ESTTA Tracking number: **ESTTA879719**

Filing date: **02/26/2018**

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

Proceeding	91221093
Party	Plaintiff P3 International Corp.
Correspondence Address	JAMES A POWER JR POWER DEL VALLE LLP 233 WEST 72ND STREET NEW YORK, NY 10023 UNITED STATES Email: jp@powerdel.com
Submission	Request for Reconsideration of Non-Final Board Order
Filer's Name	James A. Power Jr
Filer's email	jp@powerdel.com
Signature	/jpower/
Date	02/26/2018
Attachments	Sanctions Recon.pdf(50187 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

P3 INTERNATIONAL CORP.,	)	
	)	Consolidated Oppositions No.
Opposer,	)	
	)	91-221093 (parent)
v.	)	91-221702
	)	
P3 INGENIEURGESELLSCHAFT MBH,	)	
	)	
Applicant.	)	
	)	

MOTION FOR RECONSIDERATION

Opposer P3 International Corp. moves for reconsideration of the Board's February 21, 2018 order (37 TTABVUE) granting opposer's motion for sanctions, insofar as it (1) denied opposer's prayer for judgment sustaining the consolidated oppositions and dismissing with prejudice applicant's counterclaims, (2) scheduled opposer's 30-day testimony period to begin immediately and to end March 23, 2018, only one week after applicant is permitted to comply with its discovery obligations, and (3) failed to reset the date for opposer's pretrial disclosures.

The Board's order did not take into account that, aside from failing to comply with or even respond to opposer's discovery requests, respond in any way to opposer's motion to compel, or to comply with the Board's order compelling disclosure, applicant also failed to timely respond to opposer's motion for sanctions within the eight extensions it had to do so.

> . . . [A] brief in response to a motion shall be filed within twenty days from the date of service of the motion unless another time is specified by the Trademark Trial and Appeal Board. . . . The Board will consider no further papers in support of or in opposition to a motion.

37 CFR § 1.127(a). Perhaps applicant's most recent and significant default was overlooked among the numerous other dates with which it failed to comply. The belatedness of applicant's response was detailed in opposer's reply (36 TTABVUE 1), though it might be said that no reply was required because the response was out of time and should have been rejected by ESTTA.

In any case, the Board's leniency toward applicant was based entirely on matters that applicant raised in its belated response and that opposer, therefore, respectfully submits the Board need not have considered. For the same reasons that the Board denied applicant's request to reopen the discovery period (37 TTABVUE 7-8), any request by applicant to reopen the time in which it was required to respond to this motion would have been subject to denial as well.[1]

Moreover, it is clear from the decision of the majority of the Board that the only factor mitigating against its imposition of the requested sanction was its concern that applicant would be prejudiced by its counsel's litigation conduct: "Applicant had no reason to know that its counsel should have withdrawn if he was unable to meet his obligations. Accordingly, we give Applicant one final chance before entering judgment." 37 TTABVUE 6. But that is not deemed sufficient under TTAB precedent to escape otherwise deserved sanctions or to prejudice an adversary and the process further. *Id*., citing *Gaylord Entm't Co. v. Calvin Gilmore Prods. Inc*., 59 USPQ2d 1369, 1372 (TTAB 2000) ("action, inaction or even neglect by the client's chosen attorney will not excuse the inattention of the client so as to yield the client another day in court"). The Board's conclusion that "applicant had no reason to know that its counsel should have withdrawn," while not specifically supported, fails to distinguish any litigation the conduct of which regressed so far, as it did here, that cause for further counsel communication or reassessment was long apparent, and is belied by another overlooked fact.[2]

---

[1] See TBMP 509.01(b) ("A party moving to reopen its time to take required action must set forth with particularity the detailed facts upon which its excusable neglect claim is based; mere conclusory statements are insufficient.") and ("[I]t is irrelevant that the failure to timely take the required action was the result of counsel's neglect and not the neglect of the party itself. Under our system of representative litigation, a party must be held accountable for the acts and omissions of its chosen counsel.")

[2] The Board's decision also did not take into account that applicant's counsel's *de facto* client, as is so often the case in representing a foreign applicant, is the trademark counsel to whom he directly reports, Michalski Hüttermann & Partner of Düsseldorf, applicant's representatives on its SN 79/143,481 who have directly participated in this opposition and communicated with opposer's counsel, making it much less likely that these issues were not fully appreciated and, perhaps, even acknowledged on the client side.

Alternatively, opposer respectfully requests that the Board reset the date by which opposer must serve its pretrial disclosures at April 6, 2018, opposer's testimony period to end May 18, 2018, remaining dates to follow. The most recent schedule previously entered in this case (18 TTABVUE), which was suspended until the date of the Board's February 22, 2018 order, included a January 15, 2017 deadline for plaintiff's pretrial disclosures, which the Board did not reset, followed by a 30-day testimony period ending March 1, 2017 and subsequent dates through trial. The current order (37 TTABVUE 6-7), however, permits applicant to comply with discovery within 20 days thereof (*viz*., by March 14, 2018), three weeks into opposer's 30-day testimony period and only nine days before its end on March 23, 2018. *Id*. at 9. Thus, a likely unintended result of the Board's order was to penalize opposer in the process of sanctioning applicant for its recalcitrance. Moreover, the Board's omission of the pretrial disclosure deadline appears to have been an oversight.

For the foregoing reasons, it is respectfully submitted that, upon reconsideration in view of the Board's apparent oversights in denying the relief sought by opposer, judgment be entered in favor of opposer on its opposition claims and applicant's counterclaims. In the event the foregoing relief is denied, opposer requests that the date for plaintiff's pretrial disclosures be reset to April 6, 2018 to permit the filing of a dispositive pretrial motion pursuant to 37 CFR § 2.127(e)(1), and that plaintiff's testimony period be scheduled to end May 18, 2018 to permit, *inter alia*, a fair review of applicant's disclosures, if any, well prior to the close of opposer's testimony period, with remaining dates to follow at the intervals set out in the previous order.

Respectfully submitted,

New York, New York
February 26, 2018

/jpower/
James A. Power Jr
POWER DEL VALLE LLP
233 West 72 Street
New York, New York 10023
212-877-0100
jp@powerdel.com
Attorneys for Opposer

Certificate of Service

I hereby certify that, on February 26, 2018, a copy of the foregoing reply and accompanying declaration were served upon applicant's counsel by e-mail to:

Darren M. Geliebter, Esq.
Lombard & Geliebter LLP
305 Broadway, 7th Floor
New York, New York 10007

via dgeliebter@lombardip.com

/jpower/
James A. Power Jr