

Goodman

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

Mailed: September 9, 2008

Cancellation No. 92047946

Jodi Kristopher, Inc.

v.

International Seaway Trading
Corporation

Before, Holtzman, Cataldo and Ritchie de Larena,
Administrative Trademark Judges.

By the Board:

This case now comes up on petitioner's motion, filed May, 29, 2008, to reopen discovery and testimony periods and reset dates, and respondent's cross-motion, filed June 9, 2008, to dismiss under Trademark Rule 2.132(a).

We turn first to consideration of petitioner's motion to reopen discovery.

The standard to apply to a motion to reopen under Fed. R. Civ. P. 6(b)(2) is whether petitioner has demonstrated excusable neglect for its failure to act. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

In determining excusable neglect, the Board considers the following factors as set forth in *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), and adopted by the Board in *Pumpkin*,

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supra: (1) the danger of prejudice to the non-moving party; (2) the length of 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 has acted in good faith.¹

Considering the *Pioneer* factors along with all relevant circumstances, the Board finds that petitioner has not demonstrated excusable neglect to reopen discovery.

With respect to the third and most important *Pioneer* factor, petitioner explained that its failure to take discovery was due to its "good faith belief" that the parties had agreed "to suspend proceedings during the discovery period for the purposes of settlement." While attempts at settlement are generally favored, they do not excuse petitioner's failure to act within the prescribed time. *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1859 (TTAB 1998) (the belief in settlement and/or the existence of settlement negotiations do not justify a party's inaction or delay or excuse it from complying with the deadlines set by the Board or imposed by the rules.) Petitioner could have sought an extension of discovery or suspension of proceedings while discovery was still open as settlement negotiations would normally constitute good cause for granting such an extension or suspension; however,

¹ While all relevant circumstances are considered, the factors are not equally weighted: "the reason-for-delay" factor has been held to be the most important. See *Pumpkin, supra* at fn. 7 and cases cited therein.

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petitioner never filed any such motion with the Board and waited nearly three months after discovery closed to seek reopening. The Board finds that petitioner's failure to act during the discovery period was within petitioner's reasonable control.

With regard to the remaining *Pioneer* factors, we find no evidence of a bad faith attempt by petitioner to delay this case, nor specific prejudice to respondent beyond mere delay. We do find, from a docket management standpoint, however, that the delay has a significant potential impact on the judicial proceedings because reopening discovery would extend proceedings by eight months (six months for discovery and a sixty-day period between discovery and trial) which runs counter to the Board's interest in expeditious adjudication of this case.

On balance, we find that petitioner has not demonstrated excusable neglect to reopen the discovery period.

In view thereof, petitioner's motion to reopen the discovery period in this proceeding is denied.

We now turn to petitioner's motion to reopen its testimony period which we are construing as a motion to extend inasmuch as petitioner's motion was filed on the last day of petitioner's testimony period. Fed. R. Civ. P. 6(b)(1).

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The standard for granting an extension of time is good cause. See Fed. R Civ. P. 6(b)(1) and TBMP § 509 (2nd ed. rev. 2004) and authorities cited therein. The Board generally is liberal in granting extensions of time before the period to act has elapsed so long as the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. See, e.g., *American Vitamin Products Inc. v. DowBrands Inc.*, 22 USPQ2d 1313 (TTAB 1992).

We have carefully reviewed the parties' papers and supporting exhibits. In this case, we find that the privilege of extensions has not been abused and we find no evidence of negligence or bad faith on the part of petitioner. The record, through the parties' e-mails, also reflects that the parties were discussing settlement during petitioner's testimony period. Accordingly, we find, in our discretion, that petitioner has established the requisite good cause for extending its testimony period.

In view thereof, petitioner's motion to extend its testimony period is granted and petitioner's testimony period will be reset as set forth below.

In view of our granting of petitioner's motion to extend its testimony period, respondent's motion to dismiss under Trademark Rule 2.132(a) is denied as moot.

Proceedings are resumed.

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Trial dates are reset as follows:

| DISCOVERY PERIOD TO CLOSE: | CLOSED |
|-------------------------------------------------------------------------------|-------------------------|
| 30-day testimony period for party in position of plaintiff to close: | December 7, 2008 |
| 30-day testimony period for party in position of defendant to close: | February 5, 2009 |
| 15-day rebuttal testimony period for party in position of plaintiff to close: | March 22, 2009 |

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

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

* * * *

The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:

<http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf>

http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the

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Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address:

<http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm>