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

Proceeding	91162780
Party	Defendant Cangiarella, Keith Cangiarella, Keith 331 N. Harrington Drive Fullerton, CA 92831
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Attachments	F Opposition to Motion to Reopen minus sig.pdf (16 pages) F declaration of Cangiarella and Exhibits.pdf (6 pages)

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

In the Matter of Trademark Application	Opposition No. 91162780
Serial No.: 78/229875	
Mark: MESSAGE IN A BOTTLE	APPLICANT'S OPPOSITION TO
	OPPOSER'S MOTION TO
GOLD SHELLS, INC.,	REOPEN DISCOVERY PERIOD AND
a California corporation,	EXTEND TRIAL SCHEDULE
Opposer,	
v.	
CANGIARELLA, KEITH	
Applicant.	

Applicant KEITH CANGIARELLA (hereafter "Applicant") through counsel, hereby opposes Opposer's GOLD SHELLS, INC. (hereafter "Opposer")'s Motion to Reopen Discovery Period and Extend Trial Schedule as was served by mail on the Applicant dated January 12, 2006, and apparently filed with the Board on or about January 23, 2006.

I. INTRODUCTORY STATEMENT

Without proffering any declarations, proposed interrogatories nor even any cognizable basis for its latest unwarranted, untimely or otherwise belated motion;

Without identifying what discovery it was seeking or how such discovery might warrant a complete "do over"¹ resetting the entire discovery period in this action; and

After recently having been found by the Board of several violations of the Trademark Rules, including Rule 2.120(d)(1) (abusive discovery requests – serving interrogatories in excess of the seventy-five permitted)²; and Rule 2.120(e) (duty to make a good faith effort to resolve discovery disputes prior to seeking Board intervention.)³ yet avoiding any sanction therefor, and, rather obtaining unexpected relief, (after the Board sua sponte, on January 3, 2006, reopened and extended Opposer's testimonial period (for the plaintiff in the Opposition) for another ninety days – from December 29, 2005 to February 28, 2006;

¹ To make up for the acts that one is reasonably expected to timely perform in an Opposition proceeding in which it had initiated in July 2004)

² Board's Order Denying Opposer's Motion To Compel dated January 3, 2006 p.2

³ Board's Order Denying Opposer's Motion To Compel dated January 3, 2006 p.3

Opposer's counsel, now resembling Oliver Twist in search of "*more*" has boldly requested, (by nothing more than bare and cursory statements): to reopen the discovery period which closed nearly four months ago (on September 30, 2005), and to again further extend the trial schedule herein; and otherwise delay these proceedings in order to enable its counsel to prepare and serve on Applicant another set of (as-yet-identified) interrogatories; and

Thereafter providing Applicant with his 30 plus days to prepare and serve responses thereto; and

Thereafter, perhaps, Opposer will have cause to make use of such as-yet-identified interrogatory responses within the waning days of Opposer's heretofore thrice-extended testimonial period.

Opposer's 3-page motion to reopen discovery period and extend trial schedule in which Opposer concludes "that its failure to obtain the necessary discovery during the original discovery period, which closed on September 30, 2005, was due to excusable neglect"⁴ simply fails to demonstrate any "excusable" neglect as is required to reopen the discovery period, nor any "good cause" as is required to again extend the trial dates previously set herein.

Indeed, despite a past history of dilatory and repeatedly neglectful conduct, Applicant opposes the Opposer's latest motion on grounds that Opposer's counsel has failed to meet any standard of "excusable neglect", and has further failed to show any good cause therefore.

Moreover, as is shown in the accompanying "Timeline of TTAB Proceedings Relevant To this Motion" and as supported by the attached declaration of Keith Cangiarella, Applicant further opposes the instant motion on grounds that he will be harmed and prejudiced by further delay herein; and that Opposer has already caused a significant and negative commercial impact on Applicant, not to mention increasing the costs of, and further (repeatedly) delaying these proceedings.

Applicant therefore vigorously opposes said motion.

⁴ Motion To Reopen Discovery Period and Extend Trial Schedule p. 1

II. TIMELINE OF TTAB PROCEEDINGS RELEVANT TO THIS MOTION

- March 23, 2003 Applicant's application for the mark MESSAGE IN A BOTTLE In Class 016 was filed and assigned Serial Number 78/229875.
- October 08, 2003 USPTO Examining Attorney Kelley L. Wells, reported having "...searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02."
- June 29, 2004 Application Serial No. 78/229875 published for opposition.
- July 28, 2004* Opposer's alleged predecessor, Roger Rojas filed a request to extend time to file a notice of opposition re: Serial No. 78/229875.
- November 8, 2004 Opposition by Opposer instituted under TTAB No. 91162780. Discovery and testimony periods as were set included:
Discovery period to open - November 28, 2004
Discovery period to close - May 27, 2005;
30-day testimony period for party in position of plaintiff to close- August 25, 2005.
- December 10, 2004 Applicant filed his Answer to Opposer's Notice of Opposition and Counterclaim against Application Serial No. 75/226521.
- January 24, 2005
January 26, 2005 TTAB notified the parties that "Opposer and counterclaim defendant, Gold Shells, Inc. is allowed THIRTY DAYS from the mailing date of this order to file an answer to the counterclaim. "
- March 30, 2005* TTAB notified the parties that "[o]n January 24, 2005 and January 26, 2005, the Board issued orders allowing opposer time in which to respond to the counterclaim, and resetting trial dates herein. It is noted that opposer's copies of these orders were returned by the United States postal Service as undeliverable." The discovery and testimony periods were thus reset, including the following:
Discovery period to close - June 20, 2005;
30-day testimony period for party in position of plaintiff to close- September 28, 2005.
- June 1, 2005* TTAB entered notice of default against Opposer as counterclaim defendant under Fed. R. Civ. P. 55 (a) due to Opposer's failure to respond to Applicant's counterclaim or otherwise file a Motion to extend time to answer.
- June 16, 2005* Opposer filed response to the TTAB's Order to Show Cause re: default.

June 29, 2005* Opposer's default discharged by the TTAB.

June 29, 2005 Opposer served Applicant's counsel, by mail, with Opposer's First: Request For Production of Documents and Things (1-25); Requests For Admission (1-15) Set of Interrogatories (well exceeding 75 in number)

July 12, 2005* TTAB notified the parties that the trial and discovery dates were reset by the Board, including:
Discovery period to close –September 30, 2005
30-day testimony period for party in position of plaintiff to close - December 29, 2005.

August 12, 2005 Applicant timely served responses to Opposer's First Request For Production of Documents and Things (1-25); Requests For Admission (1-15) First Set of Interrogatories
 (Applicant served his "general objections to Opposer's excessive interrogatories Set One", which included several objections, including, *inter alia*, that the total number of interrogatories, contained in the First Set, counting subparts, greatly exceeded the permissible limit of interrogatories (namely seventy-five) as allowed under 37 CFR § 2.120(d)(1).

September 17, 2005* Opposer again served Applicant's counsel, by mail, an identical copy of the Opposer's First Set of Interrogatories

September 29, 2005* In a good faith attempt to resolve the dispute, Applicant restated his objections in his detailed correspondence re: excessive interrogatories, served concurrently on Opposer's counsel with a second copy of "Applicant's General Objections To Opposer's Excessive Interrogatories Set One" as well as a worksheet showing the method of computation in which the undersigned counsel had originally determined that the total number of Opposer's Interrogatories was not "68," as contended, but rather was well over 75, indeed: 154 in number counting the individual subparts and according to the specific rules and guidelines contained in Section 405.03 of the TBMP and other supporting authorities.

September 30, 2005 DISCOVERY PERIOD CLOSED

October 19, 2005* Applicant's Motion To Compel Responses To First Set of Interrogatories (due to Opposer's failure to respond thereto)

October 25, 2005* Proceedings Suspended pending Applicant's Motion To Compel

November 02, 2005* Applicant Withdraws Motion To Compel

(“withdrawn as the result of this office having recently received the Opposer’s responses which were apparently served on Applicant (belatedly) by mail on October 13, 2005. As admitted by Opposer, they erroneously sent the response to this office’s previous address ... and not to our current address on file herein.”)

November 25, 2005* Proceedings Resumed

November 28, 2005* Opposer moved to compel Applicant's answers to Opposer’s First Set of Interrogatories

December 14, 2005* Applicant opposes Opposer’s Motion to Compel Answers

December 29, 2005 TESTIMONY PERIOD for the plaintiff in the Opposition CLOSED

January 3, 2006* Citing Trademark Rule 2.120 (d)(1) the Board finds that “Applicant’s objection is well taken.” “After careful review of opposer’s first set of interrogatories” the Board has determined that the number of interrogatories exceeds seventy-five.” Inasmuch as the interrogatories were deemed excessive in number, the Board denied Opposer's motion to compel.

“As most recently reset in the Board’s July 12, 2005 order, discovery closed in this proceeding on September 30, 2005. It is noted that neither party has requested a reopening of the discovery period.”

And despite the express prayer of the Applicant as set forth at paragraph 4 at page 16 of *Applicant’s Response To Opposer’s Motion To Compel Applicant’s Answers To First Set of Interrogatories* “that all prior dates set forth by the Board remain”,

the Board graciously, *sua sponte* reset the trial dates herein to permit Opposer an additional ninety days, until February 28, 2006 to present testimony on issues relevant to its case in chief.

January 12 2006* Opposer prepares, serves and ultimately files the instant (3-page)
January 23, 2006 Motion to Reopen Discovery Period and Extend Trial Schedule.

III. ARGUMENT

A. The Conclusory Statements Contained In Opposer's Motion To Reopen Are Insufficient As A Matter Of Law To Support Any Finding Of "Good Cause" Or "Excusable Neglect."

Rule 6(b) of the Federal Rules of Civil Procedure provides:

"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 (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 ... 60(b) ... except to the extent and under the conditions stated in them." (emphasis added)

As a preliminary matter, the Opposer's sparse Motion to Reopen is insufficient as a matter of law and fails to meet the standard of pleading and presentation as is required by the Trademark Trial and Appeal Board Manual of Procedure - Second Edition - June 11, 2003, First Revision - March 12, 2004, ("TBMP").

As required by TBMP Section 509.01(a)

"[a] motion to extend must set forth with particularity the facts said to constitute good cause for the requested extension; mere conclusory allegations lacking in factual detail are not sufficient" (See e.g., *Fairline Boats plc v. New Howmar Boats Corp.*, 59 USPQ2d 1479, 1480 (TTAB 2000) (motion denied where party failed to provide detailed information regarding apparent difficulty in identifying and scheduling its witnesses for testimony and where sparse motion, containing vague reference to possibility of settlement, demonstrated no expectation that proceedings would not move forward during any such negotiations); *Instruments SA Inc. v. ASI Instruments Inc.*, 53 USPQ2d 1925, 1927 (TTAB 1999) (cursory or conclusory allegations that were denied unequivocally by the nonmovant and were not otherwise supported by the record did not constitute a showing of good cause); *Luemme, Inc. v. D. B. Plus Inc.*, 53 USPQ2d 1758 (TTAB 1999) (sparse motion contained insufficient facts on which to find good cause); and *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 13 USPQ2d 1719, 1720 n.3 (TTAB 1989) ("The presentation of one's arguments and authority should be presented thoroughly in the motion or the opposition brief thereto.")

See also: *Gaylord Entertainment Co. v. Calvin Gilmore Productions Inc.*, 59 USPQ2d 1369 (TTAB 2000) (motion to reopen discovery period denied where Opposer did not show specific reasons for former counsel inaction.)

Further, according to TBMP Section 509.01(a), “[t]he Board will ‘scrutinize carefully’ any motion to extend time, to determine whether the requisite good cause has been shown.” (See *Miscellaneous Changes to Trademark Trial and Appeal Board Rules*, 63 FR at 48086 (1998), 1214 TMOG at 149 (September 29, 1998). See also *Luemme, Inc. v. D. B. Plus Inc.*, *supra*.)

In this case, Opposer’s Motion to Reopen is simply devoid of any factual details supporting good cause for the extension of any dates, let alone the reopening of deadlines that passed more than four months heretofore.

1. Opposer’s claims related to “excusable neglect” are vague and non-specific.

Opposer’s counsel has asserted that he did not obtain the necessary discovery during the original discovery period due to excusable neglect, however he does not provide sufficient explanation as to what discovery is required, (how it might help his case), nor any of the following:

-Why he waited more than six months after the date that he had been initially notified that discovery in this matter would open, namely November 28, 2004, and until June 29, 2005 to serve Opposer’s: First Set of Interrogatories; First Requests For Production of Documents and First Requests For Admissions?;

- Why on June 29, 2005 he chose to serve on Applicant, by mail, a set of excessive and unreasonable interrogatories on behalf of Opposer in violation of Trademark Rule 2.120(d)(1)?;

- Why once he was served with Applicant’s “General Objections To Opposer’s Excessive Interrogatories Set One” back on August 12, 2005, (which expressly objected *inter alia* on the basis that the number of interrogatories propounded well exceeded the limitations placed on such discovery pursuant to certain specified authorities, including, without limitation “37 C.F.R. § 2.120(d)(1); Helen R. Wendel, *TIPS FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE* TTAB: *The Burden Shifts: Revised Discovery Practice Under Trademark Rule 2.120(d)(1)*, 82 Trademark Rep. 89 (1992); *Brawn of California Inc. v. Bonnie Sportswear Ltd.*, 15 USPQ2d 1572, 1574 (TTAB 1990).”) he chose not to meet and confer regarding same, nor to promptly move to compel responses, nor, rather to just simply serve on Applicant a set of conforming and non-excessive interrogatories?;

- Why, in light of having duly and timely received Applicant’s responses to Opposer’s First Set of Requests For Admissions (1-15) and Applicant’s responses to Opposer’s First Request For Production of Documents and Things, (1-25) as were served on August 12, 2004, he still, now, needs to serve an additional (as-yet-unidentified) set of interrogatories on Applicant herein?;

- Why on September 17, 2005, and while cognizant of Applicant's prior-stated objections did he re-serve on Applicant's counsel, the identical set of Opposer's First Set of Interrogatories, rather than reviewing the applicable law, as cited by Applicant and instead, just sending a conforming set of interrogatories within the legal limit?;
- Why after reviewing Applicant's second "General Objections To Opposer's Excessive Interrogatories Set One", as well as Applicant's counsel's detailed letter, dated September 29, 2005, cited authorities and interrogatory counting worksheet, he did not even attempt to meet and confer with the Applicant, tailor or otherwise limit the number of excessive interrogatories which he expected a response thereto, or otherwise promptly move the Board to compel a further response on grounds challenging the "Applicant's well-taken" objection on the basis of his own asserted claims?;
- Why he waited more than three months after receiving Applicant's August 12, 2005 objections to Opposer's interrogatories to actually file a motion to compel responses thereto?;
- Why, in light of the fact that discovery had closed on September 30, 2005, and the Opposer's initial testimonial period was set to close on December 29, 2005, he did not include within his motion to compel filed on November 28, 2005 a request to reopen discovery or to otherwise reset the trial dates herein? (Thereby necessitating the instant motion);
- How reopening discovery and further extending the trial dates (for at least 75 more days) herein in order to enable him to serve, and for Applicant to respond to an additional set of (as-yet-identified, and likely objectionable) interrogatories might assist his client in furthering the interests of justice herein?;
- Why, after the Board has recently denied Opposer's motion to compel, finding that the Applicant's prior communicated objections to the excessive interrogatories were "well taken", and has thus ruled that "applicant need not provide answers thereto" that he can now submit that he was "surprised" by the Board's ruling, denying response to interrogatories?;
- On what basis he has contended at page 2 of his motion to reopen that "*the discovery period had already closed on September 30, so this was not within my reasonable control*"?;
- On what basis now that the Board, *sua sponte*, has graciously reopened and again extended the Opposer's initial trial period for another ninety days, that he can now contend that the trial dates should again be extended?; nor
- Why, under the totality of circumstances, and in light of the repeated delays and rescheduling of these proceedings caused strictly by the Opposer and his counsel, Opposer's motion should not be denied and sanctions imposed against Opposer and its counsel?

Rather than explain any of these crucial issues, Opposer's counsel has simply and conclusorily submitted only a vague claim of "excusable neglect", as is contained in one paragraph at page 2 of Opposer's motion, namely:

"I believed, in good faith, that the interrogatories I submitted were less than 75 in number, counting subparts, and therefore were within the cited trademark rule. I was surprised by the Board's ruling to the contrary. Though I was timely in filing my motion to compel on November 23, the discovery period had already closed on September 30, so this was not within my reasonable control."

In light of the Board's requirement for the presentation of specific and detailed arguments and authority in support of a motion to reopen or to extend time, as discussed above, Opposer's cursory claim does not meet the legal standard as required by the TBMP, and therefore the instant motion must be denied.

Moreover, in light of the bold frivolity associated with the baseless and unsubstantiated Motion to Reopen, an appropriate sanction against Opposer and its counsel should be strongly considered by the Board herein.

B. Opposer Has Failed To Demonstrate Any Actual "Excusable Neglect", Nor Any "Good Cause", Nor Any Basis To Reopen The Discovery Period And To Further Extend The Trial Schedule Herein.

37 C.F.R. §2120(a) provides:

The Trademark Trial and Appeal Board will specify the opening and closing dates for the taking of discovery. The trial order setting these dates will be mailed with the notice of institution of the proceeding. The discovery period will be set for a period of 180 days. The parties may stipulate to a shortening of the discovery period. The discovery period may be extended upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board. If a motion for an extension is denied, the discovery period may remain as originally set or as reset. Discovery depositions must be taken, and interrogatories, requests for production of documents and things, and requests for admission must be served, on or before the closing date of the discovery period as originally set or as reset.

In this case, pursuant to the Board's Order dated November 8, 2004, discovery was originally set to open on November 28, 2004 and to close 180 days later on May 27, 2005.

After several administrative issues arose (which in no way caused Opposer to delay in seeking discovery, rather, as were related to Opposer's apparent failure to ensure that its Answer to the Counterclaim was properly filed in this action, and its failure to maintain its complete and accurate address with the TTAB herein), following the Board's orders dated March 30, 2005 and July 12, 2005, respectively, the discovery period herein was twice reset, ultimately until it closed herein on September 30, 2005. In total, the parties had more than 300 days to propound and serve discovery before the discovery period closed.

Nonetheless, Opposer's counsel now claims that, despite having received ample and repeated notice of Applicant's "well-taken" objections that Opposer's First Set of Interrogatories were unreasonable and excessive in number, his mistaken, if not willfully blind "belief" vaguely stated "that the interrogatories . . . were less than 75 in number, counting subparts, and therefore were within the cited trademark rule" and his resulting "surprise" caused by the Board's ruling to the contrary, amounts to "excusable neglect." Nothing could be further from reality.

The Opposer's First Set of Interrogatories, so well exceeded the permissible limit that Opposer's Motion to Compel, was flatly denied based on Rule 2.120 (d). By the undersigned's count, using the method explicitly set forth in the TBMP §405.03(b), and as shown in the supporting worksheets to the Applicant's Response to Opposer's Motion to Compel, the Opposer had propounded -- approximately 154 interrogatories, counting subparts -- more than twice the limit permitted in cases before the TTAB and nearly five times the number of interrogatories permitted by the District Courts. In light of the Applicant's timely, repeated and well documented objections, Opposer's counsel could not really have been "surprised" by the Board's recent ruling denying Opposer's Motion To Compel. Adding insult to injury, Opposer's counsel now alludes to some unknown circumstance that "was not within (his) reasonable control", namely: his own failure to timely serve a non-excessive and conforming number of interrogatories on Applicant within the discovery period. Under the circumstances, such delay solely on the part of Opposer, in no way constitutes "excusable" neglect, nor justifies the granting of his latest spurious motion.

1. Opposer's Own Delay in Seeking Discovery Cannot Constitute "Good Cause".

The Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), Second Edition - June 11, 2003, First Revision - March 12, 2004, explicitly advises counsel of the need for early initiation of discovery to allow for follow-up discovery. TBMP § 403.05.

If a party wishes to have an opportunity to take "follow-up" discovery after it receives responses to its initial requests for discovery, it must serve its initial requests early in the discovery period, so that when it receives responses thereto, it will have time to prepare and serve additional discovery requests prior to the expiration of the discovery period. (Id. citing: 37 CFR §§ 2.120(a) and 2.121(a); and *PolyJohn Enterprises Corp. v. 1-800-TOILETS, Inc.*, 61 USPQ2d 1860, 1861 (TTAB 2002) (mistaken belief that resetting time to respond to discovery also extended discovery and testimony periods did not constitute excusable neglect to reopen).

"Mere delay in initiating discovery does not constitute good cause for an extension of the discovery period." TBMP §403.04 citing *Luehrmann v. Kwik Kopy Corp.*, 2 USPQ2d 1303, 1305 (TTAB 1987) (no reason given why discovery was not taken during the time allowed); and Janet E. Rice, *TIPS FROM THE TTAB: The Timing of Discovery*, 68 Trademark Rep. 581 (1978)

Thus, a party which waits until the waning days of the discovery period to serve interrogatories, requests for production of documents and things, and/or requests for admission will not be heard to complain, when it receives responses thereto after the close of the discovery period, that it needs an extension of the discovery period in order to take "follow-up" discovery."

TBMP §403.04 (citing *American Vitamin Products Inc. v. Dow Brands Inc.*, 22 USPQ2d 1313, 1316 n. 4 (TTAB 1992)).

As noted above and shown in the attached Timeline, although the discovery period initially opened herein in November 2004, Opposer waited until the end of June 2004, to serve his first set of excessive interrogatories.

After receiving Applicant's clearly stated and detailed objections, Opposer waited more than three months and until the penultimate day, on November 28, 2005, to file his (unwarranted and subsequently denied) motion to compel, which itself, did not request to extend any deadlines or reopen the (extended) discovery period herein, which had closed on September 30, 2005.

Thereafter, Opposer waited more than 113 days after the discovery period closed before even filing the instant motion to reopen discovery. As noted above, Opposer has failed to diligently

seek discovery and should not now be given more time to do what any party in the position of an Opposer is expected to do. His failure to follow the Board's admonition that the parties should initiate discovery early, nor the Federal Rule that requires similar diligence with respect to the timeliness of motions certainly cannot now constitute "excusable neglect" to reopen discovery or other good cause to extend the remaining dates set herein. (See, e.g., *Societa Per Azioni Chianti Ruffino Esportazione Vinicola Toscana v. Colli Spolentini Spoletoducale SCRL*, 59 USPQ2d 1383, 1383-84 (TTAB 2001) (the press of other litigation may constitute good cause to extend but alleged deficiencies in discovery responses not good cause to extend discovery where timely motion to compel was not filed); *Procyon Pharmaceuticals Inc. v. Procyon Biopharma Inc.*, 61 USPQ2d 1542, 1543-44 (TTAB 2001) (petitioner failed to explain how activity of rearranging its laboratory facilities during relevant time period prevented taking testimony; no detailed information regarding petitioner's apparent difficulty in preparing and submitting its evidence or why petitioner waited until the last day of its testimony period to request the extension); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000) (applicant's motion to extend discovery denied when counsel knew of unavailability of witness a month before, yet delayed until last day to seek an agreement on an extension of time. In this case, defendant's counsel knew that defendant would not be able to comply with deadline, yet waited until penultimate day of response period to file unconsented motion to extend time); *Fairline Boats plc v. New Howmar Boats Corp.*, supra (mere existence of settlement negotiations or proposals, without more, would not justify delay in proceeding with testimony); *Instruments SA Inc. V. ASI Instruments, Inc.*, supra (plaintiff's claim of ongoing bilateral settlement negotiations was rebutted by defendant, and no other reason for plaintiff's failure to proceed with discovery was shown); *Luemme, Inc. v. D.B. Plus Inc.*, supra, 1760-61 (diligence not shown; discovery requests not served until last day of the discovery period: plaintiff failed to set forth detailed facts concerning the circumstances – plaintiff's allegedly busy travel schedule – which necessitated the extension, and record showed that need for extension in fact resulted from plaintiff's delay and lack of diligence during previously-set discovery period); *Luehrmann v. Kwik Kopy Corp.*, 2 USPQ2d 1303 (TTAB 1987) (desire to conduct follow-up discovery is not good cause for extension of discovery period where party seeking extension did not serve initial discovery requests until late in discovery period).

Thus, in each of the aforementioned cases, the respective parties' motions to reopen or extend time were denied, albeit, they were based on stronger grounds than are instant herein.

2. Opposer Has Not Met The Legal Standard For "Excusable Neglect"

According to TBMP § 509.01(b), when making a motion to reopen time under Fed. R. Civ. P. 6(b), "the movant must show that its failure to act within the time previously allotted therefor was the result of excusable neglect."

"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). 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 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."⁵

Applicant therefore addresses each such *Pioneer* factor in turn.

- (i) Applicant's business and rights in his mark at issue have been, are and will be harmed and prejudiced by direct acts and dilatory conduct of the Opposer herein.

Without any good faith basis for so stating, Opposer's counsel has claimed herein:

"Applicant will in no way be prejudiced by the reopening of the discovery period."

As demonstrated in the attached declaration of Keith Cangiarella, Opposer's counsel is certainly mistaken. Indeed as the direct result of acts of the Opposer as well as Opposer's dilatory conduct in these proceedings, the Applicant has been prevented from using his trademark MESSAGE IN A BOTTLE and related derivatives (e.g., message in a bottle invitation") as a commercial "pay-per-click" advertising tool used to promote Applicant's website and branded goods and services. As the result of Opposer's conduct, Applicant has suffered from substantially reduced Internet traffic and his business has suffered a significant resulting loss of sales and prospective sales. (Cangiarella Decl.¶10). Indeed, the popular search engine Yahoo! and its partners have refused to permit Applicant to advertise his products under his MESSAGE IN A

⁵ *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, supra at 395 and *Pumpkin Ltd. v. The Seed Corps*, supra at 1586.

BOTTLE trademark until this particular opposition proceeding pending before the USPTO is resolved. (Cangiarella Decl.¶9).

In addition, due to Opposer's inexcusable and obstreperous conduct herein, including the present motion, Applicant has suffered continued business uncertainty, disruptions, and legal costs and fees related to his mark. (Cangiarella Decl.¶¶ 11, 12, TIMELINE).

(ii) The extension requested will unreasonably add to these already extended proceedings;

While Opposer's counsel contends in his brief that "*no lengthy delay is sought, and there will be no significant impact on the proceeding...*" he is again mistaken. AFTER HAVING ALREADY BEEN TWICE RESET, THE DISCOVERY PERIOD HEREIN OPENED IN NOVEMBER 2004 AND CLOSED IN SEPTEMBER 2005. Now, Opposer seeks more time to prepare, serve and await Applicant's responses (and potential objections) thereto after another thirty (30) days (plus mailing) for the response; and then ostensibly, additional time to review and consider use of the responses to some as-yet-identified set of interrogatories? Such a lengthy delay would necessitate another unfair, harmful and unreasonable extension of these proceedings.

(iii) Opposer and its counsel have caused the need for the "delay" sought, if any which was certainly within the reasonable control of the movant.

It has been held that the third *Pioneer* factor, i.e. "the reason for the delay, including whether it was within the reasonable control of the movant", may be deemed to be the most important of the *Pioneer* factors. See *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, supra at n.7.

In the Motion to Reopen Opposer's counsel recited the procedural history leading to the denial of his motion to compel responses to interrogatories, rather than stating any justification for the need to reopen discovery at this late date. Had he simply followed the TBMP, by initiating discovery early, by meeting and conferring on Applicant's "well-taken" objections, by promptly filing any motions to compel (or instead, perhaps preparing a conforming and non-excessive set of up to 75 interrogatories within the allotted time); by requesting the extension of time before the expiration of the discovery period, or at any reasonable time shortly thereafter, or by taking any reasonable steps within his control rather than blaming his surprise on his on failure to read and

understand the procedural rules of discovery herein, Opposer simply should not have been “surprised” by the Board’s denial of his belated Motion to Compel and therefore, as a matter of law, his mistake construing the discovery Rules herein is no justification to extend time herein. (See *Atlanta-Fulton County Zoo Inc. v. De Palma*, 45 USPQ 2d 1858 (TTAB 1998), counsel’s oversight does not justify his failure to timely file the motion; a party moving to extend time must demonstrate that the requested extension of time is not necessitated by the party’s own lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefore; petitioner’s motion to extend discovery was denied, because diligence was not shown and discovery requests were not served until last day of the discovery period. *Luemme, Inc. v. D.B. Plus Inc.*, *supra* at 1760-61) “Inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute “excusable” neglect *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, *supra* at 392; nor should it here.

(iv) Opposer has not acted in good faith.”⁶

A. OPPOSER HAS NOT ESTABLISHED ANY NEED FOR THE EXTENSION

Though Opposer’s Motion To Reopen has “spirit,” it is completely devoid of any statement relating to the importance of any particular discovery sought or how it might justify good cause for the extension sought.

B. OPPOSER HAS NOT BEEN DEPRIVED OF THE OPPORTUNITY TO TAKE DISCOVERY HEREIN

Applicant has duly and timely responded to Opposer’s Requests For Admission and Requests For Production propounded herein. Opposer has not identified any relevant discovery sought affecting the potential outcome of this case.

C. OPPOSER’S COUNSEL DID NOT ATTEMPT TO MEET AND CONFER PRIOR TO FILING THE INSTANT MOTION

As a final note bearing directly on the lack of good faith on the part of Opposer’s counsel herein, it should be noted that he made no attempt to contact, to request a stipulation or to

⁶ *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, *supra* at 395 and *Pumpkin Ltd. v. The Seed Corps*, *supra* at 1586.

otherwise meet and confer in any manner whatsoever with Applicant, or the undersigned counsel prior to filing the instant motion.

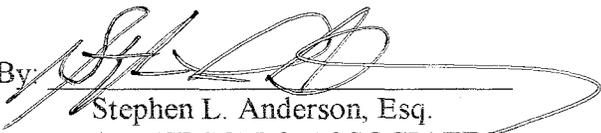
IV. CONCLUSION

According to TBMP Section 509.01(a): "If a motion to extend the time for taking action is denied, the time for taking such action may remain as previously set." (Citing: *Trademark Rules* 2.120(a) (discovery period); 2.121(a)(1) (testimony period); see also *Fairline Boats plc v. New Howmar Boats Corp.*, *supra* at 1479; *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, *supra*; *Luemme Inc. v. D.B. Plus Inc.*, *supra*; and *Procyon Pharmaceuticals Inc. v. Procyon Biopharma Inc.*, *supra* at 1544 (**petitioner's testimony period consequently expired where motion to extend testimony period was denied and dates were left as originally set**).

When considering the totality of the circumstances herein, Opposer's Motion to Reopen Discovery Period And Extend Trial Schedule, must be denied as a matter of law and all dates set previously should remain.

Indeed, even if the Board were to wait until after February 28, 2006 to properly deny the Opposer's motion to extend trial dates, under the circumstances, and based on the clear authorities cited herein and readily available in the TBMP, such a result would neither be harsh, nor unreasonable in this action.

Dated: January 30, 2006

By: 
Stephen L. Anderson, Esq.
ANDERSON & ASSOCIATES
32605 Highway 79 South,
Suite # 208
Temecula, CA 92592

Certificate of Service

I hereby certify that on January 30, 2006 a copy of the foregoing **APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO REOPEN DISCOVERY PERIOD AND EXTEND TRIAL SCHEDULE** was mailed first-class mail, postage prepaid, to Peter H. Smith, Attorney at law, 1535 J Street, Suite A, Post Office Box 1867, Modesto, California, 95353, attorney for Registrant. I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 30, 2006


Kristina K. Harrell

**DECLARATION OF KEITH CANGIARELLA IN OPPOSITION TO MOTION
TO REOPEN DISCOVERY PERIOD AND EXTEND TRIAL**

1. I am the Applicant and the owner of Trademark Application Serial No. 78/229875 for the mark MESSAGE IN A BOTTLE. I am over the age of 18 and, if called, I would competently testify to the following:

2. Since at least as early as March 10, 1998, I have used the mark MESSAGE IN A BOTTLE in United States commerce as related to my goods and services, particularly including, without limitation: novelty, favor, and souvenir bottle containing messages and greetings, invitations, promotional materials of others, and advertising materials of others; kits comprised of bottles, paper for creating promotional messages, advertising messages, greetings, messages and invitations and packaging and boxes for mailing in International Trademark Class 016.

3. I am also the owner of California State Service Mark Registration No. 059960 for the mark MESSAGE IN A BOTTLE which I have used in connection with the:
“[m]anufacturing and shipping a novelty, favor, souvenir bottle containing messages and greetings, invitations, promotional materials of others and advertising materials of others” continuously in the State of California since at least as early as June 01, 1998. A true copy of such certificate of registration as was duly issued on November 30, 2004 by the California Secretary of State is attached hereto as Exhibit “A”.

4. For several years, and at all times relative to this proceeding, I have utilized the Internet to host a website offering the branded goods and services as are described above. As the primary method to attract prospective consumers to my website, at all times relevant to this proceeding, I have utilized “pay-per-click” keyword bidding so that if an Internet user types my trademark MESSAGE IN A BOTTLE into nearly every major search engine (particularly including Yahoo, Google & MSN) then my website, trademark and product descriptions would be prominently listed among the top three “hits” or search results.

5. Such keyword bidding specifically resulted in a significant increase in web traffic to my website, consumer recognition of my MESSAGE IN A BOTTLE trademarked products and indeed led to a significant number of sales and prospective sales of my branded goods and services. For example, attached hereto as Exhibit "B" is a true copy of the first page of my "Client Activity Report" from Overture (now known as Yahoo Search Marketing) which shows that during the month of March 2003, my bids on the three keywords: "message in the bottle;" "message in a bottle invitation" and "message in a bottle gift" resulted in more than five thousand internet users seeing my web address, product name and description, and at least 407 new visitors and prospective customers being directed to my website during that one month, from that one (Overture) search system alone.

6. Shortly after this Opposition proceeding was initiated by Opposer and/or its alleged predecessor, I was advised from Overture that as a result of a complaint re: threatened litigation (by Opposer GOLD SHELLS INC. and its predecessor Roger Rojas) they were discontinuing my right to bid on any keywords that contained the term MESSAGE IN A BOTTLE and/or any other related keywords

7. Despite having responded to Overture by way of providing information and evidence to the effect that:
 - (a) My Application for the mark MESSAGE IN A BOTTLE was approved for publication only after USPTO Examining Attorney Kelley L. Wells, reported having "...searched the Office records and has found no similar registered or pending mark which would bar registration under Trademark Act Section 2(d), 15 U.S.C. §1052(d). TMEP §704.02;"
 - (b) I am entitled to all of the rights afforded by the Certificate of Registration of Servicemark granted to me by the State of California (Exhibit "A") for the mark MESSAGE IN A BOTTLE in connection with the services listed thereon;
 - (c) That Opposer, Gold Shells, Inc. owns no trademark registrations as related to any goods in International Class 016;

(d) That I am informed and believe that Opposer has been guilty of fraud by misrepresenting the nature of its goods and services offered, and/or the nature of the “telecommunications services” alleged in International Class 038 that it and its predecessor have claimed as a matter of record before the USPTO.

8. Notwithstanding my efforts and correspondence with Overture and its attorneys, throughout the duration of these proceedings, my business has been substantially harmed as they and their successor, Yahoo Search Marketing have repeatedly refused to permit me to engage in any keyword advertising with respect to the phrase “message in a bottle” or any related derivative.

9. For example, on June 17, 2005, I received a letter from attorney Howard S. Michael which stated:

“I have been asked by Yahoo! Search Marketing (formerly Overture Services, Inc.) to respond to your June 9th email, which I have reproduced below. As we have explained to you in the past, we have reviewed the applicable records and determined that Golden Shells, Inc. owns a federal registration for ‘message in a bottle’ for use in connection with services that are similar to the services you are currently providing on the www.bottlemeamessage.com web site. Accordingly, pursuant to its guidelines, Yahoo! Search Marketing will not accept your bid for the phrase ‘message in a bottle.’

We understand that you and Golden Shells are currently engaged in proceedings before the Trademark Trial and Appeals Board regarding the phrase ‘message in a bottle.’ Please feel free to contact Yahoo! Search Marketing again in the event you succeed in your case against Golden Shells.

10. As the direct result of delay caused in these proceedings my website has received substantially reduced traffic and my business has suffered a significant resulting loss of prospective sales.

11. Further delays will only cause me to incur additional legal fees and costs associated with this action, uncertainty, as well as significant and continued business delays, harm and disruption.

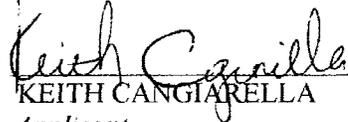
12. Finally the cost associated with the defense of my application in this proceeding have substantially increased quite surprisingly from my original expectations. I therefore

oppose the general notion of further delays herein as I am informed and believe that the Opposer and its counsel have already been the direct cause of repeated acts of erroneous and/or dilatory conduct associated with these proceedings, which are indicated by the notation of an asterisk next to the date in the attached

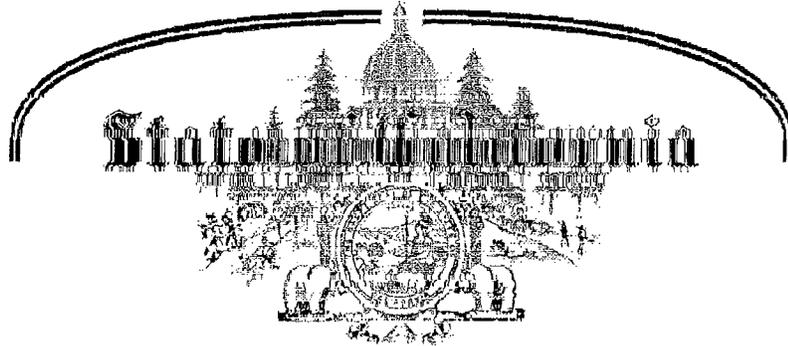
TIMELINE OF TTAB PROCEEDINGS RELEVANT TO THIS MOTION

13. I hereby attest under penalty of perjury as to the foregoing.

DATED: January 26, 2006



KEITH CANGIARELLA
Applicant



SECRETARY OF STATE

**Service Mark Reg. No. 059960 Class No. Int. 35
CERTIFICATE OF REGISTRATION OF SERVICE MARK**

I, KEVIN SHELLEY, Secretary of State of the State of California, hereby certify:

That in accordance with the application filed in this office the SERVICE MARK described below has been duly registered in this office on behalf of:

Name of Applicant: Keith Cangiarella dba Dream Weaver Studios

Business Address: 31 N. Harrington Drive, Fullerton, CA 92831

Date First Used in California: June 1998

Date First Used Anywhere: June 1998

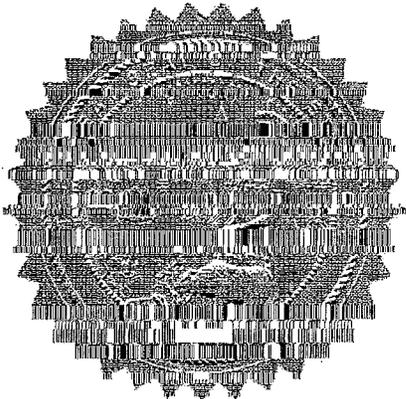
Description of Service Mark: Message in a Bottle

Description of Services with Which the Service Mark is Used: Manufacturing and shipping a novelty, favor, souvenir bottle, containing messages and greetings, invitations, promotional materials of others and advertising materials of others

A copy, specimen, facsimile, counterpart or a reproduction of the mark is attached

Date of Registration: November 30, 2004

Term of Registration Extends to and Includes: November 30, 2014



IN WITNESS WHEREOF, I execute this certificate and affix the Great Seal of the State of California this 2nd day of December, 2004.

Kevin Shelley
KEVIN SHELLEY
Secretary of State

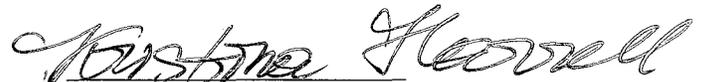
Certificate of Service

I hereby certify that on January 30, 2006 a copy of the foregoing

**DECLARATION OF KEITH CANGIARELLA IN SUPPORT OF
APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO
REOPEN DISCOVERY PERIOD AND EXTEND TRIAL SCHEDULE**

was mailed first-class mail, postage prepaid, to Peter H. Smith, Attorney at law, 1535 J Street, Suite A, Post Office Box 1867, Modesto, California, 95353, attorney for Registrant.

Dated: January 30, 2006


Kristina Harrell