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

Proceeding	91194772
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Joy A. Jones

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

Cannery Casino Resorts, LLC,

Opposer,

vs.

Omri S. Shellef,

Applicant.

Marks:

EAST SIDE SOCIAL CLUB, Serial No.
77/767677

Opposition No.: 91194772

**OPPOSER'S RESPONSE TO APPLICANT'S REQUEST TO REOPEN
TIME TO RESPOND TO OPPOSER'S MOTIONS**

Opposer Cannery Casino Resorts, LLC ("CCR"), by and through its undersigned counsel of record, hereby submits this Response to Applicant's Request to Reopen Time to Respond to Opposer's Motions (the "Response"). This Response is based upon the records and pleadings on file herein, the memorandum of points and authorities set forth below, and any further documentation or pleadings submitted to the Trademark Trial and Appeal Board (the "Board").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The plain and undeniable fact presented by Applicant in his Request to Reopen Time to Respond to Opposer's Motions (the "Request") is that Applicant Omri Shellef ("Mr. Shellef" or "Applicant") failed to timely file response briefs to three separate motions filed by CCR. Mr.

Shellef missed the deadline for filing his opposition briefs by weeks. But rather than accept responsibility for missing the filing deadline, Mr. Shellef instead attempts to shift full responsibility to the Board. Mr. Shellef's misguided blame-shifting is, unfortunately, symptomatic of his cavalier approach to these entire proceedings.

The Board has emphatically and unambiguously admonished Mr. Shellef that he is expected to fully comply with all procedural requirements administered by the Board. With regard to the issues presented by the instant Request, Mr. Shellef has not abided by the Board's clear instructions. Thus, Mr. Shellef's failure to meet the easily-understood deadline for filing responses to CCR's motions is a problem of his own making—it's not the Board's fault and it's not CCR's fault either. Because Mr. Shellef has failed to abide the Board's clear instructions and he has failed to timely file responses to CCR's motions, the Request should be denied in its entirety and the Board should grant each of CCR's motions based upon Mr. Shellef's failure to oppose same.

II. PROCEDURAL OVERVIEW

By way of background, the Board should be fully aware of Mr. Shellef's multiple failures to comply with his obligations pursuant to the applicable rules and the Board's Orders. The Request simply highlights yet another of Mr. Shellef's failures.

Applicant filed his Answer on June 14, 2010, but he failed to timely serve his Answer on CCR. Given Applicant's pro se status, CCR made several efforts to contact Applicant regarding his un-served Answer. Applicant eventually served his Answer on CCR on or about July 13, 2010, nearly thirty days after he filed it.

While CCR attempted to negotiate a possible resolution of this matter with Mr. Shellef, the settlement discussions abruptly halted when Applicant refused to consent to an extension of the discovery period and instead filed a Request to Expedite Trademark Registration ("Request

to Expedite”) on or about December 27, 2010.¹ Because Mr. Shellef refused to consent to an extension of the discovery period, CCR was forced to file a Motion for Extension of Case Management Deadlines on December 30, 2010 (the “Motion to Extend”). Mr. Shellef filed his Response to the Motion to Extend on or about February 1, 2011—several weeks after the explicit deadline—which was, as the Board well-noted, not truly a response to the Motion to Extend but was instead a rehash of his request for the Board to “expedite” his mark registration.

In response Applicant’s “response brief”, the Board admonished Mr. Shellef in its Order dated February 9, 2011. Therein, the Board plainly stated as follows:

[I]n view of the nature of applicant’s motion, applicant is required to contact the assigned Interlocutory Attorney to request a joint conference with the Board and opposer’s counsel *before* he submits another motion or request with the Board. Additionally, applicant is reminded that **strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.**

February 9, 2011 Order, at 4 (emphasis in original).

On December 21/22, 2011—following multiple efforts by CCR to reach a good faith settlement with Applicant (which he unexplainably torpedoed)—CCR filed the following motions and served each by first class mail: (1) Motion for Leave to Amend Notice of Opposition (the “Motion for Leave to Amend”); (2) Motion to Stay Deadline for Serving Pretrial Disclosures and Notice of Intent to Comply (the “Motion to Stay”); and (3) Motion for Summary Judgment. Applicant’s deadlines for filing his response briefs fell as follows: (1) for the Motion for Leave to Amend: January 10, 2012; (2) for the Motion to Stay: January 10, 2012, 2012; and

¹ CCR filed its Response to the Request to Expedite on January 18, 2011.

(3) for the Motion for Summary Judgment: January 25, 2012.² Applicant did not meet any of these deadlines.

Instead, Applicant filed his Request on February 15, 2012—thirty-six days after the due date for his responses to the Motion for Leave to Amend and the Motion to Stay and twenty-one days after the due date for his response to the Motion for Summary Judgment. Regardless, Applicant’s dilatory request to extend the deadlines for filing his responses lacks any merit and it must therefore be denied in its entirety.

III. LEGAL ARGUMENT

A. *The Burden of Proof to Obtain An Extension of Time to File the Responsive Briefs.*

As a threshold matter, Applicant bears the burden of proof to justify the need for an extension of time to file his responsive briefs. Generally, the Board will not reopen the time for a party to file a response brief absent a showing of excusable neglect. *See* TBMP § 502.02(b) (“[the] time periods for responding to motions shall apply unless another time is specified by the Board; or the time is reopened . . . by order of the Board on a motion showing excusable neglect.”). Moreover, the TBMP rules explicitly state that when a motion seeking additional time in which to file a responsive pleading “is not filed until after the expiration of the period as originally set . . . the motion is a motion to reopen, and the moving party must show that its failure to act during the time allowed therefore was the result of excusable neglect.” TBMP § 509.01 (emphasis added); *see also*, 37 CFR § 2.116(a); Fed. R. Civ. P. 6(b). Applicant has not provided the Board with any basis upon which it can conclude that Applicant’s failure to file his responsive briefs is based upon excusable neglect.

² *See* TBMP § 502.02(b); 37 CFR § 2.119(c).

B. Applicant's Justifications for Requesting That the Board Reopen the Time Period For Him to File Responsive Briefs Do Not Rise to a Level of Excusable Neglect.

Critically, Applicant's Request fails to provide the Board with any demonstrable justification or evidence arising to a level of excusable neglect that warrants reopening the time period for him to file his responsive briefs to CCR's motions. In his Request, Applicant contends that three separate events occurred "outside of his control" and that these events arise to the level of excusable neglect. Applicant's contentions are baseless. The Request is simply littered with recitations of problems that Applicant created through his own actions or inactions, and no degree of blame-shifting alters that plain fact.

1. Applicant's Acknowledgement of Service Is A Recognition That the Deadlines For Filing Responsive Pleadings Were Triggered.

Initially, Applicant suggests that his having received CCR's served copies of the Motion for Leave to Amend, Motion to Stay, and Motion for Summary Judgment on December 28, 2011 creates a justification (arising to a level of excusable neglect) that warrants granting the Request.

Applicant offers no explanation as to how an acknowledgement of receiving CCR's properly served motions on December 28, 2011 creates any level of excusable neglect. Applicant's silence on this point is telling. Frankly, there is no plausible explanation as to how receipt of service renders a party's failure to timely file a responsive brief as excusable, let alone excusable neglect. The plain fact is that receipt of service *triggers* a party's obligation to file a responsive pleading. *See* TMBP § 5.02(b) ("[a] brief in response to a motion . . . must be filed within 20 days if service of the motion was made by first class mail and a brief in response to a motion for summary judgment must be filed within 35 days from the date of service if service was made by first class mail). Applicant could easily have determined the deadlines for filing his responsive briefs by accessing the Board's rules

through the Board's website (www.uspto.gov/trademarks/process/appeal/Chapter_500.pdf) and calendaring the applicable deadline. Moreover, to the extent that Applicant believed he needed (or deserved) additional time in which to file his responsive briefs he could have either requested that CCR stipulate to additional time or he could have submitted a motion to the Board explaining his good cause justifications for needing additional time. Applicant pursued neither option, and the Board should not conclude that Applicant's failure to undertake the simple effort to determine the deadlines for filing his responsive pleadings (and to calendar same) because he received service of CCR's motions less than one week after CCR filed the motions arises to a level of excusable neglect. Insofar as Applicant's acknowledgement of service of CCR's motions triggered his obligations to file responsive briefs, Applicant simply has no justification for asserting that the service date created a level of excusable neglect to warrant reopening the briefing deadlines.

2. *Applicant's Asserted Reliance of the Board's "Help Desk" Is Not A Panacea For Failing to Comply With the Rules.*

Applicant's assertion that he telephoned the Board's "help desk" to determine the deadline for filing his responsive briefs is likewise an insufficient basis for concluding that excusable neglect warrants reopening the briefing deadlines.

As noted above, the Board has provided an easily accessible and easily understandable resource for a party to determine the applicable deadline for responding to a motion filed before the Board (through the website www.uspto.gov/trademarks/process/appeal/Chapter_500.pdf). Thus, even if there is a level of truthfulness to Applicant's contention that the "help desk" representative informed Applicant that no deadline existed for him to file responsive briefs (until the Interlocutory Attorney set a deadline), Applicant's reliance on the "help desk" for information regarding his obligations in responding to CCR's motions is improper. In its Order

of February 9, 2011 the Board made it abundantly clear to Applicant that “**strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.**” *See* February 9, 2011 Order (emphasis in original). Plainly, Applicant bears the responsibility for knowing and complying with the applicable rules, and he cannot shift that responsibility the Board, the Board’s “help desk”, or the Interlocutory Attorney.

Applicant’s failure to abide by the Board’s unambiguous instructions and his failure to research and comply with the applicable rules regarding the deadlines for filing his responsive briefs is fatal to the Request. No level of excusable neglect exists on this contention, either.

3. *Applicant’s Assertion That the Interlocutory Attorney Did Not Provide Timely Guidance Is Not Excusable Neglect.*

Finally, Applicant’s assertion that the Interlocutory Attorney’s having not returned telephone messages left by Applicant during the holiday season amounts to excusable neglect is equally baseless. Here again, Applicant’s ability to determine the requisite deadlines for responding to CCR’s motions was easily and readily available to Applicant (through access of the website at www.uspto.gov/trademarks/process/appeal/Chapter_500.pdf). Applicant has no right to expect coaching from the Interlocutory Attorney, nor should Applicant expect the Interlocutory Attorney to complete Applicant’s research and legal analysis for him. Applicant simply has no meritorious contention that his supposedly unanswered telephone calls to the Interlocutory Attorney justify his failure to timely file his responsive briefs. No excusable neglect exists based upon this third contention either, and as such the Request fails on this point as well.

C. *Applicant Has Not Demonstrated A Satisfactory Level of Excusable Neglect.*

Applicant has not demonstrated a satisfactory level of excusable neglect with regard to his Request. Although Applicant correctly identifies the four-factor test by which the Board evaluates whether a party's neglect is excusable,³ the factors—and crucially the most important factor—do not provide Applicant with any basis upon which to grant the Request.

In the instant matter, Applicant's failure to timely file his responsive briefs to CCR's motions is the direct result of Applicant's own carelessness and his willful disregard of the Board's February 9, 2011 Order. The Board unambiguously forewarned Applicant that he was required to comply with the pertinent rules governing these proceedings. Furthermore, Applicant had readily accessible resources from which he could ascertain the applicable deadlines for filing his responsive briefs (at a minimum through the Board's website). Thus, Applicant's ability to comply with the applicable deadlines was entirely within his reasonable control. Applicant cannot shift that ability to anyone else (and in particular to the Board, the "help desk" or the Interlocutory Attorney). Applicant's failure to comply with the deadlines therefore does not arise to excusable neglect. *See* DC Comics, 68 USPQ2d at 1319.

Notwithstanding Applicant's failure to satisfy the third and most important *Pioneer* factor, none of the other four factors weighs in favor of Applicant either. The prejudice to CCR in failing to have its motions timely adjudicated, the resolution of this matter moved forward, and the penalties inherent in permitting Applicant to craft his own set of rules heavily tilts against a finding of excusable neglect. Moreover, Applicant's failure to timely file his

³ The relevant factors are: (1) the prejudice to the non-moving party; (2) the length of delay and its potential impact on the judicial proceedings; (3) the reason for delay, including whether it was within the reasonable control of the moving party; and (4) whether the moving party had acted in good faith. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997) (citing *Pioneer Investments Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993)). The Board has repeatedly stated that the third *Pioneer* factor is the most important. *DC Comics and Marvel Characters, Inc. v. Margo*, 68 USPQ2d 1319 (TTAB 2003); *Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 USPQ2d 1858 (TTAB 1998).

responsive pleadings—and instead stalling the proceedings through the submission of his Request—has created an unacceptable level of delay in these proceedings. Finally, as demonstrated above Applicant has not acted in good faith in these proceedings, and has instead engaged in repeated violations of the applicable rules, repeatedly submitted untimely documents and discovery, and repeatedly neglected to abide the Board’s admonitions and Orders. Thus, none of these other three *Pioneer* factors tilt in favor excusable neglect either.

IV. CONCLUSION

For the foregoing reasons, CCR respectfully requests that this Board deny Applicant’s Request for lack of excusable neglect, and that the Board adjudicate CCR’s Motion for Leave to Amend, Motion to Stay and Motion for Summary Judgment forthwith.

SANTORO, DRIGGS, WALCH, KEARNEY,
HOLLEY & THOMPSON

Dated: March 6, 2012



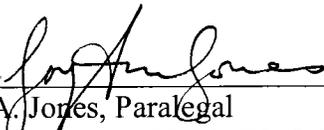
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CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing **OPPOSER'S RESPONSE TO APPLICANT'S REQUEST TO REOPEN TIME TO RESPOND TO OPPOSER'S MOTIONS** was served by First Class Mail, postage prepaid, this 6th day of March, 2012, upon:

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