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

Proceeding	91223497
Party	Plaintiff Jim Beam Brands Co.
Correspondence Address	CLAUDIA W STANGLE LEYDIG VOIT & MAYER LTD 180 NORTH STETSON AVENUE, SUITE 4900 CHICAGO, IL 60601 UNITED STATES trademark@leydig.com, cstangle@leydig.com, saagaard@leydig.com
Submission	Opposition/Response to Motion
Filer's Name	Claudia W. Stangle
Filer's e-mail	cstangle@leydig.com, saagaard@leydig.com
Signature	/Claudia W. Stangle/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

JIM BEAM BRANDS CO.,)	
)	
)	
Opposer,)	Opposition No. 91223497
)	Application Serial No. 86/415,114
v.)	
)	
BUGLISI RECOBS GROUP LLC,)	
)	
Applicant.)	

**OPPOSER’S OPPOSITION TO
APPLICANT’S MOTION TO REOPEN DISCOVERY**

On June 7, 2016, Buglisi Recobs Group LLC (“Applicant”) filed a unilateral Request for Withdrawal of Application Serial No. 86/415,114. While Jim Beam Brands Co. (“Opposer”) believes the opposition will be dismissed with prejudice such that this opposition brief may be moot, in the event the opposition is still pending, Opposer submits that Applicant has failed to show excusable neglect to justify the Board reopening discovery.

I. Facts and Procedural History

On August 26, 2015, Opposer filed a Notice of Opposition with the Board objecting to the registration of “MISTER GINGER” (“Applicant’s Mark”), filed by Applicant. (TTABVUE No. 1; App.’s Motion ¶ 2). That same day, the Board issued a Scheduling Order setting forth the dates for discovery and trial. (TTABVUE No. 2; App.’s Motion ¶ 2). Pursuant to the Board’s Scheduling Order, discovery was scheduled to open on November 4, 2015 and close on May 2, 2016. *Id.* Before the close of the discovery period set forth by the Board, Opposer served discovery requests to Applicant. (App.’s Motion ¶ 16). Applicant has not filed any discovery requests to date. (App.’s Motion ¶ 15).

Following the close of discovery, Applicant filed a Motion for Enlargement of Scheduling Order on May 26, 2016, requesting that the Board reopen the discovery period. (App.'s Motion ¶ 15). Applicant states that it was previously in negotiations with Opposer and, after it realized "settlement was not moving forward on Opposer's end," Applicant subsequently filed a Motion to Amend its Answer on April 6, 2016, which remains pending before the Board. (App.'s Motion ¶¶ 9, 11).

In addition, Applicant conceded that it knew settlement was not a possibility at least as early as April 6, 2016 when it filed its motion, yet Applicant failed to serve any discovery requests because "at the time the Motion to Amend was filed, [Applicant's counsel] was out of town for a month's time, and had not considered the possible issues with the discovery deadline." (App.'s Motion ¶¶ 11-14).

II. Applicant Has Not Shown Excusable Neglect

Applicant's failure to consider the deadlines in this proceeding does not constitute excusable neglect sufficient to reopen discovery in this case. When a party fails to take action within a prescribed period, the Board may reopen an expired period only upon a showing of excusable neglect. *FirstHealth of the Carolinas Inc. v. CareFirst of Maryland Inc.*, 81 U.S.P.Q.2d 1919, 1921 (Fed. Cir. 2007). In determining whether a party's neglect is excusable, the Board considers the following factors: "[1] the danger of prejudice to the [non-moving party], [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." *Id.* (quoting *Pioneer Investment Services Co. v. Brunswick Associates Ltd.*, 507 U.S. 380, 395 (1993)).

The third factor regarding the moving party's reason for delay and whether the delay was within the moving party's control is considered the most important factor. *Id*; *see, also, Dating DNA LLC v. Imagini Holdings Ltd.*, 94 U.S.P.Q.2d 1889, 1892 (T.T.A.B. 2010) (finding that the movant failed to establish that its "oversight" was outside of its control because the movant failed to explain "how it occurred or how it prevented [the movant] from taking action"); *Pumpkin Ltd. v. The Seed Corps.*, 43 U.S.P.Q.2d 1582, n.7 (T.T.A.B. 1997).

In this case, Applicant's ability to serve timely discovery requests was well within Applicant's control. Applicant's ambiguous reason for delay does not justify reopening discovery. Applicant states that its failure to serve discovery requests before the deadline was a result of excusable neglect because it was previously in negotiations with Opposer and Applicant failed to consider the deadline for the close of discovery *even though it realized settlement was not a possibility nearly a month before the close of discovery*. Without elaborating or explaining why it could not serve discovery requests before the deadline, Applicant's counsel merely states "at the time the Motion to Amend was filed, I was out of town for a month's time, and had not considered the possible issues with the discovery deadline." (App.'s Motion ¶ 14).

Applicant does not explain why another member of Applicant's counsel's firm could not have served discovery requests while Applicant's counsel was out of town. Failure to explain "why other authorized individuals in the same firm could not have assumed responsibility for the case" weighs against finding excusable neglect. *See, FirstHealth of the Carolinas Inc*, 81 U.S.P.Q.2d at 1922.

Not only is Applicant's rationale for failing to serve discovery vague, there is no dispute that Applicant had the opportunity to serve discovery requests since as early as November 4, 2015. Potential settlement between the parties is not an excuse, as "it is well established that the

mere existence of settlement negotiations alone does not justify a party's inaction or delay.” *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 U.S.P.Q.2d 1858, 1859-1860 (T.T.A.B. 1998) (finding that the movant's inattention to the trial schedule was well within the movant's control and, therefore, does not constitute excusable neglect); *see, also, Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 U.S.P.Q.2d 1701, 1703 (T.T.A.B. 2002) (“The Board is liberal in granting reasonable extensions or suspension of trial dates when parties are engaged in serious bilateral discussions. However, a party which fails to timely move for extension or suspension of dates on the basis of settlement does so at its own risk...”); *Melwani v. Allegiance Corp.*, 97 U.S.P.Q.2d 1537, 1541 (T.T.A.B. 2010). Thus, the third—and most important—factor for finding excusable neglect weighs in favor of Opposer.

Moreover, given the Applicant's ample opportunity to serve discovery requests and the Board's liberal position on granting extensions and suspensions in Board proceedings, Applicant has not demonstrated good faith in its request to reopen discovery (factor 4). Not only would reopening discovery be prejudicial to Opposer (factor 1), reopening the proceeding would result in unnecessary and entirely preventable delay (factor 2), which prejudices not just Opposer, but the Board and these proceedings as well.

In considering the second factor for excusable neglect (i.e. the length of delay and its potential impact on judicial proceedings), “the calculation of the length of delay in proceedings must also take into account the additional, unavoidable delay arising from the time required for briefing and deciding the motion to reopen.” *Pumpkin Ltd.*, 43 U.S.P.Q.2d at 1588. In addition, “[t]he Board, and parties to Board proceedings generally, clearly have an interest in minimizing the amount of the Board's time and resources that must be expended on matters, such as most contested motions to reopen time, which come before the Board solely as a result of a sloppy

practice or inattention to deadlines on the part of litigants or their counsel.” *Id.* Just as the Board noted in *Pumpkin Ltd. v. The Seeds Corps.*, “the Board’s interest in deterring such sloppy practice weighs heavily against a finding of excusable neglect” in this case. *Id.*; *See, also, Luster Products Inc. v. Van Zandt*, 104 U.S.P.Q.2d 1877, 1880 (T.T.A.B. 2012). Therefore, the second factor weighs heavily in favor of Opposer.

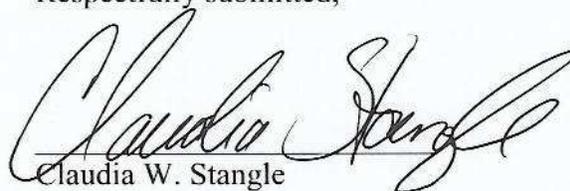
After weighing all factors, it is clear that Applicant’s neglect was inexcusable in this case. As a result, the Board should deny Applicant’s Motion to Reopen Discovery.

III. Conclusion

For the reasons stated above, Opposer respectfully requests that the Board deny Applicant’s Motion and that judgment against the Applicant be entered.

Date: June 15, 2016

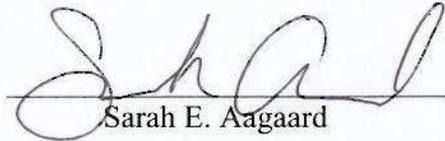
Respectfully submitted,



Claudia W. Stangle
Sarah E. Aagaard
Leydig, Voit & Mayer, Ltd.
Two Prudential Plaza
180 N. Stetson Avenue – Suite 4900
Chicago, Illinois 60601
Ph. 312-616-5600
Attorneys for Opposer

CERTIFICATE OF ELECTRONIC FILING

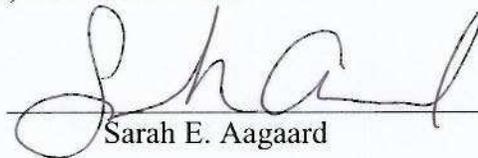
The undersigned attorney hereby certifies that the attached **OPPOSER'S OPPOSITION TO APPLICANT'S MOTION TO REOPEN DISCOVERY** was filed electronically with the Trademark Trial and Appeal Board on June 15, 2016:


Sarah E. Aagaard

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of **OPPOSER'S OPPOSITION TO APPLICANT'S MOTION TO REOPEN DISCOVERY** was served by Federal Express on June 15, 2016 to the following address, such being the Applicant's correspondence address of record as of this date:

Patrick C. O'Reilly
Lipsitz Green Scime Cambria LLP
42 Delaware Avenue
Suite 120
Buffalo, New York 14202


Sarah E. Aagaard