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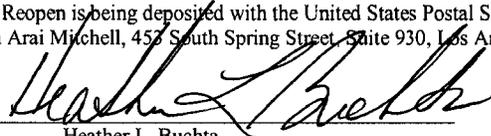
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91174297
Party	Defendant FREELIFE INTERNATIONAL, LLC FREELIFE INTERNATIONAL, LLC 333 Quarry Road Milford, CT 06460
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Date	05/03/2007
Attachments	response to motion to reopen.pdf (5 pages)(241723 bytes)

I hereby certify that this correspondence is being electronically filed with the United States Patent and Trademark Office, Trademark Trial and Appeal Board, on the date set forth below.

I hereby further certify that a copy of the below Response to Motion to Reopen is being deposited with the United States Postal Service on the date set forth below as first class mail in an envelop addressed to: John Arai Mitchell, 457 South Spring Street, Suite 930, Los Angeles, CA 90013, Attorney for Opposer.

Date of Signature and Deposit: May 3, 2007


Heather L. Buchta

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

Brandstorm Inc.

Opposer,

v.

Opposition No. 91174297

Freelife International, LLC

Applicant.

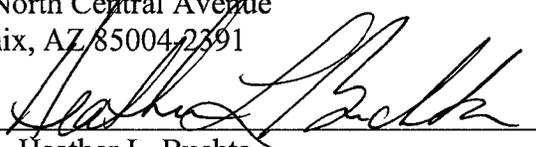
RESPONSE TO MOTION TO REOPEN

Pursuant to the Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 502.02(b), Applicant FreeLife International, LLC hereby responds to Opposer Brandstorm Incorporated's Motion to Reopen. This Response is supported by the attached Memorandum of Points and Authorities.

Respectfully submitted this 3rd day of May, 2007.

QUARLES & BRADY LLP
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By:


Heather L. Buchta

Attorneys for Applicant FreeLife International LLC

MEMORANDUM OF POINTS AND AUTHORITIES

Applicant filed a Motion to Dismiss Opposer's Notice of Opposition in this matter, based upon Opposer's lack of standing and failure to state a claim, on January 9, 2007 ("Motion to Dismiss"). Opposer failed to file any response to Applicant's Motion to Dismiss within the time allotted by TBMP § 502.02(b). As a result, the Trademark Trial and Appeal Board ("Board"), dismissed the oppositions with prejudice and terminated the proceedings on March 15, 2007.

Opposer now seeks to have the Board reopen the proceedings, requiring the Board and Applicant to invest additional time in this matter, based solely upon (1) Opposer's alleged failure to understand procedural rules, (2) events that occurred at least two months after Opposer's time to respond expired, and (3) conclusory statements regarding Opposer's alleged anticipated response to the Motion to Dismiss. These bases do not support Opposer's claim of excusable neglect under the test set forth in Pioneer Investment Services Co. v. Brunswick Associates Ltd Partnership, 507 U.S. 380 (1993) and Pumpkin, Ltd v. The Seed Corps., 43 U.S.P.Q.2d 1582 (TTAB 1997) (the reason for the delay including whether it was within the reasonable control of the moving party, whether the moving party had acted in good faith, the prejudice to the non-moving party, and the length of the delay and its potential impact on judicial proceedings). In applying this test the reason for the delay and whether it was in the reasonable control of the moving party is the most important factor. Atlanta-Fulton County Zoo, Inc. v. DePalma, 45 U.S.P.Q.2d 1858, 1859 (TTAB 1998). As set forth below, under this test Opposer's Motion to Reopen should be denied and the dismissal with prejudice sustained.

I. FAILURE TO UNDERSTAND PROCEDURAL RULES IS NOT EXCUSABLE NEGLIGENCE

Opposer claims its failure to file a response to the Motion to Dismiss was due to a misunderstanding "as to when, if ever, Opposer was to file a reply" to Applicant's Motion. (Motion to Reopen, pg. 3). However, failure to understand unambiguous procedural rules does not constitute excusable neglect. Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co., 55 U.S.P.Q.2d 1848, 1852 (TTAB 2000), *citing* Advanced Estimating Systems, Inc. v. Timothy J. Riney and Damon, Inc., 130 F.3d 996, 998, 45 U.S.P.Q.2d 1153 (11th Cir. 1997), and cases cited therein.

Section 502.02(b) of the Trademark Trial and Appeal Board Manual clearly states, "[a] brief in response to a motion, except a motion for summary judgment, must be filed within 15

days from the date of service of the motion (20 days if service of the motion was made by first class mail, 'Express Mail,' or overnight courier)." This rule is clear on its face as to when a response to a motion should be filed. Therefore, Opposer's failure to read or understand this unambiguous rule does not rise to the level of excusable neglect and cannot serve as a basis to reopen this proceeding.

Opposer has argued that the suspension issued by the Board on January 22, 2007 created the ambiguity that resulted in Opposer's confusion. However, the suspension stated only that the proceedings were suspended pending the outcome of the Motion to Dismiss; there was nothing indicating that Opposer was not obligated to file a response to the Motion to Dismiss. Thus, Opposer's argument is rather disingenuous, especially given the unambiguous language of Section 502.02(b) of the Trademark Trial and Appeal Board Manual.

Finally, Opposer's "misunderstanding" was wholly within Opposer's reasonable control. If Opposer found the language of the Board's suspension notice to be ambiguous, Opposer could have easily contacted the Board's representatives handling the case or further researched the Trademark Trial and Appeal Board Manual. However, Opposer failed to take any such action to clarify its understanding until more than two months after its response to the Motion to Dismiss was due. These facts further weigh in favor of a finding of no excusable neglect and sustaining the dismissal.

II. EVENTS THAT OCCURRED IN APRIL CANNOT AFFECT AN OBLIGATION TO ACT IN JANUARY

Opposer cites the fact that a new opposition "is going to be filed" in April as a grounds for excusing its failure to respond to the Motion to Dismiss in January. (Motion to Reopen, pg. 1). Applicant fails to see how an event, occurring months after a deadline passes, can serve as a basis for excusing compliance with that deadline.

As set forth above, Applicant's Motion to Dismiss was filed and served on Opposer by mail on January 9, 2007; Opposer had until January 29, 2007 to respond to the Motion to Dismiss under the rules of the Trademark Trial and Appeal Board Manual. Opposer is apparently arguing to the Board that the filing of a new proceeding, over two months after its deadline to respond in this proceeding has passed, should serve as the basis for reopening this proceeding. On its face, this argument is nonsensical. Events that occurred on April 10, or thereabouts, could not possibly affect, or have any impact on, an obligation to file a response to a

motion on January 29. Thus, this argument also fails to support Opposer's claim of excusable neglect.

III. OPPOSER FAILS TO OFFER ANY SUBSTANTIVE REASON WHY THE PROCEEDINGS SHOULD BE REOPENED

Opposer states in its Motion to Reopen that it "simply requests an opportunity to reply [to the Motion to Dismiss] because Applicant's motion lacks merit."¹ However, Opposer has offered the Board no more than conclusory statements alleging that the Motion to Dismiss lacked merit to support its present request. Opposer has failed to provide the Board any substantive argument as to why its Notice of Opposition as allegedly based upon proper standing and did allegedly state a valid claim in order to refute the Motion to Dismiss. Instead, Opposer is merely trying to obtain more time to make those arguments, which does nothing more than delay this matter further.

Opposer has already demonstrated a pattern of inexcusable delay. In addition to failing to file the response to the Motion to Dismiss within the original allotted time, Opposer states in its Motion that it informed the Board attorney that it would have its response to the Motion to Dismiss filed on March 15, 2007, the same day it contacted the Board attorney. In fact, Opposer waited an additional month before taking any action and filing the present Motion to Reopen. Opposer fails to provide the Board with any reassurance that this pattern of delay will change.

As the Board has previously stated, the Board is justified in enforcing procedural deadlines. Hewlett-Packard Co. v. Olympus Corp., 931 F.2d 1551, 1554, 18 U.S.P.Q.2d 1710, 1713 (Fed. Cir. 1991). Opposer brought this matter and, in doing so, took responsibility for moving it forward. Opposer has already failed to do so on more than one occasion and is merely seeking an additional reprieve from the Board to make the substantive arguments it has failed to make thus far.

IV. CONCLUSION

Opposer has not given the Board any excuse for its failure to respond to the Motion to Dismiss that rises to the level of excusable neglect. Instead, Opposer provides the Board only with disingenuous arguments, conclusory statements and a pattern of delay as a basis for

¹ On the contrary, Opposer requests an opportunity to reply to the Motion to Dismiss at this time because it failed to do so when first given an opportunity.

reopening the proceedings. As a result, the Motion to Reopen should be denied and the dismissal with prejudice sustained.

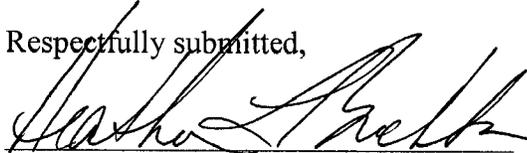
WHEREFORE, Applicant prays that Opposer's Motion to Reopen be denied and the dismissal with prejudice sustained.

FEES

No fee is believed due with this submission; however, if a fee is due, please charge the fee to Deposit Account No. 17-0055.

Dated: May 3, 2007

Respectfully submitted,



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