

Exhibits

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
Before the Trademark Trial and Appeal Board

In The Matter Of:

Serial No.: 75/696,361  
Filed: December 21, 1999  
By: Pet Zone Products Ltd.  
Trademark: STORE-N-FEED  
Published: November 30, 1999

DEC 13 AM 9:11

Pet Zone Products Ltd. )  
 )  
Opposer, )  
 )  
v. ) Opposition No. 116,397  
 )  
OurPet's Company )  
 )  
Applicant. )  
 )

**Box TTAB NO FEE**  
Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

**APPLICANT'S MOTION REQUESTING RECONSIDERATION OF A FINAL  
DECISION PURSUANT TO 37 C.F.R. 2.129(c) AND BRIEF IN SUPPORT  
THEREOF**

On January 9, 2002, the Board denied Applicant's motion for relief from final judgment in the present action, finding that Applicant's motion was not filed within a reasonable time. Applicant herein respectfully requests reconsideration of that decision.

The Board and the parties do not dispute that Applicant filed its motion within the

one-year period prescribed by FRCP 60(b). The issue is whether the filing of the motion occurred within a reasonable time. Applicant respectfully requests that the Board reconsider the applicable law and the facts of record and hold that the timing of the motion was reasonable.

As previously explained, “irregularities” in the work of a former Oldham & Oldham attorney, namely, Craig Miller, caused the default in the present matter. Examples of these irregularities are of record in this proceeding. In particular, the Affidavit of Dr. Steven Tsengas states that Dr. Tsengas, on behalf of Applicant, instructed Miller to take whatever actions were necessary in the current proceeding. Miller’s inaction was contrary to these instructions. Because similar issues were involved in the copending civil litigation, Dr. Tsengas could have reasonably assumed that a settlement of the civil case resolved all matters between the parties. This misunderstanding of any adverse consequences of not filing a responsive pleading in this matter, was primarily caused by a lack of communication from Miller rather than a lack of diligence by Applicant.

As was stated in the previously filed Affidavit of Mark A. Watkins, Mr. Watkins on December 11, 2000 assumed all responsibility for all matters previously handled by Miller. What the Board did not appear to fully consider in its decision, is that Miller had been responsible for more than just the present proceeding. Miller, in 2000, had handled numerous cases before the USPTO, all of which had to be identified, reviewed and/or reassigned after his departure from the firm. Miller’s leaving the firm of Oldham &

Oldham also coincided with the year end holidays, lengthening the total time period for this process.

In the process of reviewing the files for which Miller was responsible, attention given to certain matters was prioritized, and, as is explained below, varying standards for addressing issues caused by Miller were a primary consideration in this process. Due to the volume of work and number of hours needed to correct the affected matters, a number of months were required to investigate the affect of Miller's omissions and to decide how to best serve the affected clients. Once this was done, the matters requiring attention were prioritized and matters facing a more stringent standard for revival were addressed first. As such, the present matter was addressed as expeditiously as possible under the circumstances.

Moreover, it is important that the Board understand the severity of the "irregularities" in Miller's work. Not only was Miller's employment terminated, but he has chosen to leave the practice of law or discontinue it.

It has been held that when an attorney responsible for a matter and the client's time are taken up by significant other matters, the delay in filing a motion to reopen is reasonable. *Marquette Corporation v. Priester*, 234 F. Supp. 799 (DCSC 1964) (delay of 15 months held reasonable under the circumstances). In the present case, significant amounts of time were spent addressing irregularities in the work of attorney Craig Miller and the consequences of those irregularities.

Furthermore, Applicant, in the interest of judicial economy, contacted Opposer's

counsel, in an attempt to resolve this matter without the need for filing the present motion. Judicial economy should favor such a practice. As such, any delays incurred requesting cooperation from Opposer, including time for obtaining approval from the client for such action, should be excused.

The attached affidavit of Mark A. Watkins, explains and clarifies the magnitude of the irregularities previously referred to, illustrating why this motion was filed within a reasonable time.

The law appears settled that the Applicant or client has a duty to monitor the actions of an attorney on its behalf and to request updates on the status of its pending matters. *E.g. CTRL Systems, Inc. v. Ultraphonics of North America, Inc.* 1999 TTAB LEXIS 468 (TTAB 1999). Prior to Miller's termination by the firm, Applicant requested a status reports on its pending matters with the firm. Watkins Aff. at 14. As the attorney with primary responsibility for Applicant's work, Miller was assigned to handle this task. *Id.* If prepared by Miller as requested, a status report of all pending matters for this client would have included an update of the status of the current matter. Although Applicant may not have specifically requested the status of the current action, by following up on all of its pending matters simultaneously, Applicant should be considered to have shown due diligence in this matter.

The abovementioned irregularities extended beyond this matter to other matters involving Applicant and other Oldham & Oldham clients. Watkins Aff. at 2. Many of these matters were patent applications that had been unintentionally abandoned. Watkins

Aff. at 3. According to 37 C.F.R. §1.137(b)(2), a petition to revive an unintentionally abandoned patent application must include a substantive response to the action and “a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional.” Arguably, each day from the day the abandonment was discovered until the time a petition to revive was filed is required to be unintentional. *Id.* In contrast, the filing of the present motion needed to be within a “reasonable” time. *FRCP Rule 60(b)*. In prioritizing matters affected by Miller, Mr. Watkins complied with the more strict standard first, since “a reasonable time” is a more flexible standard than that requiring the complete “unintentional” standard, accounting for all the time spent attending to other matters affected by Miller’s conduct, per 37 C.F.R. §1.137(b)(2). Watkins Aff. at 5.

From mid-December 2000 through March 2001, over four hundred (400) hours were spent addressing the “irregularities” in Miller’s work. Watkins Aff. at 4. This does not necessarily include the time for preparing substantive responses for each petition to revive an unintentionally abandoned patent application, because in many cases, this work was recorded for each individual client.

In addition, Applicant on January 21, 2001, filed a lawsuit alleging attorney malpractice based on Miller’s conduct, naming both Miller and Oldham & Oldham as defendants. Watkins Aff. at 6. Because he was managing partner of the law firm, a significant amount of Mr. Watkins’ time has been consumed by the lawsuit. During this

period, Mr. Watkins continued to work with Applicant to address all pending matters as well as to attend to new matters. Watkins Aff. at 7.

The entire period from the time of receiving notice of the default judgment in the current matter until the filing of the motion for relief from default judgment was reasonable in view of the significant amount of time needed to address and correct matters previously handled by Miller.

Furthermore, and most importantly, as the Board stated, Opposer **will not be** prejudiced by relieving Applicant of the default judgment against it and reopening the opposition proceedings to be determined on the merits. As such, relief from the prospective application of the default judgment in the present matter is hereby respectfully requested.

Respectfully submitted,  
OURPET'S COMPANY

By:



Mark A. Watkins, Esq.  
HAHN LOESER + PARKS LLP  
Formerly Oldham & Oldham Co., L.P.A.  
Twin Oaks Estate  
1225 West Market Street  
Akron, Ohio 44313-7188  
330.864.5550(voice)  
330.864.7986(fax)

Attorneys for Applicant/Defendant  
OurPet's Company

**Attorney Docket No. 6253-22-OPP**

**CERTIFICATE OF SERVICE**

A true copy of the foregoing APPLICANT'S REQUEST FOR RECONSIDERATION AND BRIEF IN SUPPORT THEREOF was served by mailing the same, First Class Mail, postage prepaid, to Opposer's attorney:

Susan E. Clady  
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP  
2300 BP Tower  
200 Public Square  
Cleveland, Ohio 44114-2378

this \_\_\_ day of, February, 2002.

By: Mark A. Winters

TTAB

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

In the matter of:

Opposition Number: 116,397  
Mark: STORE-N-FEED



**BOX TTAB NO FEE**  
**Assistant Commissioner for Trademarks**  
**2900 Crystal Drive**  
**Arlington, VA 22202-3513**

TRANSMITTAL

Transmitted herewith:

1. Applicant OurPet's Company's Motion Requesting Reconsideration Of A Final Decision Pursuant To 37 C.F.R. 2.129(c) And Brief In Support Thereof
2. Affidavit of Mark A. Watkins, Esq.
3. Return Acknowledgement Card

Respectfully submitted,

HAHN LOESER + PARKS, LLP  
Formerly Oldham & Oldham Co., L.P.A.

Mark A. Watkins, Esq.

HAHN LOESER + PARKS LLP  
Twin Oaks Estate  
1225 West Market Street  
Akron, OH 44313  
330.864.5550(voice)  
330.864.7986(fax)

Docket No.: 6253-22-OPP

Certificate of Mailing under 37 CFR 1.8(a)

I hereby certify that this correspondence is being deposited with the United States Postal Service as Express Mail, Post Office to Addressee, label No. 829652858 addressed to: BOX TTAB NO FEE, Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513.

Date: 02/07/02

Mark A. Watkins  
(Type or print name of person mailing paper)

(Signature of person mailing paper)