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

Proceeding	91203399
Party	Defendant E-filliate, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE TRADEMARK TRIAL AND APPEAL BOARD

ICOURIER SOFTWARE SYSTEMS LTD. Opposer, v. E-FILLIATE, INC. Applicant	Opposition No.: 91,203,399 Application No.: 85/282926 Mark: TECH & GO

RESPONSE TO MOTION TO ENTER EVIDENCE

Applicant E-filliate, Inc. ("Applicant"), by its counsel, hereby opposes Opposer iCourier Software Systems Ltd's ("Opposer") "Motion to Enter Evidence and Extend Brief Filing deadline by 60 days." Opposer's motion appears to be a motion to reopen its testimony period, which closed on May 23, 2013, pursuant to TBMP § 509.01(b). To prevail on such a motion the "movant must show that its failure to act during the time previously allotted therefor was the result of excusable neglect." TBMP § 509.01(b). When determining excusable neglect, the Board considers all relevant circumstances surrounding the party's omission or delay, including (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. *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

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A. Applicant Will Be Prejudiced If The Motion Is Granted

Opposer has engaged in dilatory tactics throughout this proceeding. Between Applicant and the Board, Opposer has been granted a total of eight extensions of time to serve substantive interrogatory responses and produce documents. Opposer's excuses for failing to comply with deadlines have included multiple instances of supposed illness, needing to consult with an attorney, and having its electricity and heat cut off. Declaration of Mark R. Leonard in Support of Motion to Compel Discovery Responses and Impose Sanctions (filed June 30, 2013) ("Leonard Decl."). Opposer has also tried improper procedural tactics to avoid providing discovery responses, *e.g.* filing a defective motion for summary judgment on the date the Board ordered it to provide discovery responses. As the Board noted in its order regarding the motion, "opposer's motion appears to be nothing more than a subterfuge to avoid serving responses to applicant's discovery requests." April 5, 2013 Order. The cost to Applicant from Opposer's repeated delays during the discovery process alone has been over $6,600 in attorney fees. Leonard Decl. ¶15.

Applicant will be prejudiced if the motion is granted by having to expend further attorney fees on a frivolous action. On repeated instances since this proceeding was instituted Applicant has requested Opposer to provide evidence of use of its mark in commerce in the United States, yet it has failed to do so. Leonard Decl. ¶12. In its instant motion Opposer makes conclusory allegations, without foundation, that it has priority of use of its mark in the United States. Its supposed evidence of priority is a screenshot from its website from the Internet Archive on February 1, 2011. Even if the Board were to ignore the evidentiary deficiencies with this evidence, which Applicant

does not waive, it does not show use in commerce of Opposer's mark in commerce in the United States. Thus even if Opposer's motion was granted, it cannot prevail on its claims.

Opposer's sole authority cited in its motion, *Hornblower & Weeks Inc. v. Hornblower & Weeks Inc*., is readily distinguishable from the present action as, unlike that case, Opposer has produced no admissible evidence regarding its priority and Applicant vigorously contests Opposer's priority allegations. Granting Opposer's motion will serve no purpose other than needlessly continuing a proceeding that Opposer cannot win and prejudice Applicant by having to expend even more resources on a frivolous case.

B. The Length of Opposer's Delay Is Significant

A delay of five weeks in bringing a motion to reopen has been found to be too lengthy to support a finding of excusable neglect. *See e.g. Luster Products, Inc. v. John M. Van Zandt d/b/a Vanza USA*, 2012 WL 6137605 (TTAB 2012); see also *Vital Pharmaceuticals, Inc. v. Conrad J. Kronholm, Jr.*, 99 U.S.P.Q.2d 1708 (TTAB 2011) (seven month delay in seeking to reopen testimony period would cause "substantial delay" to the opposition.) In the present case Opposer has waited over seven *months* before bringing its motion. Moreover, Opposer was put on notice of its failure to introduce any evidence in the Board's August 16, 2013 order which expressly noted that "Opposer did not file any evidence, and does not appear to have taken any testimony, during its testimony period." August 16, 2013 Order, Note 1. Despite being put on notice in August Opposer waited over four months to bring its motion. Such a lengthy delay strongly disfavors a finding of excusable neglect.

C. Opposer's Reason For The Delay Is Not Compelling and Was In Its Control

"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." *Luster Products, Inc. v. John M. Van Zandt d/b/a Vanza USA*, 2012 WL 6137605 *2 (TTAB 2012). Mistaken belief as to the effect of filing a motion has been found insufficient to support a finding of excusable neglect. *See e.g. Prakash Melwani v. Allegiance Corporation*, 97 U.S.P.Q.2d 1537 (TTAB 2010) (applicant's counsel's mistaken belief that its motion to strike would suspend proceedings did not support excusable neglect).

Opposer states its reason for the delay was because it "was not aware that it did not have evidence on the record required for the brief filing date under the current schedule as it believed to have submitted some evidence by way of email to the Applicant, and also within the aforementioned motion for summary judgment to the other side, and the board, and that among others, these materials would be usable as evidence." Motion p. 4. This reason is unpersuasive for two reasons.

First, as stated above, Opposer was on notice since the Board's August 16, 2013 Order that it had not entered any evidence. August 16, 2013 Order, Note 1. Second, as the Board stated in its March 30, 2012 Order following the discovery conference, "The Board expects all parties appearing before it, whether or not they are represented by an attorney, to comply with the Trademark Rules of Practice and where applicable, the Federal Rules of Civil Procedure, online at http://www.law.cornell.edu/rules/frcp/. Although opposer is representing itself, opposer, as the plaintiff herein, is responsible for moving this case forward without undue delay." March 30, 2012 Order. Opposer's

claim that it did not understand the procedure for introducing evidence is therefore unavailing[1]. Accordingly, this factor also weighs against a finding of excusable neglect.

D. Opposer Has Not Acted In Good Faith Throughout This Proceeding

As described above, Opposer has repeatedly sought to delay and extend this proceeding through a variety of excuses and tactics. The Board itself has taken notice and admonished Opposer in its denial of its motion for summary judgment stating "[u]nder the circumstances in this case, opposer's motion appears to be nothing more than a subterfuge to avoid serving responses to applicant's discovery requests." April 5, 2013 Order. Opposer's latest motion is yet another dilatory tactic and further evidence of its bad faith. For the above reasons, Applicant respectfully requests the Board to deny Opposer's motion.

Respectfully submitted,

E-FILLIATE, INC.

By its attorneys,

Date: January 14, 2014

By: /Mark R. Leonard/

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[1] The Board's March 30, 2012 Order also stated "If either party files an unconsented motion to extend or suspend in this case, the moving party must contact the Board interlocutory attorney assigned to the case by telephone upon filing so that such motion can be resolved promptly by telephone conference." It is unclear from Opposer's motion whether it contacted the interlocutory attorney prior to filing its instant motion.