

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

BUO

Mailed: February 20, 2014

**Opposition No. 91185409  
("Parent Case")**

Opposition No. 91186562<sup>1</sup>

Opposition No. 91186653

Opposition No. 91196707

The Smiley Company SPRL

v.

Harvey Ball Smile Limited

**By the Board:**

This order supersedes the Board's order dated November 13, 2013, in proceeding Nos. 91185409, 91186653, 91196707, 91201490, and 92052829.

***I. Opposition Nos. 91195201 & 91201490 and Cancellation No. 92052829***

On February 4, 2014, opposer/petitioner filed a withdrawal of the oppositions and petition to cancel, with applicant/registrant's written consent in Opposition Nos. 91195201 and 91201490, and Cancellation No. 92052829.

---

<sup>1</sup> Opposition No. 91186562 was consolidated with Opposition No. 91185409 by an order from the Board dated January 23, 2009.

**Opposition Nos. 91185409, 91186562, 91186653, and 91196707**

In view thereof, Opposition Nos. 91195201 and 91201490, and Cancellation No. 92052829 are dismissed without prejudice. See Trademark Rule 2.106(c) and 2.114(c).

**II. Motion to Reopen the '707 and '653 Proceedings.**

On September 18, 2013, the Board issued an order dismissing Opposition No. 91196707 predicated on opposer's failure to file its brief on the case, pursuant to Trademark Rule 2.128(a)(3). This case now comes up for consideration of respondent's submission, filed September 19, 2013, to reopen its time to respond to the Board's July 31, 2013 show cause order.

Opposer seeks relief from a final judgment by the Board captioned as a motion to vacate the Board's order dismissing the case and to reopen the time to respond to the Board's inquiry dated July 31, 2013. The Board construes opposer's motion as a motion under Fed. R. Civ. P. 60(b)(1) to set aside the final determination and reopen the proceeding.

Opposer's motion is **GRANTED** as conceded, because applicant failed to respond thereto. Trademark Rule 2.127(a); *Central Mfg., Inc. v. Third Millennium Tech., Inc.*, 61 USPQ2d 1210 (TTAB 2001); *Boston Chicken, Inc. v. Boston Pizza Int'l, Inc.*, 53 USPQ2d 1053 (TTAB 1999).

**Opposition Nos. 91185409, 91186562, 91186653, and 91196707**

Accordingly, the Board **VACATES** its September 18, 2013 order dismissing Opposition No. 91196707, and reopens that proceeding.

We note, however, that opposer's motion would have been granted notwithstanding a response from applicant.

Fed. R. Civ. P. 55(c), which applies here, states that "[t]he court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)." Inasmuch as opposer has shown (i) that its failure to file a brief on the case was the result of excusable neglect, (ii) that its delay was not willful, (iii) that its delay in filing the motion-the day after judgment was entered-would not pose a significant delay to the proceeding; and (iv) applicant has not shown that any delay would unduly prejudice its defense of this proceeding.<sup>2</sup>

*Pioneer Invest. Servs. Co. v. Brunswick Assoc. L.P.*, 507 U.S. 380 (1993); *Information Sys. and Networks Corp. v. United States*, 994 F.2d 792, 795 (Fed. Cir. 1993); *Pumpkin, Ltd. v. Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

In its exercise of its discretion to grant relief from a final judgment, the Board favors the disposition of proceedings on their merits. See *CTRL Sys. Inc. v.*

---

<sup>2</sup> A showing of prejudice usually requires more than "mere" delay, and applicant can hardly complain that it would have to proceed with its defense of this proceeding—which applicant should have been preparing to do notwithstanding opposer's failure to file its brief.

**Opposition Nos. 91185409, 91186562, 91186653, and 91196707**

*Ultraphonics of N. Am. Inc.*, 52 USPQ2d 1300, 1301 (TTAB 1999). Accordingly, the Board is reluctant to enter a judgment by default, and motions under Fed. R. Civ. P. 60(b) are carefully considered. *Id.*

Inasmuch as the facts relating to the motion filed in the '707 opposition also gave rise to the dismissal of the '653 opposition, and in order to promote judicial economy, and to prevent unnecessary motion practice, the Board also **VACATES** its December 5, 2013 order dismissing Opposition No. 91186653 and reopens that proceeding. Further, the Board also notes opposer's response to the show cause order issued in the '707 proceeding, attached to its submission as Exhibit B. Inasmuch as opposer has shown good cause for its failure to file its brief, the show cause order is **DISCHARGED**.<sup>3</sup>

Opposer's time to file its main brief on the case is reset below.

### ***III. Consolidation***

On May 3, 2013, opposer filed a motion in Opposition No. 91195201 to consolidate Opposition Nos. 91185409, 91186653, 91195201, 91196707, 91201490 and Cancellation No.

---

<sup>3</sup> Opposer is allowed **TEN DAYS** from the mailing date of this order to file an appropriate response to the Board's show cause order issued in Opposition No. 91186653; failure to file such a response may result in that proceeding being dismissed with prejudice.

**Opposition Nos. 91185409, 91186562, 91186653, and 91196707**

92052829. On November 13, 2013, the Board issued an order denying that motion. The Board's order of November 13, 2013, is **VACATED**.<sup>4</sup>

The Board notes initially that applicant has filed its answer in each proceeding for which consolidation is sought. See TBMP § 511.

The Board may, either upon motion or by its own initiative, consolidate pending cases that involve common questions of law or fact. See Fed. R. Civ. P. 42(a); see also, *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154 (TTAB 1991) and *Estate of Biro v. Bic Corp.*, 18 USPQ2d 1382 (TTAB 1991). Inasmuch as the parties to the respective proceedings are the same, or closely related, and the proceedings involve common questions of law or fact, the Board finds that consolidation of the above-referenced proceedings is appropriate. Consolidation will avoid duplication of effort concerning the factual issues and will thereby avoid unnecessary costs and delays.

In view thereof, opposer's motion to consolidate is **GRANTED in part, to the extent that Opposition Nos. 91185409, 91186562, 91186653 and 91196707 are henceforth consolidated and should be presented on the same record and**

---

<sup>4</sup> Notwithstanding, inasmuch as Opposition Nos. 91195201 and 91201490, and Cancellation No. 92052829 have been withdrawn, and were dismissed by this order, opposer's motion is **DENIED** with respect to those proceedings.

**Opposition Nos. 91185409, 91186562, 91186653, and 91196707**

**briefs.** The record will be maintained in Opposition No. 91185409 as the "parent" case. The parties should no longer file separate papers in connection with each proceeding, but file only a single copy of each paper in the parent case. Each paper filed should bear the numbers of all consolidated proceedings in ascending order, and the parent case should be designated as the parent case by following it with: "(parent)," as in the case caption set forth above.

Consolidated cases do not lose their separate identity because of consolidation. Each proceeding retains its separate character and requires entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings and a copy of the final decision shall be placed in each proceeding file. See *Dating DNA LLC v. Imagini Holdings Ltd.*, 94 USPQ2d 1889, 1893 (TTAB 2010).

The parties are instructed to promptly inform the Board of any other related cases within the meaning of Fed. R. Civ. P. 42.

**III. Schedule**

Discovery remains closed in the now consolidated proceeding. Trial dates are reset as follows:

**Opposition Nos. 91185409, 91186562, 91186653, and 91196707**

30-day testimony period for defendant and plaintiff in the counterclaim to close	April 10, 2014
Counterclaim Defendant's and Plaintiff's Rebuttal Disclosures Due	April 25, 2014
30-day testimony period for defendant in the counterclaim and rebuttal testimony for plaintiff to close	June 9, 2014
Counterclaim Plaintiff's Rebuttal Disclosures Due	June 24, 2014
15-day rebuttal period for plaintiff in the counterclaim to close	July 24, 2014
Brief for plaintiff due	September 22, 2014
Brief for defendant and plaintiff in the counterclaim due	October 22, 2014
Brief for defendant in the counterclaim and reply brief, if any, for plaintiff due	November 21, 2014
Reply brief, if any, for plaintiff in the counterclaim due	December 6, 2014

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 taking of testimony. Trademark Rule 2.125.

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