UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: January 12, 2012

Cancellation No. 92047058

Robert P. Hornsby, Jr.

v.

Megan L. Murphy

M. Catherine Faint,
Interlocutory Attorney:

On January 9, 2012 the Board held a telephone conference involving Robert P. Hornsby, Jr., appearing pro se and Whitney Barrett, counsel for Megan L. Murphy.

On June 15, 2011 the Board issued an order allowing petitioner time to show cause why the Board should not treat petitioner's failure to file a main brief as a concession of the case. Before the Board is petitioner's response to the Board's order to show cause, and a motion to reopen the time for filing his trial brief, filed together with petitioner's trial brief. The motion to reopen is contested.[1]

The Board carefully considered the arguments raised by both parties, as well as the supporting correspondence and the record of this case, in coming to a determination regarding the

[1] Respondent also submitted, in response to the Board's show cause order, a motion to extend the time for her to file her trial brief. In light of the Board's subsequent suspension of

above matters. During the telephone conference, the Board made the following findings and determinations.

The Board notes that petitioner entered some evidence during his testimony period, as previously extended. The Board issued an order on December 16, 2010 noting that the evidence submitted by petitioner at docket numbers 43, 44 and 45 remain as evidence on petitioner's behalf, denying respondent's motion to dismiss pursuant to Trademark Rule 2.132(a), and resetting the remaining testimony period dates. In that order the Board noted,

> Briefs shall be filed in accordance with Trademark Rules 2.l28(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

In his motion to reopen, petitioner argues that he "was under the mistaken impression" that the Board would issue a further scheduling order at the conclusion of the testimony period. Further, petitioner argues that he was "unclear" regarding whether respondent's failure to introduce evidence during her testimony period would affect the briefing of the case, and had parental duties that limited his opportunities to ascertain the status of the briefing schedule in this case.

Respondent opposes the reopening of petitioner's time to file a trial brief and argues that petitioner has failed to meet the excusable neglect standard.

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this case and resetting of dates as noted below, respondent's

The show cause order for failure to file a brief is discharged.

Turning first to the show cause order, we note the principal purpose of Trademark Rule 2.128(a)(3) is to save the Board the burden of determining a case on the merits where, for example, the plaintiff has lost interest in the case.

It is not the policy of the Board to enter judgment against a plaintiff for failure to file a main brief on the case if the plaintiff still wishes to obtain an adjudication of the case on the merits. *See* TBMP § 536 (3d ed. 2011). If a show cause order is issued under Trademark Rule 2.128(a)(3) and the plaintiff files a response indicating that it has not lost interest in the case, the show cause order will be discharged, and judgment will not be entered against the plaintiff for failure to file a main brief.

Here, it is clear that petitioner has not lost interest in this case. Accordingly, the order to show cause under Trademark Rule 2.128(a)(3), dated June 15, 2011, is discharged and judgment will not be entered against petitioner based on a loss of interest in this case. However, as discussed below, the fact that an order to show cause for failure to file a brief has been discharged because the plaintiff indicated he has not lost interest in the case does not necessarily result in acceptance of a late-filed brief, or in a resetting of the

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motion to extend time is denied as moot.

time to file the brief. *Vital Pharmaceuticals, Inc. v. Kronholm*, 99 USPQ2d 1708, 1710 (TTAB 2011).

Petitioner's motion to reopen his time to file his brief is denied.

We turn next to petitioner's motion to reopen. Petitioner has indicated that he wishes to reopen, and extend time for filing, his trial brief. As noted above, this is a case where testimony is closed, but petitioner has entered evidence into the record.

The Board may, in its discretion, permit a party to reopen an expired time period where the failure to act is shown to be due to excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B). Such a determination is an equitable one that must take into account all relevant circumstances surrounding the party's omission including, but not limited to, 1) the danger of prejudice to the nonmovant, 2) the length of the delay and its potential impact on judicial proceedings, 3) the reason for the delay, including whether it was within the reasonable control of the movant, and 4) whether the movant acted in good faith. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 (TTAB 1997)(*citing Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380 (1993)). The Board has noted that the reason for the delay may be considered the most important factor in any particular case. *See Pumpkin* at 1586 n.7.

As to the first factor, prejudice to the nonmovant must be more than the mere inconvenience and delay caused by the movant's failure to take timely action, and more than the nonmovant's loss of any tactical advantage which it otherwise would enjoy as a result of the movant's delay or omission. Rather, the first factor contemplates prejudice to the nonmovant's ability to litigate the case due to, for example, the loss or unavailability of evidence or witnesses which otherwise would have been available to the nonmovant. *Pumpkin*, 43 USPQ2d at 1587. Respondent's contention that she is "in danger of prejudice" if petitioner's briefing time is reopened because respondent will experience further delay in the resolution of this matter does not amount to the "prejudice" addressed by this factor. Accordingly, respondent has not claimed any recognizable prejudice, and this factor weighs in favor of petitioner.

As to the second factor, it is appropriate to consider the time required for briefing and deciding the motion to reopen. *Pumpkin*, 43 USPQ2d at 1587-88. Petitioner's brief would have been timely filed by May 31, 2011,[2] and petitioner filed his brief in response to the order to show cause on July 17, 2011, forty-five days late. Petitioner's delay in prosecution of this case, together with the time and Board resources committed

[2] The due date for petitioner's brief was May 28, 2011, a Saturday, and Monday, May 30, 2011 was a Federal holiday.

to deciding the motion to reopen, has been detrimental to the orderly administration of the petition process, and the Board finds this factor weighs in favor of respondent.

As to the third factor, the reason for the delay, and whether it was within petitioner's control, petitioner, who brought this cancellation proceeding, has the burden of prosecuting his case. Petitioner could, and should, have sought an extension of its time to file a brief before such time expired. The Board finds that the reasons relied upon by petitioner for his failure to act, prior to the expiration of his time to file his trial brief, were within petitioner's reasonable control. Those reasons simply did not prevent petitioner from filing a timely brief, or filing a timely request to extend the briefing period prior to the expiration of the period. *See, e.g., Melwani v. Allegiance Corp.*, 1537, 1541 (TTAB 2010) (finding plaintiff's belief that proceedings were suspended in absence of Board order was not reasonable). Accordingly, this factor favors respondent.

As to the fourth Pioneer factor, respondent argues that petitioner's noncompliance with the rules must be reasonable, and petitioner's failure to ascertain a clarification of the schedule or obtain an extension was unreasonable, and thus evident of bad faith on petitioner's part. The Board disagrees

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Therefore petitioner's brief would have been considered timely filed on May 31, 2011. Trademark Rule 2.196

that such behavior rises to the level of bad faith, and at the least finds that this factor is neutral.

After careful consideration of the *Pioneer* factors and the relevant circumstances in this case, although the first and fourth Pioneer factors do not weigh against petitioner, the second factor weighs somewhat against petitioner, and the third factor weighs heavily against petitioner. In view thereof, the Board finds that petitioner's reasons for not filing his trial brief in this case fail to establish excusable neglect, and do not warrant a reopening of petitioner's time to file his main brief.

Accordingly, petitioner's request to reopen his time to file a main brief is denied.[3]

Remaining Briefing Dates reset

Dates for the remaining briefing periods are reset as follows:

Brief for party in position of plaintiff shall be due:	CLOSED
Brief (if any) for party in position of defendant shall be due:	February 23, 2012
Reply brief (if any) for party in position of plaintiff shall be due:	March 9, 2012

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

[3] Thus, to be clear, although petitioner has filed a trial brief, it will not be considered by the Board.