 unfair trade allegations should be stayed pending the resolution of the appeal. The
24 trademark infringement claim, particularly, could become precluded depending on how
25 this Court rules on the MET’s appeal of TTAB’s decision. In the complaint, MET alleges
26 Apollo infringed by using both the mark and the logo. (Doc. No. 1 at 6.) Thus, if the Court
27 affirms TTAB’s decision, MET’s argument that Apollo infringed on the mark would be
28 precluded. The Ninth Circuit noted that “[i]n the context of district court litigation, this
potential problem [issue preclusion] can be avoided, whether by delaying further
proceedings in the second action pending conclusion of the appeal in the first action”

Id. at 882–83 (internal quotations omitted).

1 Here, the Court will follow the Ninth’s Circuit’s guidance. A court’s power to stay
2 proceedings is incidental to its inherent power to control the disposition of its cases in the
3 interests of efficiency and fairness to the court, counsel, and litigants. *Landis v. N. Am. Co.*,
4 299 U.S. 248, 254 (1936); *see also Single Chip Sys. Corp. v. Intermec IP Corp.*, 495 F.
5 Supp. 2d 1052, 1057 (S.D. Cal. 2007). A stay may be granted pending the outcome of other
6 legal proceedings related to the case in the interests of judicial economy. *Leyva v. Certified*
7 *Grocers of Cal., Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979). Ordering a stay in this case
8 will “provide for a just determination of the case[] pending before it.” *Id.* at 864. Thus,
9 MET’s other claims are hereby **STAYED** pending the outcome of MET’s appeal.

10 **IV. CONCLUSION**

11 The Court **DENIES** Apollo’s motion to dismiss, finding MET’s appeal is not
12 untimely and is not issue-precluded by TTAB’s conclusions. (Doc. No. 5-1.) The Court
13 also **STAYS** the trademark infringement, unfair competition, and unfair trade claims
14 pending the resolution of the Court’s ruling on MET’s TTAB appeal.

15 **IT IS SO ORDERED.**

16
17 Dated: April 10, 2018


18 Hon. Anthony J. Battaglia
19 United States District Judge
20
21
22
23
24
25
26
27
28