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

Proceeding	91181621
Party	Plaintiff StonCor Group, Inc.
Correspondence Address	CHARLES N QUINN Fox Rothschild LLP 2000 MARKET STREET, 10TH FLOOR PHILADELPHIA, PA 19103-3291 UNITED STATES cquinn@frof.com, dmcgregor@frof.com, bpalmerchuck@frof.com
Submission	Other Motions/Papers
Filer's Name	Charles N. Quinn
Filer's e-mail	cquinn@frof.com, dmcgregor@frof.com, bpalmerchuck@frof.com
Signature	/CHARLES N. QUINN/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

StonCor Group, Inc.,	:	
	:	
Opposer,	:	
	:	Opposition No. 91181621
v.	:	
	:	Ser. No. 76/650,832
Les Pierres Stonedge Inc.,	:	
	:	
Applicant.	:	

**STONCOR’S MOTION TO REOPEN STONCOR’S PERIOD
FOR STONCOR’S TESTIMONY-IN-CHIEF**

Introduction

This is a motion by StonCor Group, Inc. to reschedule and open StonCor’s testimony period-in-chief in order that StonCor as the opposer may take testimony and introduce additional evidence and exhibits to support StonCor’s opposition to the grant of registration for Les Pierres’ mark.

On 20 December 2007 StonCor Group, Inc. filed a notice of opposition against the grant of registration of Les Pierres’ mark “STONEDGE” that was pending pursuant to application serial number 76/650,832. In its notice of opposition StonCor asserted that there would be a likelihood of confusion as between Les Pierres’ mark and a family of “S T O N” marks owned by StonCor, all of which are registered, in force and incontestable. Attached to the notice of opposition, in accordance with the requirements of 37 C.F.R. 2.122(d)(1), were title and status copies of the fourteen registrations cited by StonCor in support of its notice of opposition. Accordingly, StonCor’s fourteen cited, incontestable United States trademark registrations were in evidence in this proceeding from the beginning.

Discovery closed 8 October 2008. StonCor's 30 day testimony period opened 7 December 2008 and closed on 6 January 2009. No testimony was taken during that period due to the illness of StonCor's counsel. On 13 January 2009 Les Pierres filed a motion for judgment, alleging StonCor had failed to prove its case. On 22 January 2009 Les Pierres filed an amended motion for judgment, again alleging StonCor had failed to prove its case and on 23 January 2009 Les Pierres filed a second amended motion for judgment, yet again alleging StonCor had failed to prove its case. On 29 January StonCor filed a paper asserting that Les Pierres 13 and 22 January motions were moot, having been supplemented by Les Pierres 23 January motion and asserting that StonCor would respond substantially to Les Pierres 23 January motion in a timely fashion. The instant motion by StonCor is not StonCor's only substantive response to Les Pierres' 23 January motion for judgment.

By this motion StonCor seeks rescheduling and opening of StonCor's testimony period in order that StonCor may elicit deposition testimony in support of StonCor's position in this proceeding. StonCor acknowledges that StonCor must meet the standard of "excusable neglect" as respecting the failure to elicit deposition testimony during the testimony period that it had been assigned. StonCor respectfully submits that the materials submitted herewith evidence that StonCor clearly meets that standard and is entitled to the rescheduling and opening of its testimony period.

The United States Supreme Court recognizes that "excusable neglect" is an elastic concept:

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.¹

¹ *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership, et.al.*, 507 U.S. 380.

Courts and this Board in applying the guidance supplied by the Supreme Court in *Pioneer* have recognized that the inquiry as to whether a party's neglect is excusable is, when all is said and done, an equitable inquiry.

As clarified by the Supreme Court in *Pioneer*,...the inquiry as to 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...[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.²

In applying the test, several courts and this Board have held that the third *Pioneer* factor, namely the reason for the delay and whether the delay was within the reasonable control of the movant, should be considered the most important factor.³

Each of the four *Pioneer* factors is addressed separately below:

Factor 1: Danger/No Danger of Prejudice to the Applicant

There is no showing of record of any danger of any prejudice resulting to the Les Pierres through the reopening of StonCor's testimony period. There is no showing of evidence that has been lost, there is no indication that previously available witnesses are now unavailable, and there will be no higher cost for Les Pierres in defending itself then had StonCor taken its testimony during its assigned testimony period.⁴ Illustrative in this regard is the following:

It is difficult to see what cognizable prejudice, in the sense, for example, of lost evidence would...it is always prejudicial for a

² *Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 USPQ2d 1858 (TTAB 1998); see also *Gaylord Entertainment Co. v. Calvin Gilmore Productions, Inc.*, 59 USPQ2d 1369 (TTAB 2000); *Jodi Kristopher, Inc. v. International Seaway Trading Corporation*, USPQ2d (TTAB 2008)

³ *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). Footnote 7 of the opinion is as follows: 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).

⁴ *HKG Industries, Inc. v. Perma-Pipe, Inc.*, 49 USPQ2d 1156 (TTAB 1156).

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*.... Impact on judicial proceedings is arguably of concern; but if the parties had reported on the 59th day that the settlement could not be consummated, it would not appear to have a materially less significant impact than it does here when the report occurred some 21 days later.⁵

Accordingly, factor 1, the danger or lack of danger of prejudice to the Les Pierres weighs in favor of rescheduling and opening StonCor's testimony-in-chief period.

Factor 2: Length of Delay and Its Potential Impact on the Proceedings

StonCor's testimony period closed on 6 January 2009. This motion is being filed promptly thereafter, as soon as StonCor's counsel has made some recovery from the illness that caused his inability to take testimony during the assigned testimony period. Accordingly, the length of the delay, being twenty-four days, is minimal.⁶

The potential impact on the case and the additional time for conduct of this proceeding will be approximately eight weeks if StonCor's motion is granted and the StonCor testimony period is rescheduled to open in the neighborhood of 1 March, with the subsequent dates rescheduled accordingly.

To minimize the delay in the conduct of the remainder of this proceeding, StonCor hereby offers, in the event StonCor's motion is granted, to shorten StonCor's period for preparation of its principal brief from 60 days to 30 days⁷, thereby recovering one month that had been lost due to StonCor's counsel's illness. Accordingly, with this offer by StonCor, the potential impact of the delay on the proceeding will be minimized.

⁵ *Pratt v. Philbrook*, 109 F.3d 18 (1st Circuit 1997).

⁶ In *Pratt, supra*, the First Circuit found on different facts that a 21 day delay in filing was excusable.

⁷ This offer is subject to receipt of the parties' deposition transcripts and exhibits in a timely fashion.

Factor 3: The Reason for the Delay

The reason for the delay was a severe respiratory illness suffered by StonCor's principal counsel in this matter. As set forth in the accompanying declaration of StonCor's counsel, StonCor's counsel was taken ill on Tuesday 9 December 2008 with an illness that began as influenza and quickly developed into a severe bronchial/sinus infection. As soon as the infection developed, StonCor's counsel was under the care of his physician.⁸ The severeness of the illness is evidenced by the fact that two successive ten day courses of the antibiotic Amoxicillin did nothing to alleviate counsel's symptoms whereupon counsel's physician switched and prescribed two successive 14 day courses of Avilox⁹, another antibiotic, which has had some beneficial effect in alleviating StonCor's counsel's symptoms. Even as this motion is written and being filed, StonCor's counsel is still fighting the residual effects of the illness including a periodic cough (that brings up mucus), extreme weakness and fatigue. As a result, StonCor's counsel has been required to modify his work day and to work fewer than his normal number of hours.

Over the course of the illness, which spanned StonCor's testimony period, as indicated in StonCor's counsel's declaration he has missed nearly three full weeks of work and would have missed even more work days except for the fact that the Christmas and New Years holidays were days when his firm was closed.¹⁰

As a measure of the severity of the illness, during the illness, StonCor's counsel lost 16 pounds from his normal body weight of 194.¹¹

As a result of this illness, StonCor's counsel was not able to schedule the deposition of StonCor's principal witness in support of StonCor's case-in-chief nor could he prepare for and

⁸ Declaration of Charles N. Quinn, ¶ 2, ln. 4.

⁹ Declaration of Charles N. Quinn, ¶ 2, ln. 9.

¹⁰ Declaration of Charles N. Quinn, ¶ 3, ln. 3.

¹¹ Declaration of Charles N. Quinn, ¶ 4, ln. 2.

take the deposition during that time. Moreover, on those partial work days when StonCor's counsel was in his office StonCor's counsel was not in condition to work with another attorney, to get any other qualified attorney in his firm to learn the case and to prepare for and to take the deposition in a timely fashion.^{12 13}

Accordingly, the reason for StonCor's failure to take testimony in this case was an unexpected illness and the severity thereof, suffered by StonCor's counsel. This was not a case in which there were procedural overlooks by a party's counsel.¹⁴ In this case the reason for the failure to take testimony was beyond the control of anyone involved in the case. One cannot predict when one's health will be taken from him or her.

Whether the Movant Acted in Good Faith

StonCor has engaged in settlement negotiations with the Les Pierres, to no avail. StonCor has served discovery requests on Les Pierres and those discovery requests were answered, albeit after StonCor's testimony period had closed. Responses to Les Pierres' discovery requests served heretofore on StonCor are being served to substantially contemporaneously with this motion even though the time for discovery has passed and Les Pierres has not filed any motion to compel discovery. StonCor's good faith is further evidenced by StonCor's offer to cut its principal briefing period in half, to recover some of the time lost due to StonCor's counsel's illness.

Conclusion and Prayer for Relief

StonCor respectfully submits that it has met the excusable neglect standard for its failure to take testimony during the period for taking its testimony-in-chief. StonCor respectfully prays that its testimony-in-chief period be reopened at an early date.

¹² *Firsthealth of the Carolinas, Inc. v. Carefirst of Maryland*, 479 F.3d 825; 81 USPQ2d 1919 (Fed. Cir. 2007).

¹³ Declaration of Charles N. Quinn, ¶ 5.

Respectfully submitted,

Date: 30 January 2009

/CHARLES N. QUINN/

CHARLES N. QUINN

Attorney for Opposer, StonCor Group, Inc.

Fox Rothschild LLP

2000 Market Street, Tenth Floor

Philadelphia, PA 19103

Tel: 215-299-2135; Fax: 215-299-2150

email: cquinn@foxrothschild.com

¹⁴ *Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 USPQ2d 1858 (TTAB 1998).

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StonCor Group, Inc.,	:	
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Opposer,	:	
	:	Opposition No. 91181621
v.	:	
	:	Ser. No. 76650832
Les Pierres Stonedge Inc.,	:	
	:	
Applicant.	:	

CERTIFICATE OF SERVICE

I, Charles N. Quinn, of full age, by way of certification, state that a copy of StonCor's Motion to Reopen StonCor's Period for StonCor's Testimony-in-Chief and Supporting Declaration of Charles N. Quinn, was sent to applicant's counsel on the date set forth below via electronic mail and by first class mail, postage prepaid, addressed as follows:

James R. Menker, Esquire
Holley & Menker, P.A.
P.O. Box 331937
Atlantic Beach, FL 32233
jmenker@holleymenker.com, lgreer@holleymenker.com,
eastdocket@holleymenker.com

Date: 30 January 2009

/CHARLES N. QUINN/
Charles N. Quinn

2. I was taken ill on Tuesday 9 December 2008. The illness began as influenza with alternate chills and sweats, together with a dog barking cough, and quickly developed into a severe bronchial/sinus infection. Since contracting the bronchial/sinus infection I have been under the care of Dr. Heatley Sebring, Paoli Memorial Hospital, 210 Medical Office Building, Paoli, Pennsylvania, 19301 (610-296-7055). When Dr. Sebring first treated me, Dr. Sebring prescribed, in addition to various cough medications, mucus thinners, and the nasal steroid Flonase, two successive ten (10) day courses of Amoxicillin, which did nothing to alleviate my symptoms. After that Dr. Sebring prescribed two successive fourteen (14) day courses of Avelox, which finally seems to have had some beneficial effect in alleviating my symptoms, even though I am still fighting the residual effects of this illness. One of the residual effects manifests itself as a periodic cough, which sounds much like a dog bark, and brings up ugly mucus from my lungs. Another residual effect is extreme weakness and fatigue. This has required me to modify my work day and to work fewer than my normal number of hours.

3. Over the course of the illness I have missed nearly three weeks of work to date. I would have missed even more work days except for the fact that December 25 and 26 and January 1 and 2 were holidays and our firm was closed. While ill I slept nearly all of the time; this was especially so during the most severe period of the illness, which spanned the period from Wednesday 10 December until after the testimony period for StonCor closed, on 6 January 2009.

4. During the course of the illness I lost sixteen pounds from my normal body weight of 194, that I am now trying to gain back. I still tire easily; I cannot work long hours. I do not have my strength back.

5. As a result of all of this, I was not able to schedule the deposition of StonCor's principal witness in support of StonCor's case in chief and I could not prepare for and take that deposition during that time. I was not in any condition to work with another attorney, to have any other attorney in our firm learn the case and prepare for and take the deposition. When on one or two occasions I tried to go into the office and work for a few hours, I found it essentially impossible to work with any other person, including my secretary, my paralegal and my attorney colleagues. Everyone was reluctant to come close to me and no one would come into my office, fearing that they would contract the illness as a result of my essentially non-stop and continuous coughing and the resulting mucous discharge. When someone wanted to speak with me, they would either telephone me or speak as they stood in the hallway outside my office while I was sitting at my desk. I was asked to go home. Being in a very weak condition and under those circumstances, there was no way that I could brief another attorney on the case and have him or her take the deposition testimony.

6. I continue to work less than my normal number of hours in the office, due to continued fatigue. I am only now, by working whenever I have the energy at home in the evenings and on the weekends, beginning to catch up on my work, including my work on this case.

7. I hereby declare, under penalty of perjury pursuant to 28 USC 1746, that all statements made herein are true and that all statements made herein on information and belief are believed to be true and further that I realize that false statements and the like so made herein are punishable by fine, or imprisonment or both, under 18 USC 1001 et seq., and further may jeopardize StonCor's position in this proceeding.

8. To the extent there is any fee required in connection with the receipt, acceptance and/or consideration of declaration and/or any accompanying papers herewith, please charge all such fees to Deposit Account 50-1943.

Respectfully submitted,

Date: January 30, 2009

/Charles N. Quinn/
CHARLES N. QUINN
Attorney for Opposer
Fox Rothschild LLP
2000 Market Street
Tenth Floor
Philadelphia, PA 19103
Tel: 215-299-2135
Fax: 215-299-2150
email: cquinn@foxrothschild.com