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TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Elgin

April 9, 2021

Opposition No. 91233735

*Jaime Moreno DBA American Cannabis
Company & Venice Kush*

v.

Hugo Moreno Olvera

**Before Wolfson, Lynch, and Johnson,
Administrative Trademark Judges.**

By the Board:

This case now comes up for consideration of Applicant's motion, filed October 13, 2020, for involuntary dismissal under Trademark Rule 2.132(a), 37 C.F.R. § 2.132(a).¹ On October 31, 2020, Opposer opposed the motion and requested that the Board reopen Opposer's trial period.²

We have considered the parties' briefs and any evidence submitted therewith, but address the record only to the extent necessary to set forth our analysis and findings

¹ 33 TTABVUE. Record citations are to TTABVUE, the Board's publicly available docket history system. See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

² 37 TTABVUE 16. The Board permitted Opposer to refile his brief with proof of service, which Opposer timely did on January 7, 2021. 37 TTABVUE. All references to Opposer's brief in opposition are to the later-filed submission at 37 TTABVUE; the filing at 35 TTABVUE is given no further consideration. Applicant did not file a reply.

and do not repeat or address all of the parties' arguments or evidence. *Guess? IP Holder LP v. Knowlux LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

I. Relevant Background

On March 31, 2017, Opposer filed a notice of opposition against registration of the mark VENICEKUSH in standard characters for "Clothing, namely, hats, shirts, socks, jackets, sweaters, and gloves" in International Class 25.³ On April 19, 2018, the Board granted judgment on the pleadings as to certain pleaded claims, leaving as the sole remaining ground for opposition a claim of non-ownership of the subject mark.⁴ Applicant, in his answer, denies the salient allegations of the claim.⁵

As last reset, Opposer's main trial period ended April 26, 2020 and his rebuttal trial period ended August 9, 2020. Opposer's brief was due October 8, 2020.⁶ Applicant seeks dismissal of the opposition with prejudice in view of Opposer's failure to submit any evidence during trial or file a brief.⁷

³ Application Serial No. 87172475, filed September 15, 2016 based on an allegation of first use and first use in commerce of September 15, 2010 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

⁴ See 1 TTABVUE 5 (Notice of Opposition); 13 TTABVUE 9 (dismissing claims of fraud and false suggestion of a connection); 26 TTABVUE (order construing "Amended Notice of Opposition" as Opposer's election to proceed only on the ground of non-ownership, and confirming that the original notice of opposition (1 TTABVUE) and Applicant's answer thereto (4 TTABVUE) are the operative pleadings).

⁵ See 4 TTABVUE.

⁶ See 32 TTABVUE 1.

⁷ 33 TTABVUE. Applicant also did not file any evidence during his trial period, which ended June 25, 2020. See 32 TTABVUE 1. Although a motion for judgment under 37 CFR § 2.132(a) should be filed before the opening of the moving party's testimony period, we have exercised our discretion to consider Applicant's later-filed motion. See Trademark Rule 2.132(c), 37 CFR § 2.132(c); *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710, 1712 (Fed. Cir. 1991).

In response, Opposer contends he has made evidence of record, pointing to “email communication, receipts, and some kind of documentation” served on Applicant with Opposer’s initial disclosures.⁸ Opposer further asks the Board to take judicial notice of evidence attached to his response brief.⁹ Finally, Opposer requests that his testimony period be reopened to allow him an opportunity to submit additional evidence.¹⁰

II. Decision

A. No Evidence of Record

We first turn to Opposer’s argument that he has introduced evidence in the proceeding. There are a number of ways to introduce evidence into the record in a Board proceeding.¹¹ To be considered at final hearing, however, all evidence that is not automatically of record must be properly introduced during a party’s trial period. *Cf. Land O’Lakes, Inc. v. Hugunin*, 88 USPQ2d 1957, 1960 n.7 (TTAB 2008) (evidence

⁸ See 37 TTABVUE 5.

⁹ See *id.* at 2-3, 25-57. These documents were included as exhibits to Applicant’s Answer: a partial “Affidavit of Fact and Truth” by Applicant (the complete, signed version is at 4 TTABVUE 7-10); California articles of incorporation of “Venice Kush”; a California Seller’s Permit; a California trademark registration; and an application for event insurance.

¹⁰ *Id.* at 5. Opposer states that he intends to introduce evidence in support of “fraud” – however, Opposer’s fraud claim was dismissed and is not a pending ground for opposition. See note 4, *supra*.

¹¹ For example, evidence may be introduced either in the form of testimony depositions taken by a party or by witness affidavits or declarations. Trademark Rules 2.123, 37 C.F.R. § 2.123. Documents and other exhibits may be made of record with appropriate identification and introduction by a witness. *Id.* Certain specified types of evidence, such as official records and printed publications and discovery responses, also may be introduced by filing the materials with the Board under cover of a notice of reliance. Trademark Rules 2.120(k), 2.122(e), 37 C.F.R. §§ 2.120(k), 2.122(e). See generally TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 703-705 (2020).

submitted with summary judgment motion not of record); *Univ. Games Corp. v. 20Q.net, Inc.*, 87 USPQ2d 1465, 1468 n.4 (TTAB 2008) (same). Evidence not obtained and filed in compliance with the rules of practice will not be considered by the Board. Trademark Rule 2.123(k), 37 C.F.R. § 2.123(k). *See, e.g., Baseball Am. Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1846 n.8 (TTAB 2004) (materials submitted outside of applicant's assigned testimony period and which failed to comply with the Board's evidentiary rules given no consideration); *Original Appalachian Artworks Inc. v. Streeter*, 3 USPQ2d 1717, 1717 n.3 (TTAB 1987) (stating a party may not reasonably presume evidence is of record when it is not offered in accordance with the rules). *See also* TBMP § 706.

Opposer has not properly made any evidence of record during his trial period in this proceeding. Any documents served as part of Opposer's initial disclosures, and the exhibits attached to Opposer's brief, are not properly of record because they were not submitted during Opposer's trial period. Most of the documents that are the subject of Opposer's request for "judicial notice" do not comprise the kind of facts that may be judicially noticed by the Board. *See* Fed. R. Evid. 201(b);¹² *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1692-93 (Fed. Cir. 2018) (discussing the taking of judicial notice in Board proceedings). *See also* TBMP § 704.12(a) & nn.1-2 (discussing the kinds of facts that may be judicially

¹² Rule 201(b) provides that a tribunal "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the [tribunal's] territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."

noticed, and collecting cases in which the Board has taken, or declined to take, judicial notice of facts). Moreover, Opposer's request for judicial notice is untimely. *See Litton Bus. Sys., Inc. v. J.G. Furniture Co.*, 190 USPQ 431, 434 (TTAB 1976) (“[W]e should not use judicial notice to remedy plaintiff's failure to present adequate evidence.”). *See also* TBMP § 704.12(b) (“The request [for judicial notice] should be made during the requesting party's testimony period, by notice of reliance accompanied by the necessary information.”).¹³

Accordingly, unless Opposer's testimony period is reopened, it would be futile to allow this case to proceed. Fed. R. Civ. P. 6(b)(1)(B); *Gaylord Enter. Co. v. Calvin Gilmore Prods. Inc.*, 59 USPQ2d 1369, 1373 (TTAB 2000).

B. Reopening of Opposer's Testimony Period

To overcome Applicant's motion for involuntary dismissal, Opposer must show good and sufficient cause why judgment should not be rendered against him, failing which the notice of opposition will be dismissed with prejudice. The “good and sufficient cause” standard in the context of Trademark Rule 2.132(a) is equivalent to the “excusable neglect” standard which Opposer would be required to meet to reopen Opposer's testimony period under Fed. R. Civ. P. 6(b)(1)(B). *PolyJohn Enters. Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860, 1860-61 (TTAB 2002).

¹³ Applicant has not made any admissions in his answer that would establish Opposer's entitlement to a statutory cause of action, *see Spanishtown Enters., Inc. v. Transcend Resources, Inc.*, 2020 USPQ2d 11388, at *2 (TTAB 2020) (discussing change in nomenclature of doctrine formerly known as “standing”), or Opposer's claim of Applicant's non-ownership of the subject mark. The documents attached to Applicant's Answer, 4 TTABVUE 6-94, also are not of record in the proceeding.

As discussed by the Board in *Pumpkin, Ltd. v. Seed Corps*, 43 USPQ2d 1582, 1585-86 (TTAB 1997), the Supreme Court has clarified the meaning and scope of “excusable neglect” as used in the Federal Rules of Civil Procedure and elsewhere. In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 395 (1993), the Court held that the determination of whether a party’s neglect is excusable is “at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission.” These include:

- (1) The danger of prejudice to the non-movant;
- (2) The length of the delay and its potential impact on judicial proceedings;
- (3) The reason for the delay, including whether it was within the reasonable control of the movant; and
- (4) Whether the movant acted in good faith.

Id. In subsequent applications of this test, several courts and the Board have stated that the third *Pioneer* factor – namely, the reason for the delay and whether it was within the reasonable control of the movant – might be considered the most important factor in a particular case. *See Pumpkin*, 43 USPQ2d at 1587, n.7 and cases cited therein. *See also Luster Prods., Inc. v. Van Zandt*, 104 USPQ2d 1877, 1878 (TTAB 2012). The Board balances the reason for the delay with the other factors enumerated by the Supreme Court in *Pioneer* to take into account all relevant circumstances. *Coffee Studio LLC v. Reign LLC*, 129 USPQ2d 1480, 1482 (TTAB 2019).

1. First *Pioneer* Factor: Danger of Prejudice

The type of prejudice contemplated by the first *Pioneer* factor is prejudice to the non-movant's ability to litigate the case, e.g., where the non-movant has lost evidence or witnesses as a result of the delay. *See Pumpkin*, 43 USPQ2d at 1587. Applicant has not pointed to any specific loss of evidence or witness testimony as a result of Opposer's delay, and there is no evidence in the record that Applicant's ability to defend against Opposer's claim has been prejudiced by the delay. Accordingly, this factor weighs in favor of finding excusable neglect.

2. Second *Pioneer* Factor: Length of Delay

With respect to the length of the delay and its potential impact on proceedings, the Board must evaluate the total length of the delay caused by Opposer's failure to properly offer evidence during his testimony period or file a brief and the resulting motion practice, including the time for the Board to consider the pending motion. *Coffee Studio*, 129 USPQ2d at 1483 (citing *Pumpkin*, 43 USPQ2d at 1588).

It has been almost a year since Opposer's testimony period closed. Reopening Opposer's testimony period would further delay resolution of this case by many months and runs counter to the Board's interest in an expeditious adjudication of this and other cases, as well as Applicant's interest in the resolution of this case. *See Pumpkin*, 43 USPQ2d at 1588 ("The Board, and parties to Board proceedings generally, clearly have an interest in minimizing the amount of the Board's time and resources that must be expended on matters[.]"). Accordingly, we find this factor weighs against a finding of excusable neglect.

3. Third *Pioneer* Factor: Reason for Delay

Turning to the third *Pioneer* factor, the reason for the delay, Opposer claims his prior counsel “kept possession of documentary evidence given to him by Opposer in order for counsel to represent Opposer [sic] case to the Board. Counsel . . . would not return my phone calls after a disagreement concerning his competence to prosecute the case. If not for counsels [sic] neglect there would be no delay by Opposer.”¹⁴

The Board granted the motion of Opposer’s former counsel, The Berglund Group (“TBG”), to withdraw from the proceeding on December 21, 2019 – over four months before Opposer’s trial period closed.¹⁵ TBG stated it was Opposer who would not return his counsel’s calls, and “[t]he only documents and property in TBG’s possession related to this action were the pleadings filed by TBG on behalf of Opposer which [TBG] emailed to Opposer at the time of filing.”¹⁶ Accordingly, Opposer’s representations regarding the fault of his former counsel are, at best, inconsistent with the record in this proceeding.

Nonetheless, on January 18, 2020, Opposer stated he intended to represent himself without the aid of counsel.¹⁷ Notwithstanding that Opposer appears pro se, the Board expects all parties appearing before it, regardless of whether they are

¹⁴ 37 TTABVUE 14.

¹⁵ 27 TTABVUE. Counsel supplemented his withdrawal on December 16, 2019 in response to the Board’s order. *See* 29 TTABVUE. The Board notes that Opposer initiated this proceeding without the aid of counsel. *See* 1 TTABVUE. Subsequently, two sets of counsel have appeared and withdrawn from representing Opposer in this proceeding. *See* 7, 23, 24, 27, 29 TTABVUE. Applicant’s former counsel also withdrew from the proceeding. *See* 17 TTABVUE. Accordingly, both parties currently appear pro se.

¹⁶ 29 TTABVUE 5-6 (Declaration of Russell J. Miller ¶¶ 6, 8).

¹⁷ 31 TTABVUE.

represented by counsel, to comply with applicable rules and authorities. *McDermott v. S.F. Women's Motorcycle Contingent*, 81 USPQ2d 1212, n.2 (TTAB 2006), *aff'd unpub'd*, 240 Fed. Appx. 865 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1109 (2008). See also 30 TTAVUE 2-3 (warning Opposer that representation by an attorney is strongly advisable and strict compliance with Board's rules is required of all parties, whether or not they are represented by counsel). Opposer assumed responsibility for this case as a pro se plaintiff, and in so doing took responsibility for moving this case forward on the established schedule. See *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1860 (TTAB 1998). If Opposer believed that he needed more time to obtain papers or files, it was incumbent upon him to file a motion to extend the deadline for his testimony period before the period closed more than three months later.

In view thereof, the failure to file evidence and a brief appears to be wholly in the control of Opposer. This weighs heavily against a finding of excusable neglect.

4. Fourth *Pioneer* Factor: Good Faith

The fourth factor concerns Opposer's good faith. There is no evidence of record that Opposer failed to file evidence during his testimony period in bad faith. Accordingly, we find this factor neutral.

5. Decision

After careful consideration of the *Pioneer* factors and all of the relevant circumstances in this case, we find that Opposer's delay was not the result of excusable neglect.

Dismissal is appropriate under Section 2.132(a) of the Trademark Act where the plaintiff's time for taking testimony has expired and the plaintiff has not taken any testimony or offered any evidence. Because Opposer failed to take any testimony or offer any other evidence in support of his claim during his assigned testimony period, and because we determine that Opposer is not entitled to a reopening of the period, Applicant's motion to dismiss the opposition under Trademark Rule 2.132(a) is **granted** and the opposition is **dismissed with prejudice**.