

ESTTA Tracking number: **ESTTA114207**

Filing date: **12/12/2006**

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

Proceeding	92045238
Party	Plaintiff Rexam Closures and Containers, Inc. Rexam Closures and Containers, Inc. Rexam Closures and Containers, Inc. 3245 Kansas Road Evansville, IN 47711 UNITED STATES
Correspondence Address	Julie Ann Gregory and Brian P. McGraw Middleton Reutlinger 2500 Brown & Williamson Tower Louisville, KY 40202 UNITED STATES bmcgraw@midtreut.com
Submission	Other Motions/Papers
Filer's Name	Brian P. McGraw
Filer's e-mail	bmcgraw@midtreut.com
Signature	/Brian McGraw/
Date	12/12/2006
Attachments	Motion to Enforce Settlement Agreement or Re-Open Discovery with supporting memo and exhibits.pdf (61 pages)(1683690 bytes)

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

In the Matter of U.S. Registration No. 2,827,685

Mark: SNAPLOC
Registration Date: March 30, 2004

REXAM CLOSURES)
AND CONTAINERS INC.)

Petitioner)

v.)

Cancellation No. 92045238

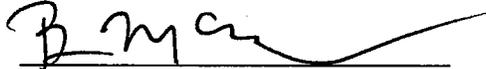
BERRY PLASTICS CORPORATION.)

Registrant)

CERTIFICATE OF TRANSMISSION

I HEREBY CERTIFY THAT THIS CORRESPONDENCE IS BEING TRANSMITTED BY ELECTRONIC MAIL TO THE TRADEMARK TRIAL AND APPEAL BOARD, UNITED STATES PATENT AND TRADEMARK OFFICE ON DECEMBER 12, 2006.

BRIAN P. MCGRAW



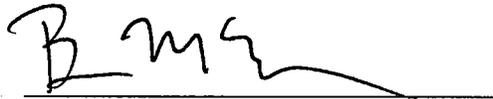
PETITIONER'S MOTION TO ENFORCE THE PARTIES' SETTLEMENT AGREEMENT OR IN THE ALTERNATIVE REOPEN THE DISCOVERY PERIOD AND RESET THE TESTIMONY DATES PURSUANT TO FED. R. CIV. P. 6(b), 37 CFR §2.120(A), 37 CFR §1.121(A)(1) AND T.M.B.P. §509.01

Petitioner, Rexam Closures and Containers, Inc. ("Rexam" or "Petitioner") by counsel, pursuant to Fed. R. Civ. P. 6(b) and § 509.01(b) of the Trademark Trial and Appeal Board Manual of Procedure ("T.B.M.P."), hereby moves to enforce the settlement agreement entered into by the parties on July 6, 2006 or, in the alternative, moves to reopen the discovery period and reset the testimony period in the above captioned

cancellation proceeding based on Respondent's fraudulent settlement offer and/or based on excusable neglect. In support of its Motion, Petitioner states that Respondent communicated an offer of settlement to Petitioner on July 4, 2006 and Petitioner accepted said offer on July 6, 2006. As such, the parties entered into a valid and enforceable settlement agreement which this Board has the power to enforce. In the alternative, Respondent fraudulently induced Petitioner into believing this matter was settled, and subsequently reneged on settlement upon expiration of the time period for Petitioner's testimony. As such, Petitioner did not file a motion to extend discovery and/or suspend the proceedings. A supporting memorandum and tendered order are attached hereto.

Dated: December 12, 2006

Respectfully submitted,

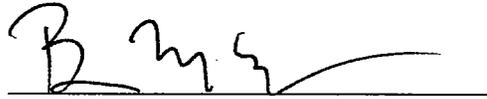


Julie Ann Gregory
Brian P. McGraw
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, Kentucky 40202
Tel: (502) 584-1135
Fax: (502) 561-0442
jgregory@midtreut.com and/or
bmcgraw@midtreut.com.

COUNSEL FOR PETITIONER
REXAM CLOSURES & CONTAINERS,
INC.

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Motion to Enforce the Parties' Settlement Agreement or in the alternative to Reopen the Discovery Period and Reset the Testimony Periods, with supporting memorandum and exhibits, was served this 12th day of December, 2006, by first-class mail, postage prepaid, and electronic mail, addressed to Ms. Julia Gard, BARNES & THORNBURG LLP, 11 S. Meridian Street, Indianapolis, In 46204, Julia.Gard@BTLaw.com.



Counsel for Petitioner
Rexam Closures and Containers, Inc.

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

In the Matter of U.S. Registration No. 2,827,685

Mark: SNAPLOC
Registration Date: March 30, 2004

REXAM CLOSURES)	
AND CONTAINERS INC.)	
)	
Petitioner)	
)	
v.)	Cancellation No. 92045238
)	
BERRY PLASTICS CORPORATION.)	
)	
Registrant)	

**PETITIONER’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO
ENFORCE THE PARTIES’ SETTLEMENT AGREEMENT OR IN THE
ALTERNATIVE REOPEN THE DISCOVERY PERIOD AND RESET THE
TESTIMONY DATES**

Petitioner, Rexam Closures and Containers, Inc. (“Rexam” or “Petitioner”) by counsel, pursuant to Fed. R. Civ. P. 6(b) and §509.01(b) of the Trademark Trial and Appeal Board Manual of Procedure (“T.B.M.P.”), submits the following brief in support of its Motion to Enforce the Parties’ Settlement Agreement and, in the alternative, to Reopen the Discovery Period and Reset the Testimony Dates in the above captioned Cancellation proceeding.

STATEMENT OF THE CASE

Petitioner seeks to cancel U.S. Trademark Registration No. 2,827,685 for the mark “SNAPLOC” in International Class 20 for “tamper-evidence plastic closures for

food and beverage products” (“the ‘685 Registration”) on the grounds that said registration is likely to cause confusion with Petitioner’s pre-existing SNAP LOK trademark for “non-metal closures for containers.” As such, Petitioner filed a Petition to Cancel the ‘685 Registration with the Trademark Trial and Appeal Board (“TTAB” or “Board”) on December 7, 2005. The TTAB instituted these cancellation proceedings, No. 92045238, on December 14, 2005.

Respondent was originally required to answer the Complaint by January 23, 2006. However, Respondent did not file an Answer or otherwise respond to the complaint within the time provided by the Board’s trial order. To that end, Petitioner filed a Motion for Default Judgment on February 2, 2006. Thereafter, on February 11, 2006, Respondent ultimately filed a response to Petitioner’s Motion for Default Judgment concurrently with its Answer to Petitioner’s Complaint. By Order dated April 19, 2006, the Board denied Petitioner’s Motion for Default Judgment, accepted Respondent’s late Answer, and reset the discovery dates as follows:

July 19, 2006 – Discovery to Close;

October 17, 2006 – Petitioner’s Testimony Period to Close;

December 12, 2006 – Respondent’s Testimony Period to Close; and

January 30, 2007 – Rebuttal Testimony Period to Close

The discovery period is now closed, as are both the Petitioner’s and Respondent’s Testimony Period¹. Petitioner brings this Motion in order to enforce the agreed upon settlement of this matter and/or to re-open the discovery period and reset the dates for the taking of testimony.

¹ Respondent’s Testimony period is set to close today, December 12, 2006. Respondent has introduced no testimony, nor has it noticed any potential testimony.

STATEMENT OF FACTS

Petitioner has been using the mark SNAP LOK in connection with the applied-for goods since at least as early as June 30, 1976. Petitioner's predecessor company, that being Rexam Plastics Inc., was the owner of U.S. Reg. No. 1,681,224 (hereinafter referred to as the '224 registration) for the mark SNAP-LOK for use in connection with "child resistant threaded plastic closures for containers" in International Class 20. The '224 registration issued on March 31, 1992, and was inadvertently allowed to be cancelled and/or to expire under Sections 8 and 9 of the Trademark Act, effective January 4, 2003. Petitioner has continued to use the mark despite the cancellation of its trademark registration. Soon thereafter, Petitioner obtained present trademark counsel and on November 4, 2004, Petitioner filed a fresh trademark application for the mark SNAP LOK, App. Serial No. 78/511,323 ("the '323 Application"), for use in connection with "non-metal closures for containers" in International Class 20.

On June 13, 2002, within three months after Petitioner's date to file a Section 9 renewal had inadvertently passed, Respondent filed an application under Section 1(a) of the Trademark Act for the mark SNAPLOC for use in connection with "tamper-evidence plastic closures for food and beverage products". Serial No. 78/135,648 was assigned to that application. Petitioner's '224 Registration, which had not yet been formally cancelled, was cited as a basis for refusing the Respondent's '323 Application under §2(d) of the Trademark Act (likelihood of confusion). Registration eventually issued on March 30, 2004 under Reg. No. 2,827,685 (but only after Petitioner's '224 Registration was cancelled pursuant to Sections 8 and 9 of the Trademark Act).

Now, regarding Petitioner's fresh application, Respondent's '685 Registration has been cited under Section 2(d) of the Trademark Act as a basis for refusing registration of Petitioner's recently filed '323 Application for the mark SNAP LOK. Petitioner subsequently filed its Petition to Cancel the '685 Registration based, *inter alia*, upon priority of use.

On March 28, 2006, Respondent, through counsel, initiated settlement discussions by sending a letter to Petitioner's counsel inquiring as to the possibility of settlement (*see* letter of March 28, 2006 attached hereto as Exhibit "A"). On April 28, 2006, Petitioner counsel responded by stating that Petitioner would not be willing to discuss settlement unless and until Respondent provided evidence that it had been continuously using its SNAPLOC mark since 1988 (as alleged in the '685 Registration) (*see* letter of April 28, 2006 attached hereto as Exhibit "B"). Berry did not respond to Petitioner's April 28 letter.

On June 20, 2006, Petitioner, by counsel, sent a follow up letter to Respondent's counsel requesting a reply to the April 28 letter (*see* letter of June 20, 2006 attached hereto as Exhibit "C"). Two weeks passed and there was still no reply from Respondent. On June 25, Respondent's counsel sent Petitioner an email stating that she would speak with her client about settlement possibilities and follow up with Petitioner as soon as she did so. (*see* email of June 25, 2006 attached hereto as Exhibit "D"). The next day, counsel for Petitioner sent an email to Respondent's counsel which stated that should the parties not agree to a settlement, they would need to file a joint motion to extend the discovery period (*see* email of June 26, 2006 attached hereto as Exhibit "E").

Subsequently, on July 4, 2006, Respondent's Counsel left a voice mail message with Petitioner. In this message, Respondent's Counsel offered to settle the case based on the fact that **Respondent had "completely lost interest in this registration"**.

Respondent's Counsel set forth the following terms in her voice mail: (1) first, Respondent would just close the file and Petitioner could just move for a default judgment; or, (2) Respondent would simply voluntarily "cancel [surrender]" the '685 Registration, without prejudice, in exchange for Petitioner's dismissal of the Cancellation. Respondent's counsel further stated that if this offer was acceptable, they would go ahead and draft the requisite settlement documents, send them to Petitioner, and withdraw the '685 Registration (*see* transcript of July 4, 2006 voicemail attached hereto as Exhibit "F").

On July 6, 2006, counsel for Petitioner accepted Respondent's July 4 offer of settlement by sending an email communicating said acceptance (*see* email of July 6, 2006, attached hereto as Exhibit "G"). A week passed and still no settlement documents were sent to Petitioner.

With the discovery deadline looming, and no documents yet received from Respondent, Petitioner sent Respondent a follow up email on July 14, 2006 (*see* email of July 14, 2006, attached hereto as Exhibit "H"). Later that day, Respondent finally replied by stating that "we'll get you a settlement agreement" (*see* email of July 14, 2006, attached hereto as Exhibit "I"). Believing the case to be settled, and believing the parties had agreed as such, Petitioner's counsel did not file a motion to extend discovery and/or suspend the proceedings on July 19, 2006 – the day discovery closed in these proceedings.

On August 9, 2006, having not heard from Respondent; Petitioner sent a follow up email which contained a draft of a proposed settlement agreement based on the terms offered and agreed to in early July (*see* email of August 9, 2006, attached hereto as Exhibit “J”). Respondent did not reply to the August 9, 2006 email, or the proposed settlement agreement. On August 29, 2006, Petitioner sent yet another follow up email to Respondent (*see* email of August 29, 2006, attached hereto as Exhibit “K”). Later that day, counsel for Respondent sent a reply email stating that she would speak to her client and get back with Petitioner (*see* email of August 29, 2006, attached hereto as Exhibit “L”). On September 5, 2006, Respondent finally replied by sending Petitioner a proposed settlement agreement. This settlement agreement reflected the basic terms of the parties’ original agreement, however, Respondent included a provision which would allow it to continue manufacturing products under its cancelled trademark (*see* email of September 5, 2006, attached hereto as Exhibit “M”).

On September 25, 2006, Petitioner rejected Respondent’s proposed draft agreement and sent Respondent an agreement which was identical to the agreement Petitioner sent to Respondent on August 9, 2006 (*see* email of Sept. 25, 2006, attached hereto as Exhibit “N”). There was no response to this proposed agreement despite follow up emails to Respondent’s counsel on October 9, 2006 and October 17, 2006 (*see* emails of October 9, 2006 and October 17, 2006 attached hereto as Exhibit “O”). Petitioner subsequently telephoned Respondent on October 24, 2006, and left a voice mail requesting a response to Petitioner’s repeated attempts to contact Respondent. Finally, on October 26, 2006, after the discovery and testimony periods had closed, Respondent’s counsel contacted Petitioner’s counsel and stated that it “no longer wished to settle this

case” (*see* email of October 26, 2006, attached hereto as Exhibit “P”). On November 25, 2006, Respondent sent Petitioner an email confirming that it would not consent to the reopening of discovery (*see* email of November 25, 2006, attached hereto as Exhibit “Q”).

ARGUMENT

I. THIS COURT SHOULD ENFORCE THE PARTIES’ SETTLEMENT AGREEMENT

The Board should enforce the parties’ settlement agreement which was entered on July 6, 2006.

There is an overriding public policy which encourages settlement of litigation and holds parties to the terms of their agreements. *See MWS Wire Industries, Inc. v. California Fine Wire Co., Inc.*, 797 F.2d 799 (9th Cir. 1986); *Beer Nuts, Inc. v. King Nut Co.*, 477 F.2d 326, 328-29 (6th Cir. 1983); *Wells Cargo, Inc. v. Wells Cargo, Inc.*, 606 F.2d 961, 965 (CCPA 1979); *Danskin, Inc. v. Dan River, Inc.*, 182 USPQ 370 (CCPA 1974); *MarCon Ltd. v. Avon Products Inc.*, 4 USPQ2d 1474 (TTAB 1987). Further, it has been held that the Board has the authority to enforce and give effect to a parties’ settlement agreement to the extent that the agreement is relevant to issues properly before the Board. *See Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316 (Fed. Cir. 1983); *see also, Vaughn Russell Candy Co. v. Cookies in Bloom, Inc.*, 47 USPQ2d 1635, 1638 n. 6 (TTAB 1998) (“...agreements to cease use of a mark or to not use a mark in a certain format are routinely upheld and enforced”). Finally, when a party fails to comply with its obligations under a settlement agreement, the opposing party may seek in equity to enforce the terms of the agreement. *Harding v. State*, 603 N.E.2d 176 (Ind. Ct. App. 4th Dist. 1992).

According to many courts, a valid compromise agreement made in good faith is enforceable, *Lyles v. Commercial Lovelace Motor Freight, Inc.*, 684 F.2d 501 (7th Cir. 1982), so long as it possesses all of the elements of a valid contract, *Mazzella v. Koken*, 739 A.2d 531 (1999), regardless of what the result might have been if the case had been decided in litigation rather than settled. *Hennessy v. Bacon*, 137 U.S. 78 (1890). Since the law favors the compromise and settlement of disputed claims, it should not circumscribe the means of carrying such settlements into effect. *Booth v. 3669 Delaware, Inc.*, 703 N.E.2d 757 (NY. 1998).

In Indiana², a contract need not be in writing to be valid. In general, in order for there to be a valid contract in Indiana, there need be offer, acceptance, and consideration. An express contract may be oral or written, *Pence v. Beckman*, 39 N.E. 169, 170 (Ind. 1894); *see also, Wilson v. Montgomery Ward & Co., Inc.*, 610 F. Supp. 1035 (D.C. Ind. 1985).

In this case, the parties began negotiating settlement around March 28, 2006. For the next few months, Petitioner and Respondent were unable to agree on the terms of a possible settlement agreement. With the discovery deadline looming, counsel for Petitioner sent counsel for Respondent an email dated June 26, 2006 (see Exhibit "E"). In this email, counsel for Petitioner clearly stated that the parties needed to come to a settlement agreement and, if they could not agree, Petitioner would need to file a motion to extend discovery. Soon thereafter, on July 4, 2006, counsel for Respondent called counsel for Petitioner and left a voice mail which offered the following settlement terms:

² Because both Petitioner and Respondent reside in Indiana the oral settlement agreement in this case is governed by the contract law of the State of Indiana.

(1) First, Respondent would just close the file and Petitioner could just move for a default judgment; or, (2) Respondent would simply voluntarily “cancel [surrender]” the ‘685 Registration, without prejudice, in exchange for Petitioner’s dismissal of the Cancellation. Respondent’s counsel further stated that if this offer was acceptable, they would go ahead and draft the requisite settlement documents, send them to Petitioner, and withdraw the ‘685 Registration (*see* Exhibit “F”).

Respondent’s counsel’s voicemail of July 4, 2006, represented an offer of settlement which was open for acceptance by Petitioner. On July 6, 2006, counsel for Petitioner sent counsel for Respondent an email which indicated that the terms of Berry’s July 4, 2006, offer were acceptable to Rexam ... i.e., that Rexam would agree to dismiss the cancellation proceeding provided Berry agree to cancel [surrender] the ‘685 Registration. The July 6, 2006 email from counsel for Petitioner to counsel for Respondent constituted acceptance of the July 4, 2006 offer. Consideration is evident since Petitioner is giving up the right to pursue its claim that the ‘685 Registration should be cancelled and Respondent is voluntarily surrendering its federal trademark registration. As such, there is a valid and enforceable settlement agreement.

Based on the forgoing, the Board should enforce the oral settlement as agreed to by the parties.

II. PETITIONER SHOULD BE ALLOWED TO RE-OPEN DISCOVERY AS RESPONDENT FRAUDULENTLY MISLEAD PETITIONER INTO BELIEVING THIS CASE HAD BEEN SETTLED

The showing which must be made to re-open an expired period of time under the Federal Rules of Civil Procedure is set forth at Rule 6(b), made applicable to Board proceedings by Trademark Rule 2.116(a). Rule 6(b) provides for an enlargement of time

after the expiration of the specified time period, “where the failure to act was the result of excusable neglect.” *See also* TMBP § 509.01. However, in this case, there is no need to analyze whether excusable neglect applies since Petitioner’s failure to conduct discovery was a direct result of Respondent’s fraudulent offer of settlement which was accepted by Petitioner, but then reneged by Respondent.

This case was settled before the expiration of the discovery period. The parties began negotiating back in March of 2006. After months of settlement discussions, counsel for Petitioner, on June 26, 2006, informed counsel for Respondent that they would need to come to an agreement or file a motion to extend the discovery period (see Exhibit “E”). Only days later, on July 4, 2006, counsel for Respondent communicated Respondent’s offer of settlement – which was accepted by Petitioner (through counsel) on July 6, 2006. Counsel for Respondent even stated that Respondent “had completely lost interest in this registration” (*see* Exhibit “F”). At that point, an enforceable agreement to settle had been formed. As such, counsel for Petitioner did not file a motion to extend the discovery period or to suspend the proceedings.

It has become apparent that Respondent offered to settle the case as a tactic to deceive Petitioner into believing the case had been settled so that Respondent could back out of the settlement agreement once the discovery period had expired. Once the agreement had been made, Respondent delayed matters and totally ignored Petitioner’s repeated requests for Respondent to provide documentation of the agreed-to settlement agreement – which counsel for Respondent had agreed to prepare once the parties had agreed to the basic settlement terms and before the close of discovery (see Exhibit “I”). Respondent’s delay tactics, its refusal to provide for a draft of a settlement agreement,

and its refusals to respond to Petitioner's multiple communications, followed by Respondent purportedly backing out of the settlement agreement upon expiration of the discovery period after fraudulently inducing Petitioner into believing the case was settled, provide ample justification for re-opening the cancellation proceedings if the settlement agreement is not enforced as requested. It is especially egregious that Respondent did not even reply to Petitioner's multiple requests until after the discovery period had already expired. Respondent tricked the Petitioner into believing the case had been settled by a binding oral agreement, only to back out of the agreement upon expiration of the discovery period.

Based on the forgoing, should this Board decline to enforce the parties' settlement agreement, Petitioner submits that its motion to reopen discovery and reset the testimony periods should be sustained based upon the Respondent fraudulent conduct.

III. DISCOVERY SHOULD BE RE-OPENED AS THE FAILURE TO CONDUCT DISCOVERY WAS THE RESULT OF PETITIONER'S EXCUSABLE NEGLIGENCE

In the alternative, Petitioner requests that it be allowed to re-open the discovery period and testimony periods in this proceeding due to excusable neglect.

The Supreme Court clarified the meaning and scope of excusable neglect in *Pioneer Investment Services Co. v. Brunswick Associates Lt. Partnership et al.*, 507 U.S. 380 (1993), and as followed by the Board in *Pumpkin Ltd. v. The Seeds Corps.*, 43 U.S.P.Q.2d 1582 (TTAB 1997) and held that a determination of excusable neglect is an equitable one, taking account of all relevant circumstances surrounding the party's omission. These circumstances include: (1) the 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 moving party, and (4) whether the moving party had acted in good faith. *Pioneer, supra* at 395. Further, according to the Board in *Pumpkin*, “excusable neglect” under Fed. R. Civ. P. 6(b) is a somewhat elastic concept, and is not strictly limited to omissions caused by circumstances beyond control of movant. *Pumpkin*, 43 U.S.P.Q.2d at 1585.

When reviewing all the excusable neglect factors outlined above, it is clear that discovery should be re-opened in this case because Petitioner’s failure to suspend the proceedings and/or file a motion to extend the discovery and testimony periods was due to Respondent inducing Petitioner to believe that this case had been settled and that there was no need to take further action to suspend the proceedings and/or extend the discovery period.

A. Respondent will Not be Prejudiced by the Reopening of Discovery

The first *Pioneer* factor, the prejudice to the non-moving party, weighs in favor of Petitioner. There is no evidence that Respondent will suffer significant prejudice, aside from mere delay or passage of time, as a result of the re-opening of the discovery period. The mere passage of time is generally not considered prejudicial, absent the presence of other facts, such as the loss of potential witnesses. *HKG Industries Inc. v. Perma-Pipe Inc.*, 49 U.S.P.Q.2d 1156, 1157-58 (TTAB 1998). The Board in *Pumpkin* expanded on this concept by holding “prejudice to the nonmovant” is prejudice to the nonmovant's ability to litigate the case, e.g., where the movant's delay has resulted in a loss or unavailability of evidence or witnesses which otherwise would have been available to the nonmovant. *See Pumpkin Ltd. v. The Seed Corps, supra* at 1587, citing *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997).

Here, there is nothing to indicate that Respondent will have difficulty locating and/or producing witnesses and evidence if the discovery period were re-opened. Respondent would bear no greater cost in defending this matter than it would have if the parties had proceeded back in July of 2006.

Finally, there is no evidence of Respondent having taken action in this case in reliance upon petitioners' failure to suspend the proceedings. In fact, the opposite is true: Petitioner relied upon the actions of Respondent. And once Respondent saw that the discovery and testimony deadlines had passed, Respondent reneged and backed out on its agreement to settle the case.

B. The Length of Delay in this case is Insignificant

The second *Pioneer* factor, the length of the delay and its potential impact on judicial proceedings, similarly weighs in Petitioner's favor. Here, Petitioner reasonably believed that the parties had settled this case based on communications from Respondent's counsel. Petitioner did not realize its attempts to settle failed until October 26, 2006 (*See Exhibit P*). Then, Petitioner, through counsel, attempted to reason with Respondent's counsel, but to no avail. Indeed, Petitioner did not have confirmation that Respondent was going to object to the re-opening of discovery until Respondent's counsel's email of November 25, 2006 stating as such (*See Exhibit Q*). As soon as Petitioner realized the case was not going to settle and that Respondent would not consent to a re-opening of discovery, it acted swiftly to seek relief. *See e.g., Jetcraft Corp. v. Banpais, S.A. De C.V.*, 166 F.R.D. 483 (D.C. Kan. 1996) (stating the second factor weighed in favor of moving party and holding excusable neglect where moving party believed the parties were engaging in successful settlement negotiations and took prompt

action to defend the case upon recognizing that the settlement negotiations would fail). Petitioner has filed the current motion within six weeks of Respondent's refusal to settle the case and within two weeks of Respondent's refusal to consent to the reopening of discovery. *See e.g., HKG Indus.*, 49 U.S.P.Q.2d at 1156 (holding thirty two day delay between end of testimony period and motion to dismiss and its potential impact on judicial proceedings held to be insignificant, but still holding no excusable neglect).

While Petitioner recognizes that rescheduling the relevant dates of this cancellation may inconvenience the schedule of the TTAB, this delay is should be insignificant when weighed with the other factors in this case. In the last six months the parties have done nothing to further this case other than negotiate settlement. Essentially, the parties have acted as if these proceedings have been suspended. The granting of the present motion would simply memorialize this six month period of suspension and allow the case to resume as of the period of suspension had been lifted.

C. **Petitioner Failed to Suspend the Proceedings Based on Respondent's Misrepresentations**

The third *Pioneer* factor, the reason for the delay and whether it was in the reasonable control of the movant, also weighs in favor of Petitioner. In undertaking the *Pioneer* analysis, several courts (as well as the Board) have stated that the third *Pioneer* factor might be considered the most important of the factors in a particular case. *See e.g., Pumpkin, supra* at footnote 7; *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 U.S.P.Q.2d 1858, 1859 (TTAB 1998). However, other courts have recognized that "to allow one factor – whether the delay was under the control of the party – to triumph when the balance of factors weigh in favor of granting an extension 'would divorce excusable from neglect'". *Gilyard v. Northlake Foods, Inc.*, 367 F. Supp.2d 1008 (D.C. Va. 2005).

Further, as explained in *Pioneer*, the Supreme Court purposely fashioned a flexible rule which, by its nature, counsels against the imposition of a per se rule on attorney neglect. Specifically, the Supreme Court held that “although inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute ‘excusable’ neglect, it is clear that ‘excusable neglect’ ... is a somewhat ‘elastic concept’ and is not limited strictly to omissions caused by circumstances beyond the control of the movant.” *Pioneer* at 392; *see also; Yesudian ex rel. U.S. v. Howard Univ.*, 270 F.3d 969, 971 (D.C. Cir. 2001) (applying the excusable neglect standard without emphasis on any particular *Pioneer* factor.)

In this case, Petitioner did not file a motion to suspend the proceedings and/or enlarge the discovery period because the Respondent unequivocally stated that it had “no interest” in the mark which was the subject of the cancellation. These actions induced Petitioner to believe the case had been settled. Respondent made an offer of settlement on July 4, 2006 which Petitioner accepted on July 6, 2006, which was *prior* to the close of discovery in this case. Petitioner believed it was just a matter of memorializing the agreement. As it turns out, once the discovery period and the Petitioner’s testimony period closed, Respondent reneged on the settlement agreement – leaving the Petitioner with no recourse.

According to the Board in *Indus., Inc. v. Lamb-Weston Inc.*, 45 U.S.P.Q.2d 1293, 1296 (TTAB 1997) there may be excusable neglect where another party significantly contributes to the moving party’s delay. In *Lamb-Weston*, the Board held that the non-moving party significantly contributed to the respondent’s delay in taking action, and

therefore, the third *Pioneer* factor weighed in favor of the movant. *Lamb-Weston* at 1293.

In this case, Respondent bears most, if not all of, the responsibility for Petitioner's inaction to suspend the proceedings. Throughout these proceedings, Respondent led Petitioner to believe the case had been settled. As such, Petitioner did not believe there was a need to suspend the proceedings. In Petitioner's view, Respondent never intended to settle this case, but it waited to back out of the agreement *after* Petitioner's discovery and testimony periods had closed. Respondent's pattern of delay and non-responsiveness now demonstrates that it was simply taking advantage of Petitioner's good faith belief that the case had been settled.

D. Petitioner has Acted in Good Faith

The fourth *Pioneer* factor, whether there is evidence of bad faith, weighs in favor of Petitioner. Here, there is *no evidence* of bad faith on the part of Petitioner. Instead, Petitioner has acted swiftly upon determining that Respondent had tricked it into believing that the case had been settled. At all times, Petitioner has proceeded with the good faith belief that the parties could, and did, settle this matter. Furthermore, Petitioner is pursuing what it believes is a legitimate case against Respondent because Petitioner believes it to be the prior user of the SNAP LOK mark. If given the opportunity to simply review evidence that Respondent has been continually using the mark, then Petitioner might be willing to settle this case on Respondent's original terms as reflected in their offer of March 28, 2006.

CONCLUSION

For all the foregoing reasons, the parties' settlement agreement should be enforced as Respondent's offer of settlement which was accepted by Petitioner. In the alternative, Petitioner requests that the discovery and testimony periods be re-opened and reset based on the Respondent's fraud in procuring settlement with the Petitioner, only to renege on same upon expiration of Petitioner's discovery and testimony periods. At the very least, Petitioner submits that the Board should reopen the trial calendar based upon Petitioner's "excusable neglect" given the fact that Petitioner was induced into believing the case had been settled by Respondent's fraudulent actions.

WHEREFORE, Petitioner prays for an Order of this Board to sustain Petitioner's Motion to Enforce the Parties' Settlement Agreement or, in the alternative, to Reopen and Reset the respective Discovery Periods and Testimony Periods.

Dated: December 12, 2006

Respectfully submitted,



Julie Ann Gregory
Brian P. McGraw
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, Kentucky 40202
Tel: (502) 584-1135
Fax: (502) 561-0442
jgregory@midtreut.com and/or
bmcgraw@midtreut.com.

COUNSEL FOR PETITIONER
REXAM CLOSURES & CONTAINERS,
INC.

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

In the Matter of U.S. Registration No. 2,827,685

Mark: SNAPLOC
Registration Date: March 30, 2004

REXAM CLOSURES)	
AND CONTAINERS INC.)	
)	
Petitioner)	
)	
v.)	Cancellation No. 92045238
)	
BERRY PLASTICS CORPORATION.)	
)	
Registrant)	

DECLARATION OF BRIAN P. MCGRAW

Comes the affiant, Brian McGraw, pursuant to 37 C.F.R. 2.20, being warned that willful false statements and the like 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 registration resulting there from, declares that all statements made of his own knowledge are true; and all statements made on information and belief are believed to be true, and after being duly sworn states as follows:

1. I, Brian McGraw, am a resident of the Commonwealth of Kentucky, I am over the age of twenty-one (21) and am competent to make this declaration. I have first hand, personal knowledge regarding the following testimony I offer.

2. I am an attorney licensed in the Commonwealth of Kentucky and the State of Illinois.

3. I am currently, and at all times relevant to this cancellation proceeding, employed as an associate with the law firm of Middleton Reutlinger in Louisville, Kentucky.

4. I currently represent Rexam Closures and Containers, Inc. ("Rexam") in connection with the above captioned Cancellation.

5. On March 28, 2006, I received a letter from counsel for Berry Plastics, Inc. ("Berry"), Ms. Julia Gard ("Ms. Gard"). In this letter, Berry offered to enter into a consent agreement whereby it would consent to Rexam's use of the SNAP LOK mark in exchange for Rexam's dismissal of the above captioned cancellation proceeding.

6. On April 28, 2006, I responded to Berry's March 28, 2006 proposed settlement letter by sending a letter to Ms. Gard which rejected Berry's initial settlement offer, but which further stated that Rexam might be willing to negotiate provided Berry could produce evidence of their alleged longstanding use of the SNAPLOC mark.

7. I did not receive a response to my letter of April 28, 2006.

8. On June 20, 2006, I sent Ms. Gard a follow up letter requesting a response from Berry to my April 28, 2006 letter.

9. I did not receive a response to the April 28 or June 20 letter until June 25, 2006.

10. On June 25, 2006, Ms. Gard sent me an email stating that she would be speaking to her client and would get back to me as soon as she could.

11. On June 26, 2006, I sent Ms. Gard a reply email to acknowledge her email of June 25, 2006, and informed her that should we not be able to come to an agreement on settlement we would need to discuss extending the discovery deadline(s) for the cancellation proceeding as the discovery deadline was rapidly approaching.

12. On July 4, 2006, I received a voice mail from Ms. Gard wherein she stated that Berry had “completely lost interest in this [SNAPLOC] registration so, what our client wanted to do was just close the file and spend no other money and you know let you go ahead and move for default judgment.” Further, Ms. Gard offered to settle the cancellation on the following terms: Rexam would agree to a dismissal without prejudice and dismiss the cancellation proceeding in exchange for Berry’s voluntary cancellation of the SNAPLOC registration.

13. On July 6, 2006, I sent Ms. Gard an email which accepted the terms of her July 4, 2006, settlement offer.

14. Having not received a response to my email of July 6, 2006, on July 14, 2006, I sent a follow up email to Ms. Gard in order to confirm that she received my acceptance of her July 4, 2006, offer and to ask whether Berry wanted to provide the settlement documents.

15. On the afternoon of July 14, 2006, Ms. Gard sent me an email stating that she would send me a draft of a proposed settlement agreement.

16. On August 9, 2006, having not heard from Ms. Gard regarding the proposed draft settlement agreement, I sent Ms. Gard an email which contained a draft of a proposed settlement agreement which we prepared. This draft agreement called for

Berry to discontinue its use of the SNAPLOC mark but allowed for a reasonable period of time to phase out all existing use.

17. Having not received a response to my August 9, 2006 email, I sent a follow up email to Ms. Gard on August 29, 2006 requesting a response.

18. Later that day, on August 29, Ms. Gard sent me an email stating that she would speak to her client and get back to me.

19. On September 5, 2006, Ms. Gard sent me a proposed draft settlement agreement via email. The proposed agreement reverted back to the terms of the original offer of settlement set forth in Ms. Gard's letter of March 28, 2006.

20. On September 25, 2006, I contacted Ms. Gard via email and informed her that her draft agreement was inconsistent with the terms of the parties' settlement in July. As such, I re-sent Ms. Gard the settlement agreement I had provided to her on August 9, 2006.

21. Having received no response to my September 25, 2006 email; on October 9, 2006, I sent a follow up email to Ms. Gard regarding the need to finalize settlement of this matter.

22. There was no response to my October 9, 2006 email.

23. On October 17, 2006, I sent another follow up email to Ms. Gard.

24. There was no response to my October 17, 2006 email.

25. Finally, on October 24, 2006, I telephoned Ms. Gard and left a voicemail which requested a response on behalf of Berry.

26. Two days later, on October 26, 2006, Ms. Gard sent me an email which stated that Berry no longer wished to settle this case.

27. Suffice it to say, I was totally surprised by Berry's repudiation of the prior settlement. To that end, that same day, I sent Ms. Gard an email which asked whether Berry would consent to the reopening of discovery in the cancellation proceeding.

28. On November 25, 2006, Ms. Gard finally responded by stating that Berry would not consent to the reopening of discovery.

29. As of July 4, 2006, Berry had agreed to voluntarily cancel their registration and had stated that it had no interest in pursuing its SNAPLOC trademark.

30. Because I believed the case to be settled, I did not file a motion to suspend the proceedings, nor did I file a motion to extend discovery.

31. Ms. Gard's representations, including her offer of settlement on behalf of Berry on July 4, 2006, which was *after* I had informed her of the need to extend discovery if we could not come to an agreement, caused me to consider the case as settled at least as of July 6, 2006.

32. I did not realize that Berry had reneged on settlement of the case until Ms. Gard's October 26, 2006 email stating as such.

33. As soon as I realized the case was not going to be settled, I took action to attempt to re-open discovery.

34. I did not realize that Berry was going to oppose our Motion to Reopen discovery until November 25, 2006.

35. I have at all times acted under the good faith belief that this case had been settled as of July 6, 2006.

FURTHER AFFIANT SAYETH NAUGHT

Brian P. McGraw

Brian P. McGraw

12/12/06

Date

COMMONWEALTH OF KENTUCKY)

) : ss

COUNTY OF JEFFERSON)

Sworn to and subscribed before me this 12th day of December, 2006.

My Commission Expires:

July 20, 2009

Virginia C. Albert
NOTARY PUBLIC, STATE AT LARGE

EXHIBIT A

BARNES & THORNBURG LLP

Julia Spoor Gard
(317) 231-7439
Email: julia.gard@btlaw.com

COPY

11 South Meridian Street
Indianapolis, IN 46204-3535 U.S.A.
(317) 236-1313
Fax (317) 231-7433

www.btlaw.com

March 28, 2006

Julie Ann Gregory
Brian P. McGraw
Middleton Reutlinger
2500 Brown & Williamson Tower
Louisville, Kentucky 40202

RECEIVED
MAR 30 2006
JAG

Re: Rexam Closures and Containers, Inc. s/v Berry Plastics Corporation
Cancellation Proceeding No.: 92045238
Our File: 5723-79434

Dear Ms. Gregory and Mr. McGraw:

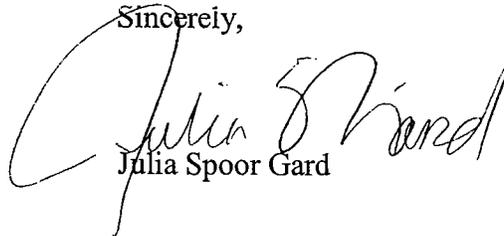
This follows my letter of February 8, 2005, regarding the above-noted cancellation. Our client would prefer to resolve this amicably. We understand that there has been no actual confusion of these marks, and we believe that the mark can coexist, so long as the actual fields of use for the products do not expand beyond their current scope.

Accordingly, our client is willing to execute a written consent to your client's registration of SNAP-LOK, if your client will withdraw this petition to cancel, amend the identification of goods in Serial No. 78/511,323 to:

"non-metal child resistant closures for containers," and will agree not to use this mark on closures other than those designed to be child resistant. As you know, our client currently uses this mark on closures which are designed to evidence tampering.

We look forward to your comments. If you have any questions, please call.

Sincerely,



Julia Spoor Gard

JSG/wlb

cc: Berry Plastics
Daniel P. Albers, Esq.

INDS02 JXS 797695v1

EXHIBIT B



MIDDLETON
REUTLINGER

April 28, 2006

Via Facsimile (317) 231-7433 and Regular Mail

2500
Brown & Williamson
Tower
Louisville, Kentucky
40202
502.584.1135
502.561.0442 fax
www.middleut.com

Julia Spoor Gard
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, IN 46204-3535

**RE: Rexam Closures and Containers Inc. s/v Berry Plastics Corporation
Cancellation No. 92045238
Our File: ZI154/97014**

Brian P. McGraw
Direct Dial: (502) 6252713
bmcgraw@middleut.com

Dear Ms. Gard:

Thank you for your letter of March 28, 2006 regarding the above-noted cancellation proceeding. We apologize for the delay in getting back to you. Our client would also like to resolve this matter as amicably as possible under the circumstances. At this time, however, our client is reluctant to walk away without discovering more facts about your client's use of the SNAPLOC mark. Given that the parties have had a recent history of contentious litigation, our client is somewhat skeptical of the present situation.

Specifically, your client claims a first use date of the SNAPLOC mark on March 19, 1988. However, we have not been able to locate any evidence that this mark is even in actual use today, much less that it has been in continuous use for 18 years. The specimen provided on the U.S. Patent & Trademark Office website gives no indication as to how and when the mark has been used. Our client is under the impression your client has not actually been using the mark since 1988, and instead, simply sought registration once it realized that Rexam's original SNAP-LOK registration was set to expire.

To that end, if you were to provide us with credible documentary evidence that your client has continually used the mark in commercially significant quantities since 1988, our client would be willing to consider your present offer of co-existence.

Should you have any questions, do not hesitate to contact us. Thank you for your attention to this matter.

Very truly yours,

MIDDLETON REUTLINGER

Brian P. McGraw

EXHIBIT C



MIDDLETON
REUTLINGER

June 20, 2006

Via Facsimile (317) 231-7433 and U.S. Mail

2500
Brown & Williamson
Tower
Louisville, Kentucky
40202
502.584.1135
502.561.0442 fax
www.middreut.com

Julia Spoor Gard
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, IN 46204-3535

**RE: Rexam Closures and Containers Inc. s/v Berry Plastics Corporation
Cancellation No. 92045238**

Brian P. McGraw
Direct Dial: (502) 6252713
bmcgraw@middreut.com

Dear Ms. Gard:

As we have not heard from you in some time, I wanted to follow up to our letter of April 28, 2006. In that letter, attached hereto, we expressed a willingness to settle this matter provided your client could produce some evidence that the SNAPLOC mark has been in continuous use since 1988. We have not received a response to this request.

As such, we would request that you please respond or at least acknowledge this renewed request by Monday, June 26, 2006. If we do not receive a response, we will have no choice but to proceed with the litigation.

Should you have any questions about the above, do not hesitate to contact us. Thank you for your attention to this matter.

Very truly yours,

MIDDLETON REUTLINGER

Brian P. McGraw

BPM/vh

cc: Julie A. Gregory, Esq.
James R. Higgins, Jr., Esq.

EXHIBIT D

From: "Julia Gard" <Julia.Gard@BTLaw.com>
To: <bmcgraw@midtreut.com>
Date: 06/25/2006 2:44 PM
Subject: SNAPLOC

Cancellation No. 92045238

Brian, thank you for your followup letter of June 20. My client has been called away on other matters, but I have exchanged emails with him and have scheduled a phone conference later this week to discuss this matter. I should be able to get back to you no later than the first week of July.

If you have any questions please don't hesitate to call.

Julia Spoor Gard
Barnes & Thornburg LLP
11 S. Meridian Street
Indianapolis, In 46204
phone 317-231-7439
fax 317-231-7433
jgard@btlaw.com
www.btlaw.com

CONFIDENTIALITY NOTICE: This email and any attachments are for the exclusive and confidential use of the intended recipient. If you are not the intended recipient, please do not read, distribute or take action in reliance upon this message. If you have received this in error, please notify us immediately by return email and promptly delete this message and its attachments from your computer system. We do not waive attorney-client or work product privilege by the transmission of this message.

TAX ADVICE NOTICE: Tax advice, if any, contained in this e-mail does not constitute a "reliance opinion" as defined in IRS Circular 230 and may not be used to establish reasonable reliance on the opinion of counsel for the purpose of avoiding the penalty imposed by Section 6662A of the Internal Revenue Code. The firm provides reliance opinions only in formal opinion letters containing the signature of a partner.

EXHIBIT E

Brian McGraw - Re: SNAPLOC

From: Brian McGraw
To: Gard, Julia
Date: 06/26/2006 9:02 AM
Subject: Re: SNAPLOC

Julia,
Thank you for the response. That is fine. Just let me know when you hear something. We should be able to work this out without having to go through discovery etc. In any event we do have a discovery deadline rapidly approaching. If for some reason we cannot work this out on our own, perhaps we could agree to a 30 to 60 day extension of the discovery period to ensure that we both have time to, at least, respond to discovery requests. We can discuss this after you have had a chance to speak with your client. Thanks.
Brian

Brian P. McGraw J.D., L.L.M. -I.P.
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202
502-625-2713

This electronic message transmission contains information from the law firm of Middleton Reutlinger, which may be confidential or privileged. The information is intended to be for the use of the individual or entity addressee named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this electronic transmission in error, please notify us by reply email, telephone (502-584-1135) or by electronic mail to HelpDesk@middreut.com immediately.

>>> "Julia Gard" <Julia.Gard@BTLaw.com> 6/25/2006 2:43 pm >>>
Cancellation No. 92045238

Brian, thank you for your followup letter of June 20. My client has been called away on other matters, but I have exchanged emails with him and have scheduled a phone conference later this week to discuss this matter. I should be able to get back to you no later than the first week of July.

If you have any questions please don't hesitate to call.

Julia Spoor Gard
Barnes & Thornburg LLP
11 S. Meridian Street
Indianapolis, In 46204
phone 317-231-7439

EXHIBIT F

7/4/2006

VOICEMAIL MESSAGE:

Brian, this is Julia Gard with Barnes & Thornbird getting back to you regarding Berry Plastics and the snaplock trademark registration. As you probably know, Berry Plastics was recently purchased and as a result of that they have just completely lost interest in this registration so, what our client wanted to do was just close the file and spend no further money and you know let you go ahead and move for default judgment. What I was think might be an easier way to resolve this, if you'll consent to our dismissing it without prejudice, we will go ahead and voluntarily cancel that registration, but if I am going to do that I would like to do it without prejudice since it is my understanding they have been using it, they have just all of sudden decided they have no interest in doing anything with it. Let me know if you think that would be acceptable. I am going to be traveling tomorrow, but . . .tomorrow the 5th, but leave me a voicemail message or shoot me an email if you'd like and, email is probably the best way to reach me and if you think that's acceptable or if your client thinks that's acceptable, we will go ahead and draft up the documents and have you sign them and we will just withdraw that registration. Thanks very much. My direct line is 317-231-7439 and I think you have my email it is jgard@btlaw.com.

EXHIBIT G

Brian McGraw - Re: SNAPLOC

From: Brian McGraw
To: Gard, Julia
Date: 07/06/2006 1:55 PM
Subject: Re: SNAPLOC

Julia,
I got your voicemail, sorry I did not respond sooner. We are fine with Berry voluntarily cancelling the registration and Rexam dismissing the suit. Do you want to take a first crack at a settlement agreement or should we? Thanks.
Brian

Brian P. McGraw J.D., L.L.M. -I.P.
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202
502-625-2713

This electronic message transmission contains information from the law firm of Middleton Reutlinger, which may be confidential or privileged. The information is intended to be for the use of the individual or entity addressee named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this electronic transmission in error, please notify us by reply email, telephone (502-584-1135) or by electronic mail to HelpDesk@middreut.com immediately.

>>> "Julia Gard" <Julia.Gard@BTLaw.com> 6/26/2006 9:11 am >>>
Brian, thanks. That should be fine. I'll shoot you an email as soon as I have a chance to speak with the client.

>>> "Brian McGraw" <bmcgraw@middreut.com> 6/26/2006 9:02 AM >>>
Julia,
Thank you for the response. That is fine. Just let me know when you hear something. We should be able to work this out without having to go through discovery etc. In any event we do have a discovery deadline rapidly approaching. If for some reason we cannot work this out on our own, perhaps we could agree to a 30 to 60 day extension of the discovery period to ensure that we both have time to, at least, respond to discovery requests. We can discuss this after you have had a chance to speak with your client. Thanks.
Brian

EXHIBIT H

Brian McGraw - Rexam v. Berry Plastics - Trademark Cancellation

From: Brian McGraw
To: Gard, Julia
Date: 07/14/2006 3:35 PM
Subject: Rexam v. Berry Plastics - Trademark Cancellation

Julia,
I just wanted to follow up with you again to make sure you received my message that we are okay with your proposed settlement of this matter. I will follow up with you again by phone on Monday. Thanks.
Brian McGraw

Brian P. McGraw J.D., L.L.M. -I.P.
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202
502-625-2713

This electronic message transmission contains information from the law firm of Middleton Reutlinger, which may be confidential or privileged. The information is intended to be for the use of the individual or entity addressee named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this electronic transmission in error, please notify us by reply email, telephone (502-584-1135) or by electronic mail to HelpDesk@middreut.com immediately.

EXHIBIT I

From: "Julia Gard" <Julia.Gard@BTLaw.com>
To: <bmcgraw@middreut.com>
Date: 07/14/2006 5:18 PM
Subject: Re: Rexam v. Berry Plastics - Trademark Cancellation

Brian, thanks. Sorry - just been swamped. We'll get you a settlement agreement

Sent from my BlackBerry Wireless Handheld

>>> "Brian McGraw" <bmcgraw@middreut.com> 7/14 3:35 pm >>>

Julia,

I just wanted to follow up with you again to make sure you received my message that we are okay with your proposed settlement of this matter. I will follow up with you again by phone on Monday. Thanks.

Brian McGraw

Brian P. McGraw J.D., L.L.M. -I.P.
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202
502-625-2713

This electronic message transmission contains information from the law firm of Middleton Reutlinger, which may be confidential or privileged. The information is intended to be for the use of the individual or entity addressee named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this electronic transmission in error, please notify us by reply email, telephone (502-584-1135) or by electronic mail to HelpDesk@middreut.com immediately.

CONFIDENTIALITY NOTICE: This email and any attachments are for the exclusive and confidential use of the intended recipient. If you are not the intended recipient, please do not read, distribute or take action in reliance upon this message. If you have received this in error, please notify us immediately by return email and promptly delete this message and its attachments from your computer system. We do not waive attorney-client or work product privilege by the transmission of this message.

TAX ADVICE NOTICE: Tax advice, if any, contained in this e-mail

EXHIBIT J

Brian McGraw - Rexam v. Berry Plastics - Settlement

From: Brian McGraw
To: Gard, Julia
Date: 08/09/2006 4:06 PM
Subject: Rexam v. Berry Plastics - Settlement
Attachments:

Julia,

I have not heard from you regarding the proposed settlement agreement so I thought I would go ahead and take a crack at drafting one myself. Attached for your review is a proposed draft of a settlement agreement for this Cancellation proceeding. Your comments and questions are welcome. Thank you.

Brian McGraw

Brian P. McGraw J.D., L.L.M. -I.P.
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202
502-625-2713

This electronic message transmission contains information from the law firm of Middleton Reutlinger, which may be confidential or privileged. The information is intended to be for the use of the individual or entity addressee named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this electronic transmission in error, please notify us by reply email, telephone (502-584-1135) or by electronic mail to HelpDesk@middreut.com immediately.

EXHIBIT K

Brian McGraw - Rexam v. Berry Plastics - Cancellation No. 92045238

From: Brian McGraw
To: Gard, Julia
Date: 08/29/2006 11:24 AM
Subject: Rexam v. Berry Plastics - Cancellation No. 92045238

Julia,
I just wanted to check in to see if there is any progress on the proposed settlement agreement. Let me know if there is anything we need to discuss.
Brian

Brian P. McGraw J.D., L.L.M. -I.P.
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202
502-625-2713

This electronic message transmission contains information from the law firm of Middleton Reutlinger, which may be confidential or privileged. The information is intended to be for the use of the individual or entity addressee named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this electronic transmission in error, please notify us by reply email, telephone (502-584-1135) or by electronic mail to HelpDesk@middreut.com immediately.

EXHIBIT L

From: "Julia Gard" <Julia.Gard@BTLaw.com>
To: "Brian McGraw" <bmcgraw@midcreut.com>
Date: 08/29/2006 4:55 PM
Subject: Re: Rexam v. Berry Plastics - Cancellation No. 92045238

Brian, I am very sorry for the delay in getting this to you. I do have a proposed agreement and hope to get the client's feedback shortly. I hope to have it to you before the holiday.

Julia Spoor Gard
 Barnes & Thornburg LLP
 11 S. Meridian Street
 Indianapolis, In 46204
 phone 317-231-7439
 fax 317-231-7433
 jgard@btlaw.com
 www.btlaw.com

>>> "Brian McGraw" <bmcgraw@midcreut.com> 8/29/2006 11:24 AM >>>

Julia,
 I just wanted to check in to see if there is any progress on the proposed settlement agreement. Let me know if there is anything we need to discuss.
 Brian

Brian P. McGraw J.D., L.L.M. -I.P.
 MIDDLETON REUTLINGER
 2500 Brown & Williamson Tower
 Louisville, KY 40202
 502-625-2713

This electronic message transmission contains information from the law firm of Middleton Reutlinger, which may be confidential or privileged. The information is intended to be for the use of the individual or entity addressee named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this electronic transmission in error, please notify us by reply email, telephone (502-584-1135) or by electronic mail to HelpDesk@midcreut.com immediately.

 CONFIDENTIALITY NOTICE: This email and any attachments are for the exclusive and confidential use of the intended recipient. If you are not the intended recipient, please do not read, distribute or

EXHIBIT M

From: "Julia Gard" <Julia.Gard@BTLaw.com>
To: "Brian McGraw" <bmcgraw@midtreut.com>
Date: 09/05/2006 11:45 AM
Subject: Proposed Settlement Agreement: Rexam v. Berry Plastics -Cancellation No. 92045238
Attachments: snaploc snap lok settlement.doc

Brian, attached is a proposed settlement agreement. If you and your client find the terms acceptable, please feel free to finalize and sign it. Of course, if you have any comments or questions, do not hesitate to call.

Julia Spoor Gard
Barnes & Thornburg LLP
11 S. Meridian Street
Indianapolis, In 46204
phone 317-231-7439
fax 317-231-7433
jgard@btlaw.com
www.btlaw.com

>>> "Brian McGraw" <bmcgraw@midtreut.com> 8/29/2006 4:56:32 PM >>>
Thanks.

>>> "Julia Gard" <Julia.Gard@BTLaw.com> 8/29/2006 4:53 PM >>>
Brian, I am very sorry for the delay in getting this to you. I do have a proposed agreement and hope to get the client's feedback shortly. I hope to have it to you before the holiday.

Julia Spoor Gard
Barnes & Thornburg LLP
11 S. Meridian Street
Indianapolis, In 46204
phone 317-231-7439
fax 317-231-7433
jgard@btlaw.com
www.btlaw.com

>>> "Brian McGraw" <bmcgraw@midtreut.com> 8/29/2006 11:24 AM >>>
Julia,
I just wanted to check in to see if there is any progress on the proposed settlement agreement. Let me know if there is anything we need to discuss.
Brian

Brian P. McGraw J.D., L.L.M. -I.P.
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202
502-625-2713

EXHIBIT N

Brian McGraw - Rexam v. Berry Plastics

From: Brian McGraw
To: Gard, Julia
Date: 09/25/2006 5:03 PM
Subject: Rexam v. Berry Plastics
Attachments:

Dear Julia:

I have now had a chance to fully review and analyze the proposed "Consent to Use and Registration Agreement." I think we might have a general misunderstanding as to our clients' intent in this case.

The proposed "Consent" agreement reads more like a concurrent use agreement - which is not something our client is willing to agree to. However, I do think we agree on the fundamental principles of settlement here.

In your voice mail of July 4, 2006, you stated that Berry has "completely lost interest in this registration" and that you would "voluntarily cancel that registration." These principles are reflected in the "Consent Agreement"; however, there are various provisions which would seem to allow Berry to continue manufacturing and selling products under the SNAPLOC mark.

In general, we do not agree with your proposal that Berry be allowed to continue manufacturing and selling products sold under the SNAPLOC mark. Of course, we are willing to allow Berry the chance to exhaust any existing inventory of products within a reasonable period of time. We feel this is more than reasonable considering your client does not wish to pursue the SNAPLOC registration.

Attached is a proposed "Settlement and Release Agreement" which reflects what our client wants in this case. Please review this agreement and use it as a basis for understanding my client's goals in settling this matter. Please feel free to give me a call to discuss this matter more fully.

Brian McGraw

Brian P. McGraw J.D., L.L.M. -I.P.
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202
502-625-2713

This electronic message transmission contains information from the law firm of Middleton Reutlinger, which may be confidential or privileged. The information is intended to be for the use of the individual or entity addressee named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents

EXHIBIT O

Brian McGraw - Rexam v. Berry Plastics

From: Brian McGraw
To: Gard, Julia
Date: 10/09/2006 1:33 PM
Subject: Rexam v. Berry Plastics

Julia,
I just wanted to follow up to see if you had any response or comment to my previous email regarding settlement of this case and, specifically, the proposed settlement agreement.
Brian McGraw

Brian P. McGraw J.D., L.L.M. -I.P.
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202
502-625-2713

This electronic message transmission contains information from the law firm of Middleton Reutlinger, which may be confidential or privileged. The information is intended to be for the use of the individual or entity addressee named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this electronic transmission in error, please notify us by reply email, telephone (502-584-1135) or by electronic mail to HelpDesk@middreut.com immediately.

Brian McGraw - Rexam v. Berry Plastics

From: Brian McGraw
To: Gard, Julia
Date: 10/17/2006 1:27 PM
Subject: Rexam v. Berry Plastics

Julia,
Just wanted to check in with you again to see if you and your client have had any progress in discussing the possibility of settlement and/or Rexam's proposed settlement agreement? If I don't hear from you in the next few days I will assume that our attempts to settle this matter have failed and that we will have no choice but to attempt to re-open discovery and pursue the cancellation. Give me a call anytime to discuss.
Brian

Brian P. McGraw J.D., L.L.M. -I.P.
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202
502-625-2713

This electronic message transmission contains information from the law firm of Middleton Reutlinger, which may be confidential or privileged. The information is intended to be for the use of the individual or entity addressee named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this electronic transmission in error, please notify us by reply email, telephone (502-584-1135) or by electronic mail to HelpDesk@midreut.com immediately.

EXHIBIT P

From: "Julia Gard" <Julia.Gard@BTLaw.com>
To: <bmcgraw@middreut.com>
Date: 10/26/2006 10:20 AM
Subject: Snaploc

Brian, thanks for your voice mail. I've now spoken with our client and, as it stands, our client is no longer interested in settling this matter.

Julia Spoor Gard
Barnes & Thornburg LLP
11 S. Meridian Street
Indianapolis, In 46204
phone 317-231-7439
fax 317-231-7433
jgard@btlaw.com
www.btlaw.com

CONFIDENTIALITY NOTICE: This email and any attachments are for the exclusive and confidential use of the intended recipient. If you are not the intended recipient, please do not read, distribute or take action in reliance upon this message. If you have received this in error, please notify us immediately by return email and promptly delete this message and its attachments from your computer system. We do not waive attorney-client or work product privilege by the transmission of this message.

TAX ADVICE NOTICE: Tax advice, if any, contained in this e-mail does not constitute a "reliance opinion" as defined in IRS Circular 230 and may not be used to establish reasonable reliance on the opinion of counsel for the purpose of avoiding the penalty imposed by Section 6662A of the Internal Revenue Code. The firm provides reliance opinions only in formal opinion letters containing the signature of a partner.

EXHIBIT Q

From: "Julia Gard" <Julia.Gard@BTLaw.com>
To: "Brian McGraw" <bmcgraw@middreut.com>
Date: 11/25/2006 10:41 AM
Subject: Re: Snaploc

Brian,

We will not consent to discovery being re-opened.

Julia Spoor Gard
Barnes & Thornburg LLP
11 S. Meridian Street
Indianapolis, In 46204
phone 317-231-7439
fax 317-231-7433
jgard@btlaw.com
www.btlaw.com

>>> "Brian McGraw" <bmcgraw@middreut.com> 10/26/2006 10:28 AM >>>

Julia,
Thank you for your response. Obviously, I will be filing a motion to re-open discovery. Is it safe to assume that you will oppose this motion rather than consenting to discovery being re-opened?
Brian

Brian P. McGraw J.D., L.L.M. -I.P.
MIDDLETON REUTLINGER
2500 Brown & Williamson Tower
Louisville, KY 40202
502-625-2713

This electronic message transmission contains information from the law firm of Middleton Reutlinger, which may be confidential or privileged. The information is intended to be for the use of the individual or entity addressee named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is prohibited.

If you have received this electronic transmission in error, please notify us by reply email, telephone (502-584-1135) or by electronic mail to HelpDesk@middreut.com immediately.

>>> "Julia Gard" <Julia.Gard@BTLaw.com> 10/26/2006 10:19 AM >>>

Brian, thanks for your voice mail. I've now spoken with our client and, as it stands, our client is no longer interested in settling this matter.