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

Proceeding	92043017
Party	Defendant Cuzcatlan Beverages, Inc. Cuzcatlan Beverages, Inc. 13015 S.W 89 Place., No. 225 Miami, FL 33176
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Date	02/04/2005
Attachments	CBI.012 Registrant's Reply Brief To Petitioner's Opp to Reg's Motion to Dismiss.pdf (13 pages) Memorandum Exhibit A.pdf (1 page) Memorandum Exhibit B.pdf (2 pages) Memorandum Exhibit C.pdf (1 page)

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

George Contos and Neil Pryor,
Petitioners

v.

C.B.I. International, Inc.
F/N/A Cuzcatlan Beverages, Inc.,
Registrant

In the matter of
Trademark Registration No. 2,375,219
For the mark: CUZCATLAN COLA
CHAMPAGNE and Design
International Class 32

Trademark Registration No. 2,396,051
For the mark: CUZCATLAN and Design
International Class 32

Trademark Registration No. 2,423,027
For the mark: CUZCATLAN and Design
International Class 32

Trademark Registration No. 2,433,109
For the mark: CUZCATLAN ROJITA and
Design
International Class 32

Trademark Registration No. 2,463,527
For the mark: CUZCATLAN COLA
CHAMPAGNE and Design
International Class 32

Cancellation No.: 92,043,017

REGISTRANT'S REPLY BRIEF TO
PETITIONERS' OPPOSITION TO
REGISTRANT'S MOTION TO DISMISS
PETITIONERS' CONSOLIDATED PETITION
FOR CANCELLATION MEMORANDUM

CBI.0101

REGISTRANT'S REPLY BRIEF TO PETITIONERS' OPPOSITION TO REGISTRANT'S
MOTION TO DISMISS PETITIONERS' CONSOLIDATED PETITION FOR CANCELLATION

This Reply Brief is submitted in response to Petitioners' Opposition to Registrant's Motion to Dismiss Petitioners' Consolidated Petition for Cancellation. Registrant's Motion to Dismiss Petitioners' Consolidated Petition for Cancellation ("Motion to Dismiss") for failure to prosecute should be granted and Petitioners' Motion to Reopen Petitioners' Testimony Period should be deemed moot, as Petitioners'

CBI.012

failure to act during the original Testimony Period was not due to excusable neglect. Petitioners failure to act during the original Testimony Period was not due to excusable neglect because: (1) Petitioners' failure to act was due to the inattention of Petitioners as Petitioners were aware of Petitioners' Testimony Period, (2) Petitioners' delay was due to the inattention of Petitioners rather than any docket error and such delay was always within the reasonable control of Petitioners; and (3) Petitioners acted in bad faith.

THE FACTS

Registrant served Petitioners, who are attorneys themselves in addition to their Counsel, with its First Set of Interrogatories to Petitioners and First Set of Requests for Production of Documents and Things on September 23, 2004 ("Discovery Requests"). Four days prior to the due date of Petitioners' discovery responses, Petitioners' Counsel contacted Registrant's Counsel and requested a two-week extension of time to respond to the Discovery Requests because of an extended illness of a relative of one of Petitioners' principals.

Registrant was suspicious as to the legitimacy or sincerity of Petitioners' inability to provide timely discovery responses. Thus, in response to Petitioners' request for a two-week extension of time, Registrant provided Petitioners with a three-week extension of time to ensure adequate time for Petitioners to provide discovery responses and to ensure adherence to the strict condition that Petitioners would not receive any further extensions for any reason. See Exhibit A. In response Petitioners expressly acknowledged and agreed to this strict condition in writing. See Exhibit B. In addition, it was expressly agreed that Registrant's discovery responses would not be due unless and until the day after Petitioners provided discovery responses.

Despite Petitioners' assurances that no further extensions would be requested for any reason, Petitioners requested from Registrant another two-week extension to respond to the outstanding Discovery Requests. See Exhibit C. Registrant did not provide consent. Petitioners then requested from

the Board a thirty-day extension without requesting an extension of Petitioners' Testimony Period. Such extension request requested an extension of Petitioners' deadline for responding to the Discovery Requests to December 15, 2004, 8 days prior to the close of Petitioners' Testimony Period.

On November 23, 2004, Petitioners' Counsel admittedly was notified of the opening of Petitioners' Testimony Period (See Declaration of Robert M. Schwartz, Pages 2 and 3; Declaration of Julie Lamdanski Page 2). Petitioners' next action was not until 22 days later. Again, despite Petitioners' express written agreement that no further extensions would be requested for any reason, on December 15, 2004, the last day of Petitioners' requested extended deadline, Petitioners attempted to contact Registrant seeking a third extension. Registrant did not provide consent. Thus, on December 15, 2004 Petitioners again requested a second unconsented extension of Petitioners' Discovery Requests deadline from the Board, 84 days after receiving the Discovery Requests, citing, for the first time, voluminous Discovery Requests. However, despite Petitioners' Counsel's admission that he was aware of the impending close of Petitioners' Testimony Period (See Declaration of Robert M. Schwartz p. 5) such discovery extension request did not request an extension of Petitioners' Testimony Period. Such extension request requested an extension of Petitioners' deadline for responding to Discovery Requests to January 15, 2005, 23 days past the close of Petitioners' Testimony Period. At the close of Petitioners' Testimony Period, Petitioners' Counsel was on vacation.

Registrant timely filed its Memorandum opposing Petitioners' request for a second extension of Petitioners' Discovery Request deadline. Petitioners' Testimony Period closed without Petitioners taking any testimony or offering any other evidence. After the close of Petitioners' Testimony Period, Registrant timely filed its Motion to Dismiss for failure to prosecute. Thereafter, Petitioners filed Petitioners' Motion to Reopen Petitioners' Testimony Period.

ARGUMENT

Petitioners' Failure to Act During the Testimony Period Was Not a Result of Excusable Neglect

Pursuant to Fed. R. Civ. P. 6(b), the Board may grant a motion to reopen an expired time if the requesting party shows that its failure to act during the time previously allotted therefore was the result of excusable neglect. The excusable neglect determination must take into account all relevant circumstances surrounding the party's omission or delay. *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). In determining excusable neglect, it is irrelevant that the failure to timely take the required action resulted from the party's counsel's neglect rather than the neglect of the party itself. *Pioneer* at 396. Furthermore, the Board scrutinizes carefully any motion that extends time. See *Miscellaneous Changes to Trademark Trial and Appeal Board Rules*, 63 FR at 48086 (1998), 1214 TMOG at 149 (September 29, 1998). And in this particular instance it should be noted that the Petitioners themselves are both attorneys. In consideration of the circumstances noted below as elements that are to be taken into account pursuant to *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), Petitioners' failure to act during the Testimony Period was not a result of Excusable Neglect.

1. Petitioners' Failure To Act During The Allotted Time Period Was Due To The Inattention Of Petitioners As Petitioners Were Aware Of The Opening Of And The Running Of Petitioners' Testimony Period

One of the most important factors to consider in determining whether there is excusable neglect is the reason for the delay, including whether it was within the reasonable control of the movant. *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). Petitioners' failure

to act during Petitioners' Testimony Period was due to Petitioners' inattention, lack of due diligence, and unreasonable delay.

Petitioners' Counsel is a highly seasoned trademark attorney. Petitioners' themselves are attorneys. Petitioners were admittedly aware of Petitioners' Testimony Period and were faced with multiple opportunities to request an extension of the Testimony Period. Petitioners' Counsel admits in his Declaration that he was aware of Petitioners' impending and/or ongoing Testimony Period on November 11, 2004; November 15, 2004; November 23, 2004; and December 15, 2004. (See Declaration of Schwartz, Pages 2, 3, 4, and 5; Exhibit C). Petitioners' Counsel admits he was specifically notified of the actual opening of the Testimony Period (See Declaration of Schwartz Pages 2 and 3). Yet Petitioners' Counsel neither took evidence during the Testimony Period nor any action to extend Petitioners' Testimony Period on the opening day or at any time during the 30 days thereafter. The argument that Petitioners were unaware of the exact date that marked the end of such 30-day period is irrelevant as Petitioners' explicitly knew they were in the midst of their Testimony Period and failed to take any action.

(2) Petitioners' Delay Was Due To The Inattention Of Petitioners Rather Than Attributable To Any Docket Error And Such Delay Was Always Within The Reasonable Control Of Petitioners.

Petitioner's failure to act during the Testimony Period was due to continuous inattention. Petitioners failed to act regardless of whether any error occurred in Petitioners' Counsel's docket system. *See Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000) (counsel's press of other business, docketing errors, and misreading of relevant rule are circumstances wholly within counsel's control.) Petitioners were granted an extension of its original

discovery deadline from Registrant. Such grant presented the opportunity to request an extension of Petitioners' Testimony Period.

Yet Petitioners were inattentive and did not request an extension of Petitioners' Testimony Period. Again Petitioners were inattentive when Petitioners' subsequently filed their first unconsented motion with the Board 8 days prior to the opening of Petitioners' Testimony Period, without requesting for an extension of Petitioners' Testimony Period. These acts of inattention occurred regardless of any docket system issue.

The pertinent date for Petitioners' Counsel is the opening of Petitioners' testimony period. Yet Petitioners failed to take any action during their Testimony Period. Petitioners' inattention that has resulted in Petitioners' request to reopen Petitioners' Testimony Period occurred on the opening of the Testimony Period and during the thirty days prior to the close of the Testimony Period. During this time Petitioners should have started propounding Testimony or at minimum request to extend such Testimony Period.

As Petitioners' Counsel admits that he was correctly notified of the opening of the Testimony Period, Petitioners' alleged failure to receive notice of the end of the Testimony Period is irrelevant. Even if Petitioners were notified of the close of Petitioners' Testimony Period, the only difference such specific knowledge would have given Petitioner is the absolute drop dead date that an enlargement of its Testimony Period could have been requested had Petitioner been able to show good cause pursuant to TBMP 509.01(a). However, Petitioners' counsel was on vacation during the end of its Testimony Period, the time the docketing error allegedly occurred. The inattention and inaction by Petitioner occurred long before the time of the alleged docket error.

Petitioners' reason why they require further extensions of their Discovery Response deadlines and ultimately the Testimony Period is because they need time to receive Registrants' discovery and to

engage in Testimony Depositions of Registrant. (See Declaration of Schwartz - Exhibit D 3 of 3).¹ The sole reason why Petitioners do not have Registrants' responses to Petitioners' discovery requests is because Petitioners' failed to provide its responses to Registrant's Discovery Requests. The sole reason why Petitioners did not engage in Testimony Depositions of Registrant during its Testimony Period is because Petitioners were inattentive. Petitioners' request to reopen Petitioners' Testimony Period is simply because of Petitioners' inattentiveness, lack of due diligence, and unreasonable delay.

(3) Petitioners Acted In Bad Faith

Petitioners' have exhibited bad faith by (1) misleading Registrant by breaking a written agreement not to request any further extensions of time for any reason and (2) submitting grounds to the Board that are contrary to statements made to Registrant.²

A. Petitioners Misled Registrant by Breaking a Written Agreement in Bad Faith

Petitioners initially requested from Registrant an additional two week period to respond to Discovery Requests and noted that such two week period would be sufficient time for their response. Registrant provided more time than Petitioners requested to ensure that responses to the Discovery Requests would be provided as agreed. The parties expressly agreed in writing that Registrant would not request any further extensions for any reason. Petitioners' have brazenly ignored this agreement between the parties in bad faith. Subsequent to such agreement, Petitioners have requested not one, but

¹ While Registrant's Counsel did not receive a copy of the referenced Exhibit until Registrant received a copy of Petitioners' Motion to Reopen the Testimony Period, such correspondence states Petitioners' reasons why Petitioners' Testimony Period allegedly should be reopened.

² Also amongst the other alleged failures that have occurred at the law firm of Petitioners' Counsel, Petitioners' Counsel has attached as an exhibit (Exhibit D page 3 of 3 of the Declaration of Robert M. Schwartz) Correspondence seemingly sent to Registrant's Counsel that was never received by Registrant's Counsel. It should be made clear that Registrant's Counsel never received such alleged Correspondence via Facsimile, U.S. Mail, Email, or any other method or transmission until Registrant's Counsel received such Correspondence as part of Petitioners' Motion to Reopen Petitioners' Testimony Period.

multiple requests for extensions of time without even any reference or acknowledgement to Petitioners' earlier express written agreement.

B. Petitioners Have Submitted Grounds to the Board That Are Contrary to Statements Submitted to Registrant in Bad Faith

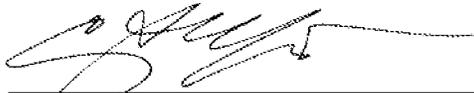
Again, after having the Discovery Requests for review and analysis for 30 days, Petitioners stated that an additional two weeks, or a total of 44 days, would be sufficient time for Petitioners to respond to the Discovery Requests. However, after Petitioners had the Discovery Requests for a total of 84 days, Petitioners requested that the Board provide them with an additional 30 days to respond to the Discovery Requests because the Discovery Requests were all of a sudden "voluminous." Petitioners had the Discovery Requests for almost three months and had requested three prior extensions without ever noting any concern regarding the volume of the Discovery Requests. Petitioners made the contrary statement to Registrant on November 11, 2004 that an additional two weeks (44 days total) would be sufficient. See Exhibit C. If Petitioners were acting in good faith, Petitioners would not have made contrary statements. If Petitioners were acting in good faith, Petitioners would have noted any concern that the Discovery Requests were voluminous during its first request to Registrant as well as during its second request to Registrant and its first formal request to the Board even though such requests were not supposed to occur pursuant to the parties' agreement as noted above.³

³ Even if the voluminous argument arguably were in good faith, the number of requests do not exceed any limitations and the number of requests alone does not serve as a valid reason to request a third extension of Petitioners' response deadline for good cause. Registrant's Discovery Requests were typical in number and type.

CONCLUSION

Registrant's Motion To Dismiss should be granted as Petitioners have failed to prosecute their case and Petitioners' failure to act during the original Testimony Period was not due to excusable neglect because: (1) Petitioners' failure to act during the allotted time period was due to the consistent inattention of Petitioners as Petitioners' Counsel was aware of the opening of and the running of Petitioners' Testimony Period, (2) Petitioners' delay was due to the consistent inattention of Petitioners rather than attributable to any docket error and such delay was always within the reasonable control of Petitioners; and (3) Petitioners acted in bad faith. Accordingly, Registrant respectfully requests that the Board grant Registrant's Motion To Dismiss, deem Petitioners' Motion to Reopen Petitioners' Testimony Period moot, and issue any other order deemed appropriate by the Board.

Respectfully submitted,



Cheryl Meide
Attorney for Registrant
Florida Bar No. 0064173

February 4, 2005
Date

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E-mail: cmeide@meidelaw.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Registrant's Reply Brief to Petitioners' Opposition To Registrant's Motion to Dismiss Petitioners' Consolidated Petition for Cancellation was deposited with the United States Postal Service as First Class Mail, postage prepaid, in an envelope addressed to Robert M. Schwartz, Esquire, Ruden, McClosky, Smith, Schuster & Russell, P.A., 200 E. Broward Blvd., Fort Lauderdale, FL 33301 on the date set forth below.



Cheryl Meide
Attorney for Registrant
Florida Bar No. 0064173

February 4, 2005
Date

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EXHIBIT A

EXHIBIT B

EXHIBIT C

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CDM04-074
October 25, 2004
Via Facsimile
And Email

Ruden McClosky
200 East Broward Boulevard
Fort Lauderdale, Florida 33301

Attention: Robert Schwartz, Esq.,

Re: CUZCATLAN® marks
Consolidated Petition for Cancellation
No. 92,043,017
CBI International, Inc.
Discovery Response Extension

Dear Robert:

I enjoyed speaking with you earlier today. Thank you for your correspondence earlier this evening to document our discussions and my client's agreement to provide a mutual three-week extension for discovery responses in the above noted proceeding.

In addition to your correspondence confirmations, further aspects of our discussion need to be identified in response to your request for immediate clarification of our understanding. As we discussed, the three-week extension for both Petitioners and Registrant's discovery responses are agreed to by Registrant strictly with the condition that Petitioners will not receive any further extensions in connection with any discovery deadlines for any reason. In addition, my client's agreement to a three-week extension is strictly under the condition that the responses to both Registrants First Set of Interrogatories to Petitioners and Registrant's First Set of Production of Documents and Things to Petitioners ("Requests") will be substantively complete with the exception of any objections particular to each individual request. My client has consented to your client's two-week extension request with a three-week extension to ensure that we will receive substantive answers to both sets of Requests from your client on November 15, 2004.

Please let me know if you have any questions or comments. Thank you so much.

Kind Regards,



Cheryl Meide

C: Jaime Giammattei (Via Email)
German Giammattei (Via Email)

From: Schwartz, Robert [Robert.Schwartz@ruden.com]

Sent: Tuesday, October 26, 2004 8:50 AM

To: Cheryl Meide

Subject: RE: Extension Clarification

Dear Cheryl,

Further to my letter to you of yesterday, I confirm you will not agree to further extension requests and we will not request another extension. Further I confirm our responses will be made in good faith and within the rules of evidence.

Robert.

-----Original Message-----

From: Cheryl Meide [mailto:cmeide@meidelaw.com]

Sent: Monday, October 25, 2004 8:34 PM

To: Schwartz, Robert

Subject: Extension Clarification

Dear Robert:

Please see the attached. Thank you.

Cheryl Meide, Esquire
Technology Law and Trademark Law

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From: Schwartz, Robert [Robert.Schwartz@ruden.com]
Sent: Thursday, November 11, 2004 4:55 PM
To: Cheryl Meide
Subject: CUZCATLAN discovery

Dear Ms. Meide,

Yesterday afternoon (Wednesday), I called my client in regards to our finishing up the pending discovery. In a return call to me later in the evening, George Contos advised me that his father had passed away last Saturday and that the funeral had been that day (Wednesday). In view thereof, it is most likely not going to be possible to meet the deadline we had previously agreed upon for furnishing discovery responses. I would appreciate your thoughts on this unforeseen turn of events. I asked George what he wanted to do. He indicated it is his intent to complete the discovery responses. I first ask you for an additional period of time. I propose two weeks. George indicated this should be possible. It is not his intent to delay these proceedings. Please advise your position. You may advise your client on my behalf that we would appreciate their understanding and cooperation. My alternative would be to request an extension from the TTAB.

Thank you.

ps This is the first opportunity I have had today to forward this information.
Also, if this would impact the testimony periods I propose we discuss this directly.

Robert M. Schwartz
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