TTAB

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

In Re Application Serial No. 76/086,290;
Filed: July 11, 2000;
Applicant: Custom Golf Sales, Inc.;
Published in the Official Gazette: February 26, 2002

[redacted]

09-16-2003
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #22

RANDY N. GRAHAM, Opposer, V. CUSTOM GOLF SALES, INC., Applicant.	)	Opposition No.: 91151470 (Opposer's File Number: 91151470) (Applicant's File Number: 2150-1/020342

Box TTAB – NO FEE
Commissioner of Patents and Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

APPLICANT'S MOTION FOR INVOLUNTARY DISMISSAL WITH PREJUDICE

COMES NOW, Applicant, CUSTOM GOLF SALES, INC., for the mark "ACCUFLEX", Application Serial Number 76/086,290, and hereby moves this Honorable Board pursuant to Federal Rule of Civil Procedure 41(b), TBMP 535.01 and 37 CFR 2.132, for an Involuntary Dismissal With Prejudice of the Opposition filed by Randy N. Graham.

Applicant files this Motion based upon Graham's failure to prosecute its case. Specifically, Graham failed to take any testimony or present any evidence during the testimony period as ordered by the Board. A Memorandum in support of this motion is attached hereto.

This the 4TH day of September, 2003.

Respectfully submitted,

CUSTOM GOLF SALES, INC.

Gregory R. Everman
Miller, Everman & Bernard, PLLC
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Suite 250
Charlotte, NC 28273
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Attorney for Applicant

APPLICANT'S MEMORANDUM IN SUPPORT OF MOTION FOR INVOLUTARY DISMISSAL WITH PREJUDICE

1. Procedural History and Background

On July 11, 2000, Applicant, Custom Golf Sales, Inc., filed its Application for the registration of the mark "ACCUFLEX" in Application Serial Number 76/086,290. The mark was published in the Official Gazette on February 26, 2002, and sought registration of the mark for the following goods and services:

GOLF CLUB SHAFTS, in International Class 28.

Thereafter, on April 30, 2002, Opposer, Randy N. Graham, filed his Notice of Opposition to the Registration of the Trademark. On May 1, 2002, this Board set the initial trial dates for the pending action. The initial trial dates were as follows:

Discovery period to open:	May 21, 2002
Discovery period to close:	***November 17, 2002***
30-day testimony period for party in the position of the plaintiff to close:	***February 15, 2003***
30- day testimony period for party in the position of the defendant to close:	April 16, 2003
15-day rebuttal testimony period for the plaintiff to close:	May 31, 2003

On July 10, 2002, Applicant timely answered the Opposition. Further, on December 19, 2002, Opposer's counsel filed contemporaneous Motions. The first Motion sought permission from the Board to withdraw as Opposer's counsel, and the second Motion was entitled "*Opposer's*

Consented Motion to reopen and extend discovery and testimony periods". (Attached hereto as Exhibit A). According to the Consented Motion, Opposer sought for and obtained the consent of Applicant to reopen and extend the trial dates for the pending action. As extended, the trial dates were as follows:

Discovery period to close:	***March 4, 2003***
30-day testimony period for party in the position of the plaintiff to close:	***May 5, 2003***
30- day testimony period for party in the position of the defendant to close:	July 7, 2003
15-day rebuttal testimony period for the plaintiff to close:	August 22, 2003

According to the Consented motion, Opposer had until May 5, 2003 to take testimony or present evidence to establish a *prima facie* case. Notwithstanding, Opposer has failed, in every respect, to present any evidence in any form in support of its Opposition. As such, the Motion herein is being filed.

2. Argument

A. The Opposition in this matter must be Dismissed With prejudice as Opposer has failed to take any testimony or present any evidence in the furtherance of its Opposition.

Generally speaking, a party in the position of the plaintiff that fails to take evidence or testimony during a pending Opposition within its prescribed testimony dates has failed to prosecute its case. In such an instance, a dismissal with prejudice is warranted and proper. *See generally*, Pumpkin, Ltd. d/b/a Pumpkin Masters v. The Seeds Corps., 1997 TTAB LEXIS 24 (decided July 7,

1997), *followed by*, Old Nutfield Brewing Company, Ltd. v. Hudson Valley Brewing Company, Inc., 2002 TTAB LEXIS 507 (decided August 6, 2002) (attached hereto as Exhibits B and C, respectively). In order to alleviate the Board's burden of hearing meritless actions, allowance is made for parties in the position of the Defendant to file for an Involuntary Dismissal With Prejudice when such a case arises. Specifically, 37 CFR 2.132 states in pertinent part:

> (a) If the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute.
>
> ***
>
> (b) If no evidence other than a copy or copies of Patent and Trademark Office records is offered by any party in the position of plaintiff, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground that upon the law and the facts the party in the position of plaintiff has shown no right to relief.

In the case *sub judice*, Opposer has filed a Notice of Opposition against Applicant's registration. As the Opposer, it was incumbent upon Graham to take testimony and/or submit some evidence in support of its claims during its testimony period, thereby establishing a *prima facie* case and moving the case forward. Currently, Graham has not presented any testimony or even a scintilla of evidence. Thus, Applicant's Motion must be granted.

Interestingly, the utter lack of evidence submitted by Graham is not due to a lack of time. Indeed, throughout this proceeding, Graham has had ample opportunity to present his case. Notwithstanding, Opposer simply elected to ignore the trial dates and leave the record devoid of any shred of evidence in support of the Opposition. As a result thereof, Graham has failed to present a

prima facie case and has failed to prosecute this matter. Therefore, this Opposition must be dismissed with prejudice.

3. Conclusion

In view of the fact that Graham has failed to take any testimony or present any evidence in support of the Opposition during the Board prescribed testimony period and the extended period, Applicant's Motion to Dismiss with Prejudice must be granted for a failure to prosecute.

This the 4TH day of September, 2003.

Respectfully submitted,

CUSTOM GOLF SALES, INC.

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Tel.: 704-523-1193
Fax.: 704-523-1194
Attorney for Applicant

CERTIFICATE OF MAILING

I hereby certify that this paper is being deposited on the date indicated below with the United States Postal Service with proper postage as First Class Mail under 37 CFR 1.8, addressed to: BOX TTAB – NO FEE, Commissioner For Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3514.

9/4/03
DATE

GREGORY R. EVERMAN

CERTIFICATE OF SERVICE

This is to certify that I have this day served the Opposer and the Attorneys for Opposer in the foregoing matter with a true and correct copy of this APPLICANT'S MOTION FOR INVOLUNTARY DISMISSAL WITH PREJUDICE by depositing a copy thereof in the United States Mail in a properly addressed envelope with adequate postage thereon.

To Opposer:

Randy N. Graham
4545 S. New Hope Road
Gastonia. North Carolina 28056

To Attorneys for Opposer:

James M. Harrington
KENNEDY COVINGTON LOBDELL & HICKMAN, LLP
Hearst Towers, 47th Floor
214 North Tryon Street
Charlotte, North Carolina 28202

This the 4TH day of September, 2003.

Gregory R. Everman
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Fax.: 704-523-1194
Attorney for Applicant

EXHIBIT A

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

In re Application Serial No. 76/086,290;
Filed July 11, 2000;
In the name of Custom Golf Sales, Inc.;
Published in the Official Gazette, February 26, 2002;

RANDY N. GRAHAM, Opposer, v. CUSTOM GOLF SALES, INC., Applicant.	Opposition No. 91151470 (Opposer's File No. 26647.001) (Applicant's File No. 2150-1/020342)

December 19, 2002

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

OPPOSER'S CONSENTED MOTION TO REOPEN AND EXTEND DISCOVERY AND TESTIMONY PERIODS

Sir:

Pursuant to 37 C.F.R. § 2.121, Opposer, Randy N. Graham, respectfully moves the Trademark Trial and Appeal Board to reopen the discovery period and to reset the discovery and testimony periods in the above-captioned action. In support of this Motion, the Opposer shows the Board the following:

1. Opposer's counsel of record, James M. Harrington, Clifford R. Jarrett, and Kennedy Covington Lobdell & Hickman, LLP, have, contemporaneously with this motion,

requested that the Board grant them leave under 37 C.F.R. § 10.40(c) to withdraw as counsel of record for Opposer.

2. The stated grounds for withdrawal are that the Opposer has failed to pay a number of statements, as agreed, for an unreasonable amount of time.

3. Further to the Opposer's failure as noted above, Opposer failed to authorize Opposer's counsel to conduct discovery during the original period, and no discovery was conducted.

4. The reopening of discovery and an extension of discovery and testimony deadlines are necessary to prevent substantial prejudice to Opposer's rights.

5. Counsel for Applicant, Gregory Everman, has consented to the reopening and extension.

6. Opposer's Motion is made in good faith and not for the purpose of delay.

If this Motion is approved by the Board, the Discovery and testimony periods are set as follows:

Discovery period to close:	March 4, 2003
30-day testimony period for party in position of plaintiff to close:	May 5, 2003
30-day testimony period for party in position of defendant to close:	July 7, 2003
15-day rebuttal testimony period for plaintiff to close:	August 22, 2003

WHEREFORE, the Opposer respectfully moves the Board to reopen discovery and to extend the deadlines for discovery and testimony in the above-captioned action.

Respectfully submitted,

James M. Harrington
Clifford R. Jarrett
KENNEDY COVINGTON LOBDELL & HICKMAN, LLP
Hearst Tower, 47th Floor
214 North Tryon Street
Charlotte, North Carolina 28202
(704) 331-7541

CERFITICATE OF MAILING

I hereby certify that this paper is being deposited on the date indicated below with the United States Postal Service with proper postage as First Class Mail under 37 CFR § 1.8, addressed to: BOX TTAB - NO FEE, Commissioner For Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513.

12/19/2002
DATE

JAMES M. HARRINGTON

CERTIFICATE OF SERVICE

This is to certify that I have this day served the Applicant and the Opposer in the foregoing matter with a true and correct copy of this Request by depositing a copy thereof in the United States Mail in a properly addressed envelope with adequate postage thereon.

To Applicant, to its counsel of record:

Ralph H. Dougherty
Gregory R. Everman
Dougherty, Clements & Hofer
6230 Fairview Road
Suite 400
Charlotte, North Carolina 28210

To Opposer:

Randy N. Graham
4545 S. New Hope Road
Gastonia, North Carolina 28056

This, the 19th day of December, 2002.

James M. Harrington
Kennedy Covington Lobdell & Hickman, LLP
Hearst Tower, 47th Floor
214 North Tryon Street
Charlotte, North Carolina 28202
(704) 331-7541

EXHIBIT B

LEXSEE 1997 TTAB LEXIS 24

Pumpkin, Ltd. dba Pumpkin Masters v. The Seed Corps

Opposition No. 99,224

Trademark Trial and Appeal Board

1997 TTAB LEXIS 24; 43 U.S.P.Q.2D (BNA) 1582

July 7, 1997, Decided

July 15, 1997, Released

[*1]

Before Sams, Rice and Hairston, Administrative Trademark Judges

OPINION:

By the Board.

I. INTRODUCTION AND BACKGROUND

This case now comes up on opposer's February 27, 1997 motion to reopen its testimony period. Applicant has filed a brief opposing the motion, and opposer has filed a reply brief in support of the motion. A discussion of the procedural history of this case is helpful in understanding the issues raised by opposer's motion.

The Board issued its original trial order in this case on February 9, 1996, pursuant to which the discovery period was set to close on May 16, 1996 and opposer's testimony period was set to close on July 15, 1996. On May 14, 1996, applicant filed a motion to extend discovery and testimony periods, which the Board granted as uncontested on July 3, 1996. Pursuant thereto, the discovery period was reset to close on July 16, 1996 and opposer's testimony period was reset to close on September 14, 1996.

On July 22, 1996, opposer filed a motion to further extend trial dates to allow for completion of discovery depositions. Opposer requested that the close of the discovery period be extended to September 14, 1996, and that opposer's testimony period be reset [*2] to close on November 14, 1996, opening thirty days prior thereto. Opposer's motion was received at the Board on July 29, 1996. When applicant failed to contest the motion, the Board granted it, stamping "APPROVED AS UNCONTESTED AUG 21 1996" on the original and on two copies of the motion and returning a copy to each party. Cf. Trademark Rule 2.121(d).

On October 7, 1996, opposer, citing Trademark Rule 2.121, filed a consented motion to extend until November 12, 1996 its time to respond to applicant's second set of discovery requests. n1 The Board stamped the motion "APPROVED" on October 17, 1996 and returned a copy thereof to each party.

n1 The applicable rule governing opposer's motion to extend its time to respond to applicant's discovery requests is FRCP 6(b)(1), not Trademark Rule 2.121. However, Trademark Rule 2.121(a)(1) provides, *inter alia,* that "the resetting of a party's time 5o respond to an outstanding request for discovery will not result in the automatic rescheduling of the discovery and/or testimony periods; such dates will be rescheduled only upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board." [*3]

On November 15, 1996, the day after the close of opposer's testimony period as last reset, applicant filed a motion to compel opposer's responses to applicant's second set of interrogatories, which had been served on April 19, 1996.

Opposer filed a brief in opposition to the motion to compel on December 5, 1996. On February 6, 1997, the Board issued an order denying the motion to compel and resetting trial dates, commencing with applicant's testimony period. In its order, the Board noted that opposer's testimony period had closed on November 14, 1996, and that opposer had failed to present any evidence in support of its claim.

On February 27, 1997, opposer filed the present motion to reopen its testimony period, asserting that its failure to present evidence during its assigned testimony period was the result of excusable neglect, within the meaning of FRCP 6(b)(2).

II. OPPOSER'S ARGUMENTS IN SUPPORT OF ITS MOTION TO REOPEN

In support of its motion, opposer argues that the standard for determining whether a party's failure to take required action was the result of "excusable neglect" under FRCP 6(b)(2) has been liberalized as a result of the decision of the U.S. Supreme [*4] Court in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership et al, 507 U.S. 380 (1993)* (hereinafter *Pioneer*). n2 Accordingly, opposer argues, pre-Pioneer decisions of the Board and of the Court of Appeals for the Federal Circuit on the issue of excusable neglect, such as *American Home Products Corp. v. David Kamenstein, Inc., 172 USPQ 376 (TTAB 1971),* and *Hewlett-Packard Co. v. Olympus Corp., 931 F.2d 1551, 18 USPQ2d 1710 (Fed. Cir. 1991),* are no longer controlling precedent.

n2 The *Pioneer* decision is discussed more fully, *infra.* In brief, the Court held that delays and omissions caused by negligence and carelessness cannot be deemed to be inexcusable per se. Rather, the determination of whether a party's neglect is excusable is an equitable one which takes into account all relevant circumstances surrounding the party's delay or omission, including the danger of prejudice to the nonmovant, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. [*5]

Opposer argues that its failure to present testimony during its assigned testimony period was the result of excusable neglect, when viewed under the equitable analysis required by *Pioneer.* Specifically, opposer argues that applicant will not be prejudiced by a reopening of opposer's testimony period, but merely will be deprived of a windfall victory. The lack of prejudice to applicant is evidenced, according to opposer, by applicant's failure to file a motion to dismiss under Trademark Rule 2.132(a) after the close of opposer's testimony period. Furthermore, opposer contends, applicant will not be prejudiced by a reopening of opposer's testimony period because applicant still will be able to present its evidence during its own testimony period.

Opposer also argues that the length of the delay caused by its failure to present testimony is minimal, in that only three months had passed between the close of opposer's testimony period and its filing of its motion to reopen. Opposer asserts that it promptly prepared and filed its motion to reopen after discovering its error on February 11, 1997, the date it received the Board's February 6, 1997 order. Opposer further argues that its [*6] delay has had no substantial impact on this proceeding, inasmuch as the Board has already suspended proceedings pending determination of opposer's February 27, 1997 motion to reopen. Opposer also notes that the Board, when it denied applicant's November 15, 1996 motion to compel discovery on February 6, 1997, reset applicant's testimony period to close on March 28, 1997, some three and one-half months after the previously- reset closing date for applicant's testimony period, i.e., December 15, 1996. Opposer argues that, in equity, opposer is entitled to a similar extension of its own testimony period.

With respect to the reasons for opposer's failure to present testimony, opposer asserts that it is possible that opposer's counsel failed to properly or timely docket the Board's August 21, 1996 order approving opposer's July 22, 1996 motion to extend trial dates, but that opposer cannot determine with certainty whether that is so. Opposer conjectures that the docketing failure may have resulted from a mishandling of the docketing slips for this case, or from a confusion of this case with a different case also pending between the parties. Opposer states that its counsel evidently received [*7] a copy of the order, but it does not know exactly when, inasmuch as the order does not bear opposer's counsel's mailroom receipt stamp or docketing notations, nor does it bear a mailing date from the Board. n3

n3 Opposer has submitted a copy of the August 21, 1996 order it received from the Board. As noted above, that copy clearly shows the Board's stamp thereon, which states that opposer's motion to extend dates was approved as uncontested on August 21, 1996. Under the Board's practice, the date stamped on the order is deemed to be the "mailing date" of the order. The documentary materials submitted by opposer reveal that its counsel received every other Board order within several days of the mailing date stamped on the order.

Finally, opposer argues that it has acted in good faith in its attempts to cure its inadvertent error, that opposer has prosecuted this case vigorously through discovery, that the outcome of this case is very important to opposer's business, and that, accordingly, opposer's testimony period should be reopened so that opposer may have its "day in court."

In support of its motion, opposer has submitted the affidavits of its counsel, of its counsel's secretary [*8] who was responsible for docketing matters, and of opposer's president.

Applicant, acting pro se in this case, filed a brief in opposition to opposer's motion to reopen, supported by the affidavit of its president. In essence, applicant argues that, inasmuch as opposer is represented by experienced counsel, its failure to abide by the Board's trial schedule is inexcusable. Applicant also asserts that it has been prejudiced by the delay caused by opposer's failure to present evidence, that it will be prejudiced if opposer is given another opportunity to present evidence, that a reopening of opposer's testimony period will have an impact on the resources of the Board, and that opposer has been uncooperative during this proceeding.

III. DISCUSSION AND ANALYSIS

A. Excusable Neglect.

Opposer's motion to reopen its testimony period is governed by FRCP 6(b), made applicable to Board proceedings by Trademark Rule 2.116(a). Rule 6(b) provides as follows:

> **(b) Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion [*9] (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

Inasmuch as opposer's previously-assigned testimony period already had lapsed by the time that opposer filed its motion, opposer is not entitled to have its testimony period reopened unless the Board, in its discretion, determines that opposer's failure to present testimony or other evidence during that previously-assigned testimony period was the result of excusable neglect. FRCP 6(b)(2).

The Board and the Court of Appeals for the Federal Circuit previously have defined "excusable neglect" as

> failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of [*10] the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.

Hewlett-Packard Co. v. Olympus Corp., 18 USPQ2d at 1712 (citing *Black's Law Dictionary* 508 (5th ed. 1979)). However, it appears that the Board's reliance on this definition of excusable neglect must be revisited in light of the Supreme Court's decision in *Pioneer.*

In *Pioneer,* the Supreme Court found, in a sharply divided five-to-four decision, that a creditor in a bankruptcy case had shown that its failure to timely file its proof of claim was the result of excusable neglect, within the meaning of Bankruptcy Rule 9006(b)(1), and that its late-filed proof of claim accordingly should have been accepted by the Bankruptcy Court. n4 In so deciding, the Court's majority rejected any "bright-line" approach to determining whether excusable neglect exists, i.e., an approach under which excusable neglect could be found only upon a showing that the movant's failure to take timely action was caused by circumstances beyond its reasonable control, or under [*11] which any showing of fault on the part of the late filer would defeat a claim of excusable neglect.

n4 Bankruptcy Rule 9006(b)(1) is essentially identical to FRCP 6(b).

The Court reasoned that because "neglect," by definition, encompasses omissions to act caused by carelessness, it would be improper to hold that excusable neglect can be shown only when the failure to act was caused by intervening circumstances beyond the party's control, or to hold that omissions caused by inadvertence, mistake or carelessness are per se not within the ambit of excusable neglect. "Although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect, it is clear that 'excusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Pioneer, 507 U.S. at 392.*

However, unless the party's neglect is "excusable," the party will not be entitled to a reopening of the time for taking action. In the context of the bankruptcy case before it, the Court stated that because Rule 9001(b)(1) requires that the party's [*12] neglect of the date for taking required action be "excusable," the Rule will "deter creditors or other parties from freely ignoring court-ordered deadlines in the hopes of winning a permissive reprieve under Rule 9006(b)(1)." *Id. at 395.*

According to the Court, the determination of whether a party's neglect is excusable is

> at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include. . .the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395. The Court also held that, under our system of representative litigation, a party must be held accountable for the acts and omissions of its chosen counsel, such that, for purposes of making the "excusable neglect" determination, it is irrelevant that the failure to take the required action was the result of the party's counsel's neglect and not the neglect of the party itself. *Pioneer, 507 U.S. at 396* [*13] (citing *Link v. Wabash R. Co., 370 U.S. 626 (1962)* and *United States v. Boyle, 469 U.S. 241 (1985)).*

Applying this analysis to the Chapter 11 bankruptcy case before it, the Supreme Court noted that the courts below had specifically found that the creditor/movant and its counsel had acted in good faith, and that the creditor's late filing of its proof of claim posed no danger of prejudice to the debtor or of disruption to efficient judicial administration. Indeed, the Court observed, the Bankruptcy Court had taken judicial notice of the fact that the debtor's second amended plan of reorganization actually accounted for the creditor's claim, despite the creditor's failure to file a timely proof of claim.

Regarding the third "excusability" factor, i.e., the culpability of the movants and/or their counsel, the Court gave little weight to the fact that counsel was experiencing upheaval in his law practice at the time the proof of claim was due. n5 However, the Court considered it "significant" that the notice of the proof of claim bar date provided by the Bankruptcy Court was "outside the ordinary course in bankruptcy cases," [*14] remarking as follows:

> As the Court of Appeals n6 noted, ordinarily the bar date in a bankruptcy case should be prominently announced and accompanied by an explanation of its significance. See *943 F.2d, at 678.* We agree with the court that the "peculiar and inconspicuous placement of the bar date in a notice regarding a creditors['] meeting," without any indication of the significance of the bar date, left a "dramatic ambiguity" in the notification. Ibid.

Id. at 398-99.

> n5 Counsel had explained that the proof of claim bar date, of which he was unaware, came at a time when he was experiencing "a major and significant disruption" in his professional life caused by his withdrawal from his former law firm. Because of this disruption, counsel did not have access to his copy of the case file until after the bar date had passed. *Id.* at 384. n6 The Court is referring to the Court of Appeals for the Sixth Circuit.

The Court concluded:

> This is not to say, of course, that respondents' counsel was not remiss in failing to apprehend the notice. To be sure, were there any evidence of prejudice to petitioner or to judicial administration [*15] in this

> case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be "excusable." In the absence of such a showing, however, we conclude that the unusual form of notice employed in this case requires a finding that the neglect of respondents' counsel was, under all the circumstances, "excusable."

Id. (Court's footnote regarding bankruptcy procedure omitted).

B. Opposer Has Not Demonstrated Excusable Neglect.

Applying the *Pioneer* excusable neglect analysis to the present case, the Board finds as follows.

Turning first to the third *Pioneer* factor, i.e., the reason for the delay, including whether it was within the reasonable control of the movant, n7 the Board finds that opposer's failure to present evidence during its assigned testimony period was caused by circumstances wholly within opposer's reasonable control, i.e., the failure of opposer's counsel's docketing system. n8 Opposer's counsel acknowledges that the Board's August 21, 1996 order resetting trial dates was received and docketed, but asserts that he cannot determine with certainty when it was received and docketed, [*16] or why the case was not properly called up for appropriate action prior to or during opposer's testimony period.

> n7 In undertaking the *Pioneer* analysis, several of the Circuit Courts of Appeals have stated that this third *Pioneer* factor may be deemed to be the most important of the *Pioneer* factors in a particular case. *See, e.g., Weinstock v. Cleary, Gottlieb, Steen & Hamilton, 16 F.3d 501, 503 (2d Cir. 1994); City of Chanute, Kansas v. Williams Nat. Gas Co., 31 F.2d 1041, 1046 (10th Cir. 1994); Thompson v. E.I.duPont de Nemours & Co., Inc., 76 F.3d 530, 534 (4th Cir. 1996).* n8 The Board, and its reviewing Court, have held that docketing errors and breakdowns do not constitute excusable neglect. *See Williams v. Five Platters, Inc., 510 F.2d 963, 184 USPQ 744 (CCPA 1975); Litton Business Systems, Inc. v. J.G. Furniture Co., 190 USPQ 428 (TTAB 1976), recon. den., 190 USPQ 431 (TTAB 1976).* After *Pioneer,* it is doubtful that docketing errors should be held, per se, to be inexcusable neglect. However, the previous case law on the subject of docketing errors is directly relevant to the third *Pioneer* factor, i.e. whether a party's delay or omission was caused by circumstances within its reasonable control. [*17]

After careful review of opposer's affidavits and their attachments, the Board finds that opposer has failed to show that anyone other than opposer and its counsel are responsible for opposer's failure to properly docket and/or call up the case for proper and timely action. Unlike the Bankruptcy Court's notice involved in *Pioneer,* there was no ambiguity in the Board's August 21, 1996 order notifying opposer that its motion to extend trial dates had been granted.

Additionally, it is significant that the trial dates set forth in the Board's August 21, 1996 order were selected and proposed by opposer in its July 22, 1996 consented motion to extend trial dates. Opposer apparently and inexplicably failed to docket those proposed trial dates when it submitted its July 22, 1996 motion. n9 Thus, even if the Board were to assume (which it does not) that opposer's counsel was not negligent in failing to docket the Board's August 21, 1996 order approving opposer's July 22, 1996 consented motion to reset trial dates, opposer's counsel clearly was remiss in failing to ascertain the status of that motion prior to the opening, or the close, of the rescheduled testimony period he himself [*18] had set out for opposer. n10

> n9 The record shows that, upon receipt of applicant's May 14, 1996 motion to extend trial dates, opposer docketed the proposed new trial dates without waiting for the Board to approve applicant's motion. *See* Affidavit of Cherise L. Knox, opposer's counsel's secretary, at paragraph 15. Opposer does not explain why the proposed extended trial dates included in its own July 22, 1996 motion were not similarly docketed. n10 In addition to failing to properly docket the new trial dates requested in its July 22, 1996 motion and approved by the Board on August 21, 1996, opposer also apparently failed to review the status of the trial schedule both when it filed its October 7, 1996 consented motion to extend its time to respond to applicant's second set of discovery requests, and when it filed its December 5, 1996 brief in opposition to applicant's November 15, 1996 motion to compel discovery.

In short, the Board finds that opposer's failure to present evidence during its assigned testimony period was solely the result of counsel's negligence, which, under *Pioneer,* the Board must attribute to opposer itself. Because the reason

for opposer's [*19] failure to present evidence during its testimony period was wholly within the reasonable control of opposer, the third *Pioneer* factor weighs heavily against a finding of excusable neglect.

Turning next to the first *Pioneer* factor, i.e., the danger of prejudice to applicant, it does not appear from this record that applicant's ability to defend against opposer's claims has been prejudiced by opposer's failure to adhere to the trial schedule. That is, there has been no showing that any of applicant's witnesses and evidence have become unavailable as a result of the delay in proceedings. *See, e.g., Pratt v. Philbrook, 109 F.3d 18 (1st Cir. 1997).* n11 *See also Paolo's Associates Ltd. Partnership v. Bodo, 21 USPQ2d 1899, 1904* (Comm'r 1990). In view thereof, the Board finds that this first *Pioneer* factor weighs in favor of a finding of excusable neglect. n12

n11 In *Pratt,* the First Circuit stated:

> From our vantage point it is difficult to see what cognizable prejudice, in the sense, for example of lost evidence, would come to the defendant from reopening the case. Of course, it is always prejudicial for a party to have a case reopened after it has been closed advantageously by an opponent's default. But we do not think that is the sense in which the term 'prejudice' is used in *Pioneer.*

Pratt v. Philbrook, 109 F.3d at 22. [*20]

n12 However, that is not to say that applicant has been unaffected by the delay caused by opposer's failure to abide by the trial schedule in this case. The determination of whether applicant is entitled to registration of its mark, and thus the possible issuance of any such registration, obviously have been irremediably delayed. Furthermore, the Board is not persuaded by opposer's argument that applicant's failure to file a motion to dismiss the opposition under Trademark Rule 2.132(a) is evidence of an absence of prejudice, under the first *Pioneer* factor.

As for the second *Pioneer* factor, i.e., the length of the delay and its potential impact on judicial proceedings, the Board notes that opposer's testimony period closed on November 14, 1996 and that opposer did not file its motion to reopen until February 27, 1997, some three and one-half months later. However, in addition to the time between the expiration of the time for taking action and the filing of the motion to reopen, the calculation of the length of the delay in proceedings also must take into account the additional, unavoidable delay arising from the time required for briefing and deciding the motion to [*21] reopen. The impact of such delays on this proceeding, and on Board proceedings generally, is not inconsiderable. Proceedings before the Board already are quite lengthy because they must be conducted on the written record rather than by live testimony.

More fundamentally, however, it cannot escape the notice of any interested observer of or participant in proceedings before the Board that the Board's steadily growing docket of active cases, and the resulting inevitable increase in motion practice before the Board, are increasingly straining the Board's scarce resources. The Board, and parties to Board proceedings generally, clearly have an interest in minimizing the amount of the Board's time and resources that must be expended on matters, such as most contested motions to reopen time, which come before the Board solely as a result of sloppy practice or inattention to deadlines on the part of litigants or their counsel. The Board's interest in deterring such sloppy practice weighs heavily against a finding of excusable neglect, under the second *Pioneer* factor.

Finally, under the fourth *Pioneer* factor, there is no basis in this record for finding that opposer's failure to [*22] present evidence during its assigned testimony period was the result of bad faith on the part of opposer or its counsel.

C. Conclusion: Opposer's Motion to Reopen is Denied.

In the Board's considered opinion, the dominant factors in the "excusable neglect" analysis in this case are the second and third *Pioneer* factors. The absence of prejudice and bad faith in this case, under the first and fourth *Pioneer* factors, is outweighed by the combination of circumstances under the second and third *Pioneer* factors which are present in this case: opposer's failure, caused solely by opposer's negligence and inattention, to appear for trial in accordance with the trial schedule approved by the Board on opposer's own motion; the unnecessary and otherwise avoidable delay of this proceeding and expenditure of the Board's resources, which are direct results of opposer's negligence; and the Board's clear interest in deterring such negligence in proceedings before it, an interest which is shared generally by all litigants with cases pending before the Board.

In short, after consideration of all of the circumstances in this case and of the relevant authorities, and in the exercise [*23] of its discretion after a careful balancing of the *Pioneer* factors, the Board finds that opposer has not demonstrated that its failure to appear and present evidence during its assigned testimony period was the result of excusable neglect. Accordingly, opposer's motion to reopen its testimony period is denied. FRCP 6(b)(2). n13

n13 The Board is not persuaded by opposer's argument that its testimony period should in equity be reopened in view of the Board's reopening of applicant's testimony period after denial of applicant's motion to compel discovery. Applicant's motion to compel was filed on November 15, 1996, prior to the opening of its testimony period but after the expiration of opposer's testimony period. In resetting trial dates upon decision of applicant's motion, the Board merely returned the parties to their respective positions as of the filing of the motion. Furthermore, opposer is unpersuasive in arguing that its motion to reopen its testimony period should be granted because it is entitled to its "day in court." Opposer had its day in court, namely, the thirty-day testimony period which opposer itself had requested.

IV. DECISION - OPPOSITION DISMISSED [*24] **WITH PREJUDICE**

In view of our denial of opposer's motion to reopen its testimony period, and inasmuch as opposer failed to offer any evidence whatsoever in support of its claims during the period assigned to opposer for presentation of its case-in-chief, we find that opposer has failed to carry its burden of proof in this case, and that opposer therefore cannot prevail herein. n14 Further proceedings in this case thus having been rendered unnecessary, n15 the opposition is dismissed with prejudice.

n14 The miscellaneous documentary materials attached to opposer's notice of opposition are not evidence in this case. Trademark Rule 2.122(c). n15 It is unnecessary to reset remaining trial dates in this case, in view of opposer's failure to prove its case during its assigned testimony period. The Board notes that, during applicant's previously-reset testimony period and prior to the suspension of these proceedings for consideration of opposer's motion to reopen, applicant filed a notice of reliance by which it introduced into evidence a copy of a design patent, issued to applicant's president on February 11, 1997, covering "the ornamental design of a pumpkin scoop." This evidence submitted by applicant does not in any way support or prove opposer's case-in-chief. The Board will not schedule a rebuttal testimony period for opposer, because even if opposer were to succeed in rebutting applicant's evidence regarding applicant's design patent, opposer still will have failed to prove its case-in-chief. Furthermore, if opposer were to attempt to introduce evidence in support of its case-in-chief during a rebuttal testimony period, the evidence would constitute improper rebuttal and would not be considered by the Board. *See Hester Industries, Inc. v. Tyson Foods Inc., 2 USPQ2d 1646 (TTAB 1987).* [*25]

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EXHIBIT C

LEXSEE

OLD NUTFIELD BREWING COMPANY, LTD. v. HUDSON VALLEY BREWING COMPANY, INC.

Opposition No. 91120235

Trademark Trial and Appeal Board

2002 TTAB LEXIS 507

August 6, 2002, Decided

[*1]

Before Hairston, Wendel, and Bottorff, Administrative Trademark Judges.

OPINION:

THIS ORDER IS CITABLE AS PRECEDENT OF THE TTAB

By the Board:

This case presents the recurring question of whether the plaintiff's failure to receive an answer (when one has in fact been filed) establishes excusable neglect for the plaintiff's failure to present its case. We hold under the facts of this case that it does not.

The notice of opposition was filed on September 6, 2000. On September 22, 2000, the Board instituted this proceeding, serving a copy of the notice of opposition on applicant and setting discovery and trial dates. On November 1, 2000, applicant timely filed its answer to the notice of opposition. Pursuant to the trial schedule, opposer's testimony period closed on July 9, 2001.

After applicant filed its answer, nothing further was heard from either party until November 19, 2001. On that date opposer filed a motion to reopen its testimony period, stating that its failure to take testimony was the result of excusable neglect. However, opposer's motion was not served upon applicant as required by the Board's rules. Trademark Rule 2.119(a).

By order dated April 1, 2002, the Board forwarded [*2] a copy of opposer's paper to applicant and allowed applicant thirty days in which to respond. Applicant filed a timely response on April 30, 2002, resisting opposer's motion to reopen. Applicant's response included a request for judgment in its favor. Opposer did not file a reply brief. n1

n1 We do not consider opposer's failure to file a response to applicant's motion for judgment as a concession of the latter motion. *But see* Trademark Rule 2.127(a). Both the motion to reopen and the motion for judgment involve essentially the same facts and legal standards, *see infra*, and it is clear that opposer has not conceded the motion for judgment.

Applicable Law

A testimony period may be reopened upon a showing of excusable neglect. Fed. R. Civ. P. 6(b)(2). Our interpretation of the "excusable neglect" standard was discussed in *Pumpkin Ltd. v. The Seed Corps, 43 USPQ2d 1582 (TTAB 1997),* which followed the test set out by the Supreme Court in *Pioneer Investment Services Company v.*

Brunswick Associates Limited Partnership, 507 U.S. 380 (1993). In *Pioneer*, the Court stated that a determination of excusable neglect [*3] is

> at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . (1) the danger of prejudice to the [nonmovant], (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.

Pioneer, 507 U.S. at 395 (numbering added). Consistent with several circuit courts of appeal, the Board has found the third *Pioneer* factor, namely, the reason for the delay, and whether it was within the reasonable control of the movant, to be of paramount importance. *See Pumpkin, 43 USPQ2d at 1586, n. 7,* and cases cited therein.

Finally, pursuant to the Trademark Rules, when a plaintiff fails to offer testimony or other evidence during its testimony period, n2 the defendant may move for dismissal for failure to prosecute. The burden then shifts to the plaintiff to demonstrate "good and sufficient cause" why judgment should not be entered against it. Trademark Rule 2.132(a).

n2 A party may also offer evidence of its pleaded registrations by attaching title and status copies of the registrations, prepared by the USPTO, to its notice of opposition. Trademark Rule 2.122(d)(1). Opposer did not do so in this case. [*4]

Arguments of the Parties

Opposer argues that its failure to take testimony during the scheduled period results from excusable neglect. Opposer alleges that (1) it never received a copy of applicant's answer and (2) that principals of the parties had been negotiating for a settlement of this matter. Opposer states that "on or about September 24, 2001[, opposer's counsel] became aware that the case had not been settled." n3 At that point, opposer's counsel sought a copy of the answer and other record documents. Eight weeks later, opposer filed the instant motion to reopen.

n3 Opposer does not indicate how counsel "became aware" of the status of the matter.

For its part, applicant admits that the parties had discussed settlement of the dispute, but states that such discussions took place prior to the filing of the notice of opposition. Applicant therefore argues that such negotiations should not be considered a factor in excusing opposer's failure to take testimony.

Analysis

We consider opposer's motion to reopen and applicant's motion for judgment together, because they both involve the same legal determination arising out of the same facts. As we have held in the past, [*5] the "good and sufficient cause" standard set out in Trademark Rule 2.132(a) is equivalent to the "excusable neglect" standard in Fed. R. Civ. P. 6(b). *HKG Industries Inc. v. Perma-Pipe Inc., 49 USPQ2d 1156, 1157 (TTAB 1998); Grobet File Co. of America, Inc. v. Associated Distributors Inc., 12 USPQ2d 1649, 1651 (TTAB 1989). See also*, TBMP § 535.02. We consider the *Pioneer* factors in turn:

(1) The Danger Of Prejudice To The Applicant

Applicant alleges that it "will continue to suffer extreme prejudice as opposer's acts have prevented applicant from obtaining its trademark registration." Opposition at 2. Nonetheless, applicant has not recited any facts to support its conclusory allegation of extreme prejudice. While opposer's actions have undoubtedly delayed the issuance of applicant's registration (assuming that applicant would prevail on the merits), we have held before that the mere passage of time is generally not considered prejudicial, absent the presence of other facts, such as the loss of potential witnesses. *See HKG Industries, 49 USPQ2d at 1157-58.*

(2) The Length Of The [*6] Delay And Its Potential Impact On Judicial Proceedings

The delay in this case is substantial. Opposer's testimony period closed on July 9, 2001. Opposer filed its motion to reopen more than four months later, on November 19, 2001. Although opposer stated that it first became aware that settlement had not been reached on September 24, 2001, it did not file its motion to reopen until November 19, 2001, eight weeks later. Opposer has not provided any explanation for this delay. n4

n4 Attached to opposer's motion to reopen is a letter dated September 24, 2001, from opposer's counsel to Mr. Paul Del Giudice, of Arlington, Virginia, requesting that Mr. Del Giudice obtain and forward a copy of the answer and other documents filed by applicant "by overnight mail." There is no indication in the record that Mr. Del Giudice did not promptly do so.

We find that the delay of more than four months between the close of opposer's testimony period and the filing of its motion to reopen - eight weeks of which occurred *after* opposer's counsel admits it was actually aware that settlement had not been reached - is significant. Indeed, the total delay caused by opposer's inaction is considerably [*7] longer. If not for opposer's failure to take testimony as scheduled, this case would have already been briefed, and quite possibly already been decided on the merits, even allowing for an oral hearing. If we were to grant opposer's motion to reset its testimony period, trial periods would not close until at least the end of this year. In determining excusable neglect, it is appropriate to consider the additional delay required to brief and decide the motion to reopen. n5 *See Pumpkin, 43 USPQ2d 1587-88.*

n5 In this regard, opposer's position is not helped by its failure to properly certify the service of a copy of its motion to reopen on applicant, as required by Trademark Rule 2.119(a). The further delay caused thereby (and the necessity for the Board's April 1, 2002, order) is properly attributable to opposer.

However, while it is appropriate to include in the analysis consideration of "the additional, unavoidable delay arising from the time required for briefing and deciding the motion to reopen," *Pumpkin* at 1587-88, we note that opposer's motion was not promptly taken up by the Board. Thus, while the total delay is now more than one year, we have not attributed this entire period to opposer. [*8]

Needless to say, such a delay would have a substantial effect on this proceeding, as well as the Board's docket in general. Both the Board and applicant clearly have an interest in seeing the expeditious resolution of this proceeding. Furthermore, the Board's workload is unnecessarily increased when it must devote time and resources to ruling on motions resulting from avoidable delays. In that respect, opposer's inaction in this case has affected not just applicant, but other litigants before the Board.

(3) The Reason For The Delay And Whether It Was Within The Reasonable Control Of Opposer

Opposer advances two reasons for its delay: (1) that it never received applicant's answer and (2) that the parties were engaged in settlement negotiations.

We agree with applicant that the allegation that the delay was caused by (or should be excused as a result of) the parties' settlement discussions is without merit. Applicant states that the only such discussions took place prior to the filing of the notice of opposition. This statement is consistent with the record. n6

n6 The only record evidence of communication between the parties is a letter to applicant dated September 1, 2000, stating that opposer would file a notice of opposition, and inviting applicant to contact it regarding settlement. The notice of opposition was filed on September 6, 2000. While opposer's motion states that the parties' principals engaged in settlement discussions after the opposition was filed, Motion at 2, applicant's response flatly denies that such discussions took place, Opposition at 2. [*9]

Ultimately, however, it makes little difference whether the parties did or did not discuss settlement after the notice of opposition was filed. Discovery and trial dates in a Board proceeding are not suspended automatically, but will only be extended or suspended upon motion. The Board is liberal in granting reasonable extensions or suspension of trial dates when parties are engaged in serious bilateral settlement discussions. However, a party which fails to timely move for extension or suspension of dates on the basis of settlement does so at its own risk, and should not expect that such relief will be granted retroactively, particularly - as here - over the opposing party's objection. n7

n7 Opposer states that its counsel "was directed not to incur any further costs with respect to the ... opposition...." Motion at 2. Although a motion to extend or suspend need not be extensive, it was, of course,

opposer's prerogative to so instruct its counsel. But it does not follow that opposer should be relieved of the foreseeable consequences of its choice.

Opposer apparently takes the position that its failure to receive an answer to the notice of opposition establishes its excusable [*10] neglect for failure to take testimony. We disagree. As noted above, opposer's testimony period was set by the Board's order instituting this proceeding. Applicant's answer was due (and was in fact filed) on November 1, 2000. Although the answer filed with the Board bears an appropriate certificate of service indicating that a copy thereof was mailed to opposer's counsel at its address of record, opposer has submitted a copy of its counsel's incoming mail log for the period of November 1-6, 2000, which indicates that no answer was received. n8

n8 While we take opposer at its word here, it would be hard to conclude from opposer's counsel's log alone that no answer was in fact received. Given the vicissitudes of the mail, it is possible that an answer mailed on Thursday, November 1, 2000, might not have been received (or logged in) until after Tuesday, November 6, 2000.

It should thus have appeared to opposer that applicant was in default beginning on November 2, 2000. Yet opposer did nothing to ascertain the status of this matter until September 24, 2001, nearly eleven months later. n9

n9 It appears that neither party sought discovery.

As stated in TBMP § 317.01, "if a defendant [*11] fails to file an answer ... during the time allowed ... the Board *may* issue a notice of default." (emphasis added) But issuance of a notice of default is not automatic, and a plaintiff is unjustified in relying on an expectation that one will issue. *Cf. DeLorme Publishing, 60 USPQ2d at 1224.* Opposer could have filed a motion for default judgment at any time after November 1, 2000. If opposer had any doubt as to the official status of the case at any time, it had only to call the Board, view the proceeding information on the Internet, n10 or inspect (or have an agent inspect) the public file in person at the Board. However, opposer did nothing until well after its testimony period had closed.

n10 The Board Information System (BISX) has been available on the USPTO's web site since Spring 2001. http://tarr.uspto.gov:81/

We find that opposer's inaction was unwarranted. It is the opposer which bears the burden of coming forward with evidence to support its case, see Trademark Rule 2.132(a), and it is manifestly clear that opposer has not done so here. The plaintiff in a Board proceeding is not automatically relieved of its obligation to take action [*12] in the case by the defendant's apparent failure to answer. A Board plaintiff acts at its own risk when it assumes that an answer has not been filed, but makes no further inquiry and takes no other action in the case until after all relevant dates have passed.

Opposer was advised of the trial schedule early in the proceeding. There was thus no reason for opposer to wait until well after the close of its testimony period to find out the status of the case.

Finally, counsel indicates that it "was directed not to incur any further costs with respect to the present opposition proceeding, since a settlement was believed to be forthcoming." While the goals of settlement and economy are laudable, they do not excuse opposer's failure to prosecute this matter, or at least to make a timely request for extension or suspension of trial dates if settlement negotiations were ongoing. In any event, the delay was entirely avoidable by the exercise of reasonable diligence, and was entirely within the control of opposer.

(4) Whether Opposer Acted In Good Faith

There is no evidence that opposer acted in bad faith.

CONCLUSION

We find that, although the first and fourth *Pioneer* factors are [*13] neutral or in opposer's favor, they are heavily outweighed by our findings on the second and third factors. We find that opposer's failure to take testimony was not the result of excusable neglect. Accordingly, opposer's motion to reopen its testimony period is DENIED.

Inasmuch as opposer has not submitted any record evidence in support of its case, applicant's motion for judgment is GRANTED. Trademark Rule 2.132(a). Accordingly, the opposition is dismissed with prejudice.

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