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

Mailed: January 13, 2012

Opposition No. 91199131

Protein Customizer, Inc.

v.

Vital Pharmaceuticals, Inc.

**M. Catherine Faint,**
**Interlocutory Attorney:**

On January 11, 2012 the Board held a telephone conference involving Kalina Pagano, counsel for Vital Pharmaceuticals, Inc., and Ronald DiCerbo, counsel for Protein Customizer, Inc. Before the Board is applicant's motion to reopen its discovery period, filed November 30, 2011. The motion is contested, and applicant requested a telephonic hearing on the motion.

The Board carefully considered the arguments raised by counsel for both parties, as well as the supporting correspondence and the record of this case, in coming to a determination regarding the matter. During the telephone conference, the Board made the following findings and determinations.

Pursuant to the Board's institution order of March 24, 2011, discovery opened in this case on June 2, 2011 and closed on November 29, 2011. There were no motions or orders

extending the close of discovery prior to applicant's November 30, 2011 motion "for continuance of discovery deadline." Applicant's counsel argues that she contacted opposer's counsel on August 26, 2011 to discuss possible withdrawal of the opposition and that she did not hear back from counsel regarding that proposal, nor did counsel send documents that she was expecting, although such documents were not related to a discovery request. During the teleconference, applicant's counsel asserted that the parties discussed settlement on several occasions. Applicant's counsel attempted to contact opposer's counsel on November 29, 2011 to seek an extension of the discovery deadline, but did not receive a response, and then served discovery on that same date.

Opposer's counsel agrees the parties discussed settlement, but disagrees that it agreed to consider withdrawal of the opposition, or that it would send any documents that were not already in applicant's possession, and contends that the motion shows applicant's lack of diligence in conducting discovery. Opposer's counsel notes that applicant's counsel attempted to contact him on November 29, 2011 at 4:30 p.m. EST, and he was not available at that time. Opposer's counsel acknowledges that applicant served discovery on November 29, 2011 at 6:30 p.m. EST.

The standard for reopening a prescribed period of time is "excusable neglect." Fed. R. Civ. P. 6(b). Such a

determination is an equitable one that must take into account 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. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 (TTAB 1997)(*citing Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380 (1993)).

The kind of prejudice to be considered is that such as the unavailability of witnesses or the loss of evidence because of the delay. There is no such allegation here. Therefore this is not a significant factor.

The length of the delay in this proceeding is measured by the length of time between the original close of discovery and the filing of the first motion to reopen, which was one day. Thus we find the delay is not significant.

There is no allegation of bad faith.

The reason for the delay and whether it was in the reasonable control of the movant, might be considered the most important factor in a particular case. *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1859 (TTAB 1998). The reason offered in this case, that applicant expected to hear back from opposer's counsel after a discussion that took place in August, over three months prior to the close of discovery, was wholly within applicant's control. Even further

discussions of settlement, without more, would not justify inaction or delay. The Board has previously found that the mere existence of settlement negotiations or proposals would not meet even the less rigorous "good cause" standard to extend time. *Instruments SA Inc. V. ASI Instruments, Inc.*, 53 USPQ2d 1925, 1927 (TTAB 1999) (plaintiff's claim of ongoing bilateral settlement negotiations was rebutted by defendant, and no other reason for plaintiff's failure to proceed with discovery was shown). Nor does it establish "excusable neglect." *Atlanta-Fulton* at 1859 (mere existence of settlement negotiations does not constitute excusable neglect).

On balance, we find that applicant's inattention to the set schedule governing this proceeding is clearly the most dominant factor in applicant's failure to timely pursue discovery, and such inattention has had an adverse impact on the orderly administration of this case. Accordingly, even under the interpretation of "excusable neglect" articulated by the *Pioneer* Court and adopted by the Board, such neglect can be neither overlooked nor excused.

In view thereof, applicant's motion to reopen the discovery period is denied.

Dates remain as set in the Board's institution order of March 24, 2011, as copied below.

| | |
|---|---|
| Discovery Closes | CLOSED |
| Plaintiff's Pretrial Disclosures | 1/13/2012 |
| Plaintiff's 30-day Trial Period Ends | 2/27/2012 |
| Defendant's Pretrial Disclosures | 3/13/2012 |

| | |
|---|---|
| Defendant's 30-day Trial Period Ends | 4/27/2012 |
| Plaintiff's Rebuttal Disclosures | 5/12/2012 |
| Plaintiff's 15-day Rebuttal Period Ends | 6/11/2012 |

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.l25.

Briefs shall be filed in accordance with Trademark Rules 2.l28(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

***