

ESTTA Tracking number: **ESTTA48955**

Filing date: **10/17/2005**

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

Proceeding	91115494
Party	Plaintiff TWELVE ISLANDS SHIPPING COMPANY LIMITED AND ALLIED DOMECQ SPIRIT & WINES USA, IN
Correspondence Address	EDWARD T. COLBERT KENYON & KENYON 1500 K STREET N. W. WASHINGTON, DC 20005
Submission	Motion to Further Suspend or Alternatively to Reopen
Filer's Name	Susan A. Smith
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Date	10/17/2005
Attachments	AD motion to further suspend or reopen.pdf (7 pages)

authority with respect to this matter, and now have the time and ability to try and complete the earlier efforts to resolve this case.

If the Board is unwilling to grant Opposer the additional time, Opposer hereby requests, in the alternative, that the Board reopen the testimony periods in this case, pursuant to Fed. R. Civ. P. 6(b), 37 C.F.R. § 2.120(a) and TBMP § 509.01(b). During settlement negotiations, the testimony periods lapsed without either side filing any evidence. On Opposer's side, this was due to a problem with the docketing system of Opposer's counsel. Counsel did not realize that the testimony dates had lapsed until the Board issued an order to show cause on February 22, 2005. Opposer immediately responded that it had not lost interest in the case but was instead engaged in trying to settle it and, rather than moving to reopen at that time, asked for additional time to try to conclude settlement.

On April 15, 2005, the Board discharged the order to show cause and suspended the proceeding for six months, which expires today. Opposer is a subsidiary of a publicly traded international corporation, which became the target of multiple unsolicited acquisition attempts. This occurred as soon as the suspension period commenced and lasted for several months. (See attached Associated Press article at Exhibit A.) Those offers ultimately concluded in a complex multiparty acquisition agreement, which is still not fully completed as to all operating divisions and subsidiaries. Nevertheless, all transition questions as to Opposer have been completed at this time.

It was hoped that the lapsing of the testimony dates would become moot through settlement of this matter; however, as settlement has not been concluded, and if the Board will not further suspend the proceeding, Opposer must seek to reopen the testimony dates. Where the

time for taking required action, as originally set or as previously reset, has expired, a party desiring to take the required action must file a motion to reopen the time for taking that action. TBMP § 509.01(b)(1). The movant must show that its failure to act during the time previously allotted therefor was the result of excusable neglect. Fed. R. Civ. P. 6(b). The analysis to be used in determining whether a party has shown excusable neglect was set forth by the Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). TBMP § 509.01(b)(1). These cases hold that the excusable neglect determination must take into account all relevant circumstances surrounding the party's omission or delay, including (1) the danger of prejudice to the non-movant, (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. *Id.*

The "prejudice to the non-movant" contemplated under the first *Pioneer* factor must be more than the mere inconvenience and delay caused by the movant's previous failure to take timely action, and more than the non-movant's loss of any tactical advantage which it otherwise would enjoy as a result of the movant's delay or omission. Rather, "prejudice to the non-movant" is prejudice to the non-movant's ability to litigate the case, e.g., where the movant's delay has resulted in a loss or unavailability of evidence or witnesses which otherwise would have been available to the non-movant. *Pumpkin*, 43 USPQ2d at 1587, citing *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997) and *Paolo's Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1904 (Comm'r 1990).

The circumstances surrounding the lapse of the testimony periods in this case are such that excusable neglect should be found. Opposer had a good faith belief that settlement was likely to succeed. The parties had come to an agreement in principle on the settlement terms and an agreement was drafted and circulated. In the meantime, an error in Opposer's counsel's docketing system caused the testimony dates to lapse without Opposer's knowledge. Opposer did not move to reopen six months ago when the Board issued its order to show cause because settlement appeared imminent. Opposer had hoped to save the parties and the Board a motion to reopen exercise that would ultimately be moot through settlement. Unfortunately, due to the acquisition of Opposer, Opposer has not had the ability to consummate settlement during the suspension period and a motion to reopen is necessary unless the Board agrees to further suspend the proceeding.

There is no danger of prejudice to the Applicant as the delay has not affected Applicant's ability to litigate the case. *Pumpkin*, 43 USPQ2d at 1587. The delay has been relatively short and will have no impact on judicial proceedings. While the testimony periods lapsed due to an error in Opposer's counsel's docketing system, this has had no practical effect as the parties were engaged in settlement negotiations and, if the dates had been known, Opposer would have moved to extend them. Opposer has at all times acted in good faith and has obtained no tactical advantage from the delay.

In view of the foregoing, Opposer respectfully requests that the Board further suspend this proceeding for three months so that Opposer can attempt to settle this matter once and for all. In the alternative, Opposer requests that the Board reopen the testimony periods in this matter.

Respectfully submitted,

s/ Susan Smith

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Exhibit A

April 5, 2005

Pernod and Allied Domecq Are in Buyout Talks

By THE ASSOCIATED PRESS

Filed at 9:48 a.m. ET

PARIS (AP) -- French alcoholic beverage group Pernod Ricard SA is in talks about a possible takeover of its British rival Allied Domecq PLC, both companies said Tuesday. Shares of Allied Domecq, which makes Perrier Jouet and Mumm champagnes, leapt on the news.

Amid mounting media speculation that a deal was imminent, Allied issued a statement confirming it was in discussions with Pernod about a possible takeover that would also involve U.S. rival Fortune Brands Inc., which distributes Jim Beam whiskey and Absolut vodka.

Pernod, whose brands include Martell cognac and Jacob's Creek wine, also said it was ``considering a takeover offer" for Allied Domecq in cooperation with Fortune Brands, which is based in Lincolnshire, Ill.

Both Pernod and Allied stressed that the talks would not necessarily lead to a deal, and neither spelled out what Fortune's role would be in the possible takeover.

Allied shares leapt 17 percent to 628.5 pence (\$11.82) in early afternoon trading on the London Stock Exchange. Pernod shares gained 1.5 percent to 109.30 euros (\$140.81).

A Fortune Brands spokesman did not immediately respond to a telephone query about the talks Tuesday.

Investors have long expected consolidation among second-tier drinks companies like Allied and Pernod, whose combined sales amount to two-thirds of those of Diageo PLC -- the British-based industry leader with brands such as Smirnoff vodka, Guinness stout and Johnnie Walker scotch.

A Pernod-Allied deal would also fill gaps in both companies' drinks portfolios. Pernod, for example, currently has no champagnes, while Allied has two.

Pernod Ricard said last month that it earned 487 million euros (\$652 million) in 2004 on sales of 3.57 billion euros (\$4.8 billion). Allied Domecq, whose businesses also include Baskin-Robbins and Dunkin' Donuts, had 2004 sales of about \$5.8 billion.

Diageo said in February that it earned 869 million pounds (\$1.64 billion) in the first half of the fiscal year on sales of 4.98 billion pounds (\$9.44 billion). The company had sales of about \$16 billion in its previous full fiscal year.

Besides producing and distributing spirits brands, Fortune Brands has interests in golf equipment such as the Titleist, Cobra and FootJoy brands and the Moen faucets, Master Lock and Therma-Tru doors businesses.

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2005, I caused a copy of the foregoing **MOTION TO FURTHER SUSPEND PROCEEDING OR ALTERNATIVELY TO REOPEN** to be served by first class mail, postage prepaid, on all counsel and pro se parties of record at the following addresses:

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