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

Proceeding	91219982
Party	Plaintiff 3PMC, LLC
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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. 86/033,388
Filed on 9 August 2013
For the Mark 'COKE HEAD
Published in the Official Gazette (Trademarks) on 2 September 2014

3PMC, LLC Opposer, v. Stacy Lee Huggins Applicant.	Opposition No. 91219982
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Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

RESPONSE TO APPLICANT’S MOTION FOR RELIEF FROM FINAL JUDGMENT

3PMC, LLC (“Opposer” or “3PMC”) hereby responds to Stacy Lee Huggins’ (“Applicant” or “Huggins”) motion for relief from final judgment (Dkt. No. 7) and requests that the Board deny the same for the reasons stated more fully in 3PMC’s arguments provided in the accompanying memorandum. Alternatively, should the Board decide in Applicant’s favor on this issue, a refund of the filing fee paid by 3PMC in the instant case be refunded to the deposit account of the undersigned (Deposit Acct. No. 19-4076).

**MEMORANDUM IN SUPPORT OF 3PMC'S RESPONSE IN OPPOSITION TO
APPLICANT'S MOTION FOR RELIEF FROM FINAL JUDGMENT**

Applicant moves for relief from final judgment entered against it in this matter, which was entered on February 28, 2015 by order of the Board pursuant to Trademark Rule 2.135. (Dk. No. 5.) Applicant cites § 218 of the Trademark Trial and Appeal Board Manual of Procedure in support of its argument that the instant opposition was never commenced, and consequently judgment was improperly entered. 3PMC generally accepts the factual allegations contained in Applicant's motion with respect to the citations to the USPTO records regarding the applications for registration at issue here, namely, serial numbers 86/033,388 and 86/493,498. (Applicant's Mot. Relief J. 1-2, Dk. No. 7.) However, it submits that the record and the case law support this Board's entry of final judgment, and therefore requests that Applicant's motion be denied.

The question presented by Applicant's motion is whether 3PMC's notice of opposition effectively instituted the current proceeding, where Applicant filed a notice of express abandonment of its application on the same day as the filing of 3PMC's notice of opposition. There is no dispute that both filings were made on December 31, 2014, nor has it been alleged that 3PMC had any knowledge of the express abandonment filed by Applicant prior to filing its notice of opposition. Therefore, the issue turns on which of the same-day filings is effective.

Generally, the USPTO does not recognize fractions of a day. *See, e.g.*, TMEP § 303.01 ("Correspondence submitted through TEAS is considered to have been filed on the date the USPTO receives the transmission."); TBMP § 306.01; 37 C.F.R. § 2.101(d)(4), 2.195. 3PMC acknowledges that the TBMP directly addresses the circumstances here, stating that "[a]ny opposition filed on or after the filing date of the abandonment will not be considered." TBMP § 218. However, the provisions of the TBMP "[do] not modify, amend, or serve as a substitute for any existing statutes, rules, or decisional law and is not binding upon the Board, its reviewing

tribunals, the Director, or the USPTO.” TBMP Introduction (citing *In re Wine Society of America Inc.*, 12 USPQ2d 1139 (TTAB 1989)). Therefore, it is appropriate to consider the legal authority underpinning the provisions of § 218.

Two decisions are cited in support of the provisions found in TBMP § 218: *Societe des Produits Nestle S.A. v. Basso Fedele & Figli*, 24 U.S.P.Q.2d 1079 (TTAB 1992), and *In re First National Bank of Boston*, 199 U.S.P.Q. 296, 297 (TTAB 1978). The former case is not relevant to the issue before the Board with regard to the instant motion, as it addressed whether an opposition proceeding was validly instituted where the application being opposed was abandoned for failure to timely respond to an outstanding office action during prosecution. 24 U.S.P.Q.2d at 1080-81. There, the trademark examiner was found to have improperly considered a late reply submitted outside of the statutory period for response, and therefore, the application was actually abandoned on the date in which the notice of opposition was filed. *Id.* Accordingly, the Board held that the applicant be permitted thirty days in which to file a petition to revive, and that absent such filing, the opposition would be considered moot. *Id.* Here, the abandonment and the notice of opposition were filed on the same day – a scenario not addressed in *Societe des Produits Nestle*.

The earlier case, *In re First Nat'l Bank of Boston*, squarely addresses the issue here, and considered the effect of an express abandonment and a notice of opposition filed on the same day. 199 U.S.P.Q. at 297. There, the Board first noted the maxim that “generally law does not recognize or consider a fraction of a day,” *id.* at 299 (citations omitted), while also pointing out that “[i]t is not a rigid or mechanical doctrine,” *id.* Generally, “all transactions on the same day are to be regarded as occurring at the same instant of time except when manifest injustice would result, in which case the exact hour or minute at which the acts were done may be shown.” *Id.* at

300 (citing *In re Susquehanna Chem. Corp.*, 81 F.Supp. 1 (W.D. Penn. 1948), affirmed 174 F.2d 783 (3d Cir. 1949)). As an initial matter, because the current proceeding was accepted by the Board's ESTTA filing system, Applicant should be found to have the burden of going forward with respect to showing whether "manifest injustice will result" by the maintenance of this Board's final judgment entry. *See* 199 U.S.P.Q. at 297 (where the Board preemptively addressed the issue by letter, eight days after the date the concurrent filings were made, by refunding the opposer's fees and holding that the application was abandoned). Here, the Board made no such determination, and instead entered final judgment against Applicant.

Turning to the facts before it, the Board in *First Nat'l Bank of Boston* considered the equities of the parties in finding that the abandonment controlled, stating:

we have to consider whether (a) the exact times of the filing of the abandonment and notice of opposition can be ascertained; (b) whether substantial rights of the parties are at stake; and (c) whether substantial justice requires that we rule one way or the other. These criteria are not independent because an assessment of the rights of the parties may affect the latitude allowable in determining the relative order of events. The closer the balance of the equities, the less latitude is permissible in the critical finding of fact.

Id. at 300. In that case, the parties were involved in other judicial proceedings involving the same or similar issues – circumstances relied upon heavily by the Board in finding the application abandoned. *See id.* For example, it cited the near certainty that wasteful, duplicative litigation would occur were it to find for the opposer and maintain the opposition, disregarding the opposer's arguments that it would be prejudiced by allowing the refiling of the application, the necessity for the opposer to monitor the Official Gazette regarding the same, and the possibility of a new opposition proceeding at a future date. *Id.*

These prejudices to 3PMC do exist here, unlike in *First Nat'l Bank of Boston*, because the parties are not involved in any other proceedings. 3PMC has instituted an opposition proceeding to address the claims of the parties with respect to the mark contained therein.

Applicant, by waiting to abandon its mark until the day on which 3PMC filed the notice of opposition, will at best be only kicking the can down the road. At worst, 3PMC will be subject to potential opposition proceedings against its applications, cancellation proceedings against future registrations, and will be forced to monitor the activities of Applicant at the USPTO for an indeterminate amount of time.

Furthermore, 3PMC submits that the equities of this issue mitigate in favor of allowing the Board's entry of final judgment to stand. First, a procedural rule categorically permitting an express abandonment filed on the final day of an opposition period to control over a notice of opposition filed the same day, effectively allows applicants to unilaterally shorten the statutory period of opposition by one day. Therefore, to the extent that the TBMP § 218 requires an express abandonment to supersede a notice of opposition in all contemporaneous filings, 3PMC submits that the provision contravenes statutory law. *See* 35 U.S.C. § 1063(a).

3PMC points out that Applicant never served or notified 3PMC of its express abandonment filed via TEAS. Nor was 3PMC aware, or has Applicant alleged that 3PMC was aware, of the filing prior to the institution of the opposition. Conversely, 3PMC properly and timely served and notified Applicant of the institution of the present opposition, affording ample opportunity for the Applicant to respond or move to dismiss the proceeding.

Applicant argues that the time stamps associated with the filing of the express abandonment in application serial no. 86/033,388 and the filing of application serial no. 86/493,498 clearly establish the sequence of events. 3PMC submits that this evidence does not, however, establish a *clear* sequence of events, in that it cannot be determined from the record the "exact" time of filing of the notice of opposition, just as in the *First Nat'l Bank of Boston* decision. This is unsurprising, because the law and USPTO practice view both filings as

occurring simultaneously. 199 U.S.P.Q. at 300 (citing *In re Susquehanna Chem. Corp.*, 81 F.Supp. 1 (W.D. Penn. 1948), affirmed 174 F.2d 783 (3d Cir. 1949)) (“all transactions on the same day are to be regarded as occurring at the same instant of time except when manifest injustice would result, in which case the exact hour or minute at which the acts were done may be shown.”).

Even assuming that Applicant’s abandonment was filed before 3PMC’s notice of opposition, both were indisputably filed on the same day. As previously pointed out, there is also no evidence that 3PMC was aware of Applicant’s filing at the time the notice of opposition was filed. Had 3PMC filed its application prior to Applicant’s notice of abandonment, there would be no way to determine the sequence of events from the record at all, let alone clearly. 3PMC points out that the TBMP itself reassures potential opposers by stating that: “Parties which use the ESTTA filing system will not face late opposition and other timing errors. The ESTTA system will not permit a would-be opposer to file an opposition against an application...that has been abandoned...,” TBMP § 306.01 (emphasis added), and thus submits that the fact that the notice of opposition filing was accepted by the ESTTA system is sufficient evidence of its lack of knowledge of Applicant’s abandonment filing. Therefore, the Board is free to consider the equities and the facts and circumstances of this case in deciding which filing should control. There being no reason to favor one type of filing over the other, 3PMC should not be forced to accept the burdens of uncertainty and risk that would be placed upon it should Applicant’s motion be granted. Applicant is merely attempting to better position itself for litigation by gaming the procedural rules at the expense of 3PMC, instead of defending against the allegations brought in the instant opposition. Such actions, if sanctioned by the Board, will

promote judicial waste and effectively shorten the statutory time to oppose relied upon by all potential opposers.

For at least these reasons, 3PMC respectfully requests that the Board deny Applicant's motion for relief from final judgment. If the Board is persuaded to reverse its original entry of final judgment, 3PMC alternatively requests that it be refunded the filing fee paid to initiate these proceedings. If necessary, said refund may be made via deposit account number 19-4076.

Respectfully submitted,

Date: 23 March 2015

/Matthew J. Schonauer/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via regular U.S. Mail this 23rd day of March, 2015 upon the following attorney of record:

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/Matthew J. Schonauer/
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