

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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BUO

Mailed: June 10, 2015

Opposition No. 91202952

*Atari Interactive, Inc.*

*v.*

*Andrew N. Greenberg*

**Benjamin U. Okeke, Interlocutory Attorney:**

Now before the Board is Opposer's motion, filed March 5, 2015, to reopen its testimony period. Opposer cites "newly discovered evidence" as the basis for its request. Opposer seeks to introduce new evidence regarding a "Suspension Notice ... issued on February 27, 2015," suspending examination of Opposer's application Serial No. 86464337. Opposer asserts that inasmuch as its application has been suspended pending disposition of the involved opposed application based upon the "Trademark Office's belief that if the opposed mark HAUNTED HOUSE TYCOON registers, Opposer's application to register HAUNTED HOUSE: CRYPTIC GRAVES may be refused registration under Section 2(d) on the basis of a likelihood of confusion," Opposer should be allowed to introduce evidence regarding the suspension because: 1) the evidence "clearly demonstrates the harm that will befall Opposer if Applicant's mark HAUNTED HOUSE TYCOON is registered," 35

TTABVUE 2-3; 2) the evidence “serve[s] as persuasive evidence that Applicant’s HAUNTED HOUSE TYCOON mark is likely to cause confusion with Opposer’s HAUNTED HOUSE trademark,” *Id.* at 3; and 3) Opposer could not have discovered it through the exercise of any diligence, let alone reasonable diligence, because it did not exist during Opposer’s testimony periods. *Id.*

Applicant contests that “the recent filing is an intentional strategy by Opposer to muddy the waters and get a second bite at the apple by reopening testimony.” Applicant argues that: 1) Opposer “had every reason to know that the USPTO would rule as it did,” and therefore, the evidence is not newly discovered because “[i]n order to be newly discovered, it must have been outside the control of the party making the discovery,” 37 TTABVUE 3; 2) “[t]he proposed evidence has little relevance to the issues of harm and likelihood of confusion, *Id.*; and 3) Applicant would be prejudiced because “this action has been going on for three years, primarily due to Opposer [sic] delays, Applicant has been developing his case for far longer than most applicants have to.” *Id.* at 4.

In determining whether to reopen a testimony period, where a party seeks to introduce allegedly newly discovered evidence the Board must consider such factors as the nature and purpose of the evidence sought to be brought in, the stage of the proceeding, and prejudice to the nonmoving party. *See Harjo v. Pro-Football, Inc.*, 45 USPQ2d 1789, 1790 (TTAB 1998) (newly discovered evidence was cumulative and redundant and did not have significant probative value to justify further delay of case). The moving party must show not only that the proposed evidence has been

newly discovered, but also that the evidence could not have been discovered earlier through the exercise of reasonable diligence. *Id.*

Given the circumstances presented by this case, the stage of the proceeding does not weigh against a grant of Opposer's motion, contrary to Applicant's arguments. The limited purpose for reopening cited by Opposer will work to mitigate any delay that may be wrought on the proceeding. Furthermore, mere delay does not constitute the type of prejudice envisioned by this rule. Indeed, a great portion of this proceeding has been spent in suspension, therefore, Applicant's contention that this proceeding has "been going on for three years," although accurate, is misleading. Thus, this factor weighs in favor of a reopening of Opposer's testimony period.

Further, the Board is convinced that Opposer has exercised reasonable diligence in introducing this evidence. Opposer's testimony period closed on May 18, 2014, with its rebuttal testimony period closing on January 30, 2015. The suspension notice issued by the USPTO, which Opposer seeks to introduce, was issued on February 27, 2015. The Board will not opine on Opposer's motive for filing the application that led to that suspension notice any more than to simply note that there is nothing of record to substantiate Applicant's claim that this filing was made in bad faith. Opposer's filing of its motion to reopen just six days after the issuance of the suspension notice supports a showing of Opposer's diligence in bringing this matter to the Board's attention. Additionally, as Opposer asserts, the suspension notice was issued by the USPTO, an entity not affiliated with Opposer; and

although it may be argued that Opposer could potentially have “predicted” the issuance of the notice, the actual issuance of the notice could neither be accelerated nor slowed (or determined in any way) by Opposer. Therefore, although Applicant provided no legal authority, nor is the Board aware of any, to support his contention that the newly discovery evidence “must have been outside the control of the party making the discovery,” it is clear that this evidence was not in Opposer’s control. Accordingly, this factor weighs in favor of a reopening of Opposer’s testimony period.

Finally, the Board finds that the nature of the evidence also warrants a reopening of the testimony period for the limited purpose of its introduction. This proceeding involves a claim of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d). Additionally, all *inter partes* proceedings before the Board involve the issue of standing. The evidence sought to be introduced by Opposer may support its standing to bring this action against the involved application. A party may establish standing by showing that it has been advised that an application it owns will be refused registration when the involved application matures into a registration. See *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1041 (TTAB 2012) (evidence of record showing petitioner’s pending application refused registration based on respondent’s registration); *Weatherford/Lamb Inc. v. C&J Energy Services Inc.*, 96 USPQ2d 1834, 1837 (TTAB 2010) (Office action suspending plaintiff’s pending application pending possible refusal based on alleged likelihood of confusion with defendant’s registration made of record). Moreover, while pending

applications are of little evidentiary value beyond the fact that they have been filed, the Board's preference is to determine its cases based upon a record that is as practicably complete as possible.

On balance, these factors weigh in favor of a reopening of Opposer's testimony period for the limited purpose of introducing the suspension notice issued by the USPTO against application Serial No. 86464337. Accordingly, Opposer's motion to reopen its testimony period is **GRANTED**. Opposer's testimony period is reopened for **FIVE DAYS** following the issuance of this order.

***Schedule***

The briefing schedule is reset as follows:

Plaintiff's Brief Due	<b>7/15/2015</b>
Defendant's Brief Due	<b>8/14/2015</b>
Plaintiff's Rebuttal Brief Due	<b>8/29/2015</b>

See Trademark Rule 2.128(a) and (b).

An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.