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

Proceeding	92044697
Party	Plaintiff ACM Enterprises, Inc.
Correspondence Address	MARC E. HANKIN HANKIN PATENT LAW, APC 6404 WISHIRE BLVD., SUITE 1020 LOS ANGELES, CA 90048 UNITED STATES marc@hankinpatentlaw.com, kevin@hankinpatentlaw.com, courtfiling@hankinpatentlaw.com
Submission	Motion to Reopen
Filer's Name	Marc E. Hankin
Filer's e-mail	marc@hankinpatentlaw.com, kevin@hankinpatentlaw.com
Signature	/Marc E. Hankin/
Date	07/07/2010
Attachments	ACM Motion to Reopen Testimony Period with Declaration and Exhibits.pdf (13 pages)(599128 bytes)

Testimony Period dates:

DISCOVERY PERIOD:	CLOSED
Thirty-day testimony period for party in position of plaintiff to close:	June 15, 2010
Thirty-day testimony period for party in position of defendant to close:	August 14, 2010
Fifteen-day rebuttal testimony period to close:	September 28, 2010

On May 14, 2010, Defendant submitted a Change of Correspondence Address, which indicated that Mr. Thomas Daly of Christie Parker & Hale LLP had been hired to represent Defendant. On May 19, 2010, ACM submitted a Change of Correspondence Address, which substituted ACM's previous Attorney, Mr. David Hong, for Mr. Marc E. Hankin. Although Mr. Hankin contacted Mr. Daly as soon as Mr. Hankin entered the case, because Mr. Hankin and Mr. Daly were so new to the case, ACM and the Defendant were unable to complete ACM's testimony before June 15, 2010.

II. Legal Standard

Pursuant to TBMP 509.01(b), "[w]here the time for taking required action, as originally set or as previously reset, has expired, a party desiring to take the required action must file a motion to reopen the time for taking that action. The movant must show that its failure to act during the time previously allotted therefor was the result of excusable neglect." *Citing* Fed. R. Civ. P. 6(b).

The TTAB, in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997) adopted the analysis set forth by the Supreme Court in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993), in determining whether a party has shown excusable neglect. In determining excusable neglect the relevant circumstances surrounding the party's omission or delay are taken into account, "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.” TBMP 509.01(b)(1), citing *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 and *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380.

III. Statement of the Facts

As discussed above, on March 12, 2010, the Board Denied Respondent-Defendant, Jeannette Martello, M.D.’s (hereinafter “Defendant”) Motion for Summary Judgment and set forth the following Testimony Period dates:

DISCOVERY PERIOD:	CLOSED
Thirty-day testimony period for party in position of plaintiff to close:	June 15, 2010
Thirty-day testimony period for party in position of defendant to close:	August 14, 2010
Fifteen-day rebuttal testimony period to close:	September 28, 2010

On May 14, 2010 and May 19, 2010, over two months after the testimony periods were set by the Board, Mr. Daly and Mr. Hankin entered the case, respectively, on behalf of Defendant and ACM. On May 19, 2010, Mr. Hankin emailed Mr. Daly to make contact and set up a meeting for Friday, May 21, 2010 to discuss the case. Declaration of Marc E. Hankin in Support of Motion to Reopen the Testimony Period for Party in Position of Plaintiff (“Hankin Decl.”) ¶ 2; Exhibit 1 to Hankin Decl. Mr. Daly responded by email on May 20, 2010 and stated that he would not be available to meet on May 21, 2010. Hankin Decl. ¶ 2; Exhibit 1. Mr. Daly also indicated that he was not prepared for a meeting because he was “still trying to get all the files transferred” and “get fully up to speed.” Hankin Decl. ¶ 2; Exhibit 1. Although Mr. Daly agreed that a meeting would be a good idea, he requested times for Thursday or Friday the next week. Hankin Decl. ¶ 2; Exhibit 1.

Later that same day, May 20, 2010, Mr. Hankin stressed the importance of having the meeting immediately in order to start taking testimony the next week. Hankin Decl. ¶ 3; Exhibit

1. Additionally, Mr. Hankin requested that the parties reopen settlement negotiations in order to save their mutual clients from paying additional attorneys fees. Hankin Decl. ¶ 3; Exhibit 1. Mr. Daly refused to meet that same week and stated that he would be “willing to talk next week.” Hankin Decl. ¶ 3; Exhibit 1.

On May 24, 2010, Mr. Daly emailed Mr. Hankin to inform Mr. Hankin that he would be able to meet starting Wednesday of that week, May 26, 2010. Hankin Decl. ¶ 4; Exhibit 2. On Sunday, May 30, Mr. Hankin emailed Mr. Daly to suggest that they meet on Tuesday, June 1, 2010. Hankin Decl. ¶ 4; Exhibit 2. Mr. Hankin had lunch with Mr. Daly, whom Mr. Hankin has known for more than 15 years, and asked Mr. Daly about settling the case. Hankin Decl. ¶ 4. The Parties subsequently exchanged written Settlement Proposals, but no agreement could be reached, which Mr. Daly finally informed Mr. Hankin of only AFTER the close of the Testimony Period. Hankin Decl. ¶ 4.

On June 16, 2010, Mr. Hankin and Mr. Daly had a telephone conference and discussed settlement and reopening the Testimony Period. Hankin Decl. ¶ 5. On June 17, 2010, Mr. Daly responded to ACM’s settlement offers and finally rejected all of the settlement offers extended. Hankin Decl. ¶ 5; Exhibit 3. Mr. Daly also indicated that Defendant would be unwilling to stipulate to a reopening of ACM’s testimony period. Hankin Decl. ¶ 5; Exhibit 3. Later that same day, Mr. Hankin informed Mr. Daly that ACM would be filing the present Motion to Reopen the Testimony Period. Hankin Decl. ¶ 5; Exhibit 3.

III. Arguments

While perhaps Mr. Hankin should have pressed harder to take the Testimony of his own Client during the Testimony Period, because Mr. Daly needed more time to prepare, and then because Mr. Hankin thought the Parties would be settling, Mr. Hankin did not push both sides to

spend legal fees, and inadvertently, and excusably, allowed the time to expire without first moving for an Extension of the Testimony Periods. When Mr. Hankin met and conferred with Mr. Daly regarding resetting the Testimony Periods, Mr. Daly chose to seize the procedural advantage he received by Mr. Hankin's courtesy, and Mr. Daly declined to stipulate to file a Joint Motion. Therefore, not only was ACM's failure to act during the time previously allotted was the result of excusable neglect, but to find otherwise would unfairly reward Respondent-Defendant.

IV. Conclusion

For the above reasons ACM respectfully requests that the Board grant **Petitioner-Plaintiff's** Motion to Reopen the Testimony Period for Party in Position of Plaintiff and reset the Testimony Periods as follows:

DISCOVERY PERIOD:	CLOSED
Thirty-day testimony period for party in position of plaintiff to close:	August 23, 2010
Thirty-day testimony period for party in position of defendant to close:	October 25, 2010
Fifteen-day rebuttal testimony period to close:	December 06, 2010

Dated: July 7, 2010

Respectfully submitted,

/Marc E. Hankin/

Marc E. Hankin
USPTO Reg. No. 38,908
HANKIN PATENT LAW, APC
Marc@HankinPatentLaw.com
Office Tel.: (323) 944-0206
Cell Phone: (310) 892-1613

Attorneys for Petitioner-Plaintiff

Certificate of Service

I hereby certify that I am not a party to this case and a true and correct copy of the following documents: PETITIONER-PLAINTIFF'S MOTION TO REOPEN THE TESTIMONY PERIOD FOR PARTY IN POSITION OF PLAINTIFF (6 pages), DECLARATION OF MARC E. HANKIN IN SUPPORT OF PETITIONER-PLAINTIFF'S MOTION TO REOPEN THE TESTIMONY PERIOD FOR PARTY IN POSITION OF PLAINTIFF (3 pages), and three Exhibits (1-3) (total of 4 pages), were sent by e-mail and first class U.S. Mail on April 11, 2010, in an envelope addressed to: Thomas Daly, Christie Parker & Hale LLP, P.O. Box 7068, Pasadena, CA, 91109-7086;
Email: Thomas.Daly@cph.com and pto@cph.com.

/Kevin Schraven/
Kevin Schraven
July 7, 2010

to discuss the case. Mr. Daly responded by email on May 20, 2010 and stated that he would not be available to meet on May 21, 2010. Mr. Daly also indicated that he was not prepared for a meeting because he was “still trying to get all the files transferred” and “get fully up to speed.” Although Mr. Daly agreed that a meeting would be a good idea, he requested times for Thursday or Friday the next week.

3. Later that same day, May 20, 2010, I stressed the importance of having the meeting immediately in order to start taking testimony the next week. Additionally, I requested that the parties reopen settlement negotiations in order to save their mutual clients from paying additional attorneys fees. Mr. Daly refused to meet that same week and stated that he would be “willing to talk next week.”
4. Exhibit 2 is a true and correct copy of a chain of emails between me and Mr. Daly, from May 24, 2010 to May 30, 2010. On May 24, 2010, Mr. Daly emailed me to inform me that he would be able to meet starting Wednesday of that week, May 26, 2010. On Sunday, May 30, I emailed Mr. Daly to suggest that they meet on Tuesday, June 1, 2010. I had lunch with Mr. Daly, whom I have known for more than 15 years, and asked Mr. Daly about settling the case. The Parties subsequently exchanged written Settlement Proposals, but no agreement could be reached, which Mr. Daly finally informed me of only AFTER the close of the Testimony Period.
5. Exhibit 3 is a true and correct copy of a chain of emails between me and Mr. Daly, from Thursday June 17, 2010. On June 16, 2010, Mr. Daly and I had a telephone conference and discussed settlement and reopening the Testimony Period. On June 17, 2010, Mr. Daly responded to ACM’s settlement offers and finally rejected all of the settlement offers extended. Mr. Daly also indicated that Defendant would be unwilling to stipulate to a reopening of ACM’s testimony period. Later that same day, I informed Mr. Daly that ACM would be filing the present Motion to Reopen the Testimony Period.
6. The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such

willful false statements and the like may jeopardize the validity of the application or document or any resulting registration, declares that he is properly authorized to execute this application on behalf of the applicant; he believes the applicant to be the owner of the service mark sought to be registered, or, if the application is being filed under 15 U.S.C. §§1051(b), 1126(d) or 1126(e), he believes the applicant to be entitled to use such mark in commerce; to the best of his knowledge and belief no other person, firm, corporation, or association has the right to use the mark in commerce, either in the identical form thereof or in such near resemblance thereto as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion, or to cause mistake, or to deceive; and that all statements made of her own knowledge are true and all statements made on information and belief are believed to be true.

Dated: July 7, 2010

Respectfully submitted,

/Marc E. Hankin/

Marc E. Hankin
USPTO Reg. No. 38,908

Marc E. Hankin

From: Thomas Daly [Thomas.Daly@cph.com]
Sent: Thursday, May 20, 2010 4:24 PM
To: Marc@HankinPatentLaw.com
Subject: RE: Skin Deep Cancellation Substitution of Counsel

I'm willing to talk next week. I understand your testimony period closes June 15. Has any testimony been noticed? I wasn't aware of any. I'm not sure what testimony you plan to take next week as I may not have received the files reflecting the testimony you are referring to.

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

From: Marc E Hankin [mailto:Marc@HankinPatentLaw.com]
Sent: Thursday, May 20, 2010 10:20 AM
To: Thomas Daly
Subject: Re: Skin Deep Cancellation Substitution of Counsel

Tom,

The problem is that I need to start taking my Testimony next week, so I wanted to sit down with you to, (a) make a schedule, and (b) see whether there is any way that two highly experienced lawyers, both new to a case, with no baggage, might re-open the settlement talks, albeit briefly, to see if there is any way to avoid transferring the funds from our Trust Accounts to our Mortgage Accounts

Thanks,
Marc

Marc E. Hankin
Hankin Patent Law, APC
Cell: (310) 892-1613

From: "Thomas Daly" <Thomas.Daly@cph.com>
Date: Thu, 20 May 2010 09:55:53 -0700
To: <marc@hankinpatentlaw.com>
Subject: RE: Skin Deep Cancellation Substitution of Counsel

Marc,

Thanks for making contact. Unfortunately, I already have meetings scheduled around the lunch at Huntington. Also, as you note, I've just come into this matter. I'm still trying to get all the files transferred so that I can get fully up to speed. However, I agree that a meeting would be a good idea. Do you have time next week for a meeting? Thursday and Friday are generally open for me. I look forward to hearing from you. Thanks.

Tom Daly

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

From: Marc E. Hankin [mailto:marc@hankinpatentlaw.com]
Sent: Wednesday, May 19, 2010 10:24 AM
To: Thomas Daly
Cc: 'Kevin Schraven'
Subject: Skin Deep Cancellation Substitution of Counsel

Dear Tom,

I hope that all is well with you.

I notice that you have just come into the Cancellation of Skin Deep by ACM Enterprises, Inc. I have been retained by ACM to represent them in this matter, replacing David Hong.

I would whether it would be possible to meet with you this Friday, May 21? I plan to be at the Provisors Lunch in the Tea Room at the Huntington Library/Gardens, and I would be pleased to come to your Offices either beforehand or afterwards. Let me know whether either works for you, and if so, what time? I prefer 10:30 am but I also could come by around 2:00 pm, if you prefer then.

Please let me know. Thanks!
Marc

Marc E. Hankin, Esq.

Selected as a Los Angeles Magazine Super Lawyer® 2004*, 2007, 2008, 2009, 2010

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E-Mail: Marc@HankinPatentLaw.com

www.HankinPatentLaw.com

Marc E. Hankin

From: Marc Hankin Patent Law [hankinpatentlaw@yahoo.com]
Sent: Friday, June 18, 2010 6:08 PM
To: 'hayley@hankinpatentlaw.com'
Subject: FW: SKIN DEEP Matter

From: Marc E Hankin [mailto:Marc@HankinPatentLaw.com]
Sent: Sunday, May 30, 2010 5:36 PM
To: Thomas Daly
Cc: Hayley Hughes
Subject: Re: SKIN DEEP Matter

Tom,

I am sorry, but this past week just got away from me. Let's speak on Tuesday.

Thank you very much,
Marc

Marc E. Hankin
Hankin Patent Law, APC
Cell: (310) 892-1613

From: "Thomas Daly" <Thomas.Daly@cph.com>
Date: Mon, 24 May 2010 16:22:07 -0700
To: <Marc@HankinPatentLaw.com>
Subject: SKIN DEEP Matter

Marc,

I have now received all the files from my client and have begun reviewing them. I also had a chance to meet with my client. If you would still like to meet to discuss the matter, I now believe I am prepared to discuss it with you. My schedule is generally open starting Wednesday of this week. Please let me know if you are still interested in talking and, if so, when you would like to get together. I look forward to hearing from you.

Thomas J. Daly
Christie, Parker & Hale, LLP
350 W. Colorado Blvd., Suite 500
Pasadena, CA 91105
(626) 795-9900

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Marc E. Hankin

From: Marc E. Hankin [marc@hankinpatentlaw.com]
Sent: Friday, June 18, 2010 6:08 PM
To: 'hayley@hankinpatentlaw.com'
Subject: FW: SKIN DEEP Matter

From: Marc E. Hankin [mailto:marc@hankinpatentlaw.com]
Sent: Thursday, June 17, 2010 5:59 PM
To: 'Thomas Daly'
Subject: RE: SKIN DEEP Matter

Tom,

That is a disappointment, but yes, we will be filing a Motion to reset all of the Testimony Periods.

It is really too bad that you chose not to cooperate in this matter, but I guess that we will not get to litigate as adversaries again.

Best of luck,
Marc

From: Thomas Daly [mailto:Thomas.Daly@cph.com]
Sent: Thursday, June 17, 2010 5:47 PM
To: Marc@HankinPatentLaw.com
Subject: SKIN DEEP Matter

Marc,

My client has decided to reject both of the alternative settlement offers you extended on behalf of your client yesterday. Although, as stated yesterday, I do not believe you have a proper basis for resetting your testimony period, please let me know if you will be filing a motion to do so. Otherwise, we will be filing a motion for directed verdict.

Thomas J. Daly
Christie, Parker & Hale, LLP
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Pasadena, CA 91105
(626) 795-9900

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