

ESTTA Tracking number: **ESTTA735915**

Filing date: **03/25/2016**

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

Proceeding	91221338
Party	Defendant Polo Gear LLC
Correspondence Address	SHERYL DE LUCA NIXON & VANDERHYE PC 901 N GLEBE RD STE 1100 ARLINGTON, VA 22203-1808 UNITED STATES nixonptomail@nixonvan.com, sld@nixonvan.com
Submission	Reply in Support of Motion
Filer's Name	Sheryl De Luca
Filer's e-mail	sld@nixonvan.com, rar@nixonvan.com, nixonptomail@nixonvan.com
Signature	/Sheryl De Luca/
Date	03/25/2016
Attachments	6429-12-13 Reply.pdf(163903 bytes) 6429-12-13 Supp Declaration of Gary Fellers.pdf(262708 bytes)

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

PRL USA HOLDINGS, INC.,)	
)	
Opposer,)	Opposition No. 91207805 (Parent)
)	Opposition No. 91221338
v.)	(Serial Nos. 85/458,112, 86/412,883,
)	86/412,886 and 86/488,070)
POLO GEAR INTELLECTUAL PROPERTIES, INC.)	
and)	
POLO GEAR LLC,)	
)	
Applicants.)	
)	
)	

**REPLY IN SUPPORT OF MOTION
FOR RECONSIDERATION AND RELIEF FROM JUDGMENT**

Applicants Polo Gear Intellectual Properties, Inc. and Polo Gear LLC (collectively “PoloGear”) submit this Reply to the Responses [13 TTABVUE – Opp. 91221338; and 39 TTABVUE – Opp. 91207805] (collectively “Responses”) filed by Opposer, PRL USA Holdings, Inc. (“PRL”), to PoloGear’s Motion for Reconsideration and Relief from Judgment [9 TTABVUE – Opp. 91221338; and 34 TTABVUE – Opp. 91207805] (“Motion”).

I. PRL Provides No Substantive Opposition to PoloGear Motion¹

¹ PRL attempts to intentionally mislead the Board with its knowingly deceptive focus on Shutts Bowen’s withdrawal. PoloGear’s Motion does not rely in any way on anything that Shutts Bowen did not do in these proceedings in the critical period between November 2, 2015 and February 2016. On October 28, 2015, Shutts Bowen specifically offered to continue to represent PoloGear which refutes PRL’s spurious assertion. On October 30, 2015, PoloGear elected to continue representation with the former Shutts Bowen partner who departed at that time –John Mariani. Mr. Mariani is the clear problem – he lied to and deceived PoloGear during the critical time period November 2, 2015 – February 2016. See also Shutts Bowen’s November 2, 2015 email, Ex. 16 to Fellers 2/22 Declaration (9 TTABVUE – Opp. Opp. 91221338; and 34 TTABVUE – Opp. 91207805), which characterizes the events as “per [PoloGear’s] election to transfer all files to Kammerer Mariani, Shutts & Bowen LLP has withdrawn from all pending matters before the USPTO.” (Emphasis added). See also Supplemental Declaration of

Since PRL has no substantive basis to oppose PoloGear's Motion, PRL focuses in desperation on a non-substantive, irrelevant red-herring that does not in fact exist. The substance of PoloGear's Motion compels the granting of the Motion, which PRL has elected not to oppose on the merits because there is no factual or legal basis to do so. A fundamental objective of all adjudicative proceedings, and the right of all participants in these types of proceedings is to have the issues disposed on the merits unless some fundamental acts of intentional misconduct exist or some fundamental injury will be imposed on the rights of other participants. No facts exist in this proceeding related to either point.

II. Mr. Mariani Provided Affirmative Assurances and Legal Advice to PoloGear

Further contrary to PRL's Responses at 2, PoloGear has provided the Board numerous communications from Mr. Mariani to Mr. Fellers providing substantive legal advice and (false) assurances that PoloGear's legal matters were well in hand, including the following exhibits from Fellers 2/22 Declaration (11 TTABVUE – Opp. 91221338; and 36 TTABVUE – Opp. 91207805):

- Ex. 18: On Nov. 4, 2015, Mr. Mariani told Mr. Fellers to use his new firm's email;
- Ex. 20: On Nov. 16, 2015, in response to Mr. Fellers' repeated requests that Mr. Mariani's file his appearance as new counsel at the PTO, Mr. Mariani said "DOING SO THIS WEEK."
- Ex. 22: On Dec. 14, 2015, Mr. Mariani gave substantive advice/instruction to PoloGear about preparation of evidence for the Oppositions;

Gary Fellers ("Supp. Fellers Decl."), ¶4, making clear that Shutts Bowen never declined to represent the Applicant for any reason.

- Ex. 26: On Jan 4, 2016, Mr. Mariani affirmatively indicated that he would call PoloGear that afternoon to go over PoloGear’s trademark cases and failure to respond to PTO Office Actions.
- Ex. 25: On Jan. 6, 2016, Mr. Mariani stated that he will “go over [the affidavit PoloGear was preparing in planned support of its oppositions], edit, and sit with you to finalize.”
- Ex. 30: On Jan. 19, 2016, in response to Mr. Fellers’ further request to get PoloGear’s trademark office matters under control, Mr. Mariani told Mr. Fellers that he would speak to him that afternoon.
- Ex. 32: On Jan. 20, 2016, when Mr. Fellers questioned Mr. Mariani about losing the ability to register PoloGear’s marks, Mr. Mariani assured Mr. Fellers that “No, PoloGear will refreshed it” [sic].
- Ex. 34: On Jan. 21, 2016, Mr. Mariani told Mr. Fellers that he had made suggested edits to Mr. Fellers’ affidavit which he would provide to Mr. Fellers.

The above communications clearly establish that Mr. Mariani did not “decline to represent Applicant” as PRL falsely asserts with absolutely no evidentiary support. Rather, Mr. Mariani continued to advise PoloGear that he was acting on its behalf through the end of January 2016. See also Supp. Fellers Decl., ¶5.

PoloGear has provided good reason for its earlier inaction in the case, i.e., that its former attorney, Mr. Mariani, flat-out lied to PoloGear about his actions and his representation of PoloGear in this matter and PoloGear reasonably believed Mr. Mariani’s assurances. PoloGear was left without representation – despite its attorney telling PoloGear that he had appeared - and

its proprietors did not have any experience with TTAB practice or procedure. See also Supp. Fellers Decl., ¶¶ 2-5.

III. No Prejudice to PRL is Even Asserted

PRL does not even attempt to assert that it would be prejudiced by the relief PoloGear seeks in its Motion. This deficiency is fatal to PRL's position.

IV. PoloGear was Not Dilatory in Moving to Set Aside the Default Judgment

PRL's argument that there was unreasonable delay (Responses at 7-8), is squarely refuted by the fact that the Board had only issued its default decision on January 20, 2016. PoloGear then immediately engaged new counsel to respond; new counsel was immediately brought up to speed; and such counsel promptly filed PoloGear's motion to set this aside the judgment on February 22, 2016, barely a month after the Board's decision. This is hardly dilatory.

V. PoloGear's Default Was Not Willful

The documentary evidence is unequivocal in showing that PoloGear was diligently preparing its case. It was preparing a lengthy affidavit, complete with documentary support spanning many years, and was preparing for depositions. PoloGear continuously relied on its attorney's statement that he was filing an appearance the week of November 20, 2015 and his continual providing of substantive advice. There was absolutely no intent by PoloGear to delay these proceedings. See Fellers 2/22 Declaration (9 TTABVUE – Opp. 91221338; and 34 TTABVUE – Opp. 91207805) and Exhibits 11, 12, 15, 17, 19, 21-33 to that declaration (11 TTABVUE – Opp. 91221338; and 36 TTABVUE – Opp. 91207805).

VI. PoloGear has Meritorious Defenses

PoloGear's voluminous submissions show that it has strong meritorious defenses to the notices of opposition and that it should prevail if given the opportunity to present its case. See

Motion at pp. 21-24 (9 TTABVUE – Opp. 91221338; and 34 TTABVUE – Opp. 91207805); and Fellers 2/22 Declaration Exhibit 1 (9-12 TTABVUE – Opp. 91221338; and 34-37 TTABVUE – Opp. 91207805). Tellingly, PRL does not even address this point despite its significance under the case law.

Applicant has clearly met the requirements of both Fed.R.Civ.P. 60(b)(1) and (6) for setting aside the default judgment.

Dated: March 25, 2016

Respectfully submitted,



Robert A. Rowan, VSB 29645
rar@nixonvan.com
NIXON & VANDERHYE P.C.
901 North Glebe Rd., Suite 1100
Arlington, Virginia 22203
Phone: 703-816-4000
Fax: 703-816-4100

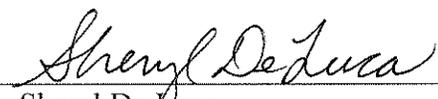
*Attorneys for Plaintiffs
Polo Gear Intellectual Properties Inc. and
Polo Gear LLC*

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2016, the foregoing "Reply in Support of Motion for Reconsideration and Relief From Judgment" was served on counsel of record for Opposer via first-class mail to:

Daniel I. Schloss
Greenberg Traurig LLP
200 Park Avenue
New York, NY 10166

NIXON & VANDERHYE, PC

By: 
Sheryl De Luca

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

PRL USA HOLDINGS, INC.,)	
)	
Opposer)	Opposition No. 91207805 (Parent)
)	Opposition No. 91221338 (Serial
v.)	Nos. 85/458,112, 86/412,883 and
)	86/412,886)
POLO GEAR INTELLECTUAL PROPERTIES, INC.)	
and)	
POLOGEAR LLC,)	
)	
Applicants)	

SUPPLEMENTAL DECLARATION OF GARY FELLERS

I, Gary Fellers, hereby declare and state as follows:

1. I am Founder and Chief Executive Officer of Polo Gear LLC and Polo Gear Intellectual Properties Inc. ("PoloGear"), located at 3500 Fairlane Farms Road Wellington FLORIDA 33414. I am submitting this supplemental declaration in further support of PoloGear's Motion for Reconsideration and Motion for Relief from Judgment with respect to the Board's Order of January 20, 2016 entering judgment against Applicant and refusing registration due to Applicant's "apparent loss of interest" in responding to the Board's November 30, 2015 Order to show cause.

2. The status of these proceedings before the Trademark Trial and Appeal Board was due to Applicant's former counsel (John Mariani): 1) lying to and misleading Applicant as to the favorable status of these proceedings and as to filings that were said to be made for Applicant, but were not made, and making false representations to Applicant that the status of these proceedings were in good order and current and that the Patent & Trademark Office warnings and negative written communications were not accurate; and 2) engaging in such continuous

false and misleading activity relating to this proceeding that it evidences either intentional misconduct or serious personal problems causing the conduct.

3. Applicant is a victim of deceit by its former counsel about these proceedings. Applicant respectfully requests that the matters presented in this Opposition be disposed of on the merits and that Applicant not suffer additional penalties due to the gross negligence, lies, and misleading conduct of Applicant's attorney.

4. Opposer knows that Opposer's baseless assertions about Shutts Bowen and Mr. Mariani are not in the record of this proceeding. The simple facts in this record are clear:

- a. Shutts Bowen never declined to represent the Applicant for any reason and on October 28, 2015 requested Applicant to allow Shutts Bowen to represent Applicant before the PTO and in other non-PTO matters. EXHIBIT 13 to my 2/22 Declaration-Letter from Shutts and Mariani
- b. In September 2015, Mr. Mariani (who had personally been the Applicant's attorney for 3 years) decided to depart Shutts Bowen to start his own firm. In Applicant's September 29, 2015 meeting with Mr. Mariani, Applicant agreed that Mr. Mariani should continue to represent Applicant on his departure from Shutts Bowen. EXHIBIT 14 to my 2/22 Declaration-response to Shutts 10/28/15 letter

5. On November 16, 2015, Applicant received a notice from the USPTO regarding the need for counsel. EXHIBIT 19 to my 2/22 Declaration.

- a. Applicant notified Mr. Mariani that he must appear and emailed him the notice from the USPTO.
- b. Mr. Mariani quickly responded on November 16, 2015, that he would be "DOING SO THIS WEEK." EXHIBIT 20 to my 2/22 Declaration. This week meant on or before November 20, 2015.
- c. Despite telling Applicant that Mr. Mariani would and had filed with the PTO as Applicant's attorney, Mr. Mariani did not do so.
- d. Applicant had every right to rely on and to believe the false statements made by its attorney who had a 3 year attorney - client relationship.

6. Throughout the October 2015 – January 20, 2016 PTO process, Mr. Mariani told Applicant that he represented the Applicant before the PTO and advised Applicant on participation in the PTO process including but not limited to:

- a. Ex. 16 to my 2/22 Declaration - November 2, 2015, Shutts Bowen transfers Applicant's PTO files and other files to Mr. Mariani's new law firm.
- b. Ex. 20 to my 2/22 Declaration - November 16, 2016, Mr. Marini advises Applicant that he is appearing as Applicant's counsel in PTO proceedings: "DOING SO THIS WEEK."
- c. Ex. 22 to my 2/22 Declaration - December 14, 2015, Mr. Mariani gave substantive advice about preparation of evidence for the PTO proceeding.
- d. Ex. 25 to my 2/22 Declaration - January 6, 2016 - Mariani edits documents to be filed with PTO and meets with Applicant.
- e. Ex. 26 to my 2/22 Declaration - January 4, 2016, Mr. Mariani represents that he will review PTO abandonment documents with Applicant.
- f. Ex. 32 to my 2/22 Declaration - January 20, 2016 - Applicant challenges Mr. Mariani about Applicant losing the ability to register marks, Mariani says "No, PoloGear will refreshed it" [sic].

7. I declare further that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements and the like are made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or document or any registration issuing therefrom.

POLOGEAR LLC and
POLO GEAR INTELLECTUAL PROPERTIES,
INC.

By: 
Name: Gary Fellers
Position: CEO
Date: March 23, 2016

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2016, the foregoing "Supplemental Declaration of Gary Fellers" was served on counsel of record for Opposer via first-class mail to:

Daniel I. Schloss
Greenberg Traurig LLP
200 Park Avenue
New York, NY 10166

NIXON & VANDERHYE, PC

By: 
Sheryl De Luca