

ESTTA Tracking number: **ESTTA572559**

Filing date: **11/22/2013**

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

Proceeding	91207394
Party	Defendant Oleg Makler
Correspondence Address	ALEXANDER ALMONTE ALMONTE LAW FIRM PC 119 WASHINGTON AVENUE, SUITE 101 ALBANY, NY 12210-2204 UNITED STATES ALCOINC2@AOL.COM
Submission	Motion to Dismiss 2.132
Filer's Name	Alexander Paine, Esq
Filer's e-mail	PaineEsq@Gmail.com
Signature	/Alexander Paine/
Date	11/22/2013
Attachments	Motion.pdf(1070068 bytes)

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 MOTION FOR INVOLUNTARY DISMISSAL
FOR FAILURE TO PROSECUTE PURSUANT TO 37 CFR § 2.132.**

Applicant, Oleg Makler (hereinafter "Applicant"), hereby respectfully moves the Board 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"). In addition, the Applicant hereby opposes the granting of any extensions to the Opposer, including those sought by Opposer via a Motion.

An Order as outlined above is appropriate under the Code of Federal Regulations and under the Trademark Rules of Practice as 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 Scheduling Order enclosed hereto as Exhibit A). This motion is proper under the pertinent rules and should be granted for the reasons that follow.

I. PROCEDURAL BACKGROUND

Applicant filed its Application to register its mark “BRATVA” on May 11, 2012. Opposer filed its Opposition on October 10, 2012, which was more than 13 months prior to the date of this motion. On October 10, the TTAB sent out a Notice and Schedule of Trial Dates. (See Exhibit A). According to the Schedule of Trial Dates provided by the TTAB the Plaintiff’s 30 day Trial Testimony Period has ended on September 15, 2013. Because the Opposer has failed to take testimony or offer any evidence, the Opposition should be dismissed with prejudice.

II. LEGAL ARGUMENT IN SUPPORT OF MOTION

A. The Opposition should be dismissed with prejudice for failure to prosecute.

Rule 37 CFR § 2.132(a) and Rule 534.01-.02 of the Trademark Rules of Practice in pertinent part(s) state that:

“If the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, **move for dismissal on the ground of the failure of the plaintiff to prosecute.** The party in the position of plaintiff shall ... show cause why judgment should not be rendered against him. In the absence of a showing of good and sufficient cause, judgment may be rendered against the party in the position of plaintiff...”

Rule 37 CFR § 2.132(c) and Rule 534 of the Trademark Rules state that the motion must be filed “before the opening of the testimony period of the moving party,” but also state that Trademark Trial and Appeal Board “may in its discretion grant a motion under paragraph (a) even if the motion was filed after the opening of the testimony period of the moving party.”

Judgment may be rendered against the Plaintiff in the absence of a showing of “good and sufficient cause” or “excusable neglect” (See TRP Rule 534.02.). The 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. As the Defendant’s trial period draws to a close, there is no reason to suffer further expenses and delays associated with continuing with the trial, absent “good and sufficient cause” by the Plaintiff.

In *Hewlett-Packard Company v. Olympus Corporation*, 931 F.2d 1551(1991), the United States Court of Appeals affirmed the decision of the USPTO Trial and Appeal Board (“TTAB”) dismissing an Opposition with prejudice where the Opposer “had not shown excusable neglect for its failure to act during testimony phase.” In that case, the Court held that the TTAB has properly defined excusable default as:

“failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.”

and that the TTAB could have properly exercised its discretion in considering the motion after the opening of the testimony period of the moving party pursuant to 37 CFR § 2.132(c). The US Court of Appeals went on to say that “While it is true that the law favors judgments on the merits wherever possible, it is also true that the Patent and Trademark Office is justified in enforcing its procedural deadlines.”

In this case, where the Opposer has had over a year to present its case and has failed to take the proper steps within the time allowed. Specifically, The Opposer failed to present any evidence whatsoever during the testimony period. Accordingly, it is respectfully submitted that the Opposition should be dismissed with prejudice for failure to prosecute the case and comply with the deadlines set by the TTAB.

In addition to the language of the rules and the HP case cited above, there are numerous other cases that support the granting of the instant motion: *Procyon Pharmaceuticals Inc v. Procyon*

Biopharma Inc, 61 USPQ2d 1542, 1544 (TTAB 2001), SFW Licensing Corp. v. Di Pardo Packing Ltd., 60 USPQ2d 1372, 1374 (TTAB 2001), Atlanta Fulton County Zoo Inc. v. De Palma, 45 USPQ2d 1858 (TTAB 1998) (motions to reopen discovery and testimony periods denied, motion to dismiss granted); Hester Industries Inc. v. Tyson Foods Inc., 2 USPQ2d 1645, 1845-46 (TTAB 1987) (where opposer failed to offer evidence during its testimony period, applicant could have filed motion to dismiss instead of offering its own evidence); and others. Accordingly, there is ample legal authority to rule in favor of the Applicant and to dismiss the Opposition with prejudice. There is no reason why the Applicant's registration should be delayed any further and why the Applicant must suffer any further litigation costs by virtue of extensions when the Opposer has neglected its Opposition.

B. Opposer has failed to make out a prima facie case

Although no evidence whatsoever was offered by the Opposer as part of its testimony period, the Opposition also fails to state a prima facie case and offer any valid grounds for opposing the Applicant's registration. The Opposer does not even allege that it would be damaged by the registration of the mark (a requirement under 37 C.F.R. Section 2.104), but instead attempts to make an argument based solely on a mistaken and/or 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.

The Opposition does not even plead that the Opposer ever registered the mark in question, ever used the mark in commerce, ever purchased any rights to it, or ever owned the exact mark that is being registered, in any classification. None of the statements or actions of the Applicant, as

alleged in the Opposition, can possibly have any effect whatsoever on the registration of the mark in question. In addition, an Opposer must “meet two judicially-created requirements in order to have standing—the opposer must have a "real interest" in the proceedings and must have a "reasonable" basis for his belief of damage under 37 C.F.R. Section 2.104. The Opposer in this case has done neither. The Opposer has neither pleaded the necessary elements for an Opposition, nor demonstrated the Standing required to oppose the registration of the mark by the Applicant.

Accordingly, because the Opposer failed to make a prima facie case, and has also failed to present any evidence whatsoever as part of its testimony period allowed by the TTAB, the Opposition should be dismissed with prejudice.

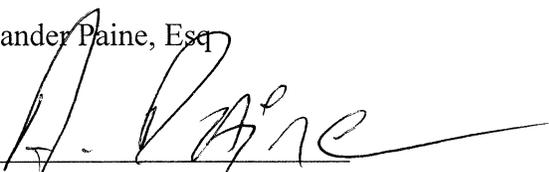
III. CONCLUSION

For the reasons stated above, Applicant respectfully requests that the TTAB grant Applicant’s motion to dismiss the Opposition with prejudice and deny any requests to extend the Opposer’s time to present evidence.

Dated: November 14, 2013

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

Exhibit A



Search:

Opposition

Number: 91207394

Filing Date: 10/10/2012

Status: Pending

Status Date: 10/10/2012

Interlocutory Attorney: CHERYL S GOODMAN

Defendant

Name: OLEG MAKLER

Correspondence: ALEXANDER ALMONTE ESQ
ALMONTE LAW FIRM P.C.
119 WASHINGTON AVE STE 101
ALBANY, NY 12210-2204
ALCOINC2@AOL.COM

Serial #: 85623013

Application File

Application Status: Opposition Pending

Mark: BRATVA

Plaintiff

Name: Bratva, Inc.

Correspondence: Julian H. Lowenfeld, Esq.
Law office of Julian H. Lowenfeld
350 Central Park West Suite 13-C
New York, NY 10025
UNITED STATES
jlowenfeld@gmail.com

Prosecution History

#	Date	History Text	Due Date
3	10/10/2012	PENDING, INSTITUTED	
<u>2</u>	10/10/2012	<u>NOTICE AND TRIAL DATES SENT; ANSWER DUE:</u>	11/19/2012
<u>1</u>	10/10/2012	<u>FILED AND FEE</u>	

Search:

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

Mailed: October 10, 2012

Opposition No. 91207394
Serial No. 85623013

ALEXANDER ALMONTE ESQ
ALMONTE LAW FIRM P.C.
119 WASHINGTON AVE STE 101
ALBANY, NY 12210-2204
ALCOINC2@AOL.COM

Bratva, Inc.

v.

OLEG MAKLER

Julian H. Lowenfeld, Esq.
Law office of Julian H. Lowenfeld
350 Central Park West Suite 13-C
New York, NY 10025
jlowenfeld@gmail.com

ESTTA499158

A notice of opposition to the registration sought by the above-identified application has been filed. A service copy of the notice of opposition was forwarded to applicant (defendant) by the opposer (plaintiff). An electronic version of the notice of opposition is viewable in the electronic file for this proceeding via the Board's TTABVUE system: <http://ttabvue.uspto.gov/ttabvue/v?qs=91207394>.

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations ("Trademark Rules"). These rules may be viewed at the USPTO's trademarks page: <http://www.uspto.gov/trademarks/index.jsp>. The Board's main webpage (<http://www.uspto.gov/trademarks/process/appeal/index.jsp>) includes information on amendments to the Trademark Rules applicable to Board proceedings, on Alternative Dispute Resolution (ADR), Frequently Asked Questions about Board proceedings, and a web link to the Board's manual of procedure (the TBMP).

Plaintiff must notify the Board when service has been ineffective, within 10 days of the date of receipt of a returned service copy or the date on which plaintiff learns that service has been ineffective. Plaintiff has no subsequent duty to investigate the defendant's whereabouts, but if plaintiff by its own voluntary investigation or through any other means discovers a newer correspondence address for

the defendant, then such address must be provided to the Board. Likewise, if by voluntary investigation or other means the plaintiff discovers information indicating that a different party may have an interest in defending the case, such information must be provided to the Board. The Board will then effect service, by publication in the Official Gazette if necessary. See Trademark Rule 2.118. In circumstances involving ineffective service or return of defendant's copy of the Board's institution order, the Board may issue an order noting the proper defendant and address to be used for serving that party.

Defendant's ANSWER IS DUE FORTY DAYS after the mailing date of this order. (See Patent and Trademark Rule 1.7 for expiration of this or any deadline falling on a Saturday, Sunday or federal holiday.) Other deadlines the parties must docket or calendar are either set forth below (if you are reading a mailed paper copy of this order) or are included in the electronic copy of this institution order viewable in the Board's TTABVue system at the following web address:
<http://ttabvue.uspto.gov/ttabvue/>.

Defendant's answer and any other filing made by any party must include proof of service. See Trademark Rule 2.119. If they agree to, the parties may utilize electronic means, e.g., e-mail or fax, during the proceeding for forwarding of service copies. See Trademark Rule 2.119(b)(6).

The parties also are referred in particular to Trademark Rule 2.126, which pertains to the form of submissions. Paper submissions, including but not limited to exhibits and transcripts of depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.

Time to Answer	11/19/2012
Deadline for Discovery Conference	12/19/2012
Discovery Opens	12/19/2012
Initial Disclosures Due	1/18/2013
Expert Disclosures Due	5/18/2013
Discovery Closes	6/17/2013
Plaintiff's Pretrial Disclosures	8/1/2013
Plaintiff's 30-day Trial Period Ends	9/15/2013
Defendant's Pretrial Disclosures	9/30/2013
Defendant's 30-day Trial Period Ends	11/14/2013
Plaintiff's Rebuttal Disclosures	11/29/2013
Plaintiff's 15-day Rebuttal Period Ends	12/29/2013

As noted in the schedule of dates for this case, the parties are required to have a conference to discuss: (1) the nature of and basis for their respective claims and defenses, (2) the possibility of settling the case or at least narrowing the scope of claims or defenses, and (3) arrangements relating to disclosures, discovery and

introduction of evidence at trial, should the parties not agree to settle the case. See Trademark Rule 2.120(a)(2). Discussion of the first two of these three subjects should include a discussion of whether the parties wish to seek mediation, arbitration or some other means for resolving their dispute. Discussion of the third subject should include a discussion of whether the Board's Accelerated Case Resolution (ACR) process may be a more efficient and economical means of trying the involved claims and defenses. Information on the ACR process is available at the Board's main webpage. Finally, if the parties choose to proceed with the disclosure, discovery and trial procedures that govern this case and which are set out in the Trademark Rules and Federal Rules of Civil Procedure, then they must discuss whether to alter or amend any such procedures, and whether to alter or amend the Standard Protective Order (further discussed below). Discussion of alterations or amendments of otherwise prescribed procedures can include discussion of limitations on disclosures or discovery, willingness to enter into stipulations of fact, and willingness to enter into stipulations regarding more efficient options for introducing at trial information or material obtained through disclosures or discovery.

The parties are required to conference in person, by telephone, or by any other means on which they may agree. A Board interlocutory attorney or administrative trademark judge will participate in the conference, upon request of any party, provided that such participation is requested no later than ten (10) days prior to the deadline for the conference. See Trademark Rule 2.120(a)(2). The request for Board participation must be made through the Electronic System for Trademark Trials and Appeals (ESTTA) or by telephone call to the interlocutory attorney assigned to the case, whose name can be found by referencing the TTABVUE record for this case at <http://ttabvue.uspto.gov/ttabvue/>. The parties should contact the assigned interlocutory attorney or file a request for Board participation through ESTTA only after the parties have agreed on possible dates and times for their conference. Subsequent participation of a Board attorney or judge in the conference will be by telephone and the parties shall place the call at the agreed date and time, in the absence of other arrangements made with the assigned interlocutory attorney.

The Board's Standard Protective Order is applicable to this case, but the parties may agree to supplement that standard order or substitute a protective agreement of their choosing, subject to approval by the Board. The standard order is available for viewing at: <http://www.uspto.gov/trademarks/process/appeal/guidelines/stdnagmnt.jsp>. Any party without access to the web may request a hard copy of the standard order from the Board. The standard order does not automatically protect a party's confidential information and its provisions must be utilized as needed by the parties. See Trademark Rule 2.116(g).

Information about the discovery phase of the Board proceeding is available in chapter 400 of the TBMP. By virtue of amendments to the Trademark Rules effective November 1, 2007, the initial disclosures and expert disclosures scheduled during the discovery phase are required only in cases commenced on or after that date. The TBMP has not yet been amended to include information on these disclosures and the parties are referred to the August 1, 2007 Notice of Final Rulemaking (72 Fed. Reg. 42242) posted on the Board's webpage. The deadlines for

pretrial disclosures included in the trial phase of the schedule for this case also resulted from the referenced amendments to the Trademark Rules, and also are discussed in the Notice of Final Rulemaking.

The parties must note that the Board allows them to utilize telephone conferences to discuss or resolve a wide range of interlocutory matters that may arise during this case. In addition, the assigned interlocutory attorney has discretion to require the parties to participate in a telephone conference to resolve matters of concern to the Board. See TBMP § 502.06(a) (2d ed. rev. 2004).

The TBMP includes information on the introduction of evidence during the trial phase of the case, including by notice of reliance and by taking of testimony from witnesses. See TBMP §§ 703 and 704. Any notice of reliance must be filed during the filing party's assigned testimony period, with a copy served on all other parties. Any testimony of a witness must be both noticed and taken during the party's testimony period. A party that has taken testimony must serve on any adverse party a copy of the transcript of such testimony, together with copies of any exhibits introduced during the testimony, within thirty (30) days after the completion of the testimony deposition. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing after briefing is not required but will be scheduled upon request of any party, as provided by Trademark Rule 2.129.

If the parties to this proceeding are (or during the pendency of this proceeding become) parties in another Board proceeding or a civil action involving related marks or other issues of law or fact which overlap with this case, they shall notify the Board immediately, so that the Board can consider whether consolidation or suspension of proceedings is appropriate.

ESTTA NOTE: For faster handling of all papers the parties need to file with the Board, the Board strongly encourages use of electronic filing through the Electronic System for Trademark Trials and Appeals (ESTTA). Various electronic filing forms, some of which may be used as is, and others which may require attachments, are available at <http://estta.uspto.gov>.

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

CERTIFICATE OF SERVICE

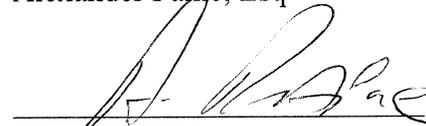
I, Alexander Paine, Esq., HEREBY CERTIFY that a true and correct copy of the APPLICANT'S MOTION FOR INVOLUNTARY DISMISSAL has been furnished on November 22, 2013, by U.S. Regular Mail to:

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
November 22, 2013

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