

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Baxley

Mailed: August 5, 2015

Opposition No. 91218603

Zeuter Inc.

v.

Ark Sciences, Inc.

Before Richey, Deputy Chief Administrative Judge, and
Seeherman and Wolfson, Administrative Trademark Judges.

By the Board:

Ark Sciences, Inc. (“Applicant”) applied to register the mark ZEUTERIN in standard characters for “Pharmaceutical preparation, namely, chemical sterilant for male pet animals for veterinary use” in International Class 5.¹

After the mark was published for opposition on June 3, 2014, Zeuter Inc. (“Opposer”) filed a request for, and received, a ninety-day extension of time to oppose registration of Applicant’s mark. On September 30, 2014, Opposer, appearing *pro se*, timely filed a notice of opposition. The ESTTA electronic cover sheet indicates proof of service upon Applicant by First-Class Mail.

¹ Application Serial No. 86170911, filed January 21, 2014, based on an assertion of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). On March 8, 2014, Applicant filed an amendment to allege use in which it claimed February 20, 2014 as the date of first use anywhere and the date of first use in commerce. Neither the application nor the amendment to allege use include a return e-mail address.

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After Applicant failed to file an answer, the Board, on November 28, 2014, issued a notice of default. After Applicant failed to respond to the notice of default, the Board, in a January 12, 2015 order, entered default judgment against Applicant. The application became abandoned on that day. The U.S. Postal Service did not return to the Board as undeliverable either the notice of default or the default judgment.

On January 29, 2015, seventeen days after entry of judgment, Applicant filed a motion for relief from judgment under Fed. R. Civ. P. 60(b). After Opposer failed to respond to Applicant's motion, the Board, on March 4, 2015, granted that motion as conceded.

On April 2, 2015, Opposer filed a motion to reopen time to respond to Applicant's Rule 60(b) motion. Applicant has filed a brief in response thereto. In support of its motion, Opposer contends in relevant part that it does not concede Applicant's motion; that, since judgment was entered, its principal has been travelling in the United States and Canada; that, although Opposer's principal has received other mail that was sent to Opposer, Opposer did not receive any notice from the Board which indicated that it needed to take any action in response to the Rule 60(b) motion; that the Board "posted the [notice] of opposition and made this fact known to the Applicant before the decision was made to deny the Application;" that Applicant abandoned an earlier application to register its involved ZEUTERIN mark; and that this proceeding "has already been settled in a fair and equitable

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way.” Brief in response at 2-3. Accordingly, Opposer asks that it be allowed three months to respond further to Applicant’s Rule 60(b) motion.

For the Board to reopen Opposer’s time to respond, Opposer must establish that its failure to respond to the Rule 60(b) motion was the result of “excusable neglect.” In *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993), as discussed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the Supreme Court clarified the meaning and scope of “excusable neglect,” as used in the Federal Rules of Civil Procedure and elsewhere.

The Court held that the determination of whether a party’s neglect is excusable is:

at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include. . . [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.

Pioneer Investment Services Co. v. Brunswick Associates L.P., 507 U.S. at 395. In subsequent applications of this test, several courts have stated that the third *Pioneer* factor, namely the reason for the delay and whether it was within the reasonable control of the movant, might be considered the most important factor in a particular case. *See Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d at 1586 n.7 and cases cited therein.

Turning initially to the third *Pioneer* factor, Opposer is advised that the Board does not send any notice to parties to indicate that a motion has been filed. Rather, notice of a motion is provided through the service copy of that motion that a movant is required to serve on its adversaries in accordance with Trademark Rule 2.119(a).

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A brief in response to a motion other than one for summary judgment is due in accordance with Trademark Rules 2.119(c) and 2.127(a). The Board expects all parties appearing before it, whether or not they are represented by an attorney, to comply with applicable rules.²

The certificate of service of the Rule 60(b) motion indicates that such motion was served upon Opposer at its correspondence address of record. Although Opposer contends that its principal was traveling following the entry of the default judgment and that it did not receive any notice from the Board, Opposer does not specifically allege that it did not receive Applicant's service copy of the Rule 60(b) motion. However, because Opposer is essentially arguing that it did not have notice of Applicant's Rule 60(b) motion, we find that Opposer's failure to timely respond to that motion was due to nonreceipt of the service copy of the motion and that such nonreceipt was beyond its reasonable control. This factor, therefore, weighs in favor of a finding of excusable neglect.

Regarding the second *Pioneer* factor, we find that the delay caused by Opposer's failure to timely respond to the Rule 60(b) motion, though disruptive to the orderly administration of this proceeding, is relatively insignificant. Regarding the first *Pioneer* factor, Applicant has made no specific showing of prejudice to its ability to

² Opposer has indicated that it intends to represent itself herein. While Patent and Trademark Rule 11.14 permits any person or entity to represent itself, it is generally advisable for anyone who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition proceeding to secure the services of an attorney who is familiar with such matters.

The Trademark Board Manual of Procedure (TBMP) and the Trademark Rules of Practice are available online at <http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>.

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litigate this case that would result from reopening Opposer's time to respond to the Rule 60(b) motion, such as lost witnesses, unavailable witnesses or expenses incurred in reliance upon the setting aside of the default judgment. *See Pratt v. Philbrook*, 109 F.3d 18, 22 (1st Cir. 1997); TBMP § 509.01(b) (2015). Finally, regarding the fourth *Pioneer* factor, there is no evidence of bad faith on Opposer's part. Therefore, we find that Opposer's failure to timely oppose Applicant's Rule 60(b) motion was caused by excusable neglect, and therefore Opposer's motion to reopen its time to respond to the Rule 60(b) motion is granted to the extent that we hereby vacate the March 4, 2015 order. However, because Opposer argued the merits of the Rule 60(b) motion in its motion to reopen, we find that allowing time for further briefing of that motion is unnecessary. We have considered Opposer's arguments in opposition to the Rule 60(b) motion in deciding that motion on the merits.

In support of the Rule 60(b) motion, Applicant contends that it filed such motion within three weeks of the entry of judgment; that neither Applicant nor its attorney were served with a copy of the notice of opposition; and that, subsequent to the issuance of the notice of publication, the only documents that Applicant received in connection with its application are (1) a postcard notifying Applicant that a request for an extension of time to oppose had been filed and (2) a notice of abandonment of its application. Applicant further contends that, had it received notice that its involved application was being opposed, it was prepared to defend the merits of this case; that it never had a willful intent to default herein; that vacating entry of

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default judgment will not result in hardship to third parties; and that it believes that the “indefinite and incomprehensible grounds set forth in the notice of opposition” are without merit. Accordingly, Applicant asks that the Board vacate the default judgment and reopen this proceeding. Applicant submitted a declaration of its attorney, Grace J. Fishel, in support of its motion.

In opposition, Opposer contends that the Board “posted the [notice] of opposition and made this fact” known to Applicant prior to entry of judgment; that Applicant filed an earlier application to register the involved ZEUTERIN mark, which was also abandoned; that the Board “need not bend over backwards to help those who try to game the system repeatedly;” and that this case “has already been settled in a fair and equitable way.” Brief in response at 2-3.

In reply, Applicant contends that the Board does not favor default judgments and that it has shown good cause to set aside the default judgment.

A motion to set aside or vacate any judgment issued by the Board is governed by Fed. R. Civ. P. 60(b). *See* Trademark Rule 2.116(a); TBMP § 544. Thus, upon such terms as are just, the Board, on motion, may relieve a party from a final judgment for one of the reasons specified in Fed. R. Civ. P. 60(b).³ A motion for relief from

³ Those reasons are as follows:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

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judgment must be made within a reasonable time; and if the motion is based on reasons (1), (2), and/or (3), it must be filed not more than one year after the judgment was entered – the time will not be extended. *See* Fed. R. Civ. P. 6(b)(1)(B) and 60(b); *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991).

Because default judgments for failure to timely answer a complaint are not favored by the law, a motion under Fed. R. Civ. P. 55(c) and Fed. R. Civ. P. 60(b) seeking relief from such a judgment is generally treated with greater liberality by the Board than are motions under Fed. R. Civ. P. 60(b) for relief from other types of judgments. *See Information Sys. and Networks Corp. v. U.S.*, 994 F.2d 792, 795 (Fed. Cir. 1993); TBMP § 312.03. Among the factors to be considered in determining a motion to vacate a default judgment for failure to answer the complaint are (1) whether the plaintiff will be prejudiced, (2) whether the default was willful, and (3) whether the defendant has a meritorious defense to the action. *See Djeredjian*, 21 USPQ2d at 1615.

With regard to the possible prejudice to Opposer, mere inconvenience and delay caused by Applicant's failure to take timely action does not constitute prejudice, nor does Opposer's loss of the tactical advantage of default judgment. *See Pumpkin Ltd.*, 43 USPQ2d at 1587; TBMP § 509.01(b). Rather, Opposer has made no specific showing of prejudice to its ability to litigate this case that would result from setting aside the default judgment, such as lost witnesses, unavailable evidence or

(6) any other reason that justifies relief.
Thus, Applicant's apparent belief that it need only show good cause to vacate the default judgment is incorrect.

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expenses incurred in reliance upon the default judgment. See *Pratt*, 109 F.3d at 22; TBMP § 509.01(b). Accordingly, we resolve this factor in Applicant's favor.

Turning to whether Applicant has a meritorious defense, Applicant has filed an answer wherein it denies the salient allegations of the notice of opposition. Thus, Applicant has a meritorious defense herein.⁴ See *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154 (TTAB 1991). Although Opposer notes that Applicant filed, and later abandoned, an earlier application to register the involved ZEUTERIN mark, an abandonment during *ex parte* examination generally does not preclude an applicant from filing a new application to register that mark. Cf. *Textron Inc. v. Omark Industries, Inc.*, 208 USPQ 524, 528 (TTAB 1980); *John B. Stetson Co. v. Globe Rubber Works, Inc.*, 180 USPQ 655, 655 (TTAB 1973) (decisions by examining attorneys are not binding upon the Board in subsequent *inter partes* proceedings in which opposer is contesting an applicant's right to registration, even where the record contains no new or different evidence). Accordingly, we resolve this factor in Applicant's favor.

With regard to whether the default was the result of Applicant's culpable conduct, we must examine whether Applicant "willfully declined to follow [the Board's] rules and procedures." *Information Sys.*, 994 F.2d at 796. We note initially that, until Applicant filed the Rule 60(b) motion, it does not appear to have provided an e-mail address through which the Board could send notice of issuance of orders in this case. When an applicant provides an e-mail address during *ex parte*

⁴ Whether or not Applicant can prevail at trial is a matter for resolution on the merits. See *Flatley v. Trump*, 11 USPQ2d 1284, 1286 (TTAB 1989).

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examination of an application, the Board sends notice of any opposition and all subsequent actions by e-mail in an opposition involving that application. *See* TBMP §§ 117.01 and 117.02; Miscellaneous Changes to Trademark Trial and Appeal Board Rules, 72 Fed. Reg. 42242, 42243-44 (August 1, 2007). Had Applicant consented to receipt of correspondence by e-mail in its application, it could have received e-mail notice of the issuance of Board orders during this proceeding, which may have rendered unnecessary its Rule 60(b) motion. In addition, because Applicant was admittedly aware that Opposer had received an extension of time to oppose, Applicant could have monitored the Board's online database TTABVUE to see if Opposer had filed a notice of opposition.

We further note that Applicant has not changed its correspondence address, which is the address of the attorney prosecuting its application, since it filed the involved application more than eighteen months ago and that none of the Board orders in this case that were mailed to Applicant was returned by the Postal Service as undeliverable. The mailing of correspondence in accordance with standard Office mailing procedures creates a presumption of receipt of correspondence. *See* TBMP § 117.01.

Against this backdrop, Applicant contends that it did not receive the notice of opposition, the October 1, 2014 notice instituting this proceeding, the November 28, 2014 notice of default, or the January 12, 2015 order in which the default judgment was entered. This contention is supported by a declaration of Applicant's attorney

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who avers to nonreceipt of the aforementioned documents.⁵ The declaration is made under penalty of perjury by an attorney, who is subject to both Patent and Trademark Rule 11.18(b) and the conduct rules of the jurisdictions in which she is licensed to practice law. Accordingly, notwithstanding our extreme skepticism with regard to the alleged nonreceipt of documents herein, we find that Applicant did not willfully ignore Board rules and procedures. In view of our determination that all of the relevant factors favor Applicant, the Rule 60(b) motion is granted. Applicant's answer is accepted and made of record. Involved application Serial No. 86017911 will be reinstated and restored to pendency.

The parties are reminded that they must keep their correspondence addresses current. *See* TBMP § 117.07. Because of the assertions of nonreceipt of correspondence, the parties are directed to serve documents herein by e-mail at the e-mail addresses of record.⁶ *See* Trademark Rule 2.119(b)(6); *McDonald's Corp. v. Cambridge Overseas Development Inc.*, 106 USPQ2d 1339 (TTAB 2013). The Board will view further assertions of nonreceipt with extreme skepticism. In addition, because the parties have filed documents herein through the Board's Electronic System for Trademark Trials and Appeals (ESTTA), they will receive notice of Board orders in this case by e-mail. *See* TBMP § 117.01.

⁵ The declaration, however, does not include an explanation of the mail-routing procedures within the law firm of Applicant's attorney.

⁶ Opposer's e-mail address of record is nick@zeuter.com; Applicant's e-mail address of record is fishel@theapplicant.com. The parties may, if they wish, also serve additional copies of correspondence by the U.S. Postal service, but the papers served by e-mail will represent the official service.

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In preparing this decision, the Board reviewed the pleadings herein. Based on that review, the Board finds that the notice of opposition fails to state any valid claim for opposing registration of Applicant's mark.⁷

The ESTTA electronic cover sheet of the notice of opposition indicates that Opposer's grounds for opposition are that the mark: (1) consists of "[i]mmoral or scandalous matter" under Trademark Act Section 2(a), 15 U.S.C. § 1052(a); (2) "[c]onsists of or comprises a name, portrait, or signature of a living individual without written consent, or the name, portrait, or signature of a deceased president without the written consent of the surviving spouse" under Trademark Act Section 2(c), 15 U.S.C. § 1052(c); and (3) "[c]onsists of or comprises a name, portrait, or signature of a corporation without written consent." In the text of the notice of opposition, Opposer alleges as follows:

1) Immoral or Scandalous Matter: There is some question in the media whether the so-called Zeuterin process is effective and harmless as portrayed. Thus the use of the term "zeuter" as a synonym for "neuter" is insulting and damaging to the name and reputation of the Nevada Corporation, Zeuter Inc., established in 2009.

2) Consists of a signature of a living individual: The word Zeuter was coined by myself, Nick Slater and my McMaster University Lab Partner, Alfred Zeuner, for a Canadian partnership back in 1980 because Zeuter sounded better than Slaner. Since that time I alone incorporated an Ontario Corporation, Zeuter Development Corporation, back in 1993 once Mr. Zeuner relinquished any continuing interest in the name Zeuter. Ultimately, I alone incorporated Zeuter, Inc. in Nevada in 2009. As such, all things Zeuter reflect the corporate me, hence my signature and as such, I am damaged by the association of my long standing and well known computer and internet business with chemical castration of dubious nature.

⁷ The Board may determine the sufficiency of a complaint at any time. *See* Fed. R. Civ. P. 12(f).

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3) Consists of the name of an existing corporation: The rights of Zeuter Inc., a Nevada Corporation involved with computers, internet and solar energy, are equivalent to that of a living individual, and as such, the use of the name “zeuter” as noun or verb in relation to a chemical castration process of dubious nature damage the good name and long history of Zeuter Inc. and may cause confusion in the marketplace.

Regarding Opposer’s claim that the mark is immoral or scandalous, Trademark Act Section 2(a), 15 U.S.C. § 1052(a), states in relevant part that “[n]o trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it ... [c]onsists of or comprises immoral, deceptive, or scandalous matter...” The terms “immoral” and “scandalous” are usually discussed as though basically synonymous; however, most refusals under the first clause of Section 2(a) have focused on whether marks comprise vulgar and therefore scandalous, as opposed to immoral, matter. See *In re Mavety Media Group Ltd.*, 33 F.3d 1367, 31 USPQ2d 1923, 1925 n.* (Fed. Cir. 1994); *In re McGinley*, 660 F.2d 481, 211 USPQ 668, 672 n.6 (CCPA 1981); *In re Manwin/RK Collateral Trust*, 111 USPQ2d 1311, 1312 n.3 (TTAB 2014). A mark is scandalous where it is “shocking to the sense of truth, decency, or propriety; disgraceful; offensive; disreputable; ... giving offense to the conscience or moral feelings; ... [or] calling out [for] condemnation.”⁸ *In re Mavety Media Group Ltd.*, 31 USPQ2d at 1926, citing *In re Riverbank Canning Co.*, 95 F.2d 327, 37 USPQ 268, 269 (CCPA 1938).

⁸ Whether a mark comprises scandalous matter is to be ascertained in the context of the marketplace as applied to the goods and/or services described in the application from the standpoint of a substantial composite of the general public in the context of contemporary attitudes. See *Mavety Media Group Ltd.*, 31 USPQ2d at 1926-27.

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The immoral or scandalous claim is based on the alleged similarity of Applicant's involved mark to Opposer's corporate name and not on any alleged vulgarity. As such, the alleged similarity suggests a possible basis for claims of false suggestion of a connection under Trademark Act Section 2(a), 15 U.S.C. § 1052(a),⁹ or likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d),¹⁰ but is not a plausible basis for a claim that the mark is immoral or scandalous under Section 2(a).

Regarding Opposer's claim that Applicant's mark "[c]onsists of the signature of a living individual," a mark is unregistrable under Trademark Act Section 2(c), 15 U.S.C. § 1052(c), if it "[c]onsists of or comprises a name, portrait, or signature identifying a particular living individual except by his written consent." Section 2(c)

⁹ A claim that a mark falsely suggests a connection with persons, living or dead, or institutions requires a pleading of facts which would establish that: (1) the defendant's mark is the same or a close approximation of plaintiff's previously used name or identity; (2) the mark would be recognized as such; (3) the plaintiff is not connected with the activities performed by the defendant under the mark; and (4) that the plaintiff's name or identity is of sufficient fame or reputation that when the defendant's mark is used on its goods or services, a connection with the plaintiff would be presumed. *See Buffett v. Chi-Chi's, Inc.*, 226 USPQ 428, 429-30 (TTAB 1985).

¹⁰ To allege a Section 2(d) claim, a plaintiff must allege must allege likelihood of confusion with a previously used or registered mark for specified goods and/or services. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

In addition, an owner of a famous mark may, in limited "extraordinary" circumstances, allege dilution under Trademark Act Section 43(c), 15 U.S.C. § 1125(c). *See Nike Inc. v. Maher*, 100 USPQ2d 1018, 1029 (TTAB 2011) ("dilution is an extraordinary remedy"). To prevail on a dilution claim, a plaintiff must show that: (1) it owns a mark that is famous and distinctive; (2) the defendant is using a mark in commerce that allegedly dilutes the plaintiff's famous mark; (3) the defendant's use of its mark began after the plaintiff's mark became famous; and (4) the defendant's use of its mark is likely to cause dilution by blurring or by tarnishment. *See Coach Services Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1723-24 (Fed. Cir. 2012). The level of fame necessary to establish dilution is greater than that which is applied in a likelihood of confusion analysis and is difficult to prove. *See id.* at 1724.

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bars the registration of marks that contain not only full names, but also surnames, shortened names, nicknames, etc., so long as the name in question does, in fact, identify a particular living individual. *See In re Sauer*, 27 USPQ2d 1073, 1074 (TTAB 1993). A name is deemed to identify a particular living individual under Section 2(c) only if the “individual bearing the name in question will be associated with the mark as used on the goods, either because that person is so well known that the public would reasonably assume the connection, or because the individual is publicly connected with the business in which the mark is used.” *Martin v. Carter Hawley Hale Stores, Inc.*, 206 USPQ 931, 933 (TTAB 1979).

Even if we assume that the involved ZEUTERIN mark in the drawing encompasses presentation of that mark as a “signature” (*see Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011)), Opposer has failed to identify any living individual upon which to base this claim. Rather, Opposer essentially alleges that its corporate name ZEUTER was created from syllables taken from the surnames of its founders, Messers. Zeuner and Slater, and that Opposer is Mr. Slater’s corporate alter ego. Even if we assume that Mr. Slater is the sole owner of Opposer, Opposer is a corporation, i.e., a separate legal person from Mr. Slater and not a living individual. Further, Opposer cannot plausibly assert that ZEUTERIN is a close approximation of Mr. Slater’s name. As such, any similarity of the involved mark to Opposer’s name cannot form a basis for a claim under Trademark Act Section 2(c).

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In addition, Opposer's assertion that the mark "[c]onsists of the name of an existing corporation" is not a basis for a claim under Section 2(c). Although this assertion suggests a possible basis for claim of false suggestion of a connection under Trademark Act Section 2(a), Opposer has not pleaded such a claim in the notice of opposition. *See* footnote 10.

Based on the foregoing, we find that Opposer has failed to plead any proper ground for opposition of Applicant's mark. *See* Fed. R. Civ. P. 12(b)(6); TBMP § 503.01. In keeping with Board practice, Opposer is allowed until thirty days from the mailing date set forth in this order to file an amended notice of opposition, failing which the opposition will be dismissed with prejudice.

Proceedings herein otherwise remain suspended.