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

Proceeding	91213057
Party	Plaintiff Hybrid Athletics, LLC
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Date	09/03/2014
Attachments	Reply ISO Motion for Sanctions.pdf(152502 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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HYBRID ATHLETICS, LLC,	:	
	:	
Opposer,	:	Opposition No. 91213057
	:	
v.	:	
	:	
HYLETE LLC,	:	
	:	
Applicant.	:	

**OPPOSER’S REPLY TO APPLICANT’S RESPONSE TO
MOTION FOR SANCTIONS AND ENTRY OF JUDGMENT**

Opposer Hybrid Athletics, LLC (“Hybrid”) submits this Reply to Hylete’s Response to Hybrid’s Motion for Sanctions and Entry of Judgment.

Hylete’s response is simply nonresponsive and provides no justification as to why judgment should not be entered on the merits. To date, Hylete is in continuing violation of the Board’s Order compelling discovery, therefore, Hylete cannot and does not make any arguments on the merits. Instead, Hylete references its offer for settlement, sent *11 days after* the Board’s August 4, 2014 deadline to provide discovery responses, as a reason to deny Hybrid’s motion. (Response at 1.) However, Hylete’s reference to an offer for settlement and Hybrid’s alleged failure to respond is not only highly inappropriate and inadmissible (FED R. EVID. 408), it is completely irrelevant.¹

¹ Hylete’s allegations of bad-faith are curious in view of Hylete’s repeated failures to respond to Hybrid’s discovery and the Board’s Order. Further, in view of the similarity of the marks and ongoing confusion, Hybrid did in fact reject Hylete’s offer of settlement. (Exhibit A.)

Despite the Board already finding that “[Hylete] has forfeited its right to object to the discovery requests on their merits” and requiring Hylete to serve upon Hybrid any responses to Hybrid's discovery requests by August 4, 2014, Hylete has completely failed to provide *any* discovery responses. In its response, Hylete now, for the first time, asks the Board to “mandate a telephonic conference in order to better understand Opposer’s discovery requests so that Applicant may provide more clear and complete responses.” (Response at 1.)

However, as set forth in TBMP §509.01(b)(1):

Where the time for taking required action, as originally set or as previously reset, has expired, a party desiring to take the required action must file a motion to reopen the time for taking that action. The movant must show that its failure to act during the time previously allotted therefor was the result of *excusable neglect*. See Fed. R. Civ. P. 6(b)(1)(B).

The analysis to be used in determining whether a party has shown excusable neglect was set forth by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). These cases hold that the 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.

Thus, the only question presented to the Board for the present motion is has Hylete shown that its failure to act by the Board’s August 4, 2014 deadline was the result of excusable neglect. In its response, the only excuses seemingly provided by Hylete are 1) a settlement proposal, sent *11 days after* the Board’s August 4, 2014 deadline; and 2) Hylete’s supposed attempt to request that discovery be extended in the interim of its settlement offer. However, neither of these rises to the level of excusable neglect.

As provided in TBMP §509.01(b)(1), “[i]t has been held that the third Pioneer factor, i.e., ‘the reason for the delay, including whether it was within the reasonable control of the movant,’ may be deemed to be the most important of the Pioneer factors in a particular case.”

Importantly, in analyzing this factor the Board has found that neither the mere existence of settlement negotiations nor a request for an extension of time justifies a party’s inaction or delay. *See* TBMP §509.01(b)(1)(citing *Luster Products Inc. v. Van Zandt*, 104 USPQ2d 1877, 1879 (TTAB 2012) (applicant made a calculated strategic decision, within its control, not to take discovery in the hope opposer had lost interest in the case, even though the parties held settlement discussions and opposer requested an extension of the discovery period before it closed); *Giersch v. Scripps Networks Inc.*, 85 USPQ2d 1306, 1307-08 (TTAB 2007) (respondent’s mistaken belief that counsel for petitioner would agree to an extension request did not relieve respondent of its duty to adhere to appropriate deadlines); *Atlanta-Fulton County Zoo Inc. v. De Palma*, 45 USPQ2d 1858, 1859-60 (TTAB 1998) (failure to timely move to extend testimony period was due to counsel’s oversight and mere existence of settlement negotiations did not justify party’s inaction or delay)).

Therefore, Hylete’s response is simply nonresponsive, discovery should not be reopened and Hybrid’s Motion for Sanctions and Entry of Judgment should be granted.

HYBRID ATHLETICS, LLC

September 3, 2014

/s/ Wesley W. Whitmyer, Jr.

Wesley W. Whitmyer, Jr.

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ATTORNEYS FOR OPPOSER

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing OPPOSER'S REPLY TO APPLICANT'S RESPONSE TO MOTION FOR SANCTIONS AND ENTRY OF JUDGMENT was served by first class mail, postage prepaid on the Correspondent for the Applicant as follows:

Kyriacos Tsircou
Eli Wagner
Tsircou Law, P.C.
515 S. Flower Street, Floor 36
Los Angeles, CA 90071-2221

9/3/2014
Date

/s/ Jessica L. White
Jessica L. White

EXHIBIT A



August 27, 2014

VIA EMAIL **ONLY**
eliwagner@tsircoulaw.com

Eli Wagner
Tsircou Law, P.C.
515 S. Flower Street, Floor 36
Los Angeles, CA 90071-2221

Re: SSJR File 05828-N0005A
Hybrid Athletics, LLC v. Hylete LLC

Dear Ms. Wagner:

We write in response to Hylete's August 15, 2014 settlement offer. We have reviewed the settlement offer with our client and we do not consider it a suitable resolution. In view of the similarity of the marks, confusion will be ongoing, and we intend to prosecute the opposition.

Sincerely,

A handwritten signature in black ink, appearing to read 'A Corea'.

Andy I. Corea
acorea@ssjr.com

AIC:MJK

c: Kyriacos Tsircou (via email **only** kyri@tsircoulaw.com)

From: [SSJR Litigation](#)
To: ["eliwagner@tsircoulaw.com"](mailto:eliwagner@tsircoulaw.com)
Cc: ["Kyri Tsircou"](#); [Corea, Andy I.](#); [Kosma, Michael J.](#); [Whitmyer, Wesley W. Jr.](#)
Subject: Hybrid Athletics, LLC v. Hylete LLC Your File Not Known - SSJR File 05828-N0005A
Date: Wednesday, August 27, 2014 12:37:17 PM
Attachments: [12R0763-LO.2014.08.27.AIC.to.Wagner.re.PDF](#)

Please see attached correspondence sent on behalf of Andy Corea.