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

Proceeding	92072655
Party	Plaintiff Playlearn USA, Inc.
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Submission	Other Motions/Submissions
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Date	11/06/2020
Attachments	Motion to Resume Proceeding.pdf(14558 bytes ) Ex. A - Order Granting Motion to Dismiss.pdf(459082 bytes )

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

PLAYLEARN USA, INC.,

Petitioner,

v.

VIAHART, LLC,

Registrant.

Cancellation No. 92072655

Mark: BRAIN FLAKES

Serial No. 87021780

Reg. No.: 5049910

Filed: May 3, 2016

Registered: September 27, 2016

**MOTION TO RESUME PROCEEDING**

Petitioner, Playlearn USA, Inc., (hereinafter “Petitioner”), by and through its undersigned counsel, hereby moves to resume this proceeding pursuant to 37 C.F.R. § 2.117(a), TBMP § 510.02(b), and the Board’s January 29, 2020 Order (11 TTABVUE). On January 29, 2020, the Board granted Registrant, Viahart, LLC’s (hereinafter “Registrant”) Motion to Suspend this proceeding due to the parties’ involvement in a civil action filed in the United States District Court for the Eastern District of Texas, styled *Viahart, LLC v. Arkview, LLC d/b/a Moo Toys and d/b/a Lexivon, et al.*, Case No. 6:19-cv-00406 (the “Civil Action”). The Board determined that “the same parties and the same or similar issues” were involved in both this proceeding and the Civil Action. (11 TTABVUE 3.) However, in view of Petitioner’s pending motion to dismiss in the Civil Action, the Board explained that Petitioner “may file a motion . . . addressing whether further suspension of this Board proceeding is warranted” upon dismissal of Petitioner from the Civil Action.

Accordingly, Petitioner hereby advises the Board that the Civil Action which occasioned the suspension of this proceeding has been dismissed as to Petitioner. Attached as Exhibit A is a

true copy of the order in the Civil Action granting Petitioner’s motion to dismiss under Rule 12(b)(2) of the Federal Rules of Civil Procedure for a lack of personal jurisdiction.

Now that Petitioner is no longer a party to the Civil Action, the suspension of this proceeding should be lifted. Although the Civil Action has not been dismissed as to *all* defendants, the remaining defendants in the proceeding are unrelated to Petitioner<sup>1</sup> and it would be prejudicial to continue to suspend Petitioner’s right to pursue this proceeding. Indeed, such prejudice is the reason that “the Board seldom . . . suspend[s] . . . proceeding[s] pending disposition of other . . . proceedings brought by *unrelated* plaintiffs against the same . . . registration.” TBMP § 510.02(a) (emphasis added) (citing *New Orleans Louisiana Saints LLC v. Who Dat?, Inc.*, 99 U.S.P.Q.2d 1550, 1551 (TTAB July 22, 2011)). To do otherwise would likely “prejudice . . . th[e parties] who did not consent to suspension”; for example, “[e]vidence or witnesses may be lost if there is a protracted delay in the ability of opposers . . . to bring their claims.” *New Orleans Louisiana Saints*, 99 U.S.P.Q.2d at 1551 & n.4.

Here, there are no circumstances that would warrant such prejudice to Petitioner by delaying its ability to pursue its claims, and the Board should exercise its discretion to resume proceedings. *See* TBMP § 510.02(a) (citing *Martin Beverage Co., v. Colita Beverage Corp.*, 169 USPQ 568, 570 (TTAB 1971)).

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<sup>1</sup> Registrant brought claims against 14 different defendants in the Civil Action, and alleged trademark infringement, unfair competition, and dilution claims based on distinct, allegedly infringing acts by each of those 14 different parties. Specifically, Registrant’s trademark claims against Petitioner were based on the allegation that Petitioner “us[ed] BRAIN FLAKES as a *search term* on Amazon” (7 TTABVUE, Ex. 1, Compl. ¶ 40 (emphasis added)), whereas Registrant’s claims against the other remaining defendants are based on unrelated acts performed by those other parties (*see, e.g., id.* ¶¶ 32, 38–39, 41).

In view of the final disposition of all the claims against Petitioner in the Civil Action, and for the above reasons, Petitioner requests that the suspension be lifted, that the proceeding be resumed, and that the dates be reset as appropriate.

Respectfully submitted,

Dated: New York, New York  
November 6, 2020

By:           / Mark Berkowitz /            
Mark Berkowitz

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Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing **PETITIONER'S MOTION TO RESUME PROCEEDING**, together with supporting **EXHIBIT A**, has been served on Registrant by forwarding said copy on November 6, 2020, via email to the following counsel of record for Registrant

Wendy B. Mills  
WB Mills, PLLC  
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Addison, TX 75001  
Email: wbm@wbmillslaw.com

*/Mark Berkowitz/*

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Mark Berkowitz

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