

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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Mailed: September 12, 2016

Opposition No. 91212653

Nautica Apparel, Inc.

v.

Majestique Corporation

**By the Board:**

This proceeding is before the Board for consideration of 1) Opposer's May 20, 2016 motion to reopen trial, and 2) Applicant's June 10, 2016 motion for involuntary dismissal of opposition for failure to comply with the USPTO schedule order.

**Opposer's motion to reopen trial**

On April 22, 2016, Opposer filed a motion to extend trial dates. The Board later noted in the June 10, 2016 suspension order that Opposer's motion to extend trial dates was granted as conceded pursuant to Trademark Rule 2.127(a). TBMP § 502.04 (2016). Subsequent to the close of Opposer's assigned trial period that Opposer requested in its motion to extend, Opposer filed a May 20, 2016 motion to reopen its trial period and reset trial dates, requesting that its trial period be reset to close on June 10, 2016. Opposer based its motion to reopen on counsel having been in the midst of a family crisis, stated that Opposer has not lost interest in this matter, and indicated the need to reschedule

the testimony deposition of Ms. Margaret Bizzari. The motion set forth Opposer's counsel's efforts to secure Applicant's consent to reopening Opposer's trial period.<sup>1</sup>

Applicant's brief in response to Opposer's motion to reopen was due by June 9, 2016. Applicant filed no brief in response. Accordingly, the Board treats the motion to reopen as unopposed, and the motion is granted as conceded. Trademark Rule 2.127(a); TBMP § 502.04 (2016).

### **Applicant's motion for involuntary dismissal**

On June 10, 2016, the closing date of Opposer's testimony period as requested and reset, Applicant filed a "motion for involuntary dismissal of opposition for failure to comply with USPTO schedule order."<sup>2</sup> Applicant's motion presents negligible argument. Applicant bases its motion on its position that Opposer "failed to comply with the scheduled order issued" in the March 10, 2016 order,<sup>3</sup> and that such failure to comply was "without just cause."<sup>4</sup> As authority for the relief it seeks, Applicant cites Trademark Rules 2.116 and 2.120.<sup>5</sup> In connection with its argument that counsel consented to Opposer's August 18, 2015 motion to extend trial, Applicant attached to its motion copies of emails dated August of 2015.

Opposer contests the motion, arguing, *inter alia*, that it filed a motion to extend the schedule set forth in the March 10, 2016 order, and thus did not fail to comply with the schedule. Opposer sets forth a history of the motions practice in this case, and sets

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<sup>1</sup> 39 TTABVUE 2.

<sup>2</sup> 40 TTABVUE.

<sup>3</sup> 40 TTABVUE 2.

<sup>4</sup> 40 TTABVUE 3.

<sup>5</sup> 40 TTABVUE 3.

forth a number of attempts to communicate with Applicant's counsel concerning various matters, including the personal circumstances that led to Opposer's counsel's need to move to reopen its trial period.

Turning to the merits of Applicant's motion, Trademark Rule 2.116 does not provide for dismissal of a claim or a proceeding. Additionally, Applicant failed to set forth the provision of the rule on which it relies, or any arguments specifically directed to the rule.

Trademark Rule 2.120 pertains to discovery. Subsection (g) includes provisions for sanctions; however, the provisions are not pertinent here, *e.g.*, Opposer did not fail to comply with an order relating to disclosure or discovery, or a protective order, as such a type of order is defined by Board authorities. *Amazon Technologies v. Wax*, 93 USPQ2d 1702, 1706 (TTAB 2009) (motion for sanctions pursuant to Trademark Rule 2.120(g)(1) denied as premature where no Board order was in place compelling discovery). Additionally, Applicant failed to set forth the provision of the rule on which it relies, or any arguments specifically directed to the rule.

For completeness, the Board *sua sponte* notes that Trademark Rule 2.132 ("*Involuntary dismissal for failure to take testimony*") affords a means for a defendant to move for dismissal in cases where the party in the position of plaintiff fails to prosecute its claim(s) (*i.e.*, fails to take testimony or introduce any other evidence in support of its claim(s)). On the record before the Board, there is no basis for a finding of involuntary dismissal under this rule.

Lastly, Applicant's request for relief is fruitless to the extent that it is based on Fed. R. Civ. P. 41(b), which provides, in pertinent part:

(b) Involuntary Dismissal; Effect. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it.

A motion for involuntary dismissal pursuant to Fed. R. Civ. P. 41(b) is not available in Board proceedings. TBMP §§ 502.01 and 534.04 (2016).

In summary, Applicant has not demonstrated, and moreover the record does not support, a finding, that Opposer failed to comply with the trial schedule set forth in the Board's March 10, 2016 order. Moreover, Applicant has not demonstrated sound authority for involuntary dismissal on the basis asserted in its motion. In view of these findings, Applicant's motion for involuntary dismissal is denied.

### **Schedule**

Proceedings are hereby resumed. Remaining trial dates are reset as indicated below:

Defendant's Pretrial Disclosures Due	<b>9/23/2016</b>
Defendant's 30-day Trial Period Ends	<b>11/7/2016</b>
Plaintiff's Rebuttal Disclosures Due	<b>11/22/2016</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>12/22/2016</b>

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125. Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.