

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Lykos

Mailed: October 20, 2009

Opposition No. 91168015

Campbell Laboratories, Inc.

v.

Kern, David A.

Before Seeherman, Walsh and Taylor, Administrative Trademark Judges.

By the Board:

On May 25, 2009, pursuant to Trademark Rule 2.128(a)(3), opposer was ordered to show cause why its failure to file a main brief should not be treated as a concession of the case. Opposer filed a response thereto on June 24, 2009, stating that it had not lost interest in the case, and that it was hopeful that the parties would be able to reach a settlement agreement. Opposer also moved to compel applicant to file responses to opposer's first set of interrogatories and document production requests, as well as to reopen the testimony periods in this proceeding. Alternatively, opposer indicated that it would agree to dismissal of the case without prejudice.

Applicant filed a brief in opposition thereto,¹

¹ Applicant's motion (filed July 30, 2009) for leave to resubmit a legible copy of its responsive brief is granted.

arguing that the May 25, 2009 order should not be discharged because opposer has lost interest in the case. In the alternative, applicant moved for involuntary dismissal for opposer's failure to prosecute, contending that opposer's motion to compel should be denied as untimely and that opposer has failed to demonstrate excusable neglect to warrant a reopening of the testimony periods.

I. *Board's May 25, 2009 Order to Show Cause*

When the Board issues a show cause order pursuant to Trademark Rule 2.128(a)(3), and the plaintiff in the case files a response indicating that it has not lost interest, the Board will discharge the show cause order and default judgment will not be entered against the plaintiff for failure to file a main brief.

Insofar as opposer filed a motion to compel as well as a motion to reopen the testimony periods in this case in response to the Board's May 25, 2009 order, opposer has demonstrated that it has not lost interest in this proceeding. As such, the Board's May 25, 2009 order is hereby discharged. The fact that opposer alternatively moved for dismissal of the case without prejudice does not warrant the entry of default judgment on this basis.

II. *Opposer's Motion to Compel*

Next, we turn to opposer's motion to compel. For the reasons explained below, opposer's motion to compel is denied as untimely.

Trademark Rule 2.120(e) provides in relevant part that a motion to compel discovery "must be filed prior to the commencement of the first testimony period as originally set or reset." There is no provision in the rule for Board discretion. If testimony periods are reset prior to the opening of the plaintiff's testimony period-in-chief, a motion to compel filed before a first trial period opens is timely. However, once the first trial period opens, a motion to compel filed thereafter is untimely, even if it is filed prior to the opening of a rescheduled testimony period-in-chief for plaintiff. *Cf. See La Maur, Inc. v. Bagwells Enterprises, Inc.*, 193 USPQ 234 (Comm'r 1976).

By Board order dated June 26, 2008 in which the Board approved the parties' stipulation to extend trial dates, opposer's first thirty-day testimony period was reset to close on November 24, 2008. Opposer filed its motion to compel seven months later on June 24, 2009. Inasmuch as opposer's motion was filed after commencement of the first testimony period, opposer's motion to compel is untimely and has been given no consideration.

III. *Opposer's Motion to Reopen Testimony Periods*

Now, we consider opposer's motion to reopen the testimony periods in this proceeding. For the reasons set forth below, the motion is denied.

Fed. R. Civ. P. 6(b), made applicable to Board proceedings by Trademark Rule 2.116(a), provides for an enlargement of time after the expiration of the specified time period ". . . if the party failed to act because of excusable neglect."

As clarified by the Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), and followed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the inquiry as to whether a party's neglect is excusable:

at bottom is 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.

After carefully considering the parties' arguments and submissions, the Board finds that opposer has failed to demonstrate the requisite excusable neglect to warrant a reopening of its main testimony period. Considering first

the third and most important *Pioneer* factor, the reason for the delay, opposer's stated reasons for failing to take testimony during its assigned period were wholly within its control. It is well established that the mere existence of settlement discussions does not justify a party's inaction or delay. See *Atlanta-Fulton County Zoo, Inc. v. De Palma*, 45 USPQ2d 1858 (TTAB 1998). In this case, applicant put opposer on notice prior to the opening of opposer's first testimony period that settlement prospects were in serious jeopardy. See Declaration of Allison Rapp, counsel for applicant. Thus, opposer lacked a reasonable basis for assuming that settlement was imminent. At a minimum, opposer had a duty to either adhere to the trial schedule, or file a motion to extend its testimony period or suspend the case in a timely fashion.

The Board further finds that pursuant to the second *Pioneer* factor, to reopen testimony at this juncture would have a substantial impact on the orderliness of this proceeding. Opposer was well aware that its testimony period closed November 24, 2008, yet it did not move to reopen its testimony period until after applicant filed its motion for involuntary dismissal. The Board has an interest in expeditious resolution of proceedings.

As to the remaining factors - the danger of prejudice to applicant and whether opposer acted in good faith -- even

if we conclude that opposer acted in good faith, this factor does not overcome the aforementioned factors which are not in opposer's favor. In addition, the record does not indicate 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 Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997).

On balance, the Board finds that in this particular case, the second and third *Pioneer* factors are the most salient. Thus, even under the more liberal excusable neglect standard articulated in *Pioneer* and adopted by the Board, such neglect on the part of opposer can neither be overlooked nor excused.

Accordingly, opposer's motion to reopen its testimony period is denied.

IV. *Applicant's Cross-Motion for Involuntary Dismissal*

In view of our denial of opposer's motion to reopen, and inasmuch as opposer has failed to offer any evidence whatsoever in support of its claims during the assigned testimony period for presentation of its case-in-chief, we find that opposer has failed to carry its burden of proof in this case, and cannot prevail herein. Accordingly, applicant's motion for dismissal under Trademark Rule

2.132(a) is granted, and the opposition is dismissed with prejudice.