

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

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Mailed: June 14, 2011

Opposition No. 91190281  
Opposition No. 91191705

Joe Cool Inc.

v.

W. Joseph Biggs

**Before Walters, Ritchie, and Lykos, Administrative Trademark  
Judges:**

**By the Board:**

This case comes up on applicant's motion to dismiss this proceeding for failure to prosecute under Trademark Rule 2.132(a), and opposer's motion to consolidate this proceeding with related Opposition Nos. 91190283 and 9191686. Both motions were filed March 7, 2011, and are contested.

Joseph W. Biggs filed applications to register the marks PANAMA CITY BEACH BIKE WEEK (application Serial No. 77559122) and PANAMA CITY BIKE WEEK (application Serial No. 77572901), both for t-shirts. Opposer and third party Danniell Sadeh each opposed both applications. Application

**Opposition Nos. 91190281 and 91191705**

Serial No. 77559122 became the subject of Opposition No. 91190281 and Sadeh's Opposition No. 91190283, and Application Serial No. 77572901 became the subject of Opposition No. 91190705 and Sadeh's Opposition No. 91191686.

On March 26, 2010, the Board consolidated the proceedings brought by Joe Cool, Inc., finding that the pleadings set forth legally sufficient claims of priority and likelihood of confusion and ornamentation, and in Opposition No. 91191705, also a claim of fraud.<sup>1</sup> In each proceeding applicant filed an answer which denied the salient allegations of the notice of opposition. The Board reset opposer's trial period to close March 1, 2011.

Opposer submitted no evidence during its trial period, and on March 7, 2011, applicant filed the instant motion seeking entry of judgment. Applicant's motion notes that opposer has taken no action to move this proceeding forward inasmuch as opposer did not serve discovery, take depositions, or offer any evidence.

On the same day, March 7, 2011, opposer electronically filed a motion to consolidate this proceeding with two other oppositions brought against the same applications by third

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<sup>1</sup> Based on opposer's repeated failure to comply with the requirements for proof of service, the Board sanctioned opposer by ordering (i) use of a specific certificate of service on each paper filed with the Board, and (ii) an email courtesy copy and a phone call notifying applicant of each filing.

**Opposition Nos. 91190281 and 91191705**

party Daniel Sadeh.<sup>2</sup> The motion states that the two opposers find that the four proceedings "arise from the same nucleus of operating facts and law" and seek consolidation, and includes electronic signatures for Joe Cool, Inc. (for this consolidated proceeding), and Daniel Sadeh (for the two related proceedings). On the same day, March 7, 2011, opposer also filed an opposition to the motion to dismiss which states:

Opposer opposes applicant's motion to dismiss and states that it has no intention of ceasing its prosecution of this opposition proceeding. Opposer's non serving of discovery papers on applicant does not in and of itself constitute lack of prosecution.

Opposer has filed a motion to consolidate proceedings above together with the other opposer involved in the above proceedings. Opposers move the Board to suspend all action in the above proceedings pending their motion to consolidate.

Wherefore opposer submits that the motion to dismiss be denied.

The purpose of the motion under Trademark Rule 2.132(a) is to save the defendant the expense and delay of continuing with the trial in those cases where plaintiff has failed to offer any evidence during its testimony period. *See Litton Business Systems, Inc. v. J. G. Furniture Co.*, 190 USPQ 431

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<sup>2</sup> The motion included a certificate of service dated February 27, 2011, eight days before the motion was filed with the Board. Applicant's reply brief notes that applicant never received a service copy of either motion; that the certificate of service does not include applicant's correct address, which has remained unchanged during these proceedings; and that opposer failed to comply with the Board's sanction requiring phone notice and a courtesy email copy of all filings.

**Opposition Nos. 91190281 and 91191705**

(TTAB 1976). The issue presented by applicant's motion to dismiss is whether opposer's failure to timely take testimony or offer other evidence resulted from excusable neglect. The question of what constitutes excusable neglect is within the sound discretion of the Board. See *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership et al.*, 507 U.S. 380 (1993) and *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

In *Pioneer*, the Court stated that a determination of excusable neglect 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 [nonmovant], (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. *Pioneer*, 507 U.S. at 395.

With respect to prejudice to applicant, applicant does not contend that evidence or witnesses have become unavailable, so this factor favors opposer. The delay of three months since opposer's trial period closed is relatively short, and this factor also favors opposer. There is no evidence that opposer has acted in good faith, or in bad faith, and this factor is therefore neutral. However, opposer has made no explanation of the reason for

**Opposition Nos. 91190281 and 91191705**

its failure to present evidence during the trial period, and this factor weighs very heavily against opposer. *Gaylord Entertainment Co. v. Calvin Gilmore Productions Inc.*, 59 USPQ2d 1369, 1373 (TTAB 2000) ("the lack of explanation as to the specific reason for former counsel's inaction, when no settlement discussions were ongoing, is significant. We cannot say that this inaction was not within the reasonable control of opposer, who should have maintained some communication with former trademark counsel about this case.").

Opposer's statement that it seeks consolidation sheds no light on the reason for the delay. The Board dismissed Opposition No. 91190283 on August 11, 2009, and the dismissal was affirmed by the United States Court of Appeals for the Federal Circuit on May 12, 2010.<sup>3</sup> In Opposition No. 9191686, trial closed with no submission of evidence by opposer on January 23, 2011, and a similar motion for dismissal under Trademark Rule 2.132(a) is pending.

Because discovery and trial has closed in the oppositions filed by both parties with no evidence submitted and thus nothing to brief, there are no economies to be realized by consolidation. The mere filing of the motion to consolidate presents no explanation why opposer has failed

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<sup>3</sup> Following dismissal of Opposition No. 91190283, application Serial No. 77559122 inadvertently issued as Registration No.

**Opposition Nos. 91190281 and 91191705**

to submit evidence in support of its case. Accordingly, applicant's motion for dismissal based on opposer's lack of prosecution pursuant to Trademark Rule 2.132(a) is granted.

Inasmuch as opposer has not submitted any record evidence in support of its case, the consolidated opposition is dismissed with prejudice.

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3956396. Inasmuch as Opposition No. 91190281 remains pending, application Serial No. 77559122 will be restored to pendency.