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

Proceeding	91242092
Party	Defendant Giggie's Bonding Company LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Giggies LLC)	Opposition No.: 91242092
)	
Opposer,)	Application No.: 87749669
)	
v.)	Mark: GIGGIE’S
)	
Giggie’s Bonding Company, LLC)	Published in the Official Gazette on
)	May 29, 2018
)	
Applicant.)	

APPLICANT’S BRIEF IN RESPONSE TO MOTION TO SUSPEND

Giggie’s Bonding Company, LLC (“Applicant”) respectfully requests that the Board deny Giggies LLC’s (“Opposer”) Motion to Suspend, grant judgment in favor of Applicant under 37 CFR § 2.128(a)(3), and dismiss this proceeding with prejudice for the following reasons.

On June 9, 2020, the Board issued an Order under 37 CFR § 2.128(a)(3) to show cause why the Opposer’s failure to file a brief should not be treated as a concession of the case. 9 TTABVUE. Prior to this Order, Opposer did not file a brief, take any testimony, or offer any other evidence to support its case.

Opposer did not file a response that properly or specifically addresses the Board’s Show Cause Order. Instead, Opposer filed a Motion to suspend these proceedings on July 7, 2020.¹ 11 TTABVUE. Applicant does not consent to suspension and requests that the Board deny the Motion. Regardless, Opposer’s Motion does not adequately address Opposer’s failure to file a brief and, therefore, fails to show cause sufficient to not to dismiss the present Opposition.

¹ Opposer filed an Amended Motion on July 16, 2020. 12 TTABVUE. The Amended Motion asserts that the only difference between the Motion and Amended Motion is the correction of a name, from Michael Thompson to Lamal Thompson.

I. Opposer's Motion to Suspend Fails to Show Cause

The Board's Scheduling Order required Opposer to file its brief on May 14, 2020. *See* 7 TTABVUE at 1 and 8 TTABVUE at 1. Opposer has failed to show cause sufficient to excuse its noncompliance with the Board's Scheduling Order.

By definition, a show cause order "direct[s] a party to appear in court and explain why the party ... failed to take ... some action." *Show-cause Order*, Black's Law Dictionary 505 (2nd pocket ed. 2003). The Board has indicated that showing cause requires that a party failing to act within a specified time "state with particularity the grounds therefor, including detailed facts" explaining their inaction. *SFW Licensing Corp. v. Di Pardo Packing Ltd.*, 60 USPQ2d 1372, 1375 (TTAB 2001) (citation omitted).

Opposer has not identified a reason to explain its failure to file its Opening Brief in this proceeding. Instead, Opposer filed the Motion to Suspend, in which Opposer suggests that "[i]t has become evident that settlement of the within proceeding is [allegedly] inextricably intertwined with a resolution of the underlying dispute." 12 TTABVUE at 2. However, even if there is some aspect of a separate underlying dispute, this does not justify Opposer's inaction **in this proceeding**. Indeed, if Opposer believed that matters were inexplicably intertwined, Opposer should have sought to extend the deadline(s) it failed to comply with or sought a stay of this proceeding. Opposer has not identified any specific reason it failed to take these possible actions. Rather, Opposer previously disregarded the deadlines and now provides no justifiable explanation for its failure to act.

By failing to identify any facts, much less the requisite detailed facts, explaining the reason for its noncompliance with the Board's Scheduling Order and by failing to file its opening brief,

Opposer failed to comply with the Board's Show Cause Order.

In summary, Opposer's Motion to Suspend is devoid of any grounds upon which the Board could excuse Opposer's failure to act in compliance with the Board's Show Cause Order or the Board's Scheduling Order. For these reasons, Applicant respectfully requests that the Board deny the Motion to Suspend and dismiss this proceeding with prejudice due to Opposer's failure to comply with the Board's Orders.

II. Opposer's Motion to Suspend Should Be Denied as Futile and This Opposition Should Be Dismissed

Opposer's Motion to Suspend should be denied as futile because it merely delays the inevitable dismissal of this case. More specifically, Opposer has not submitted a brief, and, because the Motion to Suspend does not request, justify, or warrant resetting of the time for Opposer to file its brief, the Board should not grant Opposer a second chance to file a brief and should instead proceed to enter judgement for Applicant.

TBMP § 536 (June 2017) provides that "[t]he principal purpose of 37 CFR § 2.128(a)(3) is to save the Board the burden of determining a case on the merits where ... the plaintiff has lost interest in the case." However, even if the order to show cause for failure to file a brief is discharged because Opposer has not lost interest in the proceeding, this does not necessarily result in acceptance of a late-filed brief or in a resetting of the time to file the brief. *Vital Pharmaceuticals Inc. v. Kronholm*, 99 USPQ2d 1708, 1710-11 (TTAB 2011). Moreover, TBMP § 536 (June 2017) notes

When the Board discharges a 37 CFR § 2.128(a)(3) order to show cause, plaintiff's time for filing its brief necessarily will have passed. Therefore, notwithstanding that plaintiff may have shown that it is still interested in having the Board decide the case on its merits, unless plaintiff has included with its response a motion to

reopen its time for filing its brief, plaintiff may not have a second chance to file a brief.

Opposer has not submitted a brief and has not requested a resetting of the time to file the brief. Because the time period for Opposer to file a brief has passed and Opposer has not submitted a brief or requested a resetting of the time to file the brief, the Board should not grant Opposer a second chance to file a brief and should instead proceed to enter judgement even if the Board can infer from the Motion to Suspend that Opposer has not lost interest in this proceeding.

Opposer's Motion to Suspend is futile and merely delays the inevitable dismissal of this case because, in addition to failing to file a brief, Opposer does not have any evidence of record and has not moved to reopen its testimony period. Thus, the Board should enter judgement for Applicant under 37 CFR § 2.128(a)(3).

As noted in the Board's Order to show cause, 37 CFR § 2.128(a)(3) provides that "[i]f a plaintiff files a response to the order showing good cause, but does not have any evidence of record and does not move to reopen its testimony period and make a showing of excusable neglect sufficient to support such reopening, judgment may be entered against plaintiff for failure to take testimony or submit any other evidence." TBMP § 536 (June 2017) provides

It is not unusual for a plaintiff to file a response to the Board's 37 CFR § 2.128(a)(3) order to show cause in a case in which the plaintiff cannot bear its burden of proof, regardless of whether the Board reopens the time for the plaintiff to file its brief. If the record shows (1) that plaintiff failed, during its testimony period, to take any testimony or offer any other evidence in its behalf, (2) that plaintiff failed to make (if applicable) a pleaded registration properly of record with its complaint, and (3) that defendant in its answer did not admit to any dispositive allegations, the Board, in lieu of reopening the briefing schedule, may proceed to enter judgment against plaintiff for failure to prove its case, absent the filing of, and granting of, a motion to reopen testimony brought by plaintiff.

Opposer brought this action and, as such, bears the burden of going forward and prosecuting it. *See Old Nutfield Brewing Co., Ltd. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1704 (TTAB 2002) (“It is the opposer which bears the burden of coming forward with evidence to support its case”).

Opposer cannot bear its burden of proof because Opposer has failed to take any testimony or offer any other evidence and Applicant has not admitted to any dispositive allegations. Opposer has also not filed a motion to reopen testimony. It would be futile to grant Opposer’s Motion to Suspend because opposer cannot bear its burden of proof even if the Motion to Suspend is granted and these proceedings are suspended. To avoid unnecessary delay and to further the Board’s interest in seeing its cases conclude in a timely manner, the Board should enter judgement for Applicant under 37 CFR § 2.128(a)(3) because Opposer does not have any evidence of record and has not moved to reopen its testimony period or made a showing of excusable neglect sufficient to support such reopening.

Proceedings are not suspended automatically when parties are discussing settlement and a party that fails to timely move for extension or suspension of dates on the basis of settlement does so at its own risk. *Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1704 (TTAB 2002). Further, orders suspending proceedings for settlement are generally vacated once the Board determines that an adverse party objects to suspension on such basis. *See MacMillan Bloedel Ltd. v. Arrow-M Corp.*, 203 USPQ 952, 953 (TTAB 1979).

Applicant objects to suspension, and the existence of settlement discussions in another proceeding between the parties and the other matters identified as supposedly supporting Opposer’s Motion to Suspend **did not** prevent Opposer either from taking testimony during the assigned period or filing timely requests to extend prior to expiration of the period. Opposer

assumed the risk of dismissal by failing to timely move for extension or suspension of dates on the basis of settlement negotiations. It would be detrimental to Applicant to suspend this proceeding and thus delay dismissal because Opposer failed to take any timely action in this proceeding for almost a year.

III. Conclusion

For the reasons discussed herein, Applicant respectfully requests the Board to refuse Opposer's Motion and to grant judgment in favor of Applicant under 37 CFR § 2.128(a)(3) and dismiss this proceeding with prejudice.

Date: July 27, 2020

Respectfully submitted,

/Seth E. Jones/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **APPLICANT'S BRIEF**
IN RESPONSE TO MOTION TO SUSPEND has been served upon all parties, at their address
of record by email on this date, July 27, 2020.

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