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

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| Proceeding | 91204897 |
| Party | Defendant Laguna Lakes Community Association, Inc. |
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| Submission | Motion to Dismiss 2.132 |
| Filer's Name | Chad R. Rothschild |
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| Signature | /s/ Chad R. Rothschild |
| Date | 06/09/2014 |
| Attachments | Motion to Dismiss for Failure to Prosecute.pdf(33387 bytes) |

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

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| John Gerard Marino, |) | |
| |) | Consolidated Opp. No. 91/204,897 |
| Opposer, |) | 91/204,941 |
| |) | |
| v. |) | |
| |) | MOTION TO DISMISS FOR |
| Laguna Lakes Community Association, |) | FAILURE TO PROSECUTE |
| Inc., |) | UNDER 37 CFR § 2.132(a) |
| |) | |
| Applicant. |) | |

I. Introduction.

Opposer, John Gerard Marino (“Marino”), has entered no evidence in the record and his trial period expired on May 30, 2014. The pending, eleventh-hour motion Marino filed to extend his trial period and treat “non-party [discovery] deposition testimony as evidence” [Doc. # 50] is completely devoid of any merit as explained by Applicant, Laguna Lakes Community Association, Inc. (“Laguna Lakes”) in its Response thereto [Doc. # 51]. Because Marino’s last-minute, dilatory motion should be denied, the Board should consider his testimony period closed. *See Procyon Pharmaceuticals Inc. v. Procyon Biopharma Inc.*, 61 USPQ2d 1542, 1544 (TTAB 2001) (petitioner’s testimony period consequently expired where motion to extend testimony period was denied and dates were left as originally set).

For the reasons explained herein, the Board should dismiss the consolidated opposition proceedings filed by Marino with prejudice pursuant to 37 CFR § 2.132(a).

II. The Board Should Dismiss These Consolidated Opposition Proceedings With Prejudice for Failure to Prosecute under 37 CFR § 2.132(a).

Earlier on in this matter, on November 9, 2012, Marino was reminded “as the party who brought this action . . . that he has the duty to move this proceeding forward pursuant to Board

rules and regulations.” Doc. # 22 at p. 6. As explained in its Response [Doc. # 51], Marino failed to do this and these consolidated opposition proceedings should be dismissed with prejudice for failure to prosecute under 37 CFR § 2.132(a).

When the plaintiff’s testimony period has passed, and the plaintiff has not taken testimony or offered any other evidence, the defendant may, without waiving its right to offer evidence in the event the motion is denied, move for dismissal for failure of the plaintiff to prosecute” under 37 CFR § 2.132(a). *See* TBMP § 534.02. “In the absence of a showing of good and sufficient cause, judgment may be rendered against the plaintiff.” *Id.* “The purpose of the motion under 37 CFR § 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.” *Id.* “In those cases where plaintiff did, in fact, fail to offer any evidence during its testimony period, plaintiff cannot prevail and, thus, defendant need not offer evidence either.” *Id.*

As explained in its Response [Doc. # 51], none of the evidence Marino seeks to offer into evidence (declarations and certain party and non-party deposition testimony) is properly admissible. In fact, “[t]he offhanded nature of [Marino’s belated requests] suggests that [Marino] had not even thought through what evidence and testimony [he] would need to present to meet its burden of proof as plaintiff” prior to filing his motion with only hours remaining in his testimony period. *Armor All v. Entech Corp.*, Opp. No. 109,490, 2001 WL 537140 at *2 (TTAB 2001).¹ At this point, it is beyond dispute based on his conduct (summarized below) that Marino either has not taken the time to become adequately familiarized with the Board’s rules and procedures or chooses to blatantly disregard them.

¹ The belated Pretrial Disclosures exchanged by Marino certainly did not reference any discovery deposition testimony. *See* Exhibit D to the Declaration attached to Doc. # 51.

- Doc. # 38 at p. 3 (Board order admonishing Marino and his counsel “for failing once again to comply with Board rules and procedure” and further expressing that it was “thoroughly displeased with [Marino and his counsel] with the amount of discovery motions filed . . . which do not comply with Board rules and procedure,” conduct that “not only delayed this matter but has wasted both the Board’s and [Laguna Lakes’] time and resources”);
- Doc. # 38 at pp. 6-7 (Board order finding that the reasons for [Marino’s] delay in seeking an extension of the discovery period is the result of [Marino’s own lack of diligence and therefore do not constitute good cause in extending discovery,” commenting that Marino “caused a delay in discovery by canceling depositions,” and recognizing that Marino “repeatedly file[d] motions to compel which did not comply with Board rules and procedure”);
- Doc. # 27 (detailing Marino and his counsel’s improper filing of discovery materials);
- Doc. # 29 at pp. 3-4 (denying Marino’s motion to compel “for lack of a good faith effort to resolve the parties’ discovery dispute” prior to filing in violation of Board rules, advising Marino that “the Board does not award attorneys’ fees” and denying the attorneys’ fee request “as improper”); and
- Doc. # 32 at p. 6 (denying Marino’s renewed motion to compel for again “failing to comply with Board rules and procedure,” and again finding improper Marino’s request for attorneys’ fees).

The charade being played by Marino must stop. There is no “good and sufficient cause” or “excusable neglect” to justify the conduct of Marino. *See PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860-61 (TTAB 2002) (good and sufficient cause standard in context of motion to dismiss under 37 CFR § 2.132(a) is excusable neglect standard); *see also Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 (TTAB 1997) (Board adopts *Pioneer* standard that excusable neglect determination must take into account all relevant circumstances surrounding the party’s omission or delay, including (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). “[I]nadvertence, ignorance of the rules, or mistakes

construing the rules do not usually constitute ‘excusable’ neglect.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 392 (1993).

Marino’s neglect of the consolidated opposition proceedings he instituted is entirely inexcusable. Though the length of the extension requested is small, Marino has engaged in a pattern of delay throughout this case. Marino was warned back in November 2012 of his duty to move these consolidated opposition proceedings forward pursuant to Board rules and regulations; Marino has entirely failed to do this. Given the repeated admonitions from the Board for violation of its rules and procedures, Laguna Lakes seriously questions whether Marino is acting in good faith. At the minimum, the sheer ignorance of the Board’s rules and procedures, and mistakes construing the same, exhibited by Marino and his counsel demonstrate that their neglect is inexcusable.

III. Conclusion.

Marino is not entitled to an extension of his trial period. With no evidence in the record, the Board should dismiss these consolidated oppositions with prejudice and enter judgment against Marino for failure to prosecute pursuant to 37 CFR § 2.132(a).

Respectfully submitted,

/s/ Chad R. Rothschild

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