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Filing date: **04/20/2016**

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

Proceeding	92057116
Party	Plaintiff Westheimer Corporation
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Submission	Motion to Suspend for Civil Action
Filer's Name	Brent M. Davis, Esq.
Filer's e-mail	bdavis@musicesq.com
Signature	/Brent M. Davis/
Date	04/20/2016
Attachments	Mot_Suspend.pdf(19939 bytes)

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

In the Matter of Trademark Registration No. 3,986,754
Registered on June 28, 2011

_____)	
WESTHEIMER CORPORATION)	
)	
Petitioner,)	
)	Cancellation No. 92057116
v.)	
)	Registration No. 3,986,754
DARRYL D. AGLER)	
)	
)	
Registrant.)	
_____)	

WESTHEIMER CORPORATION'S
MOTION TO SUSPEND PROCEEDINGS

Petitioner Westheimer Corporation (“Petitioner”) respectfully submits this Motion to Suspend Proceedings (the “Motion”). Although the United States District Court for the Northern District of Indiana (the “District Court”) has ruled on Registrant Darryl D. Agler’s (“Registrant”) Motion for Summary Judgment, there is a motion for interlocutory appeal currently pending in the District Court. Further, in the event that Petitioner is denied by either the District Court or by the United States Court of Appeals for the 7th Circuit, Petitioner will appeal the decision out of right upon the issuing of final judgment. Therefore, the resetting of the trial dates in the above-captioned proceeding (the “Proceeding”) is premature, as there is no final resolution of the issue that caused the suspension of this Proceeding in the first place. Accordingly, the Motion should be granted in its entirety.

STATEMENT OF FACTS

Petitioner initiated the Proceeding on April 25, 2013 for cancellation of Registrant's registration for the mark STRATOTONE (the "Mark"). Declaration of Brent M. Davis, Esq. ("Davis Decl.") at ¶ 5. Discovery closed on January 4, 2014. Id. at ¶ 6. On March 4, 2014, Petitioner served Registrant with a Notice of Deposition, with the deposition to take place on March 15, 2014. Id. at ¶ 7. Petitioner's Testimony Period opened on March 5, 2014. Id. at ¶ 8. On Friday, March 7, 2014, Registrant's counsel requested an adjournment of the deposition. Id. at ¶ 9. The deposition was rescheduled for March 31, 2014. Id. at ¶ 10.

On March 27, 2014, Registrant filed a complaint in the United States District Court for the Northern District of Indiana (the "District Court Action"). See Dkt. No. 9. That same day, Registrant filed a motion to suspend the Proceeding. Dkt. No. 9. Registrant's counsel informed Petitioner's counsel that Registrant would not attend his scheduled deposition. Davis Decl. at ¶ 11. On April 4, 2014, the Board denied Registrant's motion to suspend. Dkt. No. 12. The Board granted a consented motion to suspend the Proceeding on May 27, 2014. Dkt. No. 17.

On June 3, 2015, Registrant filed a motion for summary judgment in the District Court action. Dkt. No. 21 at ¶ 5. On October 28, 2015, the District Court ruled on that motion and granted summary judgment in favor of Registrant. Id. at Exhibit A. On November 11, 2015, Registrant filed notice of the *non-final* to the Board. Dkt. No. 21.

However, on November 23, 2015, the District Court granted leave for Petitioner to file a motion for interlocutory appeal. Davis Decl. at ¶ 12. Petitioner's motion for interlocutory appeal was fully briefed on December 29, 2015 and is still pending in the District Court. Id. at ¶ 13. Regardless of whether the appeal process is interlocutory or after final judgment in the

District Court, Petitioner will appeal the grant of summary judgment and, therefore, the issue causing the suspension of this Proceeding has not reached a *final* judgment. Id. at ¶ 14.

On April 14, 2016, the Board, relying on Registrant's filing of November 11, 2015 and not aware of the motion practice pending in the District Court, lifted the suspension of the Proceeding. Dkt. No. 22.

ARGUMENT

Whenever it shall come to the attention of the Trademark Trial and Appeal Board that a party or parties to a pending case are engaged in a civil action or another Board proceeding which may have a bearing on the case, proceedings before the Board may be suspended until termination of the civil action or the other Board proceeding.

37 C.F.R. § 2.117(a).

In its orders suspending this proceeding, the Board stated that "proceedings are suspended pending final determination of the civil action." Dkt. No. 17 at 1; Dkt. No. 20 at 1. "A proceeding is considered to have been finally determined when a decision on the merits of the case (i.e., a dispositive ruling that ends litigation on the merits) has been rendered, and no appeal has been filed therefrom, or all appeals filed have been decided." TBMP § 510.02(b).

As Petitioner is seeking leave to file an interlocutory appeal of the District Court's grant of partial summary judgment, and will appeal that decision regardless of which procedural mechanism it ultimately uses, the District Court action has not reached *final* resolution.

Petitioner respectfully requests that, since civil action upon which suspension was predicated has not reached final resolution, the Board suspend the Proceeding until *final* judgment is reached.

CONCLUSION

For the reasons stated above, Petitioner's Motion should be granted in its entirety.

Dated: April 20, 2016
Hackensack, New Jersey

Respectfully submitted,

BIENSTOCK & MICHAEL, LLC

By: /s Brent M. Davis, Esq.

Brent M. Davis, Esq.

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COUNSEL FOR PETITIONER

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TRADEMARK TRIAL AND APPEAL BOARD

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WESTHEIMER CORPORATION)	
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Petitioner,)	
)	Cancellation No. 92057116
v.)	
)	Registration No. 3,986,754
DARRYL D. AGLER)	
)	
)	
Registrant.)	
_____)	

DECLARATION OF BRENT M. DAVIS, ESQ.

I, Brent M. Davis, Esq., declare that:

1. I am an attorney licensed to practice in the States of New York and New Jersey. I am in good standing with the State Bars of New York and New Jersey. I am in all respects competent to testify to the facts stated in this Declaration.

2. I am a partner in the law firm of Bienstock & Michael, LLC (the "Firm"), counsel to the above-captioned Petitioner ("Petitioner").

3. The Firm represents the above-captioned Petitioner in various trademark matters, including the above-captioned proceeding pending in the United States Patent and Trademark Office before the Trademark Trial and Appeal Board ("TTAB") against Registrant, Darryl D. Agler ("Registrant").

4. The facts stated in this Declaration are based on my personal knowledge, and are true and correct. I understand that this Declaration will be submitted to the

Trademark Trial and Appeal Board of the United States Patent and Trademark Office in connection with Petitioner's Opposition to Registrant's Motion To Suspend Proceedings in the above-captioned opposition proceeding.

5. Petitioner initiated the Proceeding on April 25, 2013 for cancellation of Registrant's registration for the mark STRATOTONE.
6. Discovery closed on January 4, 2014.
7. On March 4, 2014, Petitioner served Registrant with Notice of Deposition, with the deposition to take place on March 15, 2014.
8. Petitioner's Testimony Period opened on March 5, 2014.
9. On Friday, March 7, 2014, Registrant's counsel requested an adjournment of the deposition.
10. The deposition was rescheduled for March 31, 2014.
11. Registrant's counsel informed Petitioner's counsel that Registrant will not attend his scheduled deposition.
12. On November 23, 2015, the District Court granted leave for Petitioner to file a motion for interlocutory appeal.
13. Petitioner's motion for interlocutory appeal was fully briefed on December 29, 2015 and is still pending in the District Court.
14. Regardless of whether the appeal process is interlocutory or after final judgment in the District Court, Petitioner will appeal the grant of summary judgment and, therefore, the issue causing the suspension of this Proceeding has not reached a final judgment.

The undersigned, being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

Dated: April 20, 2016

s/ Brent M. Davis, Esq.
Brent M. Davis, Esq.

CERTIFICATE OF MAILING

I, Brent M. Davis, Esq., hereby certify that the foregoing Westheimer Corporation's Motion to Suspend Proceedings has today been deposited with the United States Postal Service on the date below as first class mail, postage prepaid, in an envelope addressed as follows:

Louis T. Perry, Esq.
Faegre Baker Daniels LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 44144

April 20, 2016
Date

s/ Brent M. Davis, Esq. _____
Brent M. Davis, Esq.

CERTIFICATE OF FILING

I hereby certify that this correspondence, including all enclosures and attachments, is being transmitted to the United States Patent and Trademark Office, Trademark Trial and Appeal Board, via the TTAB's ESTTA procedure on April 20, 2016.

April 20, 2016
Date

s/ Brent M. Davis, Esq. _____
Brent M. Davis, Esq.