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

Proceeding	92053424
Party	Defendant World Nutrition, Inc.
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Submission	Motion to Reopen
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Date	11/02/2011
Attachments	Motion to Reopen Discovery Period.PDF (6 pages)(49135 bytes)

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

PROTHERA, INC.,	:	
Petitioner,	:	In re Registration No. 3,783,555
v.	:	Cancellation No. 92053424
WORLD NUTRITION, INC.	:	
Respondent.	:	

BOX TTAB NO FEE
Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3514

MOTION TO REOPEN DISCOVERY PERIOD AND RESET THE TESTIMONY PERIODS AND TRIAL DATES

Respondent WORLD NUTRITION, INC. moves to reopen the discovery period for a period of sixty (60) days and reset the testimony periods and trial dates in this matter. If the Board grants this motion, Respondent moves that the applicable discovery and testimony periods would be reopened as of the date of the Board's order and extended sixty (60) days with all subsequent deadlines falling accordingly.

Background

On December 20, 2010, Petitioner PROTHERA, INC. (the "Petitioner") filed the present cancellation action. Petitioner previously contacted Respondent with potential issues surrounding Respondent's use of VITÄLZYM in light of Petitioner's marks and forwarded a draft coexistence agreement. Respondent replied in an e-mail dated December 17, 2010 (attached hereto and marked as "Exhibit A") requesting information necessary for Respondent to assess whether it would be possible to enter into the proposed coexistence agreement. Petitioner responded in an e-mail dated December 20, 2010 (attached hereto as "Exhibit B") indicating that it filed the present cancellation action, but is open to an "amicable resolution of this matter." Respondent sent two e-mails, one on January 11, 2011 and one

on January 20, 2011 reiterating the previous request for information. Respondent's original deadline to file an answer was January 30, 2011. Petitioner called Respondent on January 27, 2011, left a voice mail and consented to a sixty (60) day extension of time to file an answer and indicated he would reply to Respondent in "due course". Respondent filed the consented motion to extend the time for filing an answer on January 28, 2011. The Board extended Respondent's time to file an answer to March 31, 2011.

Respondent called Petitioner on March 11, 2011 and March 28, 2011 reiterating the request for information in order to assess settlement. In the absence of a response from Petitioner, Respondent filed its answer in this proceeding on March 31, 2011. Respondent received no response from Petitioner upon receiving Respondent's answer. The deadline to hold a discovery conference was set for April 30, 2011. Respondent made numerous requests to determine Petitioner's availability, but Petitioner did not respond to Respondent's e-mail of April 15, 2011; Registrant's attorney's e-mail of April 19, 2011; Registrant's attorney's voice mail of April 19, 2011; Registrant's attorney's e-mail of April 20, 2011, or Registrant's attorney's voice mail of April 20, 2011. On April 20, 2011, Respondent filed a request for Board participation in the discovery conference without Petitioner's availability.

Upon receiving an e-mail from the interlocutory assigned to this action, Petitioner left a voice mail for Respondent on April 26, 2011, indicating willingness and availability to participate in the discovery conference while simultaneously indicating a desire to settle the present action. The parties participated in the discovery conference along with the Board on April 27, 2011. After the discovery conference, during a telephone conference, Petitioner indicated to Respondent it would provide the information previously requested by Respondent if Respondent would be willing to provide similar information and be willing to suspend the proceedings. Petitioner indicated that it would confer with its principals to ensure whether they would still be amenable to providing this information. Respondent agreed that once it received confirmation of Petitioner's willingness to provide the requested information, it would consider providing similar information and possibly suspending the action.

On May 31, 2011, Respondent served Petitioner with its initial disclosures. To date, Respondent has not received any response from Petitioner or its initial disclosures.

ARGUMENT

The discovery period in a Board action may be reopened if the moving party shows that its failure to act during the time previously allotted was a result of excusable neglect. *T.M.B.P.* §509.01(b). In an analysis to determine whether a party has shown excusable neglect, the Board adopted the standard established by the Supreme Court in *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993) through its decision in *Pumpkin Ltd. v. The Seed Corps,*43 USPQ2d 1582 (TTAB 1997). These cases have set forth that the excusable neglect determination must take into account all relevant circumstances surrounding the party's omission or delay, including the following factors:

(1) the danger of prejudice to the nonmovant;

(2) the length of delay and its potential impact on judicial proceedings;

(3) the reason for the delay; and

(4) whether the movant acted in good faith.

Respondent respectfully submits that its failure to take action within the established discovery period relates to the Petitioner's repeated statements and actions that Petitioner hopes to resolve this matter amicably through a coexistence agreement. Furthermore, Respondent, in seeking instructions from Respondent's principals discovered on the date that the discovery period was to expire, Respondent's main contact, former Chief Operating Officer Chuck Eberhardt, was no longer with Respondent's company. Respondent received instructions from Ryuji Hirooka on October 28, 2011 to attempt to extend discovery as a means for obtaining the information sought from Petitioner numerous times in the past.

Petitioner Will Not Be Prejudiced by Reopening of the Discovery Period

The Board has held that the mere passage of time is generally not prejudicial. *Old Nutfield Brewing Company, Ltd. v. Hudson Valley Brewing Co., Inc.*, 65 USPQ2d 1701 (T.T.A.B. 2002). Petitioner in this proceeding would not be prejudiced by reopening of the discovery period, but, in fact would benefit from the reopening of the discovery period. Trademark Rule 2.132(a) clearly establishes that the Petitioner bears the burden of coming forward with evidence to support its case. Petitioner has

not sought or offered any evidence in support of its allegations in its Petition to Cancel. To date, Petitioner has not taken any steps to prosecute its case. All actions have been initiated by Respondent in order to preserve its rights, including requests for information, filing an answer when Petitioner did not respond to Respondents requests for information to asses settlement, organizing and seeking Board participation in the discovery conference and presenting its initial disclosures. Respondent seeks the opportunity to obtain information Petitioner promised to deliver through informal means.

The Length of Delay Will Not Impact Judicial Proceedings

The discovery period in this case ended on October 27, 2011. Respondent files this motion six (6) days after the close of discovery. A six (6) day delay in requesting additional time to conduct discovery should not impact judicial proceedings. Furthermore, Respondent requests sixty (60) days to conduct any discovery. If Petitioner was concerned about the loss or unavailability of certain evidence or witnesses, Petitioner would have timely filed its initial disclosures then served discovery requests on Respondent. There is ample time before briefing is due in 2012. Thus, an additional discovery period will not impact the current cancellation action.

Delay Was Not in Reasonable Control of Movant

As previously stated, Respondent, in seeking instructions from Respondent's principals discovered on the date that the discovery period was to expire, Respondent's main contact, former Chief Operating Officer Chuck Eberhardt, was no longer with Respondent's company. Respondent received instructions as soon as possible and filed this motion in accordance therewith.

Additionally, as Petitioner has not prosecuted its case and, as chronicled in the Background section above, has been unresponsive throughout these proceedings. Respondent has made numerous attempts to engage Petitioner in productive discussions regarding settlement or furtherance of this action with little or no response from Petitioner. Petitioner refuses to prosecute its case, yet refuses to dismiss it as well, leaving Respondent captive to this action which Petitioner initiated. Respondent has filed this action in good faith in an attempt to obtain information which it is forced to obtain through discovery.

Conclusion

Respondent's numerous good faith attempts to engage Petitioner to participate in the present action it initiated have failed. After weighing its options, Respondent filed the instant motion in hopes of obtaining information previously sought from Petitioner. Respondent respectfully requests that the Board grant Petitioner's motion to reopen the discovery period and reset the trial dates and agrees to any abbreviated scheduling that the Board may deem appropriate in order to reduce any delay or impact on these proceedings.

Respectfully submitted,

Dated: 11/2/11

By: Laila S. Wolfgram

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Request for Board Participation was served this 2nd day of November 2011, by depositing a copy thereof in the U.S. mail, postage prepaid, addressed to the Petitioner and his Attorney of Record as follows:

Brian Geoghegan
GeoMark
8201 164th Ave. NE, Suite 200
Redmond, WA 98052

Attorney for Respondent