

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

Mailed: December 31, 2013

Cancellation No. 92053298

Tyler Perry Studios, LLC

v.

Kimberly Kearney

Andrew P. Baxley, Interlocutory Attorney:

In a September 23, 2013 order, the Board granted respondent's motion (filed August 12, 2013) to extend her testimony period and reset that testimony period to close on October 19, 2013. In a November 18, 2013 order, the Board denied respondent's motion (filed October 4, 2013) to suspend or further extend her testimony period for an unspecified period to go through the necessary procedures to obtain the subpoenas for her intended witnesses.

Accordingly, respondent's testimony period closed on October 19, 2013. See TBMP Section 509.01(a) (3d ed. rev. 2 2013) (when a motion to extend is denied, dates may remain as last set or reset).

On December 7, 2013, more than three years after the commencement of this proceeding, an attorney entered an appearance on behalf of respondent for the first time. On December 17, 2013, respondent filed a "motion for

reconsideration for extending testimony period." Although petitioner's time in which to respond to such motion has not lapsed, the Board, in its discretion and in the interest of avoiding further delay in this case, elects to decide the motion on the merits at this time.¹ See Trademark Rule 2.127(a).

By such motion, respondent states that she "understands and respects the [B]oard's decision," but asks that the Board reopen her testimony period to allow her to properly make of record documentary evidence that she submitted as exhibits to briefs in connection with the motions to extend.² As such, the motion is not one for reconsideration of the November 18, 2013 order, but is instead a new motion to reopen her testimony period. See Fed. R. Civ. 6)(1)(B); TBMP Section 509.01(b).

For the Board to reopen respondent's testimony period, respondent must establish that her failure to act in a

¹ "The presentation of one's arguments and authority should be presented thoroughly in the motion or the opposition brief thereto." *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 13 USPQ2d 1719, 1720 n.3 (TTAB 1989).

In view of petitioner's previous filings herein, the Board presumes that petitioner opposes the motion.

² Respondent submitted e-mails with her August 12, 2013 brief in support of her motion to extend, her September 13, 2013 reply brief in support of her motion to extend, and her November 4, 2013 reply brief in support of her motion to suspend or further extend and submitted website screenshots with her reply brief in support of her motion to suspend or further extend. The reply brief in support of the motion to suspend or further extend was filed after the October 19, 2013 close of respondent's testimony period.

timely manner was the result of excusable neglect. See *id.* In *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993), as discussed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the Supreme Court clarified the meaning and scope of "excusable neglect," as used in the Federal Rules of Civil Procedure and elsewhere. The Court held that the determination of whether a party's neglect is excusable is:

at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include. . . [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.

Pioneer Investment Services Co. v. Brunswick Associates L.P., 507 U.S. at 395. In subsequent applications of this test, several courts have stated that the third *Pioneer* factor, namely the reason for the delay and whether it was within the reasonable control of the movant, might be considered the most important factor in a particular case. See *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 at 1586, fn.7 and cases cited therein.

Turning to the third *Pioneer* factor, the Board finds that respondent's failure to act in a timely manner was caused by both her unfamiliarity with, and failure to follow, Board procedure and her failure to retain an

attorney until the middle of trial and further finds that such failure was entirely within her control. This factor weighs strongly against a showing of excusable neglect.

With regard to the second *Pioneer* factor, the Board finds that the delay caused by respondent's failure to take appropriate action during her testimony period and her motions arising therefrom is significant. Both the Board and parties before it have an interest in minimizing the amount of the Board's time and resources that must be expended on matters, such as the present motion, which comes before the Board solely as a result of one party's failure to understand straightforward Board procedure. See *PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860 (TTAB 2002). The Board's interest in deterring such failure weighs against a finding of excusable neglect under the second *Pioneer* factor.

With regard to the first *Pioneer* factor, the Board finds that there is no evidence of significant prejudice to petitioner, and, with regard to the fourth *Pioneer* factor, we find that there is no evidence of bad faith on the part of respondent. However, on balance, the Board finds that respondent's failure to timely act before the close of her testimony period was not caused by facts constituting excusable neglect. Accordingly, respondent's motion to reopen her testimony period is denied.

In any event, the e-mails that respondent submitted with briefs in connection with the motions to extend are properly entered in evidence and made of record by notice of reliance. A notice of reliance is a means of making of record printed publications, official records and other self-authenticating documents.³ See Trademark Rule 2.122(e); TBMP Section 704. E-mails must be introduced in evidence through a testimony deposition. See TBMP Section 703 *et seq.* Moreover, the website excerpts that respondent submitted with those briefs, at minimum, do not include dates of publication or dates of access. Website excerpts are admissible under notice of reliance in the same manner as a printed publication in general circulation under Trademark Rule 2.122(e) only where those excerpts include dates of publication or dates on which the websites were accessed and the excerpts were printed, and their sources (e.g., URLs). See *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1038-39 (TTAB 2010).

³ A notice of reliance shall specify the printed publication (including information sufficient to identify the source and the date of the publication) or the official record and the pages to be read; indicate generally the relevance of the material being offered; and be accompanied by the official record or a copy thereof whose authenticity is established under the Federal Rules of Evidence, or by the printed publication or a copy of the relevant portion thereof. ... The notice of reliance shall be filed during the testimony period of the party that files the notice. Trademark Rule 2.122(e).

The Board finds that the filing of the motion to reopen during petitioner's rebuttal testimony period warrants a brief extension of that rebuttal testimony period. See Fed. R. Civ. P. 6(b)(1)(A); TBMP Section 509.01(a). Accordingly, petitioner's rebuttal testimony period is reset to close on **January 6, 2014**.

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.

If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.