

Goodman

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

Mailed: October 23, 2010

Opposition No. 91179577

Opposition No. 91179777

Palm Trademark Holding  
Company, LLC

v.

Fujitsu Limited

Before Holtzman, Kuhlke and Cataldo, Administrative  
Trademark Judges.

By the Board:

Now before the Board is applicant's motion to dismiss under Trademark Rule 2.132(a) and alternative motion for judgment on the pleadings which the Board construes as a motion to dismiss under Trademark Rule 2.132(b). Applicant seeks consideration of the "motion for judgment on the pleadings" only if the Board denies the Trademark Rule 2.132(a) motion. The motions are fully briefed.

We turn first to the motion to dismiss under Trademark Rule 2.132(a).

In support of its motion, applicant argues that dismissal is appropriate because of a lack of prosecution by opposer since there has been no "effort by Opposer to change

Opposition Nos. 91179577 and 91179777

trial dates or take testimony" and no evidence has been submitted.

In response, opposer points to its exhibits to the notice of opposition which consist of photocopies of certificates of registration of its pleaded registrations. Opposer asserts that the registrations are "part of the evidentiary record."<sup>1</sup> Opposer further submits that "to the extent that the Board is inclined to grant this [Trademark Rule 2.132(a)] motion" it has established excusable neglect due to its reliance on "world-wide" settlement negotiations with applicant in this matter. Opposer seeks to reopen this opposition proceeding for a period of sixty days "to present additional evidence in this matter" in the event the Board is inclined to grant the motion to dismiss.

Opposer did not introduce the pleaded registrations during its testimony period. Furthermore, applicant has not admitted in its answers or otherwise stipulated to the current ownership and validity of the pleaded registrations. The plain photocopies of certificates of registration attached to the notices of opposition are not status and title copies of the pleaded registrations and are insufficient for purposes of Trademark Rule 2.122(d)(1). Nor

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<sup>1</sup> While opposer pleaded Reg. Nos. 1887791, 1965938, 3113585, 2653036, 2639660, 2265234, 2488694 2588534, 2611088, 2613597, 2681093, 2619261, 2637822 and 2740330 in the notices of opposition, pleaded Regs. Nos. 2588534, 2611088, 2613597, 2681093, 2619261, 2637822 and 2740330 have since been cancelled.

Opposition Nos. 91179577 and 91179777

were such copies of registrations accompanied by printouts from a USPTO electronic database reflecting status and title. Trademark Rule 2.122(d)(1). Accordingly, the pleaded registrations are not of record in these proceedings.

*Syngenta Crop Protection Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112 (TTAB 2009) (photocopy of registration--which is not a status and title copy--attached to notice of opposition not evidence of current status and title of registration, discussing Trademark Rule 2.122(d)(2)); *Teledyne Technologies Inc. v. Western Skyways Inc.*, 78 USPQ2d 1203 (TTAB 2006) (photocopy of registration attached as exhibit to pleading which is not a status and title copy prepared by the Office does not conform to Trademark Rule 2.122(d)(1)).

We therefore must consider whether opposer has established excusable neglect for its failure to submit testimony and evidence and to reopen its testimony period. *See Grobet File Co. of Am. Inc. v. Associated Distrib. Inc.*, 12 USPQ2d 1649 (TTAB 1989) (the "good and sufficient cause" standard, under Trademark Rule 2.132(a), is equivalent to the "excusable neglect" standard which is required to be met in seeking to reopen under Fed. R. Civ. P. 6(b)(1)(B)).

In determining excusable neglect, the Board considers the following factors as set forth in *Pioneer Investment Services Company v. Brunswick*, 507 U.S. 380 (1993) and adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43

Opposition Nos. 91179577 and 91179777

USPQ2d 1582 (TTAB 1997) (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and (4) whether the moving party has acted in good faith.<sup>2</sup>

With respect to the third and most important *Pioneer* factor, opposer points to the parties' worldwide settlement negotiations as the reason for its delay. However, while attempts at settlement are generally favored, they do not excuse opposer's failure to act within the prescribed time or to seek an extension of trial dates. *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1859 (TTAB 1998) (the belief in settlement and/or the existence of settlement negotiations do not justify a party's inaction or delay or excuse it from complying with the deadlines set by the Board or imposed by the rules.) *See also Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1703 (TTAB 2002) (party who 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; trial dates in a Board proceeding

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<sup>2</sup> In considering these factors, the reason for delay generally is considered the most significant. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

Opposition Nos. 91179577 and 91179777

will only be extended or suspended upon motion).<sup>3</sup>

Opposer could have sought an extension of its testimony period or further suspension of proceedings while its testimony period was still open as settlement negotiations would normally constitute good cause for granting such an extension or suspension; however, opposer never filed any such motion with the Board. Opposer waited until after its testimony period closed to seek reopening.

Thus, the Board finds that opposer's failure to act during its testimony period was within opposer's reasonable control.

With regard to the remaining Pioneer factors, we find no evidence of a bad faith attempt by opposer to delay this case, nor specific prejudice to applicant beyond mere delay. We note, notwithstanding, that while mere delay generally does not constitute prejudice, opposer filed its notices of opposition in September 2007 and, despite several extensions of time, has failed to introduce any evidence to date. Reopening testimony at this late date certainly works to applicant's detriment. We find, in addition, from a docket management standpoint, that the delay has a significant potential impact on the judicial proceedings

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<sup>3</sup> The Board also notes that the motion to reopen was contained in footnote and is lacking detailed factual information required in support of the requested relief. *HKG Industries, Inc. v. Perma-Pipe, Inc.*, 49 USPQ2d 1156, 1158 n.1 (TTAB 1998).

Opposition Nos. 91179577 and 91179777

which runs counter to the Board's interest in expeditious adjudication of this case.<sup>4</sup>

On balance, we find that opposer has not demonstrated excusable neglect for its failure to take testimony/submit evidence or to reopen its testimony period.

In view thereof, opposer's motion to reopen its testimony period in this consolidated proceeding is denied.

Because opposer has taken no testimony nor submitted any other evidence in support of its claims during its testimony period, as last reset, applicant's motion to dismiss under Trademark Rule 2.132(a) is granted.

Judgment is hereby entered against opposer, and Opposition Nos. 91179577 and 91179777 are dismissed with prejudice.<sup>5</sup>

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<sup>4</sup> The Board must consider not only the delay caused by briefing and consideration of the motion to reopen but also any delay that would result from granting a reopening/extension of sixty days.

<sup>5</sup> In view of our granting dismissal, the alternative motion for judgment on the pleadings need not be considered.