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

Proceeding	91225158
Party	Plaintiff Elizabeth and James Holdings, LLC
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Signature	/Susan Hwang/
Date	07/10/2017
Attachments	NIRVANA - Response to OSC.pdf(50750 bytes )

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

ELIZABETH AND JAMES HOLDINGS, LLC

Opposer,

v.

NIRVANA VAPOR, LLC,

Applicant.

Serial No. 86/557,890

Mark: NIRVANA VAPOUR  
AROMATHERAPY

Opposition No. 91225158

**OPPOSER’S RESPONSE TO ORDER TO SHOW CAUSE AND  
MOTION TO REOPEN TESTIMONY AND TRIAL PERIODS**

Opposer Elizabeth and James Holdings, LLC (“Opposer”) hereby responds to the Order to Show Cause (“OSC”) issued by the Trademark Trial and Appeal Board on June 8, 2017. In the Order, the Board stated that Opposer must show good cause why Opposer’s brief on the case is not of record. Opposer states that, for the reasons set forth below, good cause exists for not filing a brief in the present proceeding. Opposer also moves the Board to reopen the testimony periods and trial periods. A declaration in support of this motion is submitted herewith.

**I.  
STATEMENT OF FACTS**

Opposer filed its Notice of Opposition on December 2, 2015.

Applicant filed its Answer on January 11, 2016.

The parties subsequently entered into settlement discussions. On August 5, 2016, Opposer filed a Consent Motion to Extend Discovery and Trial Dates to extend

deadlines in this proceeding by 30 days. The parties requested the extension in order to review the draft settlement agreement exchanged between the parties.

The Board granted the motion on August 29, 2016 and reset deadlines by 30 days, with the new discovery cut-off set to September 7, 2016. Meanwhile, the parties continued to pursue settlement.

Through inadvertent error in Opposer's counsel's docketing management, Opposer did not seek further extensions of the discovery and trial deadlines in this proceeding to allow for time to finalize the settlement.

On May 17, 2017, Opposer's counsel sent a final revised draft settlement agreement to Applicant's counsel.

On May 24, 2017, Opposer's counsel sent an e-mail to Applicant's counsel regarding extension of deadlines.

In telephone and e-mail correspondence on May 25, 2017, Applicant's counsel informed Opposer's counsel that, to date, he had not received a response from Applicant on whether Applicant consented to extend the deadlines or any comments on the final proposed draft settlement agreement.

Neither Opposer nor Applicant have conducted discovery, filed testimony or filed briefs in this proceeding.

Upon information and belief, Applicant is no longer operating a business related to fragrances and is now operating a business related to musical instruments.

## II.

### **DISCUSSION**

For the reasons below, Opposer moves the Board to reopen the testimony and trial periods in this proceeding.

Where the time for taking required action, as originally set or as previously reset, has expired, a party desiring to take the required action must file a motion to reopen the time for taking that action. 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)(1), citing Fed. R. Civ. P. 6(b)(1)(B). The analysis to be used in determining whether a party has shown excusable neglect include (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. *Id.*, citing *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

**A. Opposer's Motion Should Be Granted Because Opposer Can Demonstrate Excusable Neglect**

Opposer's motion should be granted because Opposer can demonstrate excusable neglect.

**1. There is No Danger of Prejudice to Applicant**

On information and belief, the resetting of deadlines will not cause Applicant to suffer any prejudice in this proceeding. Applicant has not conducted any discovery, filed any testimony or filed a brief in this proceeding. The resetting of dates will enable Applicant to do so. Upon information and belief, there have been no changes in key personnel or loss of evidence in Applicant's possession or control that would prejudice Applicant in this regard.

Furthermore, upon information and belief, Applicant no longer operates a business website at <www.nirvanapor.com> or <nirvanavapour.com> related to

fragrances, but now operates a business website at <nirvanahandpans.com> advertising and selling musical instruments, namely, handpans.

**2. The Reopening of Dates Will Not Adversely Impact Judicial Proceedings**

Opposer respectfully submits that the length of delay is not materially significant. Opposer is not aware of any intervening events, scheduling conflicts or any other elements that would adversely impact judicial proceedings. Furthermore, Opposer is willing to accommodate the Board and Applicant's schedule in this regard.

**3. Opposer's Reason for the Resetting of Dates is Based on Inadvertent Error**

Opposer respectfully submits that the reason for delay is based on inadvertent error. Through inadvertent error in Opposer's counsel's docketing management, Opposer did not seek further extensions of the discovery and trial deadlines in this proceeding while the settlement agreement was being finalized. Upon discovery of the docketing error, Opposer's counsel promptly contacted Applicant's counsel requesting a meet and confer on an extension of the proceeding deadlines. Applicant's counsel has informed Opposer's counsel that to date, he has not yet received a response from Applicant on the proceeding dates or the settlement agreement. Upon information and belief, Applicant's delay in finalizing or executing the settlement agreement is related to Applicant's cessation of his business related to fragrances and recent establishment of a business related to musical instruments. See Declaration of Susan Hwang attached hereto.

**4. Opposer is Acting in Good Faith**

Opposer is acting in good faith in the bringing of this motion. As stated above, Opposer's reason for the motion is not intentional, but based on excusable

neglect while the parties were working on finalizing a settlement of the claims that are the subject of this proceeding. Furthermore, Opposer and Applicant have exchanged a draft settlement agreement, which, if executed, will constitute a final disposition of the present proceeding. The current draft of the settlement agreement constitutes an agreement in principle between the parties on key settlement terms.

**B. Opposer Has Met and Conferred with Applicant on this Motion**

Opposer states that its counsel and Applicant's counsel met and conferred by telephone and written correspondence on May 25, 2017 on the issue presented by this motion, but Applicant's counsel could not provide consent because, to date, counsel has not received a response on whether or not Applicant consents to the motion.

**III.**

**CONCLUSION**

Opposer has not lost interest in the present proceeding and requests adjudication on the merits or additional time to finalize settlement of the present proceeding. For all the reasons stated herein, Opposer respectfully requests that the Board discharge the OSC and reopen testimony and trial periods in this proceeding.

Dated: July 10, 2017

/Susan Hwang/  
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Susan Hwang, Esq.  
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Attorneys for Opposer  
ELIZABETH AND JAMES HOLDINGS, LLC

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that this correspondence is being transmitted electronically to Commissioner of Trademarks, Attn: Trademark Trial and Appeal Board through ESTTA pursuant to 37 C.F.R. §2.195(a), on this 10<sup>th</sup> day of July, 2017.

/Susan Hwang/  
Susan Hwang

CERTIFICATE OF SERVICE

I hereby certify that this correspondence is being emailed to Applicant's counsel at [john@altviewlawgroup.com](mailto:john@altviewlawgroup.com) and [hill@altviewlawgroup.com](mailto:hill@altviewlawgroup.com) on this 10<sup>th</sup> day of July, 2017.

/Susan Hwang/  
Susan Hwang

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Mark: NIRVANA VAPOUR  
AROMATHERAPY

Opposition No. 91225158

**DECLARATION OF SUSAN HWANG**

I, Susan Hwang, hereby declare as follows:

1. I am an attorney at the law firm of Sheppard, Mullin, Richter & Hampton LLP, counsel of record for Opposer Elizabeth and James Holdings, LLC.

2. I make this declaration in connection with an opposition proceeding, No. 91225158, pending in the U.S. Patent and Trademark Office. Except as otherwise stated, I have personal knowledge of the facts set forth in this declaration and am competent to testify to those facts.

3. Opposer filed its Notice of Opposition on December 2, 2015.

4. Applicant filed its Answer on January 11, 2016.

5. The parties subsequently entered into settlement discussions. On August 5, 2016, Opposer filed a Consent Motion to Extend Discovery and Trial Dates to extend deadlines in this proceeding by 30 days. The parties requested the extension in order to review the draft settlement agreement exchanged between the parties.

6. The Board granted the motion on August 29, 2016 and reset deadlines by 30 days, with the new discovery cut-off set to September 7, 2016.



7. Through inadvertent error in my docketing management, I did not contact Applicant's counsel to seek further extensions of the discovery and trial deadlines in this proceeding to allow for time to finalize the settlement agreement.

8. On May 17, 2017, I sent a final revised draft settlement agreement to Mr. Begakis.

9. On May 24, 2017, I sent an e-mail to Mr. Begakis requesting a meet and confer regarding extension of the deadlines.

10. In telephone and e-mail correspondence on May 25, 2017, Mr. Begakis informed me that he had not received a response, to date, from his client, Applicant, on whether Applicant consented to the motion and thus could not consent to the motion.

11. Neither Opposer nor Applicant have conducted discovery, filed testimony or filed briefs in this proceeding.

12. Upon information and belief, Applicant no longer operates a business website at <www.nirvanapor.com> or <nirvanavapour.com> related to fragrances, but is operating a business website at <nirvanahandpans.com>, which is currently advertising and accepting pre-sales for musical instruments, namely, handpans.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed in Los Angeles, California, on July 10, 2017.

By: /Susan Hwang/

SUSAN HWANG