

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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December 9, 2019

Opposition No. 91248073

Good Life Fitness Center, LLC

v.

Patchell Holdings Inc.

By the Board:

On November 20, 2019, Applicant filed a motion to strike¹ the notice of opposition and to dismiss this proceeding for failure to participate in the required discovery and settlement conference, for failure to produce initial disclosures as required by Fed. R. Civ. P. 26(a)(1), and for failure to prosecute pursuant to Trademark Rule 2.132(a). 6 TTABVUE 2.

In view of the circumstances, the nature of the motion and to avoid delay, the Board exercises its discretion to adjudicate the motion prior to the time for full briefing thereof as allowed under Trademark Rule 2.127(a).

Analysis

¹ The Board does not construe Applicant's motion as a motion to strike matter pursuant to Fed. R. Civ. P. 12(f). The relief that Applicant seeks by way of its brief on its motion is dismissal of the proceeding.

In the May 9, 2019 order instituting this proceeding the Board set forth a discovery and trial schedule wherein 1) the deadline for the parties to hold their discovery and settlement conference was July 18, 2019; 2) the deadline for the parties to serve initial disclosure was August 17, 2019; and 3) Opposer's thirty-day trial period was set to end on April 13, 2020. 2 TTABVUE 3.

Discovery Conference

Under the Board's applicable authorities, it may impose sanctions against a non-cooperating party for failure to participate in the required discovery conference. Trademark Rule 2.120(h)(1); TBMP § 411.05 (June 2019). The Board may make any appropriate order imposing sanctions, including those provided in Fed. R. Civ. P. 37(b)(2) *Id.* Said sanctions include dismissal. However, a motion for sanctions against a party for its failure to participate in the discovery conference must be filed prior to the deadline for any party to make initial disclosures. Trademark Rule 2.120(h)(1); TBMP § 408.01(a). Applicant did not file its motion within the time allowed. Accordingly, Applicant's motion is **denied** as untimely.

Initial Disclosures

Under the Board's applicable authorities, a party that fails to make initial disclosures may be subject to a motion to compel, and ultimately, a motion for discovery sanctions. Trademark Rules 2.120(f)(1) and (h); TBMP § 401.02. The filing of a motion to compel initial disclosures is a prerequisite to the filing of a motion for sanctions for failure to make initial disclosures. Trademark Rules 2.120(h)(1)-(h)(2). A motion to compel initial disclosures must be filed within thirty days after the

deadline therefor. Trademark Rule 2.120(f)(1); TBMP §§ 401.02, 408.01(c), 411.01 and 523.03. Applicant did not file its motion within the time allowed. Accordingly, Applicant's motion is **denied** as untimely.

Failure to Prosecute

The Board's applicable authority, Trademark Rule 2.132(a), allows a defendant to move for dismissal when the plaintiff's testimony period has passed, and the plaintiff has not taken testimony or offered any other evidence. TBMP § 534.02. The motion is relevant only where the plaintiff's testimony period has passed. Inasmuch as Opposer's testimony period has not passed, Applicant's motion is **denied** as premature.

The Board notes Applicant's argument that it "should not be required to wait for another five months of inaction and non-compliance by Opposer." 6 TTABVUE 6. Applicant moved for relief predicated on the position that Opposer failed to prosecute, thereby implicating Trademark Rule 2.132(a). Applicant is bound by the parameters of the rule under which it moved for relief. The intent and purpose of the rule is to save the defendant the expense and delay of continuing with trial when the plaintiff has failed to offer any evidence **during its trial period**. TBMP § 534.02, and cases cited therein. That purpose is not met where the time allowed for the plaintiff to introduce testimony and evidence has not expired. Here, Opposer's trial period has not even opened. Applicant cannot circumvent the very purpose for the rule by merely declaring that it does not want to "wait" until such time as a motion under the rule **would** be timely. In the event that a motion to dismiss for failure to

prosecute becomes warranted under the trial schedule, Applicant may file a new motion, as appropriate and timely.

Schedule

Discovery remains open, and dates remain as set in the May 9, 2019 institution order.