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

Mailed: January 22, 2019

Opposition Nos. 91236953 (parent)
91238144

Alliance Sports Group, L.P.

v.

H. Best Ltd.

By the Trademark Trial and Appeal Board:

As set in the Board's institution order, Opposer's testimony period in Opposition No. 91236953 was scheduled to close on September 3, 3018, and that period was not extended. *See* 2 TTABVUE 4. During its trial period in Opposition No. 91236953, Opposer failed to introduce any evidence or testimony. Applicant then filed a motion to dismiss for failure to take testimony under Rule 2.132 in Opposition No. 91236953. *See* 7 TTABVUE.[1] The motion is contested by Opposer. Opposer also seeks to have its testimony reopened in Opposition No. 91236953 and to have remaining dates reset to correspond with Opposition No. 91238144. *See* 9 TTABVUE.

[1] Applicant filed its motion originally at 5 TTABVUE in Opposition No. 91236953. Thereafter, Applicant re-filed its motion at 7 TTABVUE in Opposition No. 91236953 with a corrected certificate of service and requested that its original motion at 5 TTABVUE be disregarded. *See* 6 TTABVUE; 7 TTABVUE. In view thereof, the motion at 5 TTABVUE in Opposition No. 91236953 will be given no further consideration.

The Board has considered the parties' submissions and presumes the parties' familiarity with the factual bases for the motions, and does not recount them here, except as necessary to explain the Board's decision.

Motion to Dismiss under 2.132 and Motion to Reopen in Opposition No. 91236953

For the Board to reopen Opposer's testimony period, Opposer must establish that his failure to act in a timely manner was the result of excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B); TBMP § 509.01(b)(1). In *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380, 395 (1993), as adopted by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the Supreme Court held that the determination of whether a party's neglect is excusable is:

> at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These 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.

Regarding the first *Pioneer* factor, there does not appear to be any prejudice to Applicant. Prejudice to the nonmovant as contemplated under the first *Pioneer* factor must be more than mere inconvenience or delay. Prejudice to the nonmovant is prejudice to the nonmovant's ability to litigate the case, such as the loss of potential witnesses, which has not been alleged here. *See Pumpkin Ltd.,* 43 USPQ2d at 1587 (*citing Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997));

TBMP § 509.01(b)(1). There are no allegations that Applicant is unable to litigate this case and as such, this factor weighs in favor of finding excusable neglect.

Regarding the second *Pioneer* factor, Opposer's testimony period closed September 3, 2018 in Opposition No. 91236953. Accordingly, the impact of the delay upon this proceeding is not insignificant and weighs against a finding of excusable neglect.

Turning to the third *Pioneer* factor, Opposer asserts that its failure to timely act was due to a docketing error and that the parties are trying to settle this matter. 9 TTABVUE 3. Docketing errors are within a party's control. *See Pumpkin Ltd.*, 43 USPQ2d at 1586-87. Accordingly, this factor weighs against a finding of excusable neglect.

Finally, regarding the fourth *Pioneer* factor, there is no evidence of bad faith on Opposer's part.

After consideration of all the factors and the parties' filings, Opposer has shown the requisite excusable neglect, although just barely. The motion to reopen Opposer's testimony period is **granted** as modified herein.[2] In view thereof, Applicant's motion to dismiss under Rule 2.132 is **denied**.

[2] Opposer's motion seeks an extension of its testimony period but also its discovery period. *See* 9 TTABVUE 4. Opposer also requests that dates in Opposition No. 91236953 correspond with the dates in Opposition No. 91238144. Inasmuch as Opposition No. 91238144 is in pretrial disclosures for Opposer and have discovery closed, the Board adopts this trial schedule and does not otherwise reopen discovery.

Opposition No. 91238144

It has come to the attention of the Board that Opposition Nos. 91236953 and 91238144 involve the same parties and common questions of law and fact. It is therefore appropriate to consolidate these proceedings pursuant to Fed. R. Civ. P. 42 (a). Accordingly, Opposition Nos. 91236953 and 91238144 are hereby consolidated and may be presented on the same record and briefs. *See, e.g., Hilson Research Inc. v. Society for Human Resource Management*, *supra*; and *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989).

The Board file will be maintained in Opposition No. **91236953** as the "parent case." From this point on, only a single copy of all motions and submissions should be filed, and each submission should be filed in the parent case only, but captioned with all consolidated proceeding numbers, listing and identifying the "parent case" first.[3]

Despite being consolidated, each proceeding retains its separate character and requires entry of a separate judgment. The decision on the consolidated cases shall take into account any differences in the issues raised by the respective pleadings; a copy of the decision shall be placed in each proceeding file.

[3] The parties should promptly inform the Board of any other Board proceedings or related cases within the meaning of Fed. R. Civ. P. 42, so that the Board can consider whether further consolidation is appropriate.

Proceedings are resumed. Dates for the consolidated proceedings are reset as indicated below:

Plaintiff's Pretrial Disclosures Due	February 15, 2019
Plaintiff's 30-day Trial Period Ends	April 1, 2019
Defendant's Pretrial Disclosures Due	April 16, 2019
Defendant's 30-day Trial Period Ends	May 31, 2019
Plaintiff's Rebuttal Disclosures Due	June 15, 2019
Plaintiff's 15-day Rebuttal Period Ends	July 15, 2019
BRIEFS SHALL BE DUE AS FOLLOWS:	
Plaintiff's Main Brief Due	September 13, 2019
Defendant's Main Brief Due	October 13, 2019
Plaintiff's Reply Brief Due	October 28, 2019

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).