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

Proceeding	91207394
Party	Defendant Oleg Makler
Correspondence Address	ALEXANDER PAINE 606 BRIGHTON BEACH AVENUE, 2ND FLOOR BROOKLYN, NY 11235 UNITED STATES PaineEsq@Gmail.com
Submission	Reply in Support of Motion
Filer's Name	Alexander Paine, Esq
Filer's e-mail	PaineEsq@Gmail.com
Signature	/Alexander Paine/
Date	01/30/2014
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 85623013

Filed on May 11, 2012

For the Mark BRATVA

Published in the *Official Gazette* (Trademarks) on October 9, 2012

Bratva, Inc.,

Opposer,

v.

Oleg Makler,

Applicant.

Opposition No.

91207394

**APPLICANT'S REPLY TO OPPOSER'S RESPONSE
TO MOTION FOR INVOLUNTARY DISMISSAL
FOR FAILURE TO PROSECUTE PURSUANT TO 37 CFR § 2.132.**

Applicant, Oleg Makler (hereinafter "Applicant"), hereby replies to arguments made by Opposer, Bratva, Inc. (hereinafter "Opposer") as follows:

I. OPPOSER'S UNTIMELY RESPONSE SHOULD NOT BE CONSIDERED.

Applicant's motion for an Order dismissing the Opposition of Opposer, Bratva, Inc. (hereinafter "Opposer"), for failure to take testimony, present evidence, or otherwise prosecute, Pursuant to Rule 37 CFR § 2.132 and Rule 534 of the Trademark Rules of Practice ("TRP") was filed and served on November 22, 2013. Opposer had 20 days (until December 28) to respond in accordance with TTAB Rule 502.02(b), which states in pertinent part that:

"[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)."

According to the TTAB electronic file, the Opposer did not file a response brief until January 22, 2014 (61 days later), and did not serve the response brief until January 23, 2014 (62 days later). Response was due on December 12, 2013. Accordingly, the Opposer's Response to Applicant's Motion was is at least 41 days later that TTAB rules allow and should not even be considered by the Board.

It appears that Opposer also filed with the Board some type of a confidential response on December 28, 2013. This document was mailed to the Board Ex-parte, without ever serving the Applicant with a copy. Although the Applicant has no way of knowing what the substance of that document was, assuming that this document is the same as the Opposer's Reponse to its motion, it is worth noting that this "Confidential Document" was also untimely, as it was never served on the Applicant, and was only filed with the Board December 28, which was 16 days later than the December 12, 2013 deadline of 20 days allowed for a response under TTAB Rule 502.02(b).

Opposer does not offer any legal authority for excuse of this delay. Nor does it explain why his filing is exempt from the 20 day requirement dictated by TTAB Rule 502.02(b), and instead simply goes on to oppose the Motion (and the entire Application) on the merits. Although the Applicant is sympathetic to opposing counsel's personal situation, the explanation provided does not justify the length of the delay, nor does it cite any authority under which his Response should be considered by the Board. Opposer's counsel also states that "for some reason [he] did not see the electronic version of the motion." This is simply not a valid excuse for delay in responding to a Motion. "In light of the fact that the very purpose of the underlying motion was to prevent any further prejudice caused to the Applicant by Opposer's continuing delays, this even further delay in filing its Response should not be allowed for the same reasons as those given in the original motion papers.

Opposer seems to think that it can just argue its case on the merits whenever it wants, irrespective of the deadlines set by TTAB rules, and offers no valid explanation either for its delays in prosecuting the case, or for its delays in responding to the Motion.

II. OPPOSER DOES NOT OFFER A VALID EXCUSE FOR ITS FAILURE TO PROSECUTING THE CASE

Assuming arguendo that the Board decides to consider the arguments made in Opposer's Response papers even though they were untimely, Applicant respectfully replies as follows. Opposer essentially argues that the Applicant's motion should be denied because the parties did not agree that Discovery was completed, and also because it had been in communication with the Applicant and merely discussed extending discovery. This argument is devoid of merit and does not excuse the Opposer's failure to take testimony or present evidence during the testimony period and within the time allowed by TTAB rules.

It has long been established that the mere fact that discovery was in progress does not constitute excusable neglect. In *PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860, 1860-61 (TTAB 2002) the board found no excusable neglect where a motion to reopen was filed nearly one month after close of testimony period and was based on a "mistaken belief that extension of time to respond to discovery extended testimony period and on fact that petitioner was gathering information to respond to discovery"). Similarly, the fact that parties were negotiating settlement does not constitute excusable delay. In *Vital Pharmaceuticals Inc. v. Kronholm*, 99 USPQ2d 1708, 1711 (TTAB 2011) no excusable neglect to reopen testimony was found based on "purported settlement discussions." Mere "existence of settlement negotiations" was also found to be insufficient in *Atlanta Fulton County Zoo Inc. v. De Palma*, 45 USPQ2d 1858, 1859-60 (TTAB 1998).

Opposer's argument that Applicant did not sign a stipulation extending Opposer's time to take action is equally unavailing. In *Hewlett-Packard Co. v. Olympus Corp.*, Opposition No. 77,043, slip op. at 3 (TTAB April 10, 1990), the Board held that a "mere request to one's opponent for extension of time is not sufficient to meet [Opposer's] burden in seeking an enlargement of its testimony period, and Hewlett cannot rely on [Applicant's] inaction to establish that its own neglect was excusable." Accordingly, arguments made by Opposer do not establish excusable neglect.

Having done some discovery does not change the fact that the Opposer had over a year to prosecute his case, and has failed to do so. Opposer failed to establish excusable neglect and good and sufficient cause as per the rules. While it is true that the law favors judgments on the merits, it is "also true that the Patent and Trademark Office is justified in enforcing its procedural deadlines" *See PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860, 1862 (TTAB 2002) (Board is justified in enforcing procedural deadlines). For the reasons stated above, the Applicant's motion should be granted.

III. OPPOSER HAS NOT STATED A PRIMA FACIE CASE

As already stated in the original motion papers, the Opposition fails to state a prima facie case and offer any valid grounds for opposing the Applicant's registration. By making all sorts of de novo arguments in its Response to the Applicant's Motion, the Opposer misses the very point of the Motion. It was the Opposer's burden to state a prima facie case during the testimony period, and having failed to do so, it is unable to make its case in Opposing the Applicant's motion.

All importantly, the Opposer does not allege first prior use. Nor does it allege that it would be damaged by the registration of the mark (a requirement under 37 C.F.R. Section 2.104). Instead attempts to make an argument based solely on a mistaken and baseless belief that some wholly

ambiguous and unrelated right to a totally unrelated copyright, in a different industry, of a different class was allegedly sold by the Applicant to the Opposer. The entire Opposition is based on a single line of text, which the Opposer notably and conveniently misquotes in its Opposition to make its case, said language having nothing to do with the Applicant's registration. Please see original motion papers for more details.

IV. APPLICANT IS PREJUDICED BY ANY FURTHER DELAY

The very purpose of a motion under Rule 37 CFR § 2.132(a) is "to save the Defendant the expense and delay of continuing with the trial in those cases where the Plaintiff failed to offer any evidence during its testimony period." See TRP Rule 534.02. In this case, the Plaintiff has failed to prosecute the case and its trial period has ended. The Opposer had over a year to prosecute this case, and the Opposer's 30 day Trial Period has ended on September 15, 2013. (See Original Motion papers). In the meantime, Applicant is unable to use the mark and has already suffered damages as a result. Applicant is also unable to invest in its activities due to the continued uncertainty over the pending case.

In summary, Opposer's response presents arguments (some brand new) on the merits of the Opposition, using whatever dates and timelines are convenient to the Opposer, in complete disregard of TTAB deadlines and rules, and offers no valid explanation either for its delays in prosecuting the case, or for its delays in responding to the motion. Opposer's failure to prosecute its case and its other delays are prejudicial to the Opposer. Accordingly, the Applicant's motion should be granted.

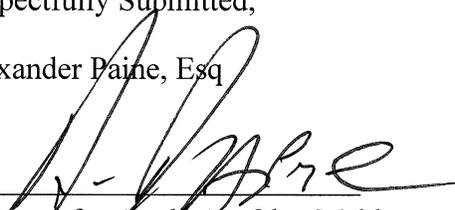
V. CONCLUSION

For the reasons stated above, Applicant respectfully requests that the TTAB refuse to consider the Opposer's untimely Response to its motion, and that the Board grant Applicant's motion to dismiss the Opposition with prejudice and deny any requests to extend the Opposer's time to present evidence.

Dated: January 29, 2014

Respectfully Submitted,

Alexander Paine, Esq



Attorney for Applicant Oleg Makler

606 Brighton Beach Ave., 2FL

Brooklyn, New York 11235

Tel: (718) 676-1067

Fax: (718) 795-1985

Email: PaineEsq@gmail.com

To: Julian H. Lowenfeld, Esq.
Attorney for Opposer(s) Bratva, Inc.
350 Central Park West Suite 13-C
New York, New York 10025
Tel: (917) 375-9996
Fax: (917) 534-6090
Email: jlowenfeld@gmail.com

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CERTIFICATE OF SERVICE

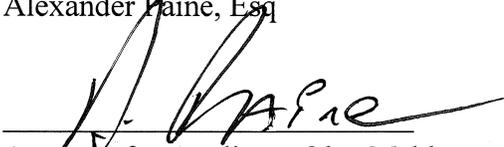
I, Alexander Paine, Esq., HEREBY CERTIFY that a true and correct copy of the **APPLICANT'S REPLY (TO OPPOSER'S RESPONSE TO APPLICANTS MOTION FOR INVOLUNTARY DISMISSAL)** has been furnished on January 30, 2014, by U.S. Regular Mail to:

To: Julian H. Lowenfeld, Esq.
Attorney for Opposer(s) Bratva, Inc.
350 Central Park West Suite 13-C
New York, New York 10025

Dated: Brooklyn, NY
January 30, 2014

Respectfully Submitted,

Alexander Paine, Esq


Attorney for Applicant Oleg Makler
606 Brighton Beach Ave., 2FL
Brooklyn, New York 11235
Tel: (718) 676-1067
Fax: (718) 795-1985
Email: PaineEsq@gmail.com