

ESTTA Tracking number: **ESTTA542379**

Filing date: **06/07/2013**

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

|                        |   |
|------------------------|---|
| Proceeding             | 91202586  |
| Party                  | Defendant<br>Andrew Smith   |
| Correspondence Address | ROBERT M WASNOFSKI JR<br>DORSEY & WHITNEY LLP<br>51 W 52ND STREET<br>NEW YORK, NY 10019<br>UNITED STATES<br>ny.trademark@dorsey.com, wasnofski.robert@dorsey.com,<br>sunderji.fara@dorsey.com |
| Submission             | Motion to Dismiss 2.132   |
| Filer's Name           | Robert M. Wasnofski, Jr.  |
| Filer's e-mail         | ny.trademark@dorsey.com, wasnofski.robert@dorsey.com,<br>sunderji.fara@dorsey.com   |
| Signature              | /rmw/   |
| Date                   | 06/07/2013  |
| Attachments            | MapMy - Applicant's Motion for Judgment under Rule 2 132(a)-v2.pdf(23758 bytes )  |



37 C.F.R. 2.132(a). Such motions should be filed prior to the moving party's testimony period.  
*See id.*

The Board has not hesitated to dismiss opposition proceedings where an Opposer has failed to prosecute its case and it cannot make a showing of good and sufficient cause for its neglect after the Applicant makes a timely motion under Trademark Rule 2.132(a). *See, e.g., Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551 (Fed. Cir. 1991); *Atlanta Fulton County Zoo Inc. v. De Palma*, Opp. No. 98819, 1998 TTAB LEXIS 9 (TTAB 1998).

The Board has held that the "good and sufficient cause" standard is analogous to the "excusable neglect" standard under Fed. R. Civ. P. 6(b). More specifically, excusable neglect has been defined as:

failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.

*Hewlett-Packard*, 931 F.2d at 1552-1553 (quoting TTAB's April 10, 1990 opinion); *see also Riko Enterprises, Inc. v. Lindsley*, 1977 Commr. Pat. LEXIS 13, at \*4 (Comm'r Pats. 1977) ("Excusable neglect is generally understood to be that course of action taken by a reasonably prudent person under the same or similar circumstances.")

An excusable neglect inquiry should take into account the following four factors identified in the *Supreme Court's Pioneer Investment Services Company v. Brunswick Associates Limited Partnership* case:

[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.

*Atlanta Fulton County Zoo Inc*, 1998 TTAB LEXIS 9, at \*5 (quoting *Pioneer*, 507 U.S. 380, 395 (1993)). In applying this test, the Board has deemed that the third factor, the reason for delay, is the most important one. *Id.*

In the instant case, Opposer's testimony period ended on May 21, 2013. *See* D's Motion for Extension of Time with Consent, Sept. 27, 2012 (Dkt. 10) and Order granting same, Sept. 28, 2012 (Dkt. 11). During the thirty-day period Opposer neither offered any testimony nor did it serve a notice of reliance. Opposer also failed to timely serve its pretrial disclosures by the April 7, 2013 deadline. On the other hand, Applicant's testimony period does not open until June 22, 2013, making this motion timely. *See* 37 C.F.R. 2.132(a).

Applicant is unaware of any good and sufficient cause that would rise to the level of excusable neglect on Opposer's part for failing to prosecute its case. In fact, Applicant is not aware of any reason for Opposer's neglect. Opposer may argue that the existence of settlement discussions excuses its inaction, but existing case law is clear that settlement negotiations are not an excuse. *See Atlanta Fulton Co. Zoo*, 1998 TTAB LEXIS 9, at \*6 (holding "it is well established that the mere existence of settlement negotiations alone does not justify a party's inaction or delay.") Thus, unless Opposer can proffer good and sufficient cause for its failure to prosecute this opposition, the case should be dismissed with prejudice. *See* 37 C.F.R. 2.132(a).

### **CONCLUSION**

For all the foregoing reasons, Applicant respectfully requests that the Board grant its Motion and dismiss the instant proceeding with prejudice.

Respectfully submitted,  
DORSEY & WHITNEY LLP

Dated: June 7, 2013

By: /rmw/  
Robert M. Wasnofski, Jr.  
Fara S. Sunderji  
51 W. 52<sup>nd</sup> Street  
New York, NY 10019  
(212) 415-9200

Attorneys for Applicant

