UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500
General Email: TTABInfo@uspto.gov

kds

December 30, 2024

Opposition No. 91265658 (parent case)

Turac Dis Ticaret Limited Sirketi

v.

Spearhead Inc.

Cancellation No. 92073765

Spearhead Inc.

v.

Turac Dis Ticaret Limited Sirketi

Katerina D. Sparer, Interlocutory Attorney:

This case comes up on Opposer/Respondent Turac Dis Ticaret Limited Sirketi's ("Turac") motion, filed August 26, 2024, "to amend its Notice of Reliance and/or, in the Board's discretion, Reopen [the] Testimony Period" for Applicant/Petitioner Spearhead Inc. ("Spearhead").[1] 31 TTABVUE 2. The motion is contested.

The Board has carefully considered all of the parties' arguments, presumes the parties' familiarity with the bases for their filings, and does not recount the facts or

[1] A public version of Turac's motion appears at 31 TTABVUE, with confidential exhibits thereto filed under seal at 32 TTABVUE.

arguments here except as necessary to explain this decision. *See Guess? IP Holder LP v. Knowluxe LLC*, Can. No. 92060707, 2015 WL 9702438, at *1 (TTAB 2015).[2]

I. Background

This consolidated proceeding is comprised of Opposition No. 91265658 and Cancellation No. 92073765. *See* 4 TTABVUE. Turac's testimony period as plaintiff in the opposition proceeding closed on October 1, 2023. *See* 20 TTABVUE 2. On October 3, 2023, Spearhead filed a motion in the opposition proceeding seeking involuntary dismissal under Trademark Rule 2.132(a) for Turac's failure to take testimony.[3] *See* 21 TTABVUE. On October 23, 2023, Turac filed its response to Spearhead's motion (24 TTABVUE), along with an untimely notice of reliance (Turac's "Untimely Notice of Reliance") (25 TTABVUE). Turac's Untimely Notice of Reliance contained the prosecution files for the subject marks in each of the consolidated proceedings,

[2] This order cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals only by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this order employs citation to the Westlaw (WL) database. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03(a) (2024). Practitioners should adhere to the practice currently set forth in TBMP § 101.03(a).

[3] Trademark Rule 2.132(a) provides:

> If the time for taking testimony by any party in the position of plaintiff has expired and it is clear to the Board from the proceeding record that such party has not taken testimony or offered any other evidence, the Board may grant judgment for the defendant. Also, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute. The party in the position of plaintiff shall have twenty days from the date of service of the motion to show cause why judgment should not be rendered dismissing the case. In the absence of a showing of excusable neglect, judgment may be rendered against the party in the position of plaintiff. If the motion is denied, testimony periods will be reset for the party in the position of defendant and for rebuttal.

including, inter alia, Turac's Registration No. 4774729[4] for the mark STERLING for "firearms" in International Class 13 (i.e., the subject mark in Cancellation No. 92073765) ("Turac's Involved Registration"). *Id.*

On December 18, 2023, the Board denied Spearhead's motion for involuntary dismissal, stating, inter alia, that because the prosecution file for Turac's Involved Registration is automatically of record in the pending cancellation proceeding by operation of Trademark Rule 2.122(b)(1),[5] it is likewise of record in this consolidated proceeding such that Trademark Rule 2.132(a) is inapplicable. *See* 27 TTABVUE 3-4. The next day, on December 19, 2023, the Board granted the parties' consented motion to extend time. 29 TTABVUE. Therein, the Board reset Turac's rebuttal period as plaintiff in the opposition and defendant in the cancellation to close on May 12, 2024, and reset Turac's opening brief deadline for August 25, 2024. *Id.* at 2.

On August 26, 2024,[6] in addition to timely filing its opening brief (33 TTABVUE), Turac filed the instant motion to "amend" its Untimely Notice of Reliance and/or reopen the testimony period for Spearhead (31 TTABVUE 2).

---

[4] Issued July 21, 2015 pursuant to Trademark Act Section 66(a), 15 U.S.C. § 1141f(a).

[5] Trademark Rule 2.122(b)(1) provides, in relevant part:

> The file . . . of the application against which a notice of opposition is filed, or of each registration against which a petition or counterclaim for cancellation is filed forms part of the record of the proceeding without any action by the parties and reference may be made to the file for any relevant and competent purpose in accordance with paragraph (b)(2) of this section.

[6] The Board notes that, because August 25, 2024 fell on a Sunday, Turac timely filed its opening brief on Monday, August 26, 2024. *See* Trademark Rule 2.196 ("When the day, or the last day fixed by statute or by regulation under this part for taking any action or paying any fee in the Office falls on a Saturday, Sunday, or Federal holiday within the District of

II. Preliminary Matter

As aforementioned, Turac's Untimely Notice of Reliance was filed October 23, 2023, after the close of Turac's testimony period on October 1, 2023. *See* 20 and 25 TTABVUE. While the instant motion moves to "amend" Turac's Untimely Notice of Reliance, to the extent that the Board's December 18, 2023 order found no excusable neglect and did not accept Turac's Untimely Notice of Reliance, no notice of reliance is currently of record. *See* 27 TTABVUE 2-4. In view thereof, the Board construes Turac's motion to "amend" its notice of reliance as a motion to reopen its testimony period such that Turac's August 26, 2024 proposed notice of reliance, submitted with the instant motion, is deemed timely. *See* 31 and 32 TTABVUE.

III. Turac's Proposed Notice of Reliance

In addition to the prosecution files for the marks at issue in this consolidated proceeding (which are automatically of record pursuant to Trademark Rule 2.122(b)(1), *see supra* note 5), Turac's proposed notice of reliance consists of: (1) the declaration of Turac's Vice General Manager, Ahmet Aksahin (the "Aksahin Declaration"), by which it seeks to introduce invoices that were previously "unintentionally omitted" from evidence (Exhibit 1 to the Aksahin Declaration); and (2) the declaration of Turac's counsel, Alexander Lazouski (the "Lazouski Declaration"), by which it seeks to introduce: (a) Turac's August 5, 2021 responses to Spearhead's discovery requests (Exhibit 1 to the Lazouski Declaration); (b) the

Columbia, the action may be taken, or the fee paid, on the next succeeding day that is not a Saturday, Sunday, or a Federal holiday.").

aforementioned invoices provided with Turac's discovery responses that were previously "unintentionally omitted" from evidence (Exhibit 2 to the Lazouski Declaration); (c) website evidence that Turac alleges "could not have been discovered earlier through the exercise of reasonable diligence" (Exhibit 3 to the Lazouski Declaration), and (d) Turac's March 5, 2021 "Updated Initial Disclosures" (Exhibit 4 to the Lazouski Declaration). 31 TTABVUE 6-36; 32 TTABVUE 2-141.

As an initial matter, the Board notes that a party may not make its own written disclosures or discovery responses of record, except to the extent necessary "to make not misleading" the discovery responses submitted by the inquiring party. Trademark Rule 2.120(k)(5). In view thereof, and because Spearhead has not submitted any of Turac's discovery responses into evidence, Turac's submission of its own discovery responses and amended initial disclosures is improper and will be given no further consideration herein.

IV. Turac's Construed Motion to Reopen

For the Board to reopen Turac's testimony period, Turac must establish that its failure to act in a timely manner was the result of excusable neglect. Fed. R. Civ. P. 6(b)(1)(B); TBMP § 509.01(b)(1); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, Opp. No. 91095170, 2000 WL 1300412, at *4 (TTAB 2000) ("Pursuant to Fed. R. Civ. P. 6(b)(2), the requisite showing for reopening an expired period is that of excusable neglect."). In determining excusable neglect, the Board considers the following factors as set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993), and adopted by the Board in *Pumpkin*

Ltd. v. Seed Corps, Opp. No. 91099224, 1997 WL 473051 (TTAB 1997): (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and (4) whether the moving party has acted in good faith.

With respect to the "newly discovered" website evidence that comprises Exhibit 3 to the Lazouski Declaration, however, in order for Turac's testimony period to be reopened, Turac must show not only that the evidence has been newly discovered, but also that it could not have been discovered earlier through the exercise of reasonable diligence. *Harjo v. Pro-Football, Inc.*, Can. No. 92021069, 1998 WL 90884, at *2 (TTAB 1998). The decision to reopen a trial period for the purpose of introducing new evidence "is committed to the sound discretion of the Board." *Id. See also Zenith Radio Corp v. Hazeltine Res., Inc.*, 401 U.S. 321, 331 (1971). In determining a motion to reopen time, "the Board will consider, among other things: (1) the nature and purpose of the evidence sought to be added; (2) the stage of the proceeding; (3) the adverse party's right to a speedy and inexpensive determination for the proceeding; and (4) the need for closure once the trial period has been completed." *Harjo*, 1998 WL 90884, at *2.

A. Turac's Previously Omitted Invoice Evidence

With respect to Turac's previously omitted invoice evidence, the determination of whether Turac's neglect is excusable such that its testimony period should be reopened is "at bottom an equitable one, taking into account all relevant

circumstances[.]" *Pioneer Inv. Servs. Co.*, 507 U.S. at 395; *accord FirstHealth of the Carolinas v. CareFirst of Maryland Inc.*, 479 F.3d 825, 829 (Fed. Cir. 2007); *Pumpkin Ltd.*, 1997 WL 473051, at *2 n.2. Ultimately, however, the determination of whether a party's neglect is excusable lies within the discretion of the Board. *See FirstHealth of the Carolinas*, 479 F.3d at 829.

The type of prejudice contemplated by the first *Pioneer* factor is prejudice to the non-movant's ability to litigate the case, e.g., where the non-movant has lost evidence or witnesses as a result of the delay. *Pumpkin Ltd.,* 1997 WL 473051, at *7. Spearhead has not pointed to any specific loss of evidence or witness testimony as a result of Turac's delay, and there is no evidence in the record that Spearhead's ability to defend against Turac's claims in the opposition or prosecute its own claims in the cancellation has been prejudiced thereby. Accordingly, this factor weighs in favor of finding excusable neglect.

With respect to the second *Pioneer* factor, namely the length of the delay and its potential impact on proceedings, the Board must evaluate the total length of the delay, including the time for the Board to consider the pending motion. *Coffee Studio LLC v. Reign LLC*, Can. No. 92066245, 2019 WL 990243, at *3 (TTAB 2019) (citing *Pumpkin Ltd.*, 1997 WL 473051, at *7). Turac filed and served its proposed notice of reliance and the instant construed motion to reopen on August 26, 2024, almost eleven months after the close of its October 1, 2023 testimony period, and over three months after the close of its May 12, 2024 rebuttal period. Turac failed to introduce any evidence during its testimony period, again failed to introduce any evidence

during its rebuttal period, and did not timely move to extend either deadline. This consolidated proceeding is now in its final briefing stage, and Turac's trial brief has already been filed. *See* 33 TTABVUE. Inasmuch as reopening would delay resolution of this case by several additional months, the impact of Turac's delay is significant. Accordingly, this factor weighs against a finding of excusable neglect.

Turning to the third *Pioneer* factor, the reason for the delay and whether it was in Turac's control, Turac asserts, inter alia, that: (1) it is a Turkish-based company with local counsel in Turkey; (2) communication between Turac's representative, US counsel, and foreign counsel is "cumbersome" and involves translation between Turkish and English; (3) introduction of the evidence at issue was "unintentionally omitted due to a miscommunication between Turac's US counsel, foreign counsel and Turac's representative"; and (4) Spearhead would not be unfairly surprised by the introduction of this evidence because it was "produced to Spearhead on August 5, 2023 when Turac responded to Spearhead discovery requests." 31 TTABVUE 4

Turac's apparent oversight in timely introducing its invoice evidence and its failure to seek an extension of its testimony period were entirely within its reasonable control. *Cf. Williams v. The Five Platters, Inc.*, 510 F.2d 963, 964 (CCPA 1975) (carelessness and inattention of counsel and client's personal neglect of matter as evidenced by failure to maintain communications with counsel did not establish excusable neglect), *aff'g* 1974 WL 19888 (TTAB 1974); *Hobie Designs Inc. v. Fred Hayman Beverly Hills Inc.*, Opp. No. 91079928, 1990 WL 354502, at *1 n.1 (TTAB 1990) (no excusable neglect where defendant's failure to act was due to its oversight

or lack of care); *Atlanta-Fulton County Zoo Inc. v. DePalma*, Opp. No. 91098819, 1998 WL 104306, at *2-3 (TTAB 1998) (failure to timely move to extend testimony period was due to counsel's oversight and does not constitute excusable neglect). In view of the foregoing, the third *Pioneer* factor weighs against finding excusable neglect.

With respect to the fourth factor, there is no evidence that Turac's delay was the result of bad faith. Accordingly, the fourth *Pioneer* factor is neutral.

The reason for the delay is often the most important *Pioneer* factor in an excusable neglect analysis and that is the case here. *See Luster Prods. Inc. v. Van Zandt*, Opp. No. 91202788, 2012 WL 6115928, at *2 (TTAB 2012) (*citing Pumpkin Ltd.*, 1997 WL 473051, at *6 n.7). This factor, along with the length of the delay, outweighs the lack of any prejudice to Spearhead, and the fourth *Pioneer* factor, which is neutral. Accordingly, the Board finds that Turac has failed to establish excusable neglect to reopen its testimony period. In view thereof, Turac's construed motion to reopen its testimony period to introduce its previously omitted invoice evidence is **denied**.

B. Turac's Newly Discovered Website Evidence

Inasmuch as Turac asserts that the website from which it seeks to introduce newly discovered evidence was registered on June 8, 2024 (31 TTABVUE 4), there is no dispute that the evidence could not have been discovered prior to the close of Turac's testimony or even rebuttal periods through the exercise of reasonable diligence. *See Tektronix, Inc. v. Daktronix, Inc.*, 1975 WL 21268, at *1 n.1 (TTAB 1975), *aff'd*, 534 F.2d 915 (CCPA 1976) ("While it would appear from the date of publication of [opposer's advertising or promotional] documents that they were not in existence

during either of opposer's trial periods, the information contained therein could have been made of record through other means such as a motion to reopen if this matter was truly 'newly discovered' evidence."). Nonetheless, the Board must consider the factors articulated in *Harjo* to determine if Turac's motion should be granted with respect to its website evidence.

Regarding the nature and purpose of the evidence, Turac has not explained why the website evidence it seeks to introduce justifies reopening. While Turac's proposed notice of reliance states that the evidence "is relevant to the issue of likelihood of confusion, scope of use of Turac's mark STERLING for ammunition and firearms and continuous intent to resume use of its mark in US" (31 TTABVUE 36, ¶ 4), Turac does not sufficiently explain how the proposed evidence bears on the issues in dispute. With respect to Turac's likelihood of confusion claim in the opposition proceeding, the Board notes that the likelihood of confusion analysis is based on the description of the goods stated in the application and registration at issue, not on extrinsic evidence of actual use. *See Stone Lion Cap. Partners, L.P. v. Lion Cap. LLC*, 746 F.3d 1317, 1323 (Fed. Cir. 2014). With respect to Spearhead's abandonment claim, inasmuch as Spearhead's alleged nonuse period predates the June 8, 2024 registration of Turac's website,[7] evidence therefrom of Turac's alleged efforts to resume use would not cure the alleged abandonment. *See Stromgren Supports Inc. v. Bike Athletic Co.*, Can. No.

[7] Spearhead's petition to cancel, filed March 18, 2020, alleges that Turac "does not currently use and has not used [Turac's Involved Registration] in interstate commerce or in any commerce within the United States on any goods listed [therein]. To the extent [Turac] has ever used [Turac's Involved Registration] . . . [Turac] has ceased [use thereof] . . . for a period greater than three consecutive years." Can. No. 92073765, 1 TTABVUE 4-5, ¶ 4.

92021379, 1997 WL 377630, at *15 (TTAB 1997) (evidence of intent to resume use which occurred after abandonment is evidence of a new use which does not cure the abandonment) (citing *Cerveceria Centroamericana S.A. v. Cerveceria India Inc.,* 892 F.2d 1021, 1027-28 (Fed. Cir. 1989) (evidence of nonuse between 1977 and 1984 is not rebutted by evidence of an intent to resume use after 1984)).

Turac has not otherwise argued that its newly discovered evidence justifies reopening trial, particularly in light of the late stage of this proceeding and the severe prejudice that would result to Spearhead's right to a speedy and inexpensive determination of the claims at issue. *See, e.g., L.C. Licensing Inc. v. Berman*, Opp. No. 91162330, 2008 WL 835278, at *2 (TTAB 2008) (the Board declined to reopen applicant's testimony period after the briefs had been filed in part because the newspaper article sought to be introduced into evidence was not probative of opposer's intent to abandon its mark); *Harjo*, 1998 WL 90884, at *2 (newly discovered evidence did not have significant probative value to justify further delay of case). Accordingly, Turac's construed motion to reopen its testimony period to introduce newly discovered website evidence is **denied**.[8]

V. Proceeding Schedule

Proceedings herein are **resumed**. Dates are reset as follows:

Combined Brief for Spearhead as Defendant in Opposition and Opening Brief as Plaintiff in Cancellation Due	**1/27/2025**

[8] Because Turac's construed motion to reopen is denied in its entirety, Turac's request that the Board reopen Spearhead's testimony (or discovery) period to "mitigate[ ]" any possible prejudice caused by the Board's acceptance of Turac's proposed notice of reliance is **denied as moot**. *See* 31 TTABVUE 4-5.

Combined Rebuttal Brief for Turac as Plaintiff in Opposition and Brief as Defendant in Cancellation Due	**2/26/2025**
Rebuttal Brief for Spearhead as Plaintiff in Cancellation Due	**3/13/2025**
Request for Oral Hearing (optional) Due	**3/23/2025**

IMPORTANT TRIAL AND BRIEFING INSTRUCTIONS

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, 37 C.F.R. §§ 2.121-2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, 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), 37 C.F.R. §§ 2.128(a) and (b). Such briefs should utilize citations to the TTABVUE record created during trial, to facilitate the Board's review of the evidence at final hearing. *See* TBMP § 801.03. 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), 37 C.F.R. § 2.129(a).