ESTTA Tracking number: **ESTTA1325415**
Filing date: **11/29/2023**

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

Proceeding no.	92077633
Party	Defendant Byron Belin
Correspondence address	GEORGE L HAMPTON IV HALL GRIFFIN LLP 1851 E FIRST ST 10TH FLOOR SANTA ANA, CA 92704 UNITED STATES Primary email: ghampton@hallgriffin.com Secondary email(s): epaulino@hallgriffin.com 714-918-7000
Submission	Opposition/Response to Motion
Filer's name	Stephanie A. Pittaluga
Filer's email	spittaluga@hallgriffin.com, ghampton@hallgriffin.com, epaulino@hallgriffin.com
Signature	/Stephanie A. Pittaluga/
Date	11/29/2023
Attachments	2023.1129 Belin Opposition to Motion to Reopen Time.pdf(143229 bytes)

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

Zuffa, LLC, Petitioner, v. Byron Belin, Respondent.	Cancellation No. 92077633 Registration No. 6002970 Mark: BMF

RESPONDENT BYRON BELIN'S OPPOSITION TO THE MOTION TO REOPEN TIME AND MOTION TO SUSPEND PROCEEDINGS BY PETITIONER ZUFFA, LLC

I. INTRODUCTION

Responding Byron Belin ("Respondent" or "Belin") respectfully submits this Opposition to Petitioner Zuffa, LLC's ("Petitioner" or "Zuffa") Motion to Reopen Time and Motion to Suspend Proceedings (the "Motion"). *See* 38 TTABVUE.

Petitioner's Motion is not well taken. Petitioner claims it is merely seeking to *"to reopen time for forty-five (45) days for the limited purpose of taking [Belin's] deposition testimony and following up on any newly-disclosed information and/or documentation revealed therein"* pursuant to TBMP § 509.01(b) and Fed. R. Civ. P. 6(b)(1)(B). These are the provisions relating to motions to reopen time "after the time has expired if the party failed to act because of excusable neglect" (see 38 TTABVUE 1, and Fed. R. Civ. P. 6(b)(1)(B)). In reality, however, Petitioner's Motion is **an improper motion for reconsideration** of the Board's Order dated October 27, 2023 (37 TTABVUE) deciding both Respondent's Rule 36(b) motion to withdraw or amend deemed admissions (27 TTABVUE) and Petitioner's motion for summary judgment (28 TTABVUE).

In ruling on both of these motions, Board unequivocally stated *three times* in its Order that "discovery shall remain closed" – none of which was cited by Petitioner in its moving papers. Instead, Petitioner quotes only from a portion of the Order in which the Board stated as a general

rule that this *"case is in the pre-trial stage, and any potential prejudice can be mitigated by extending the discovery period as necessary"* (38 TTABVUE 2, citing 37 TTABVUE at 8) before going on to rule that discovery shall remain closed.

First, below is the entire paragraph from 37 TTABVUE 8 that Petitioner only partially recites at 38 TTABVUE 2:

> "Petitioner argues that it would be prejudiced by the resulting delay from granting the motion. However, mere delay is insufficient. The type of prejudice contemplated by Rule 36(b) 'relates to the special difficulties [such as the unavailability of key witnesses] a party may face caused by the sudden need to obtain evidence upon withdrawal or amendment of admission.' [citation] Petitioner does not allege any such prejudice, or that it would require additional evidence. The case is in the pre-trial stage, and any potential prejudice can be mitigated by extending the discovery period as necessary. **We further note Petitioner's assertion that if Respondent was allowed to respond to the requests for admission, 'there is no need for the Board to reopen discovery because it would be futile.'**[19]"

37 TTABVUE 8, citing Petitioner's opposition at 31 TTABVUE 10 (emphasis added).

Second, the Board held again on page 9 of the Order: "Accordingly, Respondent's motion to withdraw his deemed admissions under Fed. R. Civ. P. 36(b) is granted, Respondent's proposed responses are substituted therefor, **and discovery remains closed.**" 37 TTABVUE 9 (emphasis added).

Third, towards the conclusion of the decision, the Board held: "Proceedings are resumed. **Discovery remains closed**, and trial dates are reset as follows: …" 37 TTABVUE 26 (emphasis added).

Petitioner's counsel has a duty of candor to the Board (and to undersigned counsel) to be forthright about the relief Petitioner seeks and accurate in its citations to prior TTAB Orders and legal authorities. Such candor is not reflected in Petitioner's Motion.

Not only does Petitioner disingenuously avoid any discussion of the Board's ruling that discovery shall remain closed – based in part upon Petitioner's own insistence that it would be "futile" to reopen discovery – but Petitioner likewise fails to cite the proper legal standard on the Motion, as discussed in the next section.

II. PETITIONER CITES THE WRONG LEGAL STANDARD FOR ITS MOTION

Because Petitioner's Motion is in reality a motion for reconsideration of the Board's prior decision on a motion contained in the October 27, 2023 Order (37 TTABVUE), the applicable legal standard is not the "excusable neglect" standard referenced in TBMP § 509.01(b) and Fed. R. Civ. P. 6(b)(1)(B) claimed by Petitioner (*see* 38 TTABVUE 2). Rather, Petitioner's Motion is subject to the provisions of TBMP § 518 ("Motion for Reconsideration of Decision on Motion"), which states: "37 C.F.R. § 2.127(b) Any request for reconsideration or modification of an order or decision issued on a motion must be filed within one month from the date thereof. A brief in response must be filed within twenty days from the date of the service of the request." 9 Trademark Trial and Appeal Board Manual of Procedure 518 (2023).

The notes of decision following TBMP § 518 make clear that the rule does not contemplate a second request for reconsideration of the same basic issue. *See Giant Food, Inc. v. Standard Terry Mills, Inc.,* 231 USPQ 626, 631 n.11 (TTAB 1986); *Avedis Zildjian Co. v. D. G. Baldwin Co.,* 181 USPQ 736, 736 (Comm'r 1974). "Generally, the premise underlying a motion for reconsideration, modification or clarification under 37 C.F.R. § 2.127(b) is that, based on the facts before it and the prevailing authorities, **the Board erred in reaching the order or decision it issued. Such a motion may not be used to introduce additional evidence, nor should it be devoted simply to a reargument of the points presented in a brief on the original motion.**" 9 Trademark Trial and Appeal Board Manual of Procedure 518 (2023) (emphasis added), citing *Lumber Liquidators Servs., LLC v. Columbia Ins. Co.*, 2022 USPQ2d 31, at *2 (TTAB 2022); and *Scotch Whisky Ass'n v. ASW Distillery, LLC*, 2021 USPQ2d 179, at *3 (TTAB 2021).

"Rather, the motion should be limited to a demonstration that based on the facts before it and the applicable law, the Board's ruling is in error and requires appropriate change." *Id*., citing numerous cases at fn. 8, including *Guess? Ip Holder L.P. v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

/ / /

/ / /

In *Guess?,* the Board held:

> "A motion for reconsideration under Trademark Rule 2.127(b) is limited to a demonstration that on the basis of the facts before the Board and applicable law, the Board's ruling was in error and requires appropriate change. Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 518 (October 2015). *See Vignette Corp. v. Marino*, 77 USPQ2d 1408, 1411 (TTAB 2005) (reconsideration denied because Board did not err in considering disputed evidence)."

Id. at 2019.

Here, it was incumbent upon Petitioner to meet the above-quoted legal standard on its Motion, which it did not do.

III. PETITIONER FAILS TO DEMONSTRATE THAT ON THE FACTS BEFORE THE BOARD, AND ON THE APPLICABLE LAW, THE BOARD ERRED IN ARRIVING AT ITS RULING THAT DISCOVERY SHALL REMAIN CLOSED

Here, Petitioner's Motion requests that the Board to reconsider its ruling in the 37 TTABVUE Order that "discovery shall remain closed," but nowhere in the Motion does Petitioner demonstrate that on the facts before the Board, and on the applicable law, the Board erred in arriving at its ruling.

Instead, Petitioner's Motion is devoted to a discussion of its purported showing of "excusable neglect" pursuant to the four-factor analysis set forth in *Pioneer Investment Services Co. v. Brunswick Associates L.P.,* 507 U.S. 380 (1993), adopted by the *Board in Pumpkin Ltd. v. The Seed Corps,* 43 USPQ2d 1582 (TTAB 1997) – a wholly inapposite discussion on a motion for reconsideration which is what Petitioner's Motion is. *See* 38 TTABVUE 2-8.

Petitioner's Motion also requests a suspension of these proceedings to accommodate a reopening of discovery (*see* 38 TTABVUE 8), but does so under the same "excusable neglect" standard applying the *Pioneer* factors. This is likewise incorrect. As noted above, the Board's 37 TTABVUE Order held: "**Proceedings are resumed**. Discovery remains closed, and trial dates are reset as follows: …" 37 TTABVUE 26 (emphasis added). Thus, Petitioner is still seeking a reconsideration of the Board's prior ruling even as to a suspension of these proceedings. Yet

Petitioner fails to demonstrate that on the facts before the Board, and on the applicable law, the Board erred in arriving at its decision to "resume proceedings" in addition to ruling that "Discovery remains closed."

Because the Board already addressed the arguments for and against reopening discovery in its Order (37 TTABVUE), and because Petitioner has failed to demonstrate how the Board has erred in so ruling, there is no basis for the Board to reconsider its Order now. The Motion must be denied because Petitioner has failed to meet its burden under TBMP § 518 and Trademark Rule 2.127(b).

Even though Petitioner has incorrectly cited an "excusable neglect" legal standard on the present Motion, it is ironic that Petitioner has failed in making that showing also. To show "excusable neglect" requires a party to admit that it has been neglectful in the first place. However, in the Motion where Petitioner discusses the third and "most important" *Pioneer* factor, "the reason for the delay," Petitioner claims that *"[h]ere, Zuffa did not delay in its efforts to take discovery, and has diligently sought the evidence required to prove its claims at all times. If anything, Zuiffa has been the victim of unjustifiable delays attributable to Belin, who responded to Zuffa's discovery requests for production of documents and interrogatories over eight (8) months after his deadline to respond…"* 38 TTABVUE 3. Once again, Petitioner misses the point. What has that got to do with Petitioner's strategy decision to not take Belin's deposition? Even after Belin's current counsel, Mr. Hampton, invited Petitioner to do so on September 30, 2022? *See* 27 TTABVUE 6.

Petitioner made a strategic decision to forego Belin's deposition both before discovery cut-off on May 4, 2023, and afterwards, when Petitioner claimed in opposition to Belin's Rule 36(b) Motion that a reopening of discovery would be "futile," even if the Board were to grant the motion to withdraw deemed admissions. The reality is Petitioner did not anticipate losing its motion for summary judgment. There has simply been no showing of "excusable neglect" here, even if that were the proper legal standard, which it is not.

/ / /

/ / /

IV. CONCLUSION

For all the foregoing reasons, Petitioner's Motion to Reopen Time and Motion to Suspend Proceedings should be denied in its entirety.

DATED: November 29, 2023 HALL GRIFFIN LLP

By: /s/ George L. Hampton IV
George L. Hampton IV
Stephanie A. Pittaluga
Attorneys for Respondent Byron Belin

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 1851 East First Street, 10th Floor, Santa Ana, CA 92705-4052.

On November 29, 2023, I served the within document(s) described as:

RESPONDENT BYRON BELIN'S OPPOSITION TO THE MOTION TO REOPEN TIME AND MOTION TO SUSPEND PROCEEDINGS BY PETITIONER ZUFFA, LLC

on each interested party in this action, as stated below:

John L. Krieger, Esq.
jkrieger@dickinsonwright.com
Michael Feder, Esq.
mfeder@dickinsonwright.com
3883 Howard Hughes Parkway, Suite 800
Las Vegas, Nevada 89169
(702) 550-4400 (phone)
(844) 670-6009 (fax)

BY E-MAIL: I caused a true copy of the document(s) to be sent to the persons at the corresponding electronic address as indicated above on the above-mentioned date. My electronic notification address is spittaluga@hallgriffin.com. I am readily familiar with this firm's Microsoft Outlook electronic mail system and did not receive any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on November 29, 2023, at Irvine, California.

/s/ Stephanie A. Pittaluga

Stephanie A. Pittaluga