

MEMORANDUM IN SUPPORT OF MOTION

A. BACKGROUND AND SUMMARY

As part of its decision of April 29, 2004 denying a motion for summary judgment by Petitioner/Plaintiff New York Exotics, Inc., this Board suspended proceedings pending resolution of a related civil action (case no. BC 290511) pending in Los Angeles before the Superior Court of the State of California. By inquiry dated April 4, 2006, Interlocutory Attorney Angela Lykos sent each of the present parties a request for a status report as to that action.

Subsequent correspondence from Plaintiff's to Defendant's counsel suggested that a proper response might require a mutual stipulation by counsel for the parties. Noting no indication of such a requirement either in the TBMP or the April 4, 2006 inquiry, nor indeed any indication of the appropriate form of response, the undersigned inquired of Ms. Lykos as to the nature of a proper response. She kindly replied that a simple statement about the California case would suffice. Accordingly, the undersigned prepared the Response (file copy attached here as Exhibit 1), and sent copies to the Board and Plaintiff's Counsel on May 4, 2006, with the appropriate certificates of mailing and service.

On May 9, 2006, the copy of the Response addressed to the Board re-appeared when the undersigned went to pick up his off-campus mail at a UCLA contract post office. Despite the envelop being properly addressed and affixed with postage, the USPS system had bar-coded the return address on the envelop, causing its return. This Motion to Reopen Time and Resubmission follows therefrom.

B. ARGUMENT FOR REOPENING TIME

This motion presents a perhaps unusual situation: while the standard for reopening time is excusable neglect (TBMP 509.01(b)), in the present situation all things to be done were timely done, i.e., namely mailing a response within the required time. In the absence of a more appropriate alternative motion, the situation is treated as excusable neglect where the instance of neglect is null.

Citing *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership* 507 U.S. 380 (1993) as adopted by this Board in *Pumpkin Ltd. v. Seed Corps* 43 USPQ2d 1582 (TTAB 1997), the TBMP recites that the excusable neglect determination takes into account all circumstances of the party's omission or delay, "including (1) the danger of prejudice to the non-movant, (2) the length of delay and its potential impact on the judicial proceedings, (3) the reason for the delay, including whether it was in the reasonable control of the movant, and (4) whether the movant acted in good faith." TBMP *ibid.* Addressing these factors in this proceeding, we emphasize that:

(1) In light of the two year suspension, it is difficult to see how the Board's reopening of time and acceptance of the Response would prejudice Plaintiff, even if it wished to reactivate proceedings, which it clearly does not. Plaintiff's recent correspondence has indicated quite the opposite of rekindling this proceeding, namely an intention to proceed with a comprehensive settlement between the parties in June. That settlement would include this trademark proceeding.

(2) We know of no adverse impact that would flow from allowing a few additional weeks for the re-filing of the Response. Because the Response supports continuing the

extant suspension thereby facilitating settlement and dismissal of this proceeding, the Board's granting of this Motion stands to benefit the Parties.

(3) As indicated, the USPS misrouted the properly mailed Response back to the undersigned sender. Clearly once the Response was placed in the mailstream, it was outside the reasonable the control of counsel for Movant.

(4) Since the Response complied with the April 4, 2006 request and subsequent instructions by the Attorney Lykos, there was no action or omission on Movant's part that could be construed as anything other than good faith.

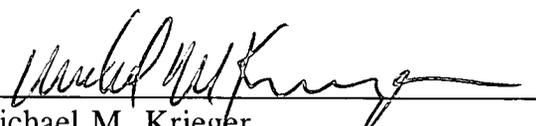
C. CONCLUSION

Granting this Motion and acceptance of the proffered Response would simply preserve the *status quo* while settlement is completed. As such it neither harms Plaintiff nor adversely impacts judicial proceedings. Moreover, because the Response was misrouted by the USPS after timely mailing, nothing relevant to the delay was in Movant's control so there is no neglect on Movant's part. Accordingly, this Motion to Reopen Time meets the excusable neglect standard and should be granted.

Moreover, in the interests of economy, the Response is here resubmitted, identical but for date to that sent on May 4, 2006. The Board is requested to accept this Response *nunc pro tunc*.

Dated: May 28, 2006

Very truly yours,


Michael M. Krieger
Attorneys for Respondent/Registrant
EXOTICS.COM, INC. a Nevada corp.
EXOTICS.COM, INC. a Delaware corp.

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

NY-EXOTICS, INC.	)	Cancellation No. 92/040976
)	
Petitioner	)	Registration No. 2,576,808
)	
vs.	)	Mark: NY-EXOTICS.COM
)	
EXOTICS.COM, INC.	)	DECLARATION OF MICHAEL M.
	)	KRIEGER IN SUPPORT OF MOTION
Respondent/Registrant	)	TO REOPEN TIME
_____)	

DECLARATION OF MICHAEL M. KRIEGER

I, Michael M. Krieger, declare as follows:

I am over twenty-one years of age, have personal knowledge of the matters set forth herein and each of them is true and correct.

1. I am an attorney at law and member of the State Bar of California. I represent Respondent/Registrant Exotics.com, Inc., and related Exotics.com, Inc entities (collectively, *Exotics*) in this proceeding.

2. In mid-April I received the Board's April 4, 2006, request for the status of the California civil case for which it had suspended the present action two years earlier. On April 24 opposing counsel in this proceeding, Cathryn Berryman of Jenkins & Gilchrist, contacted me suggesting that in view of the finalization of a definitive settlement of the California action — expected to be done by early June, a joint consent motion re further suspension be filed with the Board. This suggestion seemed to come from Plaintiff's civil litigation counsel, Glenn Plattner. Notwithstanding some additional discussion in this regard by civil litigation counsel on both sides, my "read" was that all the Board wanted to know was simply "What's the status of the California case?" and that a simple response likely would suffice.

3. After conferring about the status of the California action with Pamela Koslyn who with the Siegler Law Group has been representing Defendant Exotics.com Inc. in the California action, I then found the TBMP essentially silent on procedures with respect to a suspension such as here. Accordingly, I left a message inquiring of Attorney Lykos about the content and form of response for the Board. She promptly replied on May 4,

2006 that a simple statement of the case status would suffice, and that no particular form was required.

4. I prepared a brief Response with Certificates of Mailing and of Service, then mailed it with sufficient postage affixed to the Board and Plaintiff's counsel on May 4 in the evening. On or about May 9, upon going to the UCLA contract post office where I receive mail, I saw that envelop addressed to the Board had been routed by the USPS back to me, apparently because the postal equipment read the (i.e., my) return address and bar-coded it onto the envelop in lieu of the Board's address.

5. In fact a similar (return) mis-routing had happened a 10 days before to a letter envelop mailed to a client April 25 with a similarly formatted label. A postal counter clerk who accepted the remailing (Melinda, at the 90064 P.O.) had no explanation. Likewise, a similarly labeled envelop sent May 5 had been mis-coded and returned on May 9. The USPS Clerk, Richard Clark, at the UCLA station had no explanation despite 30+ years with the USPS/USPO. While the two items were put back in the mail stream by the postal clerks, it seemed improper to ask this for mail to the Board since it had a certificate of mailing and the time for response to the April 4, 2006 inquiry had expired.

6. My own explanation is that the there may be new mail scan/sort software at the Los Angeles main processing center which is reading envelopes differently. That observation-conjecture stems from noting a new cancellation format and knowing from local newspapers and changes at several post offices that processing centers have been consolidated. Perhaps significantly, all three envelopes had printed upper-left return addresses as well as a return in the label.

7. While declarations from the postal clerks could be sought, as well as technical information about processing from USPS management and other declarations, I have refrained in consideration of my clients' budget and the fact that no contested issue appears to turn on the delay underlying this Motion. Of course, should the Board be interested in such specifics, I would be pleased to provide it.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. This declaration was executed on the 27th day of May, 2006.


Michael M. Krieger

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

NY-EXOTICS, INC.	)	Cancellation No. 92/040976
)	
Petitioner ("Plaintiff")	)	Registration No. 2,576,808
)	
vs.	)	Mark: NY-EXOTICS.COM
)	
EXOTICS.COM, INC.	)	REPLY TO STATUS REQUEST OF APRIL 4, 2006
	)	RE SUSPENSION
Respondent ("Defendant")	)	BY INTERLOCUTORY ATTORNEY,
_____	)	ANGELA LYKOS

Angela Lykos, Interlocutory Attorney
United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Dear Ms. Lykos:

Thank you for your reply to my telephone message inquiring about the form of response to your letter of April 4, 2006 in the matter captioned above. Per your message indicating that there was no specific form and that a straightforward statement re the relevant civil case would suffice, the status is as follows:

With regard to the California civil action (case no. BC 290511) for which the Board suspended the present cancellation proceeding, counsel for Plaintiffs in that action (Respondent's in this cancellation proceeding) has informed the undersigned that action has not yet been terminated or otherwise been finally determined, but that in fact terms have been negotiated for final settlement of that and other actions, that settlement is scheduled to be executed in June, 2006, and that the settlement provides for filing of a dismissal of the present cancellation proceeding now before the Board. In particular, the case is scheduled for an *OSC re: dismissal* on June 15, 2006 and it is expected that plaintiffs and defendants will file dismissals with prejudice of the complaint

Exhibit 1

and of the Maltin and London cross-complaints before that date to avoid the court appearance.

Dated: May 4, 2006

Very truly yours,

MS/
Michael M. Krieger
Attorneys for Respondent/Registrant
EXOTICS.COM, INC. a Nevada corp.
EXOTICS.COM, INC. a Delaware corp.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Reply to Status Request re Suspension is being served on Petitioner by deposit with the United States Postal Service on May 4, 2006 as first class mail in an envelope addressed to:

Jenkins & Gilchrist
Attn: Cathryn A. Berryman
1445 Ross Avenue, Suite 3200
Dallas TX 75202-2799

MS/
Michael M. Krieger

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the U.S. Postal Service with sufficient postage as first class mail in an envelope addressed to:

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

on May 4, 2006

By: MS/
Michael M. Krieger

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this ~~Reply~~^{Motion} to ~~FILE~~^{REOPEN TIME} re ~~Response~~ is being served on Petitioner by deposit with the United States Postal Service on May 28, 2006 as first class mail in an envelope addressed to:

Jenkins & Gilchrist
Attn: Cathryn A. Berryman
1445 Ross Avenue, Suite 3200
Dallas TX 75202-2799

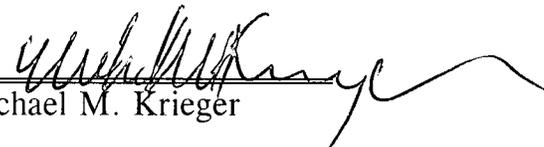

Michael M. Krieger

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on May 28, 2006

By: 
Michael M. Krieger