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

September 8, 2023

Opposition No. 91276956

The Cooking Guild LTD

v.

Long Zhang

By the Trademark Trial and Appeal Board:

This proceeding is before the Board for consideration of Applicant's motion for judgment under Trademark Rule 2.132(a).[1] 10 TTABVUE. The motion is fully briefed.[2]

[1] Applicant's counsel's notice of appearance is noted, and the Board's records in this proceeding have been updated accordingly. 4 TTABVUE.

In this order, citations to the record in this proceeding are to TTABVUE, the Board's online docketing system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 106.03 (2023). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any number(s) following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear. The Board expects the parties to use this method of citing to the record throughout this proceeding.

[2] The Board has considered the parties' submissions and presumes the parties' familiarity with the factual bases for the motion. The Board does not recount the facts or arguments here, except as necessary to explain the Board's order. *See Guess? IP Holder L.P. v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

I. Background

Applicant seeks to register the standard character mark MEN WITH THE POT on the Principal Register for "bayonets; bread knives; butcher knives; carving knives; ceramic knives; filleting knives; folding knives; knife handles; knife steels; machetes; penknives; scalpels for hobby use; shear blades; shears; table knives" in International Class 8.[3]

Opposer opposes registration of the mark on the grounds of likelihood of confusion, non-ownership, deceptiveness, and fraud, pleading ownership of an application for the mark MENWITHTHEPOT for, among other things:

> "Cutlery, kitchen knives, and cutting implements for kitchen use; knives; knives; Japanese, style chopping kitchen knives; knife bags; knife handles; knife holders; knife sharpeners; manual knife sharpeners; knife sharpeners; knife sheaths; knife steels; knives being tableware; tableware, namely, knives, forks and spoons; knives for hobby use; knives for skinning animals; hand operated knives for skinning animals; knives, forks and spoons; knives made of precious metal; table knives made of precious metal; knives, forks and spoons being tableware made of precious metal; shear blades; shears; machetes; penknives; scalpels for hobby use; folding knives; carving knives; ceramic knives; bayonets; bread knives; butcher knives," in International Class 8.[4]

1 TTABVUE; *see* Trademark Act Sections 1, 2(a), 2(d), 15 U.S.C. §§ 1051, 1052(a), 1052(d).

[3] Application Serial No. 97003900, filed August 31, 2021, is based on an assertion of use in commerce pursuant to Trademark Act Section 1(a), 15 U.S.C. § 1051(a), with July 29, 2021 as a claimed date of first use and first use in commerce.

[4] On the ESTTA cover sheet, Opposer indicates that application Serial No. 97278409 was filed on February 22, 2022, and asserts January 25, 2022 as the foreign priority date and as the date of first use and first use in commerce for the goods in International Class 8. 1 TTABVUE 2. However, in the body of the notice of opposition, Opposer alleges September 11, 2020 as the "[d]ate of [f]irst use in [i]nterstate [c]ommerce." *Id*. at 5.

Applicant filed an answer, denying the salient allegations in the notice of opposition and asserting three purported affirmative defenses. 7 TTABVUE.

II. Timeliness

As last reset, Opposer's trial period ended on June 30, 2023. Applicant filed the instant motion on July 11, 2023, before the opening of his trial period. In view thereof, the motion is timely. *See* Trademark Rule 2.132(c).

III. Reopen

In its response to the motion, Opposer requests "that prosecution deadlines be reset." 12 TTABVUE 3.

Opposer did not file any evidence or take any testimony during its trial period, and Applicant did not make any material admissions in his answer to the notice of opposition sufficient to establish any of Opposer's claims. Therefore, unless Opposer's trial period is reopened, it would be futile to allow this opposition to proceed. *See Gaylord Entm't Co. v. Calvin Gilmore Prods. Inc.*, 59 USPQ2d 1369, 1373 (TTAB 2000) ("Because all testimony periods have expired and opposer has taken no testimony or submitted any other evidence, these proceedings are hereby dismissed with prejudice.") (footnote omitted).

To reopen its trial period, Opposer must demonstrate "excusable neglect." Fed. R. Civ. P. 6(b)(1)(B); *see Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1852 (TTAB 2000). A determination of excusable neglect requires consideration of the following factors set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. L.P.*, 507 U.S. 380, 395 (1993), and which the Board applied in *Pumpkin Ltd.*

v. Seed Corps, 43 USPQ2d 1582, 1586 (TTAB 1997) (quoting *Pioneer*, 507 U.S. at 395): "[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." Whether neglect is excusable "is at bottom an equitable [question], taking account of all relevant circumstances," *Pioneer*, 507 U.S. at 395; *accord Pumpkin*, 43 USPQ2d at 1584 n.2, and lies within the Board's discretion, *see FirstHealth of the Carolinas, Inc. v. CareFirst of Md., Inc.*, 479 F.3d 825, 81 USPQ2d 1919, 1921 (Fed. Cir. 2007).

A. Prejudice

Prejudice to the nonmovant must be more than mere inconvenience, delay, or loss of any tactical advantage that it otherwise would enjoy as a result of the movant's delay or omission. *See* TBMP § 509.01(b)(1). Rather, prejudice pertains to the nonmovant's ability to litigate the case, such as the unavailability of witnesses or evidence. *See Pumpkin*, 43 USPQ2d at 1587.

Applicant does not allege prejudice on this basis. Instead, Applicant conclusory asserts that he "will be greatly prejudiced if the Board allows Opposer to reopen its trial period to present its case after the preset deadlines have long passed." 13 TTABVUE 3.

Inasmuch as this does not constitute the type of prejudice that this factor contemplates, this factor weighs in favor of finding excusable neglect.

B. Length of Delay

"[I]n addition to the time between the expiration of the time for taking action and the filing of the motion to reopen, the calculation of the length of the delay in proceedings also must take into account the additional, unavoidable delay arising from the time required for briefing and deciding the motion to reopen." *Pumpkin*, 43 USPQ2d at 1588.

Opposer requested "that prosecution deadlines be reset" more than two months after its pretrial disclosure deadline and more than three weeks after its trial period ended. In addition, Applicant's motion has been pending for approximately two months. Though this delay is not insignificant, aside from a single thirty-day extension in this case, which was to Applicant's benefit, Opposer's inaction and the motion practice arising therefrom represent the only other postponement in this proceeding.

Thus, this factor weighs slightly in favor of finding excusable neglect. *See Coffee Studio LLC v. Reign LLC*, 129 USPQ2d 1480, 1483 (TTAB 2019) ("We find that the delay caused by Petitioner's failure to offer testimony or evidence during its testimony period, and the parties' motions arising therefrom, is minimal…. This weighs in Petitioner's favor as it is a relatively short period of time") (citation omitted).

C. Reason for Delay

Regarding the reason for the delay and whether it was in Opposer's reasonable control, Opposer submits from the prosecution record of the involved application a "NOTE TO THE FILE" from the Office of the Deputy Commissioner for Trademark

Examination Policy, which states that "[t]he Commissioner's Office has identified the application proceeding for this serial number as requiring administrative review of the record for submission(s) made to the United States Patent and Trademark Office in potential violation of the USPTO's trademark rules of practice." 12 TTABVUE 6. This "NOTE TO THE FILE" was filed on July 22, 2022, after this proceeding was instituted. Opposer argues that it was "mistakenly … of the opinion that a decision was imminent," and that "a decision rendered by the Commissioner against the Applicant would render these proceeding moot," such that Opposer "refrained from pursuing further action on the pending matter so as to prevent the generation of unnecessary fees and costs." *Id.* at 2-3. Opposer also notes that "the Commissioner has not completed the administrative review of the record." *Id.* at 3.

In response, Applicant asserts that "Opposer had more than half a year to ask the Board to stay this case pending the Office of the Deputy Commissioner for Trademark Examination Policy's review." 13 TTABVUE 3. Nor, as Applicant notes, did Opposer "notify the Board about this Office of the Deputy Commissioner for Trademark Examination Policy's review during the entire process of this opposition proceeding." *Id.*

Opposer mistakenly assumed that administrative review of the involved application would be completed before Opposer needed to act in this proceeding. In addition, Opposer never informed the Board of this, nor did Opposer ever move to suspend or extend proceedings to accommodate the review.[5] Inasmuch as Opposer

[5] Notwithstanding, inasmuch as this proceeding is in trial, and there is no indication when administrative review of the involved application will be completed, the Board declines to

"has not contended that it was unaware of the closing date of its testimony period as last reset," *Poly John Enters. Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860, 1862 (TTAB 2002), nor was Opposer "in any way prevented from taking action," *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1859 (TTAB 1998), it was incumbent upon Opposer to adhere to the trial schedule or timely move to extend or suspend, which were in Opposer's reasonable control. *See Melwani v. Allegiance Corp.*, 97 USPQ2d 1537, 1541-42 (TTAB 2010) ("If opposer expected a ruling on the motion to strike, he easily could have moved the matter forward toward resolution by … requesting suspension until the matter was resolved. Both parties bear the responsibility for following the trial schedule as ordered unless and until the Board issues a suspension order or otherwise resets the trial date.") (footnote omitted).

In view thereof, this factor weighs against a finding of excusable neglect.

D. Good Faith

Inasmuch as there is no evidence of Opposer's bad faith,[6] this factor weighs in favor of finding excusable neglect. *See Coffee Studio*, 129 USPQ2d at 1483 ("With regard to the fourth *Pioneer* factor, we find that there is no evidence of bad faith by Petitioner. These factors weigh in favor of a finding of excusable neglect.").

E. Balancing the *Pioneer* Factors

The third *Pioneer* factor—the reason for the delay—is often critical in an excusable neglect analysis. *See Luster Prods., Inc. v. Van Zandt*, 104 USPQ2d 1877, 1878 (TTAB

exercise its discretion and suspend this proceeding pending such review. *See* Trademark Rule 2.117(c).

[6] Applicant conclusory argues that "Opposer failed to act in good faith." 13 TTABVUE 3.

2012) (citing *Pumpkin*, 43 USPQ2d at 1586 n.7). However, "it is clear that 'excusable neglect' under [Fed. R. Civ. P.] 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Pioneer*, 507 U.S. at 392 (footnotes omitted). Here, the Board finds that an absence of cognizable prejudice against Applicant, a lack of evidence of Opposer's bad faith, and the fact that this proceeding has experienced only one other delay (a thirty-day extension to Applicant's benefit) outweigh Opposer's inaction and the reasons therefor. It also is not lost on the Board that "the law favors judgments on the merits wherever possible." *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710, 1713 (Fed. Cir. 1991).

F. Decision

In view thereof, and in its discretion, the Board finds Opposer has demonstrated that its neglect in complying with the Board's schedule in this case is excusable. *See Kaszuba v. Iancu*, 823 F. App'x 973, 2020 USPQ2d 10887, at *3-4 (Fed. Cir. 2020) (finding no error or abuse of discretion where the Board found excusable neglect because of minimal, non-significant delay, no prejudice, and no bad faith, despite delay being in movant's reasonable control). Thus, Opposer's request "that prosecution deadlines be reset" is **granted**.

Consequently, Applicant's Trademark Rule 2.132(a) motion is **denied without prejudice**.

IV. Schedule

Proceedings are **resumed**, and dates are **reset** as follows:

Plaintiff's Pretrial Disclosures Due	9/25/2023
Plaintiff's 30-day Trial Period Ends	11/9/2023
Defendant's Pretrial Disclosures Due	11/24/2023
Defendant's 30-day Trial Period Ends	1/8/2024
Plaintiff's Rebuttal Disclosures Due	1/23/2024
Plaintiff's 15-day Rebuttal Period Ends	2/22/2024
Plaintiff's Opening Brief Due	4/22/2024
Defendant's Brief Due	5/22/2024
Plaintiff's Reply Brief Due	6/6/2024
Request for Oral Hearing (optional) Due	6/16/2024

V. 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. 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). 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).