ESTTA Tracking number: **ESTTA319126**
Filing date: **11/25/2009**

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

Proceeding	91187908
Party	Plaintiff Oklahoma State University
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Submission	Motion to Reopen
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Signature	/Lauren Sullins Ralls/
Date	11/25/2009
Attachments	Consented Motion to Reopen Time to File Evidence with Attachment.pdf (9 pages)(344818 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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OKLAHOMA STATE UNIVERSITY,	)	
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	)	
Opposer,	)	
v.	)	In the matter of Application
	)	Serial No. 77/383,001
	)	for the mark COWBOYADE
	)	Opposition No. 91187908
SUPER BAKERY, INC.,	)	
	)	
	)	
Applicant.	)	

CONSENTED MOTION TO REOPEN TIME TO FILE EVIDENCE DUE TO EXCUSABLE NEGLECT

On October 9, 2009, counsel for Opposer Oklahoma State University ("Opposer") filed three motions for summary judgment in three related proceedings against applications filed by Super Bakery, Inc. ("Applicant"). The following documents were filed in support of each motion:

(1) A Redacted Brief in Support of Motion for Summary Judgment;
(2) A Confidential Brief in Support of Motion for Summary Judgment Filed Under Seal;
(3) Declaration of Michael Drucker and exhibit(s)
(4) Declaration of Lauren Sullins Ralls ("Ralls Declaration") and exhibits, including one exhibit filed in both redacted and confidential form
(5) A declaration of a representative from each opposer and exhibits

These documents were served on counsel for Applicant on October 9, 2009 via first class mail to John W. McIlvaine at The Webb Law Firm, 436 Seventh Avenue, 700 Koopers Building, Pittsburgh, Pennsylvania 15219.

Upon review of the Board's electronic docket, review of the files of Opposer's counsel, and consultation with Applicant's counsel regarding the documents contained in Applicant's service copy, it appears that there was an error with the Ralls Declaration that was filed and served for this proceeding. Opposer's filings for the University of Michigan and Oklahoma State proceedings were filed and served on the same day, October 9, 2009. It appears, however, that as the documents were being organized for mailing, the Ralls Declaration for this proceeding was inadvertently replaced with the Ralls Declaration for the University of Michigan proceeding. The correct exhibits to the Ralls Declaration (relating to Oklahoma State's COWBOYS marks) were attached – only the declaration was incorrect. Applicant has confirmed that opposing counsel also received the correct exhibits with the incorrect declaration. Due to this error, the declaration and exhibits for the Oklahoma State opposition were placed in the University of Michigan's electronic file (Docket No. 5 to Opposition No. 91187907).

Rule 509.01(b)(1) the Trademark Trial and Appeal Board Manual of Procedure states that "[w]here the time for taking required action, as originally set or as previously reset, has expired, a party desiring to take the required action must file a motion to reopen the time for taking that action." TBMP § 509.01(b)(1). Such a motion is granted where the movant's failure to act during the allotted time was the result of excusable neglect. *Id.*; *see also* Fed. R. Civ. P. 6(b). A Motion to Reopen may be filed as a stipulation with the signature of both parties or as a consented motion with the nonmoving party's oral consent. TBMP § 509.02. "Ordinarily, a consented motion to extend or reopen will be granted by the Board." *Id.*

Although Applicant has consented to this motion, Opposer hereby demonstrates to the Board that the error was a result of excusable neglect. "Excusable neglect" is determined by balancing four factors: "(1) the danger of prejudice to the nonmovant, (2) the length of delay and

its potential impact on judicial proceedings, (3) the reasons for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith." TBMP § 509.01(b). Here, Opposer's inadvertent substitution of the incorrect Ralls Declaration, with the correct exhibits, constituted excusable neglect. First, there is no danger of prejudice to Applicant, who did receive the documentary evidence submitted as exhibits to the Ralls Declaration and was not delayed in nor prevented from responding to Opposer's Motion for Summary Judgment. Applicant agrees that it has not been prejudiced. Second, upon discovering its error, Opposer's counsel has acted quickly to confer with counsel for Applicant and file this Consented Motion to Reopen Time to correct the record. Third, the inadvertent error was a result of the filing numerous Motions for Summary Judgment on behalf of different opposers in related proceedings in a very short time frame.[1] Finally, there has been no bad faith on the part of Opposer or Opposer's counsel. Balanced as a whole, these factors weigh heavily in favor of finding excusable neglect. *See, e.g., id.* (finding excusable neglect where nonmovant would not be significantly prejudiced, where the delay was short compared to the three and one-half month delay in another case, and where there was no bad faith on the part of the movant).

Counsel for Opposer has conferred with counsel for Applicant, and counsel for Applicant has consented to Opposer's Motion to Reopen Time to File Evidence Due to Excusable Neglect in order to substitute the misfiled Ralls Declaration with the enclosed Declaration of Lauren Sullins Ralls in Support of Opposer's Motion for Summary Judgment ("Replacement Ralls Declaration"). The Replacement Ralls Declaration is the same declaration that Opposer's

[1] While these reasons were ultimately within Opposer's counsel's reasonable control, as the Board stated in an non-precedential opinion, "the Board must balance the reason for the delay with the other factors enumerated by the Supreme Court in *Pioneer* [*Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993)] to take account [of] all of the relevant circumstances in determining whether [Opposer]'s actions constitute a sufficient showing of excusable neglect." *Intershop Software Entwicklungs GmbH v. Interwave Systems, Inc.*, 2004 WL 1772118, at *3 (T.T.A.B. Aug. 3, 2004) (finding excusable neglect despite the fact that the inadvertent error that caused movant to fail to make a timely filing was ultimately within its reasonable control).

counsel originally prepared and intended to file and serve on October 9, 2009 and corresponds with the same Ralls exhibits that Opposer filed and served on October 9, 2009.[2]

Based on the foregoing, Opposer respectfully requests that the Board grant this Consented Motion to Reopen Time and accept the enclosed Declaration of Lauren Sullins Ralls in Support of Opposer's Motion for Summary Judgment.

Respectfully submitted,

Dated: November 25, 2009

By: Lauren Sullins Ralls

R. Charles Henn Jr.
Alicia Grahn Jones
Lauren Sullins Ralls
Allison M. Scott
KILPATRICK STOCKTON LLP
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309

Attorneys for Opposer,
Oklahoma State University

[2] Opposer is unable to locate a signed version of the original declaration and Applicant's counsel does not have a copy. Accordingly, the Replacement Ralls Declaration is dated November 24, 2009. Opposing counsel is aware of this change and consents that, save for the date of signing, the Replacement Ralls Declaration is the same as the declaration that was intended to be filed.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing CONSENTED MOTION TO REOPEN TIME was served on counsel for Applicant on November 25, 2009 via first class mail to:

John W. McIlvaine
The Webb Law Firm
436 Seventh Avenue
700 Koppers Building
Pittsburgh, PA 15219

Counsel for Opposer

CERTIFICATE OF TRANSMITTAL

I hereby certify that a true copy of the foregoing CONSENTED MOTION TO REOPEN TIME is being filed electronically with the TTAB via ESTTA on this day, November 25, 2009.

Counsel for Opposer

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DECLARATION OF LAUREN SULLINS RALLS IN SUPPORT OF OPPOSER'S MOTION FOR SUMMARY JUDGMENT

I, Lauren Sullins Ralls, make the following declaration:

1. I am an attorney at the law firm of Kilpatrick Stockton LLP, and am one of the attorneys representing Opposer Oklahoma State University. (the "University") in this opposition against Applicant Super Bakery, Inc. ("Applicant"). I am over the age of twenty-one, I am competent to make this Declaration, and the facts set forth in this Declaration are based on my personal knowledge.

2. Applicant owns at least twenty pending applications to register marks for use in connection with sports drinks that incorporate the trademarks of well-known universities and the suffix "-ADE." A true and correct copy of charts reflecting a sample of Applicant's applications to register marks that incorporate the mascots and nicknames of numerous colleges and universities are attached as **Exhibit A**.

3. On or about January 29, 2008, Applicant filed an intent-to-use application under Section 1(b) of the Lanham Act to register the mark COWBOYADE (Serial No. 77/383,001)

("Applicant's Mark" or "COWBOYADE Mark") for use in connection with "sports drinks and performance drinks" in International Class 32. A true and correct copy of Applicant's application to register Applicant's Mark (Serial No. 77/383,001) is attached as **Exhibit B**.

4. On or about May 6, 2008, the Trademark Examiner entered an Examiner's Amendment amending the recitation of goods to "sports drinks" in Class 32. A true and correct copy of the May 6, 2008 Examiner's Amendment is attached as **Exhibit C**.

5. On December 5, 2008, the University timely filed a Notice of Opposition alleging that Applicant's Mark is likely to cause consumer confusion, mistake, and deception with the University's trademarks. *See* Docket No. 1.

6. On March 3, 2009, the University served written discovery requests, including interrogatories, requests for document production, and requests for admission, on Applicant. A true and correct copy of the University's First Request for Production of Documents and Applicant's responses are attached as **Exhibit D**. A true and correct copy of the University's First Set of Interrogatories and Applicant's responses are attached as **Exhibit E**. A true and correct copy of the University's First Requests for Admission and Applicant's responses are attached as **Exhibit F**.

7. On June 4, 2009, a partner at my law firm, R. Charles Henn Jr., deposed Franco Harris in his individual capacity and as Applicant's Rule 30(b)(6) designee. A true and correct copy of relevant portions of the Deposition of Franco Harris ("Harris Dep.") is attached as **Exhibit G** (p. 26 of Exhibit G is Exhibit 3 to the Harris Dep.).

8. True and correct copies of unsolicited media articles using the University's COWBOYS marks to refer to the University are attached as **Exhibit H**.

9. The suffix "-ADE" is defined by the *Merriam-Webster Dictionary* as a generic word for drinks. True and correct copies of the definition of the suffix "-ADE" in the *Merriam-Webster Dictionary* are attached as **Exhibit I**.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Dated: November 24, 2009.

Lauren Sullins Ralls

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	)	
	)	
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DECLARATION OF LAUREN SULLINS RALLS has been served on counsel for Applicant by mailing a copy on November 25, 2009, via First Class Mail, postage prepaid, and addressed as follows:

John W. McIlvaine
The Webb Law Firm
436 Seventh Avenue
700 Koppers Building
Pittsburgh, PA 15219

Lauren Sullins Ralls
Attorney for Opposer

CERTIFICATE OF TRANSMITTAL

I hereby certify that a true copy of the foregoing OPPOSER'S DECLARATION OF LAUREN SULLINS RALLS IN SUPPORT OF OPPOSER'S MOTION FOR SUMMARY JUDGMENT is being filed electronically with the TTAB via ESTTA on this day, November 25, 2009.

Counsel for Opposer