

ESTTA Tracking number: **ESTTA168931**

Filing date: **10/16/2007**

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

Proceeding	92046637
Party	Defendant Living Spaces Furniture, LLC
Correspondence Address	Michael G. Frey Greenbaum Doll & McDonald PLLC 2800 Chemed Center, 255 East Fifth Street Cincinnati, OH 45202-4728 UNITED STATES lek@gdm.com
Submission	Opposition/Response to Motion
Filer's Name	Michael G. Frey
Filer's e-mail	mgf@gdm.com
Signature	/michael.g.frey/
Date	10/16/2007
Attachments	living spaces response.pdf ( 24 pages )(806948 bytes )



Petitioner relies on the definition of “excusable neglect” found in *Hewlett Packard Co. v. Olympus Corp.*, 18 U.S.P.Q.2d 1710 (Fed. Cir. 1991). The Trademark Trial and Appeal Board, however, has indicated that the definition found therein no longer applies. In *Pumpkin Ltd. v. The Seed Corps*, the Board noted that, in 1993, the Supreme Court had presented a new analysis for determining whether a party’s failure to act constitutes excusable neglect. See 43 U.S.P.Q.2d 1582, 1585 (T.T.A.B. 1997) (explaining that “the Board’s reliance on [the *Hewlett Packard*] definition of excusable neglect must be revisited in light of the Supreme Court's decision”).

Hence, the proper focus for the Board should be the factors enumerated in *Pumpkin*, specifically (1) the danger of prejudice to the Registrant, (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 Petitioner, and (4) whether the Petitioner acted in good faith. See *id.* at 1586. Of these, the third factor has consistently been viewed as the most significant. See *FirstHealth of the Carolinas Inc. v. CareFirst of Maryland Inc.*, 81 U.S.P.Q.2d 1919, 1921 (Fed. Cir. 2007); *Pumpkin*, 43 U.S.P.Q.2d at 1586 n.7; *Old Nutfield Brewing Co., v. Hudson Valley Brewing Co.*, 65 U.S.P.Q.2d 1701, 1702 (T.T.A.B. 2002).

In this case, the reason for Petitioner’s delay in acting was well within its control. Petitioner was aware of the close of the testimony period as a result of receiving the scheduling order for the proceeding. Further, Registrant offered to discuss suspending the proceedings or resetting trial dates a few days prior to the close of the testimony period, but Petitioner chose not to respond to that offer. Instead, Petitioner allowed the deadline to pass without taking action. Petitioner has not provided good cause for why its failure to act should now be excused.

*A. There Was No Agreement To Reset Trial Dates*

The justification that Petitioner does offer is an allegation that “counsel for Registrant specifically promised on at least two occasions that Registrant would agree to an extension of the testimony period if a settlement could not be reached.” Petitioner’s Motion, p.4. The two occasions Petitioner refers to are an August 15, 2007, conversation between John F. Luman III, counsel for Petitioner, and Carrie A. Shufflebarger, counsel for Registrant, and a September 20, 2007, conversation between Mr. Luman and Michael G. Frey, also counsel for Registrant.

Before discussing the specifics of these conversations, Registrant submits that the September 20 conversation is wholly immaterial to the matter at hand. Petitioner’s testimony period closed on September 3, 2007, seventeen days *before* the September 20 conversation took place. Given the linear nature of time, Petitioner could not have relied on statements that had not yet been made. Yet Petitioner alleges that it relied on those statements: Petitioner argues that its decision not to enter evidence or request an extension of the testimony period on or before September 3 was due, in part, on its reliance on an alleged promise made on September 20. While Registrant cannot explain why Petitioner would make this temporally-impossible representation, one could posit that it reflects the fact that Petitioner has no valid basis to excuse its conduct, and thus is attempting to cobble together whatever it can in hopes of persuading the Board to rule in its favor.

Notwithstanding the immateriality of the September 20 conversation, Registrant disputes Petitioner’s version of what transpired. Specifically, Registrant did not, in either conversation, agree to reset, extend or otherwise alter the trial schedule.

The August 15 conversation took place between Mr. Luman and Ms. Shufflebarger. Ms. Shufflebarger took part in this conversation because Mr. Frey was out of the office on vacation. Ms. Shufflebarger had only limited authority to act on behalf of Registrant in the conversation; specifically, she was only authorized to agree to an extension of the deadline for Petitioner to respond to outstanding discovery requests. Ms. Shufflebarger informed Mr. Luman of this fact during their conversation. *See* Declaration of Carrie A. Shufflebarger, attached hereto as Exhibit A. Registrant does not dispute that Ms. Shufflebarger and Mr. Luman discussed the possibility of rescheduling trial dates. However, in light of her limited authority, Ms. Shufflebarger did not agree to reschedule the dates or to file any motion pertaining thereto, instead agreeing only that if the parties were not able settle the matter quickly, then the parties would need to discuss resetting the dates. *See id.* Hence, there was no agreement regarding trial dates.

Mr. Luman did state in an e-mail following the August 15 conversation that “We agreed to jointly file with the Trademark Office a new scheduling order if we cannot resolve the case in the next few weeks.” However, Registrant cannot be held to an agreement merely because Petitioner’s counsel says that one exists. It is true that Registrant’s counsel did not immediately respond to this statement. However, the delay in disputing the contentions in this e-mail resulted from the fact that Mr. Frey, Registrant’s primary counsel was out of town with limited access to e-mail — again, a fact of which Petitioner’s counsel was informed. *See* Declaration of Michael G. Frey (“Frey Declaration”), attached hereto as Exhibit B. Mr. Frey did look into the matter upon his return, and raised the issue of resetting trial dates in his next communication to Mr. Luman, an e-mail dated August 29, 2007. Although Mr. Frey did not expressly contradict Mr.

Luman's statement regarding an alleged agreement in this e-mail, he did suggest that, in light of the upcoming deadlines, the parties agree to suspend the proceedings. He also invited Mr. Luman to contact him to discuss the resetting of trial dates. *See id.* Registrant submits that these comments should have indicated to Mr. Luman that the parties were not in full agreement as to the resetting of trial dates, or at the very least that something needed to be done regarding the schedule. Yet, rather than take any action with regard to the trial schedule, Petitioner responded by postponing further discussion until after the close of the testimony period. *See id.*

The topic of resetting the trial dates was raised by Mr. Luman again in the September 20 conversation. As before, however, the parties only discussed the topic, and did not come to any agreement. The primary topic of the September 20 conversation was a settlement offer proposed by Petitioner. Mr. Luman relayed the offer, and Mr. Frey said that he would discuss it with his client. Mr. Luman then asked if the parties should file something with the Board regarding trial dates. Mr. Frey stated that if his client accepted the settlement offer, there would be no need to file anything regarding trial dates.<sup>1</sup> *See* Frey Declaration. As with the August 15 conversation, the topic was discussed, but no agreement was made.

***B. Petitioner Was Obligated to Act, But Failed to Do So***

Even if the Board were to accept that the parties had an agreement to extend the testimony period as a result of the August 15 conversation, the mere existence of an agreement

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<sup>1</sup> The settlement offer was subsequently rejected because of changed factual circumstances regarding Petitioner's business learned by Registrant around the time the settlement offer was made. Contrary to Petitioner's recitation of the facts, Registrant did not state "that it refused to settle this dispute." Petitioner's Motion, p.3. Instead, in the same communication in which the offer was rejected, Registrant indicated a willingness to continue to discuss settlement, but noted that the terms of settlement would need to take into account the new information discovered by Registrant. Further, Registrant provided Petitioner with a new proposal for settlement on October 3, 2007, five days before Petitioner filed its motion. *See* Frey Declaration.

does not relieve Petitioner of its obligations under the Trademark Rules of Practice. If an agreement existed, Petitioner had an obligation to act on that agreement. The Board has explained that, even in cases where there is an understanding between the parties to reset trial dates, it is “incumbent upon petitioner, as the party with the burden of moving forward, to comply with the requirements of [the Trademark Rules of Practice], or run the risk of suffering dismissal for want of prosecution.” *PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 U.S.P.Q.2d 1860, 1862 (T.T.A.B. 2002); *see also Atlanta-Fulton County Zoo Inc. v. De Palma*, 45 U.S.P.Q.2d 1858, 1860 (T.T.A.B. 1998) (noting that, even under a broad interpretation of the concept of “excusable neglect,” a party’s failure to adhere to the timetable set in the scheduling order “can be neither overlooked or excused”).

The crux of the matter is that Petitioner had an obligation under the Trademark Rules of Practice to act prior to the close of its testimony period. This is not a particularly onerous burden. It would have been a simple matter for Petitioner to request to suspend the proceedings or to extend its testimony period, particularly in light of Registrant’s August 29 e-mail inviting Petitioner’s counsel to do so. However, rather than take this simple step, Petitioner chose to take no action, and thus risked having its petition for cancellation dismissed for want of prosecution. Under the standards set by the Board, Petitioner’s choice does not constitute excusable neglect.

## **II. Registrant’s Motion Was Not Brought in Bad Faith**

Petitioner contends that Registrant’s Motion for Judgment was brought in bad faith, an allegation that Registrant flatly denies. Petitioner’s allegation of bad faith is based, in part, on Petitioner’s assertion that Registrant filed its Motion for Judgment after twice agreeing to extend

the Petitioner's testimony period. As discussed above, Registrant never entered into any agreements to extend the testimony period, either before or after the close of that period. As such, Registrant had not acted unethically or in bad faith by disregarding any promise.

Even if an agreement had been reached, Petitioner failed to take steps necessary to give effect to the agreement within the time allotted under the rules. As such, Petitioner effectively forfeited the benefit provided by this hypothetical agreement. The Board has explained that a party that does not comply with the trial schedule risks having its case dismissed, regardless of whether there was an understanding regarding the resetting of dates. *See PolyJohn*, 61 U.S.P.Q.2d at 1862. It is hardly bad faith for Registrant to force Petitioner to face that risk.

Petitioner also contends that Registrant's bad faith is evidenced by the fact that Registrant failed to present material information to the Board in connection with its motion. Petitioner has pointed to several communication exchanges which it believes were omitted from Registrant's discussion of the facts. Registrant submits that none of those communications are material to the central issue underlying Registrant's motion, namely, whether Petitioner's failure to produce any evidence prior to the expiration of its testimony period is excused.

The communication exchanges to which Petitioner refers are readily divided into three different groups. The first set took place beginning in late June and continuing through early August. These exchanges include several of the e-mails referenced in Petitioner's motion and attached thereto as Exhibits 1 and 2. However, whereas Petitioner has shown that the exchanges took place, it has failed to show that the discussions were material to the issue before the Board. Petitioner asserts that these exchanges involved discussions "regarding settlement and extending

discovery deadlines.”<sup>2</sup> They did not involve, nor has Petitioner asserted that they involved, any discussion of extension or rescheduling of Petitioner’s testimony period.

To the extent that these early communications are evidence of settlement discussions, they are not material. The Board has repeatedly explained that the existence of settlement negotiations does not excuse a party’s failure to introduce testimony or request an extension of the testimony period. *See, e.g., Atlanta-Fulton County Zoo*, 45 U.S.P.Q.2d at 1859. The Board’s view on the materiality of settlement discussions is made plain in *Old Nutfield*, 65 U.S.P.Q.2d at 1703. The Board explained that “it makes little difference whether the parties did or did not discuss settlement” because “a party which fails to timely move for extension or suspension of trial dates on the basis of settlement does so at its own risk, and should not expect that such relief will be granted retroactively.” *Id.*

To the extent that the early communications concern extensions to Mattress Firm’s discovery response deadline, the communications are still not material. Trademark Rule 2.120(a) expressly states that “[t]he resetting of a party’s time to respond to outstanding discovery requests will *not* result in an automatic rescheduling” of the party’s testimony period. 37 C.F.R. § 2.120(a) (emphasis added). As such, an extension of time to respond to discovery does not affect a party’s obligation to take action during its testimony period. *See PolyJohn*, 61 U.S.P.Q.2d at 1861 (upholding a motion to dismiss because a party’s reliance on an extension of time to respond to discovery does not excuse failing to act during its testimony period).

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<sup>2</sup> See Frey Declaration for a more complete discussion of the substance of these exchanges.

Given that the existence of settlement negotiations and the extensions to respond to discovery are immaterial to the issue at hand, Registrant can hardly be said to have acted in bad faith by not disclosing the early communications to the Board.

The second set of exchanges occurred in mid-August, and concern, at their heart, the August 15 conversation between Mr. Luman and Ms. Shufflebarger. Petitioner alleges that this conversation was material because it involved an agreement between the parties to extend Petitioner's testimony period. As discussed above, Registrant did not enter into any such agreement during the conversation. As such, the second set of exchanges amounted to nothing more than another conversation resetting the deadline for Petitioner to respond to discovery requests. As the resetting of discovery dates does not affect Petitioner's obligations with respect to its testimony period, Registrant's omission of this conversation is not evidence of bad faith.

The third communication exchange Petitioner refers to is the September 20 conversation between Mr. Luman and Mr. Frey. As noted above, this conversation took place seventeen days *after* the close of Petitioner's testimony period. Regardless of the substance of that conversation, it is difficult to comprehend how any statements made more than two weeks days after the close of Petitioner's testimony period could have impacted Petitioner's decision not to take action prior to the close of its testimony period. As such, the conversation is not material to the issue before the Board, and Registrant's failure to discuss it is not evidence of bad faith.

Petitioner's allegations of bad faith and gamesmanship are little more than a smokescreen to obfuscate the simple facts at the heart of this matter. Petitioner had an obligation to adhere to the trial schedule set by the Board and act before the close of its testimony period, or risk having

its case dismissed. *See PolyJohn*, 61 U.S.P.Q.2d at 1862. Despite this obligation, Petitioner did not act. As such, Petitioner's case is now subject to dismissal for want of prosecution.

### III. Conclusion

In light of the foregoing, Registrant respectfully requests that the Board grant its motion for judgment under Rule 2.132(a), and dismiss the petition for cancellation with prejudice.

Respectfully submitted,



Michael G. Frey

Lori Krafte

GREENEBAUM DOLL & MCDONALD PLLC

2800 Chemed Center

255 East Fifth Street

Cincinnati, Ohio 45202

(513) 455-7600

(513) 455-8500 (facsimile)

Counsel for Registrant Living Spaces, LLC

Dated: October 16, 2007

**CERTIFICATE OF FILING**

I certify that the foregoing REGISTRANT'S RESPONSE TO MATTRESS FIRM, INC.'S RESPONSE TO REGISTRANT'S MOTION FOR JUDGMENT AND [MATTRESS FIRM'S] MOTION TO REOPEN AND EXTEND TESTIMONY PERIOD is being submitted electronically to the Trademark Trial and Appeal Board at the United States Patent and Trademark Office on this 16th day of October, 2007.

  
\_\_\_\_\_  
Michael G. Frey

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing REGISTRANT'S RESPONSE TO MATTRESS FIRM, INC.'S RESPONSE TO REGISTRANT'S MOTION FOR JUDGMENT AND [MATTRESS FIRM'S] MOTION TO REOPEN AND EXTEND TESTIMONY PERIOD has been sent via regular U.S. Mail this 16th day of October, 2007, to the following:

Anthony F. Matheny, Esq.  
John F. Luman III, Esq.  
Bracewell & Giuliani LLP  
P.O. Box 61389  
Houston, Texas 77208-1389

  
\_\_\_\_\_  
Michael G. Frey



3. During my conversation with Mr. Luman, I stated that I had authority only to agree to an extension of the Mattress Firm's deadline for responding to outstanding discovery requests. On behalf of the Registrant and in accordance with that limited authority, I granted Mr. Luman's client a three-week extension of time in which to respond to discovery requests.

4. In addition to our discussions regarding discovery, the subject of rescheduling trial dates came up during the August 15 conversation. I agreed that if the parties were not able to settle the matter, we would need to talk about changing the trial dates. However, because I had no authority to agree to an actual resetting of trial dates, I did not do so.

Signed,



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Carrie A Shufflebarger

Dated: October 11, 2007



3. During the late June conversation, Mr. Luman also broached the subject of settlement. He stated that he had not discussed the specifics of any settlement proposal with his client, but believed that there was room for the parties to work out some sort of arrangement. I indicated that I believed Living Spaces would be open to discussing settlement, and that I would try and contact Living Spaces regarding the matter while Mr. Luman was away from the office. At that point, we scheduled a follow-up discussions for July 9, 2007.

4. I was unable to speak with my client prior to July 9. Since no actual proposal for settlement had been proposed by either party at this point, I asked Mr. Luman for his thoughts on settlement, so that I could present them to my client when I was able to make contact. See Exhibit B-1. Mr. Luman did not respond with any proposals or suggested terms for settlement.

5. Over the course of the next several weeks, I made several further attempts to contact Living Spaces to discuss the possibility of the parties working out a settlement. Though my client and I exchanged several voice mail messages during this period, we were unable to find a time when we were both free to discuss the issue. As a result, on July 30, 2007, I sent an e-mail to Mr. Luman stating that I had not yet been able to talk with Living Spaces about the possibility of settlement but that I personally believed a resolution was possible. I also granted Mattress Firm a further three-week extension of time to respond to the outstanding discovery requests in light of the difficulty I was having connecting with my client. See Exhibit B-2.

6. On August 10, 2007, I sent Mr. Luman an e-mail in response to his voice mail inquiring about settlement. I informed him that I still had not managed to connect with someone at Living Spaces, and that I would be out of the office on vacation, with only limited access to e-

mails, during the following week. I advised him that if he needed to speak to someone in my absence, he could contact my colleague, Carrie A. Shufflebarger.

7. While I was on vacation, Mr. Luman sent me an e-mail on August 15, 2007, following a conversation with Ms. Shufflebarger. In the e-mail, he stated that the parties had agreed to jointly file a new scheduling order. I was unable to review this e-mail, consider its contents, and respond to it until after I returned to the office.

8. After returning from vacation, I resumed the process of trying to get in touch with my contact at Living Spaces. I finally spoke with my contact on August 28, 2007. It was during this conversation that Living Spaces first authorized our firm to discuss terms of settlement with counsel for Mattress Firm.

9. My difficulties in finding time to speak with my client during July and August were genuine. They arose both as a result of the time difference between Ohio and California, and from our respective business schedules. The difficulties were not a sham or a device intended to delay the proceedings or disadvantage Mattress Firm. Instead, my client acted to minimize any adverse impact that the difficulties might cause by agreeing to postpone Mattress Firm's discovery response deadline until such time as my client and I could discuss the possibility of settlement.

10. Following the discussion with my contact, I sent an e-mail to Mr. Luman on August 29, 2007, advising him of the fact that my client was in fact interested in a negotiated settlement in the form of a coexistence agreement, and asking questions intended to allow us to define the parameters of the agreement. In addition, because it appeared from my review of Ms.

Shufflebarger's notes from her August 15, 2007, conversation with Mr. Luman that no agreement had been made to reschedule trial dates, and mindful of the fact that Mattress Firm's testimony period was set to close on September 3, 2007, I suggested in the e-mail that we suspend the proceedings. I asked Mr. Luman to let me know if his client was agreeable so that we could work out the specifics as to the new deadlines. See Exhibit B-3.

11. Mr. Luman responded via e-mail on August 30, 2007. He stated that his client contact was on vacation, and that he would get back to me after speaking with her. No response was made to the offer to suspend proceedings, nor did Mr. Luman otherwise address the September 3 deadline. See Exhibit B-4.

12. Mr. Luman attempted to schedule a telephone call to discuss settlement on September 13, 2007. However, I was heavily involved in another project that day, and did not have time to talk. I suggested that we postpone the conversation until the next day, September 14, but Mr. Luman stated that he would be out of the office then.

13. Mr. Luman and I spoke on September 20, 2007. In that conversation, Mr. Luman presented his client's proposed terms of settlement. This was the first time an actual proposal for settlement was discussed by the parties. In the conversation, I indicated that I believed that my client would be receptive to the offer. That representation was based on my understanding of each party's respective trading area, based in part on information publicly available through the end of August.

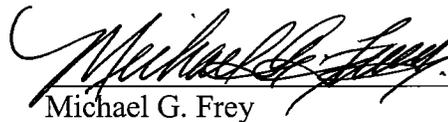
14. In the September 20 conversation, Mr. Luman asked about filing something with the Board to suspend the proceedings or move the trial dates. Rather than agreeing to do so, I

pointed out that there would be no need for such a filing if my client was willing to agree to the settlement terms, as a settlement would end the proceedings. Mr. Luman agreed with my assessment. We therefore made no agreement regarding resetting trial dates during that conversation. Instead, we elected to wait to see how Living Spaces reacted to the settlement proposal before taking action.

15. Living Spaces elected to reject Mattress Firm's proposed terms of settlement, due to information it recently come across concerning Mattress Firm's plans to expand its business operations into my client's trading area. We communicated the rejection of the offer to Mr. Luman in a letter dated September 27, 2007. Our letter specifically noted that Living Spaces remained open to discussing the matter further and exploring settlement possibilities, but that the terms of settlement would need to be adjusted in light of Mattress Firm's imminent expansion.

16. In a later communication, faxed to Mr. Luman on October 3, 2007, I presented my client's counterproposal for settlement.

Signed,



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Michael G. Frey

Dated: October 16, 2007

**Frey, Michael G.**

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**From:** Frey, Michael G.  
**Sent:** Monday, July 09, 2007 3:36 PM  
**To:** Luman, John  
**Subject:** RE: Mattress Firm v. Living Spaces Cancellation

I wasn't able to talk with my client last week. However, if you'd like to share your thoughts on settlement, we can talk and I can discuss them with my client when we do touch base.

---

**From:** Luman, John [mailto:John.Luman@bgllp.com]  
**Sent:** Monday, July 09, 2007 3:34 PM  
**To:** Frey, Michael G.; Zeve, Andrew  
**Cc:** Giles, Penny L.  
**Subject:** RE: Mattress Firm v. Living Spaces Cancellation

Thanks for the extension. Are we still on for today?

---

**From:** Frey, Michael G. [mailto:MGF@GDM.com]  
**Sent:** Friday, June 29, 2007 1:47 PM  
**To:** Luman, John; Zeve, Andrew  
**Cc:** Giles, Penny L.  
**Subject:** Mattress Firm v. Living Spaces Cancellation

John:

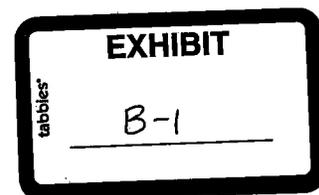
We agree to a three-week extension for you to respond to discovery in the Mattress Firm v. Living Spaces cancellation proceeding. We trust, should we have a similar need for additional time to take action during this proceeding, that you will extend the same courtesy to us.

Further, as we discussed, I hope to be in contact with my client within the next week so that we can discuss settlement possibilities in more detail when we talk on July 9.

Very truly yours,  
Michael G. Frey  
Greenebaum Doll & McDonald PLLC  
2800 Chemed Center  
255 East Fifth Street  
Cincinnati, Ohio 45202-4728  
Phone: 513-455-7678  
E-Mail: [mgf@gdm.com](mailto:mgf@gdm.com)

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10/16/2007



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As a result of perceived abuses, the Treasury has recently promulgated Regulations for practice before the IRS. These Circular 230 regulations require all attorneys and accountants to provide extensive disclosure when providing certain written tax communications to clients. In order to comply with our obligations under these Regulations, we would like to inform you that since this document does not contain all of such disclosure, you may not rely on any tax advice contained in this document to avoid tax penalties, nor may any portion of this document be referred to in any marketing or promotional materials.

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10/16/2007

**Frey, Michael G.**

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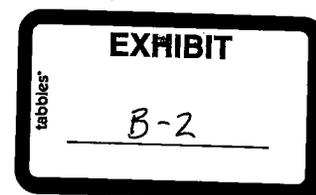
**From:** Frey, Michael G.  
**Sent:** Monday, July 30, 2007 9:56 AM  
**To:** Luman, John  
**Subject:** Mattress Firm v. Living Spaces

John:

I have not yet been able to speak with our client regarding the possibility of settlement. I continue to think that some sort of resolution is possible; I just haven't been able to speak to the client about it. Because of this delay, we are willing to grant you another three week extension to respond to the outstanding discovery requests.

Very truly yours,  
Michael G. Frey  
Greenebaum Doll & McDonald PLLC  
2800 Chemed Center  
255 East Fifth Street  
Cincinnati, Ohio 45202-4728  
Phone: 513-455-7678  
E-Mail: [mgf@gdm.com](mailto:mgf@gdm.com)

10/16/2007



**Frey, Michael G.**

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**From:** Frey, Michael G.  
**Sent:** Wednesday, August 29, 2007 11:20 AM  
**To:** Luman, John  
**Subject:** Mattress Firm v. Living Spaces

John:

I have finally had the opportunity to discuss settlement options with representatives of my client. I can report that Living Spaces is indeed open to settling this matter through some type of coexistence agreement.

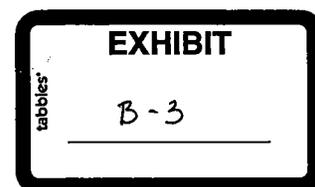
[Redacted material related to settlement discussions]

If your client has an alternate proposal regarding coexistence, please let me know the particulars so that I can discuss them with Living Spaces.

Finally, in light of the upcoming deadlines in the proceeding, I suggest that we suspend the opposition to allow the parties time to negotiate toward an acceptable agreement. If your client is agreeable, we can then work out the specifics of the suspension, scheduling order and discovery response deadline.

Very truly yours,  
Michael G. Frey  
Greenebaum Doll & McDonald PLLC  
2800 Chemed Center  
255 East Fifth Street  
Cincinnati, Ohio 45202-4728  
Phone: 513-455-7678  
E-Mail: [mgf@gdm.com](mailto:mgf@gdm.com)

9/27/2007



**Frey, Michael G.**

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**From:** Luman, John [John.Luman@bgllp.com]  
**Sent:** Thursday, August 30, 2007 1:17 PM  
**To:** Frey, Michael G.  
**Subject:** RE: Mattress Firm v. Living Spaces

Michael

Thanks for your email. My client contact is on vacation until next week. I will get back with you after speaking with her.

John

John F. Luman III | Partner | Bracewell & Giuliani LLP  
711 Louisiana Street, Suite 2300 | Houston, Texas | 77002-2770  
T: 713.221.1596 | F: 713.437.5398  
[john.luman@bgllp.com](mailto:john.luman@bgllp.com) | [www.bgllp.com](http://www.bgllp.com)

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**From:** Frey, Michael G. [mailto:MGF@GDM.com]  
**Sent:** Wednesday, August 29, 2007 10:20 AM  
**To:** Luman, John  
**Subject:** Mattress Firm v. Living Spaces

John:

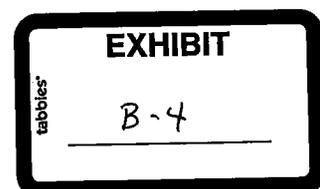
I have finally had the opportunity to discuss settlement options with representatives of my client. I can report that Living Spaces is indeed open to settling this matter through some type of coexistence agreement.

[Redacted material related to settlement discussions]

If your client has an alternate proposal regarding coexistence, please let me know the particulars so that I can discuss them with Living Spaces.

Finally, in light of the upcoming deadlines in the proceeding, I suggest that we suspend the

9/27/2007



opposition to allow the parties time to negotiate toward an acceptable agreement. If your client is agreeable, we can then work out the specifics of the suspension, scheduling order and discovery response deadline.

Very truly yours,  
Michael G. Frey  
Greenebaum Doll & McDonald PLLC  
2800 Chemed Center  
255 East Fifth Street  
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Phone: 513-455-7678  
E-Mail: [mgf@gdm.com](mailto:mgf@gdm.com)

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The following warning is required by the IRS whenever tax advice is given. If this email contains no direct or indirect tax advice, the warning is not applicable.

As a result of perceived abuses, the Treasury has recently promulgated Regulations for practice before the IRS. These Circular 230 regulations require all attorneys and accountants to provide extensive disclosure when providing certain written tax communications to clients. In order to comply with our obligations under these Regulations, we would like to inform you that since this document does not contain all of such disclosure, you may not rely on any tax advice contained in this document to avoid tax penalties, nor may any portion of this document be referred to in any marketing or promotional materials.

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