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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Mailed: May 21, 2010

Cancellation No. 92048654

WWRD Ireland IPCO LLC by
assignment from Waterford
Wedgwood PLC

v.

TOB International Marketing
Corp.

Before Grendel, Holtzman and Wellington, Administrative
Trademark Judges.

By the Board:

This case now comes up on respondent's motion to
dismiss under Trademark Rule 2.132(a), filed May 15, 2009,
and petitioner's cross-motion to reopen, filed June 22,
2009.

Respondent seeks dismissal of this proceeding due to
petitioner's failure to submit any evidence at the close of
its testimony period on April 28, 2009.

In response and in support of its motion to reopen,
petitioner advises that the parties had already agreed to
settlement, which had been executed by respondent, and that
respondent's counsel, "expressly acknowledged that this
proceeding had been resolved in correspondence to

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Petitioner's counsel." Petitioner further submits that petitioner has "encountered some difficulty in executing the agreement, however, due to bankruptcy proceedings" in the United Kingdom. Petitioner argues that respondent "gave no warning of its intent to pull out of the settlement . . . and unilaterally attempted to void the Settlement Agreement" on the same day it filed its motion to dismiss. Petitioner submits that "based on the existence of an executed Settlement Agreement and Registrant's acknowledgement that the proceedings have been resolved, Petitioner's lack of testimony during the testimony period was reasonable and excusable." Petitioner argues that the motion to dismiss should be denied and proceedings either suspended for petitioner's bankruptcy, or petitioner's testimony period reopened.

In reply, respondent complains that after respondent signed the settlement agreement on December 3, 2008, the settlement agreement remained unsigned by petitioner. Respondent submits that the reasons for delay were within petitioner's control and that petitioner never advised respondent of the delay or difficulty in obtaining signatures to the parties' agreement. Respondent points out that petitioner did not seek an extension of the deadlines in this proceeding or a stay based on petitioner's bankruptcy. Respondent argues that petitioner cannot rely

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on the existence of the settlement agreement for its failure to seek an extension of dates or for its failure to submit testimony since "the agreement did not constitute [a] contract until all parties had signed."

To overcome a motion to dismiss for failure to prosecute under Trademark Rule 2.132(a), petitioner must show good and sufficient cause why judgment should not be rendered against it. The "good and sufficient cause" standard, in the context of Trademark Rule 2.132(a), is equivalent to the "excusable neglect" standard which opposer is required to meet under Fed. R. Civ. P. 6(b)(1)(B) to reopen petitioner's testimony period. *See Grobet File Co. of Am. Inc. v. Associated Distrib. Inc.*, 12 USPQ2d 1649 (TTAB 1989); and *Fort Howard Paper Co. v. Kimberly-Clark Corp.*, 216 USPQ 617 (TTAB 1982). Therefore, the standard applied to respondent's motion to dismiss and petitioner's motion to reopen is whether petitioner has demonstrated excusable neglect.

Excusable neglect is a somewhat "'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of the movant." *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 392 (1993). The Board considers the following factors as set forth in *Pioneer* and adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997)

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in determining excusable neglect: (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.

Regarding *Pioneer* factors 1, 2 and 4, respondent has not argued and the Board does not find that petitioner acted in bad faith, engaged in excessive delay, or caused prejudice to the other side. With regard to the third *Pioneer* factor, respondent has argued that the existence of the partially executed settlement agreement does not constitute excusable neglect because the agreement was not executed by both parties.

However, in appropriate circumstances, a party's good faith but mistaken reliance on settlement negotiations to defer the expense and effort of litigating a case can constitute excusable neglect. *Cf. Eitel v. McCool*, 782 F.2d 1470 (9th Cir. 1986) (finding excusable neglect for failure to answer due to the fact that parties appeared to have reached final settlement prior to deadline for answer); *Jetcraft Corp. v. Banpais, S.A. De C.V.* 166 F.R.D. 483 (D.Kan., 1996) (finding excusable neglect for failure to file answer due to mistaken belief that dispute would be resolved through negotiations and fact that authorization to

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hire counsel was not available until after answer due).

The Board has broad discretion in considering all relevant circumstances to determine whether the existence of settlement negotiations can constitute excusable neglect. *Cf. Wright & Miller, 4B Fed. Prac. & Proc. Civ. § 1165 (3d ed. 2010) (discussing Fed. R. Civ. P. 6(b) and citing Friedman & Feiger, L.L.P. v. ULofts Lubbock, LLC, (3:09-CV-1384-D) 2009 WL 3378401 (N.D.Tex., October 19, 2009) (court has discretion to find excusable neglect for failure to file answer due to mistaken reliance on settlement negotiations; "intended elasticity of Rule 6(b)(1)(B) would be unduly restricted if courts were to hold categorically that mistaken reliance on settlement negotiations can never satisfy the excusable neglect standard"))*. Additionally, Rule 6(b) gives the Board extensive flexibility to modify fixed time periods whether the enlargement is sought before or after the actual termination of the allotted time. *Procyon Pharmaceuticals Inc. v. Procyon Biopharma Inc., 61 USPQ2d 1542, 1544 (TTAB 2001) ("We note initially that the Board possesses broad discretion to reset dates as warranted by the circumstances before it when deciding motions that impact discovery or trial dates")*.

Although hindsight suggests that petitioner would have been wise to seek an extension of the Board proceeding given its difficulties in obtaining a signature to the final

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settlement agreement due to petitioner's bankruptcy, we find that under the relevant circumstances, petitioner's belief that the action had settled based on respondent's counsel's written representations was a reasonable basis for failing to proceed to trial or to seek an extension. See Petitioner's Exhibit A (Settlement agreement executed by respondent on December 3, 2008) and Petitioner's Exhibit B (respondent's counsel's cover letter of December 3, 2008 which stated that "Once I receive a fully executed agreement from you, I will proceed with TOB's obligations under paragraphs 3 and 4 of the agreement. I'm delighted that we were able to resolve this matter amicably").

After balancing all the *Pioneer* factors, and in our discretion, we find that petitioner's failure to take testimony or seek an extension of time was excusable under the circumstances. In view thereof, respondent's motion to dismiss is denied, and petitioner's motion to reopen its testimony period is granted. With regard to petitioner's motion to suspend for petitioner's bankruptcy, the automatic stay provisions do not mandate the suspension of the Board proceeding for plaintiff's bankruptcy unless there is a counterclaim in the proceeding for cancellation of the plaintiff's registration, which is not present in this case. In view thereof, the motion to suspend is denied. TBMP Section 510 (2d ed. rev. 2004).

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Petitioner's motion, filed March 9, 2010, to substitute WWRD Ireland IPCO LLC as party petitioner is granted.¹ The caption in this proceeding has been amended to reflect the assignment.

Proceedings are resumed. Trial dates are reset as follows²:

Plaintiff's Pretrial Disclosures	6/4/10
Plaintiff's 30-day Trial Period Ends	7/19/10
Defendant's Pretrial Disclosures	8/3/10
Defendant's 30-day Trial Period Ends	9/17/10
Plaintiff's Rebuttal Disclosures	10/2/10
Plaintiff's 15-day Rebuttal Period Ends	11/1/10

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 filed as provided by Trademark Rule 2.129.

¹ Recorded at the Office's Assignment Branch at Reel/Frame 3960/0414.

² The Board is also resetting the date for service of pretrial disclosures inasmuch as respondent indicates no pretrial disclosures have been served.