

ESTTA Tracking number: **ESTTA679483**

Filing date: **06/22/2015**

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

Proceeding	91207862
Party	Defendant 21st Century Solutions, Ltd.
Correspondence Address	B JOSEPH SCHAEFF DINSMORE & SHOHL LLP ONE SOUTH MAIN STREET , SUITE 1300 FIFTH THIRD CENTER DAYTON, OH 45402-2023 UNITED STATES joseph.schaeff@dinsmore.com
Submission	Reply in Support of Motion
Filer's Name	B. Joseph Schaeff
Filer's e-mail	joseph.schaeff@dinsmore.com
Signature	/bjschaeff/
Date	06/22/2015
Attachments	CEY0002T4reply.PDF(50448 bytes) CEY0002T4replyexh.PDF(70084 bytes)

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

Boca's Best Locksmith, Inc., :
Opposer, :
 :
 :
v. : Opposition No. 91207862
 :
21st Century Solutions, Ltd., :
Applicant. :

APPLICANT'S REPLY TO OPPOSER'S MOTION TO REOPEN THE TIME TO FILE
ITS NOTICE OF RELIANCE OR DEEM THE NOTICE OF RELIANCE TIMELY AND
OPPOSITION TO APPLICANT'S MOTION TO DISMISS

Introduction

As a preliminary matter, Applicant requests that the Board not consider the first paragraph of Opposer's reply, that portion of Opposer's reply headed "OPPOSER HAS SUBMITTED ADEQUATE EVIDENCE TO SHOW THAT APPLICANT'S MARK IS MERELY DESCRIPTIVE" appearing on pages 4-7, and the attachments to the reply. Those pages and the attachments purport to demonstrate that Applicant's mark is descriptive. The premise for Applicant's motion to dismiss is that Opposer failed to submit evidence during Opposer's trial period, and because there is no evidence in the record, Applicant is entitled to judgment. The Board's order dated May 19, 2015 cautioned the parties to refrain from filing any paper not germane to the motion to strike or the motion to dismiss. The descriptiveness arguments in Opposer's reply are not germane to the motion to strike or the motion to dismiss.

Opposer Has Not Shown Excusable Neglect

Counsel for Opposer asserts that she failed to file Opposer's testimonial affidavit on time because she did not properly docket the due date, and that such failure constitutes excusable

neglect. Applicant disagrees. As the Board noted in Atlanta-Fulton County Zoo Inc. v. De Palma, 45 USPQ2d 1858, 1860 (TTAB 1998),

Opposer brought this case and, in so doing, took responsibility for moving forward on the established schedule. As required by the scheduling order, as reset, opposer had an obligation to take testimony or otherwise introduce evidence in furtherance of its claim by (the due date) or, alternatively, to file, on or prior to that date, a motion to extend its testimony period.

On October 23, 2014, Opposer filed a consented motion to suspend proceedings and reset trial dates. Opposer's testimony period was set to close on February 4, 2015. See Exhibit A. On February 3, 2015, Opposer filed a motion to extend trial dates, which set Opposer's testimony period to close on April 5, 2015. See Exhibit B. Earlier on February 3, Opposer's counsel requested Applicant's consent. Counsel's reason for requesting consent was that she had "inadvertantly calendared the wrong date for plaintiff's 30-day trial period." See Exhibit C, a true and correct copy of an email exchange between Opposer's counsel and Applicant's counsel.

Trademark Trial and Appeal Board trial dates are computer generated when a motion for extension is filed, and delivered to the moving party at the time of filing. See Exhibit A which set the February 4, 2015 due date and Exhibit B which set the April 5, 2015 due date. It is hard to see how Opposer's counsel could have failed to properly docket the February 4, 2015 due date. It is even harder to see how she might have failed to properly docket the April 5, 2015 due date, particularly after she acknowledged that she had failed to properly docket the earlier due date.

"A party moving to reopen its time to take required action must set forth with particularity the detailed facts upon which its excusable neglect claim is based; mere conclusory statements are insufficient." TBMP sec. 509.01(b)(1). The test for excusable neglect is set forth in Pioneer Investment Services Co. v. Brunswick Associates L.P., 507 U.S. 380, 395 (1993),

made applicable to Board proceedings in Pumpkin Ltd. v. The Seed Corps, 43 USPQ2d 1582 (TTAB 1997). Section 509.01(b)(1) states,

the excusable neglect determination must take into account all relevant circumstances surrounding the party's omission or delay, including (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.

As section 509.01(b)(1) further states,

[i]t has been held that the third Pioneer factor, i.e., "the reason for the delay, including whether it was within the reasonable control of the movant," may be deemed to be the most important of the Pioneer factors in a particular case.

Opposer's docketing errors were circumstances wholly within Opposer's control. See Pumpkin, 1586-1587; see also HKG Industries Inc. v. Perma-Pipe Inc., 49 USPQ2d 1156, 1158 (TTAB 1998). As in Pumpkin, the trial dates set forth in the Board's order were proposed by Opposer, and there was no ambiguity in the Board's order setting those trial dates. The third Pioneer factor weighs heavily against a finding of excusable neglect. Pumpkin at 1587.

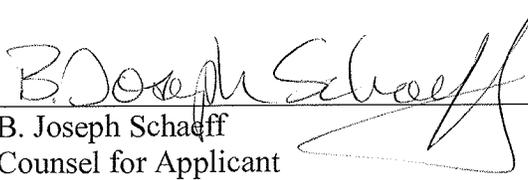
Regarding the remaining Pioneer factors, there is no specific prejudice to Applicant beyond mere delay, and the length of the delay was minimal. However, "from a docket management standpoint ... the delay in opposer's prosecution of this case is detrimental to the orderly administration of the opposition process." Atlanta-Fulton at 1860.

Applicant recites on numerous occasions that the parties were involved in settlement negotiations. It is true that the parties exchanged a number of settlement proposals. However, the last settlement proposal was contained in an email dated October 23, 2014 from Applicant's counsel to Opposer's counsel. In any event, the existence of settlement negotiations does not justify a party's inaction or delay. Atlanta-Fulton at 1859-1860.

Opposer has failed to establish excusable neglect in this case. Accordingly, Applicant prays that its motions to strike and to dismiss be granted, and that Opposer's motions to reopen its testimony period be denied.

Respectfully submitted,

Dinsmore & Shohl LLP

By 
B. Joseph Schaeff
Counsel for Applicant

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One South Main Street
Suite 1300
Dayton, OH 45402
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Facsimile: 937-449-6405
joseph.schaeff@dinsmore.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on Opposer by email and first class U.S. mail, postage prepaid, addressed to Ali F. Weinberg, Esq., Attorney for Opposer, 49 Somerset Drive South, Great Neck, NY 11020-1821, this 22nd day of June, 2015.

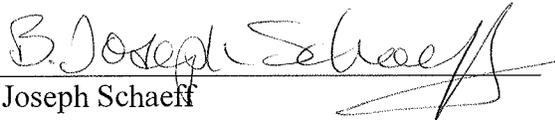

B. Joseph Schaeff

EXHIBIT A

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

Proceeding.	91207862
Applicant	Plaintiff Boca's Best Locksmith, Inc.
Other Party	Defendant 21st Century Solutions, Ltd
Have the parties held their discovery conference as required under Trademark Rules 2.120(a)(1) and (a)(2)?	Yes

Motion for Suspension for Settlement With Consent

The parties are actively engaged in negotiations for the settlement of this matter. Boca's Best Locksmith, Inc. requests that this proceeding be suspended for 60 days to allow the parties to continue their settlement efforts.

Time to Answer :	CLOSED
Deadline for Discovery Conference :	CLOSED
Discovery Opens :	CLOSED
Initial Disclosures Due :	CLOSED
Expert Disclosure Due :	CLOSED
Discovery Closes :	CLOSED
Plaintiff's Pretrial Disclosures :	12/21/2014
Plaintiff's 30-day Trial Period Ends :	02/04/2015
Defendant's Pretrial Disclosures :	02/19/2015
Defendant's 30-day Trial Period Ends :	04/05/2015
Plaintiff's Rebuttal Disclosures :	04/20/2015
Plaintiff's 15-day Rebuttal Period Ends :	05/20/2015

Boca's Best Locksmith, Inc. has secured the express consent of all other parties to this proceeding for the suspension and resetting of dates requested herein.

Boca's Best Locksmith, Inc. has provided an e-mail address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Facsimile or email (by agreement only) on this date.

Respectfully submitted,
/Ali Weinberg/
Ali Weinberg
ali@amoslegal.com
joseph.schaeff@dinsmore.com
10/23/2014

EXHIBIT B

ESTTA Tracking number: **ESTTA653760**

Filing date: **02/03/2015**

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

Proceeding.	91207862
Applicant	Plaintiff Boca's Best Locksmith, Inc.
Other Party	Defendant 21st Century Solutions, Ltd
Have the parties held their discovery conference as required under Trademark Rules 2.120(a)(1) and (a)(2)?	Yes

**Motion for an Extension of Answer or Discovery or Trial Periods With
Consent**

The Close of Plaintiff's Trial Period is currently set to close on 02/04/2015. Boca's Best Locksmith, Inc. requests that such date be extended for 60 days, or until 04/05/2015, and that all subsequent dates be reset accordingly.

Time to Answer :	CLOSED
Deadline for Discovery Conference :	CLOSED
Discovery Opens :	CLOSED
Initial Disclosures Due :	CLOSED
Expert Disclosure Due :	CLOSED
Discovery Closes :	CLOSED
Plaintiff's Pretrial Disclosures :	02/19/2015
Plaintiff's 30-day Trial Period Ends :	04/05/2015
Defendant's Pretrial Disclosures :	04/20/2015
Defendant's 30-day Trial Period Ends :	06/04/2015
Plaintiff's Rebuttal Disclosures :	06/19/2015
Plaintiff's 15-day Rebuttal Period Ends :	07/19/2015

The grounds for this request are as follows:

- *Parties are unable to complete discovery/testimony during assigned period*

Boca's Best Locksmith, Inc. has secured the express consent of all other parties to this proceeding for the extension and resetting of dates requested herein.

Boca's Best Locksmith, Inc. has provided an e-mail address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Facsimile or email (by agreement only) on this date.

Respectfully submitted,

/Ali Weinberg/
Ali Weinberg
ali@amoslegal.com
joseph.schaeff@dinsmore.com
02/03/2015

EXHIBIT C

Schaeff, B. Joseph

Subject: FW: CEY0002T4; GoKeyless/JustGoKeyless

From: Ali Weinberg [<mailto:ali@amoslegal.com>]
Sent: Tuesday, February 03, 2015 1:27 PM
To: Schaeff, B. Joseph
Subject: RE: CEY0002T4; GoKeyless/JustGoKeyless

I will request 60. Thank you very much.

Best,
Ali

Ali Weinberg, Esq.
Law Office of Amos Weinberg
49 Somerset Drive South Great Neck NY 11020-1821
Phone: (516) 829-3900, Fax: (516) 829-3915, Email: ali@AmosLegal.com

From: Schaeff, B. Joseph [<mailto:joseph.schaeff@dinsmore.com>]
Sent: Tuesday, February 03, 2015 1:24 PM
To: Ali Weinberg
Subject: RE: CEY0002T4; GoKeyless/JustGoKeyless

Good afternoon Ali.
I consent to an extension.
Instead of 30 days, may I suggest 60? My February is pretty crowded.
Joe

Dinsm^ore

B. Joseph Schaeff
Partner

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T (937) 449-6436 • F (937) 449-6405
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From: Ali Weinberg [<mailto:ali@amoslegal.com>]
Sent: Tuesday, February 03, 2015 1:16 PM
To: Schaeff, B. Joseph
Subject: RE: CEY0002T4; GoKeyless/JustGoKeyless

Hi Joe,

Hope all is well by you. I had inadvertently calendared the wrong date for plaintiff's 30-day trial period, and would like an extension. Please advise if you would consent to a 30 day extension of the deadline.

Thank you in advance.

Regards,
Ali

Ali Weinberg, Esq.
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