

This Decision is Not a  
Precedent of the Board

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

Mailed: April 11, 2014

Opposition No. 91194974  
Opposition No. 91196358

Promark Brands Inc. and H.J. Heinz  
Company

v.

GFA Brands, Inc.

Before Rogers, Chief Administrative Trademark Judge, and Ritchie and Masiello,  
Administrative Trademark Judges.

Rogers, Chief Administrative Trademark Judge:

The last decision issued by the Board in these consolidated proceedings was issued by the Board attorney assigned responsibility for interlocutory matters arising in these cases. By that order, the attorney granted opposers' motion to strike applicant's final brief on the merits as untimely; and denied applicant's cross-motion to reopen which, had it been granted, would have rendered that brief as timely filed.<sup>1</sup>

While the referenced cross-motions were pending, applicant filed a request for oral hearing. After the motions were disposed of as noted above,

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<sup>1</sup> See *Vital Pharmaceuticals, Inc. v. Kronholm*, 99 USPQ2d 1708, 1710 n.10 (TTAB 2011) ("The Board construes a motion to extend an expired period as a motion to reopen such period."); and Fed. R. Civ. P. 6(b)(1)(B) ("When an act may or must be done within a specified time, the court may, for good cause, extend the time: ... (B) on motion made after the time has expired if the party failed to act because of excusable neglect.")

applicant filed a request for an additional 15 minutes<sup>2</sup> at the oral hearing, “so that it may provide the Board with guidance during oral argument regarding relevant record citations in the voluminous record as well as legal authorities that had been addressed in its [now stricken] trial brief.” 101 TTABVUE at 2.<sup>3</sup> This request also sought an equal amount of additional time for opposers, and was not contested by opposers.<sup>4</sup>

Approximately a week later, applicant filed a petition to the Director seeking “reconsideration” of the Board attorney’s order striking applicant’s brief as clearly in error, and relied for that petition on Trademark Rule 2.146, 37 C.F.R. §2.146, which provides in part “(a) Petition may be taken to the Director: ... (3) to invoke the supervisory authority of the Director in appropriate circumstances....” Authority to review petitions seeking review of interlocutory orders of the Board having been delegated by the Director to the Commissioner for Trademarks, see subsection (h) of Rule 2.146, the petition was acknowledged by the Commissioner’s office. After briefing of the issues presented by the petition for reconsideration, the Commissioner’s office determined that it was appropriate for the petition to be considered in the first instance by the Board, as

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<sup>2</sup> Trial cases involve 30 minutes of argument for each side. See Trademark Rule 2.129(a), 37 C.F.R. §2.129(a).

<sup>3</sup> See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014) in regard to citations to material in the electronic case file records of the Board. “Citations to the record in this opinion are to the TTABVUE docket entry number and the electronic page number where the document or testimony appears.” *Id.*

<sup>4</sup> During a subsequent telephone conference involving the Board and the parties, convened to discuss scheduling details for the oral argument, then-counsel for opposers confirmed that opposer did not contest the request for additional time.

a request for reconsideration. See Trademark Rule 2.127(b), 37 C.F.R. §2.127(b), which allows one month for filing of a request for reconsideration of a decision on a motion. Applicant's petition for reconsideration was filed well within this time frame.

As the panel which will hear arguments in these consolidated cases, we take up the request for reconsideration. A review of the issues raised by the earlier cross-motions is appropriate.

Under the then-extant trial and briefing schedule for these cases, applicant's brief on the merits was due September 11, 2013, thirty days after the August 12, 2013 due date for, and actual filing date of, opposers' brief. The due date for applicant's brief was set by operation of Trademark Rule 2.128(a)(1), 37 C.F.R. §2.128(a)(1), and would not have been affected by the actual date on which opposers filed their brief, had it been filed and served on a date other than the date it was due. Likewise, because applicant's deadline was set by operation of Rule 2.128 and not by the date of filing and service of opposers' brief, applicant was not entitled to the addition of five days to its period for responding to opposers' brief, which Trademark Rule 2.119(c), 37 C.F.R. §2.119(c), provides when "a party is required to take some action within a prescribed period after the service of a paper upon the party by another party" other than by email. See discussion in 100 TTABVUE at 3-4.

Applicant filed its brief on September 17, 2013, six days after it was due. In its cross-motion to reopen the time for filing that brief, applicant explained why its brief was late. First, applicant "mistakenly believed that the additional

five days provided under Trademark Rule 2.119(c) governing service by mail applied to its trial brief.” 95 TTABVUE at 3. Second, “[b]ecause of several unexpected problems that arose in connection with e-filing GFA Brands’ brief, it was filed at about 11:10 p.m. Central Time on September 16, which is 12:10 Eastern Time on September 17, making its filing about ten minutes after what GFA Brands’ counsel had believed to be the deadline.” *Id.*

Opposers and applicant, in their briefing of opposers’ motion to strike applicant’s trial brief and applicant’s cross-motion to reopen, as well as in their briefing of the petition for reconsideration, both analyze the issues under the oft-discussed Supreme Court decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd.*, 507 U.S. 380 (1993), as explained and applied by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). The parties also rely on various prior decisions of the Board that address issues raised by the late filing of briefs and the question of whether a party’s neglect of a deadline is excusable. Opposers relied on two such decisions in their motion to strike, and four such decisions are discussed in applicant’s response and cross-motion. None of these, however, was issued as a precedent of the Board. It is significant that neither side cited to precedential decisions of the Board. First, it has clearly been stated by the Board that it is not bound by its prior decisions that were not issued as precedents. Second, the inability of the parties to marshal precedents to support their respective positions suggests how fact-specific these inquiries tend to be, as well as how firmly resolution of such

matters is committed to the Board's exercise of professional discretion, whether by its attorneys when the issues arise in an interlocutory context, or by its judges when such issues are addressed in a final decision on the merits. Indeed, the Board's decision in *Pumpkin* noted that *Pioneer* was "a sharply divided five-to-four decision," 43 USPQ2d at 1585, which underscores that the question whether neglect of a matter is excusable is not easily or predictably answered. Questions of such character arising in Board cases necessarily must be left to resolution by exercise of the discretion of the Board.

It is also useful to revisit various other statements made in both *Pioneer* and in *Pumpkin*. While the various Board cases on which the parties rely routinely discuss the four factors specifically delineated and discussed in *Pioneer*, the Supreme Court noted that the inquiry is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include..." and listed its four factors. *Pioneer*, 507 U.S. at 395. The introduction of the list of factors in this manner clearly suggests that all other factors bearing on the party's omission may be considered; and broader equitable considerations are not to be overlooked. In addition, the decision in *Pumpkin* is often seen as endorsing factor three as a critical factor in the analysis because the Board discussed that factor first and noted that various Circuit Courts of Appeals appear to have placed significant reliance on it. *Pumpkin*, 43 USPQ2d at 1586-87. We note, however, that the ultimate conclusion in *Pumpkin* that the

opposer's neglect of trial was not excusable stemmed equally from the importance, in that case, of factor two. *Id.* at 1587-88.

Applicant contends, 102 TTABVUE at 4-5, that the Board attorney clearly was in error in concluding that the second *Pioneer* factor (the length of the delay and its potential impact on judicial proceedings), weighed “somewhat against applicant.” 100 TTABVUE at 5. Yet at the same time, applicant contends, in an apparent reference to the third *Pioneer* factor (the reason for the delay, including whether it was within the reasonable control of the movant), that the attorney erred in “focusing on just one factor in striking Applicant’s brief.” 102 TTABVUE at 5. We see no clear error in the attorney’s weighing of factor three “heavily against applicant.” 100 TTABVUE at 5. Indeed, *Pioneer* states that “mistakes construing the rules do not usually constitute ‘excusable neglect,’” 507 U.S. at 390, and five of the six days of delay by applicant stem from a mistaken assumption that Trademark Rule 2.119(c) provided applicant with five additional days’ time to file its brief.<sup>5</sup> Nor can we conclude that even weighing factor two “somewhat” against applicant constituted clear error.

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<sup>5</sup> The sixth day of delay, which applicant attributes to “several unexpected problems that arose in connection with e-filing” of applicant’s brief, 95 TTABVUE at 3, is at best a vague suggestion that counsel had problems with filing its brief electronically, but does not specify whether these problems were internal to counsel’s law firm and systems or involved the Board’s ESTTA electronic filing system. Even if the problems involved the latter, the Board has clearly informed users of the ESTTA system not to wait until the last minute to file documents with the Board because problems may arise and time should be left for the use of alternative filing methods, if an e-filing problem should be experienced. See [estta.uspto.gov](http://estta.uspto.gov) (“**PLAN AHEAD.** Because unexpected problems can occur, you should keep filing deadlines in mind and allow plenty of time to resolve any issue which might arise.”) (emphasis on web page).

We need not, however, find clear error in the attorney's decision in order for us to exercise our discretion to consider additional circumstances that are, in our view, significant in this case—and we stress that this decision represents a considered determination by this panel, based solely on the particular facts of this case, and should not be taken as an indication that a similar result would be attainable in another case that differs in any particular fact or circumstance.

Opposers filed their brief on the merits. It is unlikely, however, that that brief would leave this panel with no questions regarding the significance of evidence in the record, as it bears on the question whether opposers have carried their burden of proof as plaintiffs, or regarding the application of the law to the facts adduced by the evidence of record. In the normal course of briefing an opposition on the merits, an applicant usually raises questions about an opposer's claims; and a reply brief by the opposer not only responds to those questions, but also raises questions about the applicant's defenses. The full extent of this exchange is valuable to the Board, especially in a case, like the one before us, having a large record that includes survey evidence and expert testimony, as well as numerous disputes about evidentiary matters. In a case without oral argument, the exchange of briefs suggests issues the Board may need to consider in its deliberations. In a case, such as this, where there will be oral argument, having the opportunity to review a full set of briefs prior to argument enhances the quality and utility of the argument as well as suggesting issues the panel should consider in its deliberations.

Another factor we have considered relates to the admission by applicant's counsel as to mistaken reliance on Trademark Rule 2.119(c). We are aware that mistaken reliance on that rule has occurred in other Board cases. While the Board's attorneys and judges are very familiar with Board application of this rule, as well as its inapplicability to briefing deadlines that are set by Trademark Rule 2.128, the occasional erroneous coupling of the two rules suggests some confusion among the bar. Certainly, it would appear useful to consider incorporating additional clarifying language or cross-references in the rules. In addition, we note that there are no precedential cases cited in the Board's manual of procedure regarding the Board's reading of Rule 2.119(c) and its inapplicability to briefing deadlines. Indeed, even TBMP Section 801.02(b), discussing "Defendant's Main Brief" does not discuss the inapplicability of Rule 2.119(c) to the deadline for that brief. There is a reference on point in TBMP Section 113.05,<sup>6</sup> as noted by the Board attorney in her order striking applicant's brief as untimely; and the heading for TBMP Section 310.03(b) reads "Five-Day Addition Under 37 CFR § 2.119(c) Not Applicable to Deadlines Set by Board."

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<sup>6</sup> "37 CFR § 2.119(c) applies only when a party has to take some action within a prescribed period after the service of a paper upon it by another party, and service of the paper was made in one of three specified ways. It does not apply to an action that must be taken by a party within a time set in a communication from the Board. Thus, for example, when a Board action notifying a defendant of the filing of an opposition or petition to cancel allows the defendant 40 days from the date of the notification in which to file an answer to the complaint, the answer is due on or before the 40th day, not on the 45th day. **Similarly, the 5-day enlargement is not applicable to 37 CFR § 2.128 which sets the time for filing the briefs on the case.**" (emphasis added)

However, the fact remains that no reference to the inapplicability of Rule 2.119(c) appears in the TBMP section on the time for filing of defendant's main brief.<sup>7</sup>

Under the circumstances of this case, we set aside the order striking applicant's brief. We shall consider that as well as opposers' reply brief. In view of this decision, we deny the motion for additional time at oral argument as moot.

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<sup>7</sup> Again, this observation should not be taken to mean that we would find oversight of the Trademark Rules or the contents of the TBMP acceptable under any circumstances, but rather that we may weigh these points as factors in our analysis.