

ESTTA Tracking number: **ESTTA912744**

Filing date: **07/31/2018**

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

Proceeding	92064294
Party	Defendant Ninkasi Brewery, LLC
Correspondence Address	NINKASI BREWERY LLC 272 VAN BUREN STREET EUGENE, OR 97402 UNITED STATES
Submission	Motion to Dismiss 2.132
Filer's Name	Daniel K Olson
Filer's email	dolson@wrlaw.com
Signature	/Daniel K Olson/
Date	07/31/2018
Attachments	MotDismiss073118.pdf(831826 bytes)

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

**Cancellation No. 92064294
Registration No. 4274393**

**EBC Brewery, LLC,
Petitioner**

v.

**Ninkasi Brewery, LLC,
Registrant**

MOTION TO DISMISS UNDER 37 C.F.R. § 2.132(a).

Ninkasi Brewery, LLC (“Registrant”), an Oregon limited liability company, having an address of 155 Blair Blvd., Eugene, Oregon 97402, hereby moves to dismiss EBC Brewery, LLC’s (“Petitioner”) Petition for Cancellation against Registrant’s mark HELLES BELLES, U.S. Reg. No. 4,274,393 (“Ninkasi Mark”) under 37 C.F.R. § 2.132(a) for failure of Petitioner to take testimony and offer other evidence and for failure of Petitioner to prosecute. The motion is supported by the following Argument, the Declaration of Daniel K. Olson (Olson Decl.), and the records and files contained herein.

STATEMENT OF FACTS

1. On or about August 24, 2016, Petitioner filed the Petition for Cancellation to cancel Registrant’s registration for the Ninkasi Mark.
2. On or about September 30, 2016, Registrant filed its Answer to the Petition for Cancellation.
3. On or about November 3, 2017, the discovery period opened.

4. On or about May 2, 2017, Registrant applied for, and the Trademark Trial and Appeal Board's (TTAB) granted, a suspension so the parties could engage in settlement negotiations.

5. On or about October 3, 2017, Registrant received its last communication from Petitioner, despite attempts by Registrant to communicate with Petitioner since October 3, 2017. *See* Olson Decl.; Exhibit DKO-1 to Olson Decl.

6. On or about October 24, 2017, Registrant applied for, and the TTAB granted, a suspension so the parties could engage in settlement negotiations.

7. On or about April 27, 2018, the discovery period closed.

8. On or about July 26, 2018, Petitioner's 30-day trial period closed.

9. As of the expiration of Petitioner's 30-day trial period, Petitioner has failed to submit initial disclosures, expert disclosures, discovery requests, pretrial disclosures, evidence, or testimony of any kind. *See* Olson Decl.; Exhibit DKO-3 to Olson Decl.

ARGUMENT

Dismissal for Failure of Petitioner to Take Testimony or Offer Other Evidence

37 C.F.R. § 2.132(a) states that “[i]f the time for taking testimony by [Petitioner] has expired and it is clear to the Board from the proceeding record that [Petitioner] has not taken testimony or offered any other evidence, the Board may grant judgment for [Registrant].” Judgment may be rendered by the TTAB against Petitioner in the absence of excusable neglect on the part of Petitioner. 37 C.F.R. § 2.132(a); *Hewlett-Packard Co. v. Olympus Corp.*, 931 F2d 1551, 1553-554 (Fed Cir 1991) (concluding that the TTAB

did not abuse its discretion by dismissing a proceeding where the petitioning party did not submit any evidence during its testimony period and failed to present a prima facie case).

Petitioner has repeatedly failed to engage in the TTAB trademark dispute process. During the time period set for discovery, which opened on November 3, 2016 and closed approximately 18 months later on April 27, 2018, Petitioner did not engage in any discovery. *See* Olson Decl. Additionally, Petitioner has not taken testimony from any person or offered any evidence. *Id.*

Because Petitioner has failed to take any testimony or offer any evidence within the allotted time, the Petitioner's Petition for Cancellation must be dismissed with prejudice.

Dismissal for Failure of Petitioner to Prosecute

37 C.F.R. § 2.132(a) states that Registrant may also, "without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of [Petitioner] to prosecute." Judgment may be rendered against Petitioner in the absence of excusable neglect on the part of Petitioner. 37 C.F.R. § 2.132(a); *Hewlett-Packard Co. v. Olympus Corp.*, 931 F2d 1551, 1553-554 (Fed Cir 1991) (concluding that the TTAB did not abuse its discretion by dismissing a proceeding where the petitioning party did not submit any evidence during its testimony period and failed to present a prima facie case).

Petitioner has failed to file any documents since Petitioner's initial Petition for Cancellation on August 24, 2016. Petitioner has failed to present any evidence or take the testimony of any person. *See* Olson Decl. Petitioner's 30-day trial period ended on July 26, 2018. *Id.* Petitioner has repeatedly failed to respond to Registrant's attempts to

communicate with Petitioner. *Id.* The last time Petitioner's attorney responded to Registrant's attempts to communicate was on October 3, 2017. *Id.* Based on the Petitioner's inaction and the expiration of Petitioner's 30-day Trial Period, the only reasonable conclusion is that Petitioner has failed to prosecute this case.

Because Petitioner has failed to take any actions to prosecute this case, Petitioner's Petition for Cancellation must be dismissed with prejudice.

CONCLUSION

For the foregoing reasons Registrant's motion must be granted.

Ninkasi Brewery, LLC
Registrant
By its attorney,

/Daniel K. Olson/
Daniel K. Olson
Watkinson Laird Rubenstein, P.C.
1203 Willamette Street, Suite 200
Eugene, OR 97401
Phone: 541-484-2277

Dated: July 31, 2018

Certificate of Service

I hereby certify that on July 31, 2018, a copy of the **MOTION TO DISMISS UNDER 37 C.F.R. § 2.132(a)** was served by email and first class U.S. mail, postage prepaid, to the Petitioner at the following address:

Christopher L. Sorey
Law Office of Christopher L Sorey
1094 Mosstree Drive
Apex, North Carolina 27502

chris.sorey@gmail.com

/Daniel K. Olson/
Daniel K. Olson

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

**Cancellation No. 92064294
Registration No. 4274393**

**EBC Brewery, LLC,
Petitioner**

v.

**Ninkasi Brewery, LLC,
Registrant**

Declaration of Counsel in Support of Registrant's Motion to Dismiss.

In accordance with Fed. R. Civ. P. 56(c)(4), I, Daniel K. Olson, declare under penalty of perjury that the following are true and correct:

1. I am one of the attorneys for Registrant in this action, and I make this Declaration in support of Registrant's Motion to Dismiss.

2. On or about October 3, 2017, Petitioner's attorney sent an email communication to me consenting to an extension of suspension. That email communication was the last communication Registrant or its agents received from Petitioner or its agents. I sent email communications to Petitioner's attorney on or about January 18, 2018 and February 26, 2018 for the purpose of engaging in settlement discussions. A true copy of the email communications referred to in this paragraph is attached hereto as **Exhibit DKO-1**, and incorporated by reference as though fully set forth.

3. Petitioner's 30-day Trial Period ended July 26, 2018. At the conclusion of the suspension, proceedings automatically resumed without need for further notice or order from the Trademark Trial and Appeals Board (Board). A true copy of the stipulated Motion for Suspension for Settlement With Consent and grant of motion to suspend is attached hereto as **Exhibit DKO-2**, and incorporated by reference as though fully set forth.

4. As of the expiration of Petitioner's 30-day Trial Period, Petitioner has not submitted any of the following to Registrant or to the Board: initial disclosures, expert disclosures, discovery requests, pretrial disclosures, evidence, or testimony. A true copy of the Cancellation status page is attached hereto as **Exhibit DKO-3**, and incorporated by reference as though fully set forth.

I declare that I have personal knowledge concerning the statements set forth above, or I have been informed and believe, and therefore declare under penalty of perjury, that the matters set forth above are true.

DATED this 31st day of July, 2018.

/Daniel K. Olson/
Daniel K. Olson, OSB No. 165706

Dan Olson

From: Dan Olson
Sent: Monday, February 26, 2018 11:18 AM
To: 'Chris Sorey'
Cc: Nancy Shelton
Subject: RE: Helles Belles Answer

Chris,

Checking in again. Is your client interested in a coexistence agreement?

Thanks,

Dan Olson, Attorney



Watkinson Laird Rubenstein, P.C.
101 E. Broadway, Suite 200
Eugene, OR 97401
(541) 484-2277

This communication, along with any attachments, is not tax advice intended to be used to avoid federal tax penalties. It is confidential, privileged, and is solely for the intended recipient(s).

From: Dan Olson
Sent: Thursday, January 18, 2018 9:47 AM
To: 'Chris Sorey'
Cc: Nancy Shelton
Subject: RE: Helles Belles Answer

Hi Chris,

Any word from Big Boss about coexistence?

Thanks,

Dan Olson, Attorney



Watkinson Laird Rubenstein, P.C.
101 E. Broadway, Suite 200
Eugene, OR 97401
(541) 484-2277

This communication, along with any attachments, is not tax advice intended to be used to avoid federal tax penalties. It is confidential, privileged, and is solely for the intended recipient(s).

From: Chris Sorey [<mailto:chris.sorey@gmail.com>]
Sent: Tuesday, October 03, 2017 12:14 PM
To: Dan Olson
Cc: Nancy Shelton
Subject: Re: Helles Belles Answer

Dan,

We will consent to the extension. I really do hope to be back to you soon with some answers regarding the coexistence.

Regards,
Chris

On Mon, Oct 2, 2017 at 12:56 PM, Dan Olson <dolson@wrlaw.com> wrote:

Chris,

Touching base again. Discovery is set to close near the end of this month. Will you consent to another (or extension of the) suspension so that we can work out a co-existence agreement? I am not certain off the top of my head if the TTAB has any issue with an extended suspension, but I vaguely recall that we can do it.

Thanks,

Dan Olson, Attorney



Watkinson Laird Rubenstein, P.C.

[101 E. Broadway, Suite 200](#)

[Eugene, OR 97401](#)

[\(541\) 484-2277](#)

This communication, along with any attachments, is not tax advice intended to be used to avoid federal tax penalties. It is confidential, privileged, and is solely for the intended recipient(s).

ESTTA Tracking number: **ESTTA854210**

Filing date: **10/24/2017**

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

Proceeding.	92064294
Applicant	Defendant Ninkasi Brewery, LLC
Other Party	Plaintiff EBC Brewery, LLC
Have the parties held their discovery conference as required under Trademark Rules 2.120(a)(1) and (a)(2)?	Yes

Motion for Suspension for Settlement With Consent

The parties are actively engaged in negotiations for the settlement of this matter. Ninkasi Brewery, LLC requests that this proceeding be suspended for 180 days to allow the parties to continue their settlement efforts.

Time to Answer :	CLOSED
Deadline for Discovery Conference :	CLOSED
Discovery Opens :	CLOSED
Initial Disclosures Due :	CLOSED
Expert Disclosure Due :	03/28/2018
Discovery Closes :	04/27/2018
Plaintiff's Pretrial Disclosures :	06/11/2018
Plaintiff's 30-day Trial Period Ends :	07/26/2018
Defendant's Pretrial Disclosures :	08/10/2018
Defendant's 30-day Trial Period Ends :	09/24/2018
Plaintiff's Rebuttal Disclosures :	10/09/2018
Plaintiff's 15-day Rebuttal Period Ends :	11/08/2018

Ninkasi Brewery, LLC has secured the express consent of all other parties to this proceeding for the suspension and resetting of dates requested herein.

Ninkasi Brewery, LLC has provided an email address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address of record by Email on this date.

Respectfully submitted,
/Daniel K Olson/
Daniel K Olson
dolson@wrlaw.com
chris.sorey@gmail.com
10/24/2017

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

October 24, 2017

Proceeding No. 92064294

EBC Brewery, LLC

v.

Ninkasi Brewery, LLC

MOTION TO SUSPEND GRANTED

Ninkasi Brewery, LLC's motion filed, Oct 24, 2017, to suspend this proceeding is granted. Accordingly, proceedings herein are suspended through **Apr 22, 2018**, subject to the right of either party to request resumption at any time. During the suspension period, the parties shall notify the Board of any change of address for either the parties or their counsel.

Unless the parties sooner request resumption, upon conclusion of the suspension period, proceedings shall resume without further notice or order from the Board, upon the schedule set out in the motion. If an answer has not been filed, the defendant is allowed the time set forth in the motion in which to file an answer. The parties are allowed THIRTY DAYS from resumption in which to serve responses to any outstanding discovery requests.



United States Patent and Trademark Office

Home | Site Index | Search | Guides | Contacts | eBusiness | eBiz alerts | News | Help



TTABVUE. Trademark Trial and Appeal Board Inquiry System

v1.9

Cancellation

Number: 92064294

Filing Date: 08/24/2016

Status: Pending

Status Date: 08/24/2016

General Contact Number: 571-272-8500

Interlocutory Attorney: ELIZABETH A DUNN

Paralegal Name: MILLICENT CANADY

Defendant

Name: Ninkasi Brewery, LLC

Correspondence:

NINKASI BREWERY LLC
272 VAN BUREN STREET
EUGENE, OR 97402
UNITED STATES

Serial #: 85505135

Application File

Assignment

Registration #: 4274393

Application Status: Cancellation Pending

Mark: HELLES BELLES

Plaintiff

Name: EBC Brewery, LLC

Correspondence: CHRISTOPHER L SOREY

LAW OFFICE OF CHRISTOPHER L SOREY
1094 MOSSTREE DRIVE
APEX, NC 27502
UNITED STATES
chris.sorey@gmail.com
Phone: 919-803-9920

Serial #: 86843084

Application File

Assignment

Application Status: Report Completed Suspension Check - Case Still Suspended

Mark: HELL'S BELLE

Prosecution History

Table with 4 columns: #, Date, History Text, Due Date. Contains 8 rows of prosecution history entries.

Results as of 07/30/2018 11:03 AM

Back to search results

Search: [input box]

.HOME | INDEX | SEARCH | eBUSINESS | CONTACT US | PRIVACY POLICY