

ESTTA Tracking number: **ESTTA711220**

Filing date: **11/27/2015**

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

Proceeding	91217486
Party	Defendant Oregon Honey Products LLC
Correspondence Address	RONALD M RUBIN RUBIN & ZIMMERMAN PC 9725 E HAMPDEN AVENUE , SUITE 330 DENVER, CO 80231-4918 UNITED STATES ron.rubin@rzpc.com, lisa@rzpc.com
Submission	Opposition/Response to Motion
Filer's Name	Ronald M Rubin
Filer's e-mail	ron.rubin@rzpc.com
Signature	/RMR/
Date	11/27/2015
Attachments	Brood-AmendedReplyToResponse-MDismiss-V3.pdf(134435 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK AND TRIAL APPEAL BOARD  
Opposition No. 91217486  
Application # 86229370

Brood Soda, LLC,	)	
Opposer,	)	
	)	
v.	)	AMENDED REPLY TO
	)	BRIEF IN OPPOSITION TO
	)	APPLICANT'S MOTION TO DISMISS
Oregon Honey Products, LLC	)	
Applicant	)	

---

Oregon Honey Products LLC d/b/a Nectar Creek ("Nectar Creek") submits the following Amended Reply to "Brief in Opposition to Applicant's Motion to Dismiss".

**I. FACTS**

The gravamen of Opposer's position is that settlement negotiations constitute "excusable neglect" justifying its failure to follow the rules and Orders of this Board. The representation of Opposer that the parties were "actively engaged in settlement discussions" is patently false.

While it is true that a possible settlement was discussed between the parties in October, 2014, Opposer is misleading this Board by stating that the parties were actively engaged in settlement discussions or that the parties "intended to delay the Case Schedule". To be sure, the undersigned proposed a settlement in writing on October 10, 2014, repeatedly requested a response from Opposer's attorney, and even retransmitted the same offer in writing about 3 months later. Up to the filing of the Motion to Dismiss for failure to prosecute, 10 months after the offer was first made, Opposer failed to respond either by email, letter, or a phone call. Rather than being actively engaged in settlement, Opposer was actively disengaged from settlement discussions and ignored all settlement offers.

Opposer's 10 month silence can be seen in the redaction of emails between the parties, Exhibit A. (Note that Exhibit A includes references to settlement negotiations but the terms of settlement have been redacted, Rule 408 of the Federal Rules of Civil Procedure.) Most relevant

are the following exchanges:

**October 10, 2014, from Ronald M. Rubin to Michael Burger**

Nevertheless, I would like to explore settlement in the spirit of the discussion that we have had. I propose the following:

[Sections of this email have been Redacted Due as settlement negotiations; i.e. **this is the “term sheet” referenced.**]

---

**Mon 1/26/2015 11:03 AM, from Ronald M. Rubin to Michael Burger**

Michael:

Below is the last correspondence that we had regarding terms of settlement. As I recall, you were to get back to me as we also discussed a few weeks ago. If we aren't able to resolve this in the next week, I suggest that we both request that the Accelerated Case Resolution process and commence discovery and disclosures.

Hopefully, there is a settlement to be made within the next week or so. Can you give me a ring today?

**[October 10, 2014 email was duplicated with the terms at the end of this email]**

---

**March 27, 2015, from Ronald M. Rubin to Michael Burger**

Dear Mr. Burger:

About four months ago we proposed a resolution of the Brood Opposition. You indicated that I should put that in writing, which I did, and you would get back to me. You never did. I then called you a month or so later, and you said to put that in writing, which I did, and you would get back to me. You never did.

We have delayed discovery based on what I believed to be good faith negotiations. My concern now is that both the negotiations and the filing of the

Opposition were in bad faith.

I am not sure what your client wants to do, but Nectar Creek would still like to work out something along the lines of what has been proposed a number of times. Please advise what your position is.

---

Opposer did not contact the undersigned (with the exception of a March 30, 2015 “response” to the March 27, 2015 email above) until August 4, 2015-10 months after the first offer was made! The undersigned did receive an email from attorney L. Taylor Arnold on August 6, 2015 and on August 7, 2015, Mr. Taylor wrote that he was not aware of any proposals of settlement. Mr. Taylor never entered an appearance and the undersigned has not heard from Mr. Taylor since.

## **II. LAW**

### **A. Default Judgment**

Opposer cites the third test set forth in *Pioneer Investment Services CO v. Brunswick Associates Limited Partnership* 507 U.S. 380, 113 S.Ct. 1489 (1993) regarding excusable neglect to justify its failure to prosecute. That is: was the delay in the reasonable control of Opposer? The emails between the parties make it abundantly clear that Opposer had control over the situation and chose to ignore both settlement offers AND the Case Schedule. Indeed, Opposer has the audacity to state that Applicant should have filed “motions to further the Case Schedule”! Opposer then incredulously argues that it does not want the case dismissed because it “believed itself to be in fruitful settlement talks”.

Opposer further argues that Applicant will not be prejudiced by resetting the times for disclosures and trial. To the contrary, Applicant has been denied the rights associated with a registered trademark. In this case, a mark that has been approved by the examining attorney. Applicant has been impeded in the use of its mark by the cloud of this action for almost one year. Opposer has been able to assert its will by filing but a single document in September, 2014 with

this Board and taking no action to prosecute the Opposition or otherwise settle the case. Opposer now wishes to continue its ruse even longer and prevent Applicant's use of its mark in accordance with the Lanham Act even further.

Finally, Opposer argues that it was proceeding in good faith, a factor in the fourth test of *Pioneer, id.* Given the emails set forth in Exhibit A, such a position is simply outrageous and is not deserving of further response.

#### B. Rules

In reality the allegations of Opposer regarding the factors in *Pioneer, id.* are but a series of "red hearings". Pursuant to the Rules of this Board:

No testimony shall be taken except during the times assigned, unless by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. The deadlines for pretrial disclosures and the testimony periods may be rescheduled by stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board.

#### 37 CFR § 2.121

Opposer has been continuously represented by counsel. Had Opposer believed in good faith that it did not need to timely file disclosures or submit evidence during its trial period, Opposer could have moved to reschedule the times. However, Opposer never filed such a motion and for that matter never filed a single document in this case after September, 2014 until after Applicant's Motion to Dismiss for failure to prosecute.

#### C. Burden of Proof.

The party opposing registration bears the burden of proof. *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. \_\_\_, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049, 2056 (2015). Opposer, as plaintiff in an opposition proceeding, bears the burden of proving, by a preponderance of the evidence, its asserted grounds of priority and likelihood of confusion. *Genesco Inc. and Genesco Brands Inc. v. Gregory Martz*, Opposition No. 121,296, (TTAB 2003). See *Cerveceria Centroamericana, S.A. v. Cerveceria India Inc.*, 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir.

1989); and *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1848 (Fed. Cir. 2000).

Since Opposer has failed to present a single shred of evidence, Opposer has failed to meet its burden of proof. Accordingly, the Opposition should be dismissed.

### III. CONCLUSION

Opposer has acted in bad faith in filing the within action, in failing to make any disclosures, in failing to offer any evidence, and in asserting that it was actively engaged in settlement discussions. Opposer has not submitted any evidence of likelihood of confusion. Accordingly, judgment should enter against Opposer and the Opposition should be dismissed for failure to prosecute.

Dated: November 27, 2015

Respectfully submitted,



### CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Amended Reply of Nectar Creek has been (or will be) served by mailing said copy on November 27, 2015, via First Class Mail, postage prepaid and by email to as set forth below.

Attorneys for Opposer:

Michael A. Burger

Mathew M. Lawless

HOWARD, STALLINGS, FROM & HUTSON, P.A.,

Post Office Box 12347

Raleigh, North Carolina 27605

Brood Soda, LLC:

Jonathan H. Lehman, President

[jhl@broodsoda.com](mailto:jhl@broodsoda.com)

/S/

---

Ronald M. Rubin

## EXHIBIT A

**From:** Ronald M. Rubin [<mailto:ron@rzpc.com>]  
**Sent:** Wednesday, September 17, 2014 1:21 PM  
**To:** Michael Burger  
**Cc:** [phillip@nectarcreekhoneywine.com](mailto:phillip@nectarcreekhoneywine.com)  
**Subject:** Brood Opposition  
**September 17, 2014**

Dear Mr. Burger:

In accordance with TTAB scheduling order, we are required to conduct a Discovery Conference by September 30, 2014. I have September 29<sup>th</sup> and 30<sup>th</sup> open. Please advise if one of those dates are acceptable and let me know a time that is good for you.

Regards,  
Ron

**RUBIN & ZIMMERMAN, P.C.**

Ronald M. Rubin  
9725 E. Hampden, #330  
Denver, CO 80231  
Tel: 303-306-6191  
Fax: 303-306-7603  
mobile: 303-941-2004  
e-mail: [ron.rubin@rzpc.com](mailto:ron.rubin@rzpc.com)

---

**From:** Michael Burger [<mailto:MBurger@hsfh.com>]  
**Sent:** Friday, **September 19, 2014** 10:52 AM  
**To:** Ron Rubin  
**Cc:** Matthew Lawless  
**Subject:** RE: Brood Opposition

Ron,

Let's have the call on 9/29/2014. We are available around 2PM EST. Does that time work for you?

Regards,  
Mike

Michael A. Burger  
Howard, Stallings, From & Hutson, P.A.  
5410 Trinity Rd. Suite 210 (27607)  
P.O. Box 12347  
Raleigh, N.C. 27605  
Phone: [\(919\) 821-7700](tel:(919)821-7700)  
Facsimile: [\(919\) 821-7703](tel:(919)821-7703)

---

**September 23, 2014 from Ronald M. Rubin to Michael Burger**

2:00 PM EDT would be fine

---

**From:** Michael Burger [mailto:MBurger@hsfh.com]  
**Sent:** Wednesday, **October 08, 2014** 8:40 AM  
**To:** Ron Rubin  
**Subject:** RE: Brood Opposition

Ron,

I just wanted to check in on the status of the term sheet we discussed on 9/29/2014 and 10/1/2014. If you could, please e-mail me a copy at your earliest convenience so that I can send it on to my client.

Regards,  
Mike

---

**October 8, 2014**

My apologies. I was out of the office much of last week. I will call Nectar Creek today. Thanks for the reminder.

---

**October 9, 2014**

I have a call into Nectar Creek and will get back to you as soon as I talk with them.

---

**October 10, 2014**

[Redacted sections-Settlement Negotiations]

Nevertheless, I would like to explore settlement in the spirit of the discussion that we have had. I propose the following:

[Redacted sections with specific terms-Settlement Negotiations; i.e. this is the term sheet referenced.]

---

**Mon 1/26/2015 11:03 AM**

Michael:

Below is the last correspondence that we had regarding terms of settlement. As I recall, you were to get back to me as we also discussed a few weeks ago. If we aren't able to resolve this in the next week, I suggest that we both request that the Accelerated Case Resolution process and commence discovery and disclosures.

Hopefully, there is a settlement to be made within the next week or so. Can you give me a ring today?

[October 10, 2014 email duplicated with the same term sheet]

**RUBIN & ZIMMERMAN, P.C**

Ronald M. Rubin  
9725 E. Hampden, #  
Denver, CO 80231  
Tel: 303-306-6191  
Fax: 303-306-7603  
mobile: 303-941-2004  
e-mail: [ron.rubin@rzpc.com](mailto:ron.rubin@rzpc.com)

---

**March 27, 2015**

Dear Mr. Burger:

About four months ago we proposed a resolution of the Brood Opposition. You indicated that I should put that in writing, which I did, and you would get back to me. You never did. I then called you a month or so later, and you said to put that in writing, which I did, and you would get back to me. You never did.

We have delayed discovery based on what I believed to be good faith negotiations. My concern now is that both the negotiations and the filing of the Opposition were in bad faith.

I am not sure what your client wants to do, but Nectar Creek would still like to work out something along



the lines of what has been proposed a number of times. Please advise what your position is.  
Ronald M. Rubin

March 30, 2016 **from Michael Burger to Ronald M. Rubin**  
Ron,

I can assure you that both the filing and the negotiations for a potential workout were, at all times, in good faith. Currently, I am in the process of substituting out as counsel (I've attached a pdf copy of the Motion for your reference). Jon Lehman (copied here) will be taking the place of me and my firm as counsel for Brood. You should feel free to communicate with Jon regarding the matter.

Regards,  
Mike

---

On 8/4/15, 8:24 AM, "L. Taylor Arnold" <[taylor@artifactlegal.com](mailto:taylor@artifactlegal.com)> wrote:

Dear Mr. Rubin:

I am newly retained as counsel to Brood Soda, LLC in its Opposition to Registration for USPTO Serial Number 86229370 filed by Oregon Honey Products, LLC, and upon which you are listed as attorney of record. I would appreciate the opportunity to work constructively to address the concerns of both parties. Are you still acting as counsel to Oregon Honey Products in this matter?

Sincerely,  
L. Taylor Arnold

L. Taylor Arnold  
Attorney at Law  
Arnold Law Firm, PLLC  
Artifact Entertainment Law and IP Management  
6104 Westgate Rd., Ste. 102  
Raleigh, NC 27617  
919-791-1001  
[artifactlegal.com](http://artifactlegal.com)

---

Sent from my iPhone

On Aug 6, 2015, at 2:18 PM, Ron Rubin <[Ron.Rubin@rzpc.com](mailto:Ron.Rubin@rzpc.com)> wrote:

Mr. Arnold:

Sorry for not getting back to you sooner as I have been out of town. I am always willing to talk although the invitation is somewhat odd to me since I set forth multiple proposals many months ago without a response and placed many calls without the courtesy of a return call.

If you would like to call, please call today after 4:00 PM EDT or anytime tomorrow after 10:00 AM EDT.

Regards,  
Ron

---

On 8/7/15, 2:16 PM, "[taylor@artifactlegal.com](mailto:taylor@artifactlegal.com)" <[taylor@artifactlegal.com](mailto:taylor@artifactlegal.com)> wrote:

Dear Mr. Rubin:

My apologies for any confusion; I was not made aware of your proposals prior to my email to you. I am in correspondence with prior counsel and I will review any such proposals he may have before giving you a call.

Sincerely,  
L. Taylor Arnold