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

Mailed: June 10, 2013

Cancellation No. 92055020

Tech Data Corporation

v.

StreamOne

**Before Zervas, Wellington, and Kuczma,
Administrative Trademark Judges.**

By the Board:

Now before the Board is petitioner's motion (filed November 12, 2012) for discovery sanctions against respondent in the form of judgment granting the petition for cancellation. By its brief in opposition to the motion, respondent effectively cross-moves to reopen the time in which to serve its initial disclosures and responses to petitioner's discovery requests. Both motions are fully briefed.¹

Background

On August 16, 2012, petitioner filed a motion to compel respondent's initial disclosures and responses to

¹ Petitioner's January 8, 2013 filing is a sur-reply to respondent's cross-motion, and has, therefore, been given no consideration. Trademark Rule 2.127(a).

petitioner's first set of interrogatories and first set of requests for production of documents. No response to the motion having been made by respondent, the Board granted the motion to compel as conceded and allowed respondent until November 8, 2012, to serve upon petitioner its initial disclosures and complete responses to the interrogatories and document requests.

Motions to Reopen and for Sanctions

In its motion for sanctions, filed just four days after the compelled deadline, petitioner moves for judgment under Trademark Rule 2.120(g)(1) and argues that respondent failed to serve the compelled initial disclosures and discovery requests and that respondent has not otherwise contacted petitioner about the issue. In opposition to the motion, respondent states that on November 5, 2012, while its counsel was finalizing responses to the compelled discovery, counsel lost power at his home office as a result of Hurricane Sandy, which storm caused severe damage to counsel's home and neighborhood, and caused an evacuation of "[t]he entire area." Counsel also states that later in the same week, his wife underwent emergency surgery, his five year-old son and ninety-five year-old mother had to be temporarily relocated out-of-state, and he was otherwise busy with Federal Emergency Management Agency and insurance company representatives. Respondent requests that the

motion for sanctions be denied based upon "the extraordinary and extenuating circumstances" that its counsel experienced around the time the compelled disclosures and discovery were due, and states that a copy of the discovery responses were sent to petitioner on November 16, 2012, the same day that respondent filed its brief in opposition to the motion for sanctions. Petitioner replies that, while it appreciates the issues created by Hurricane Sandy, there is "a disconnect" between the timeline of the October 29th storm and counsel's representation that he lost power on November 5th; implies that counsel should have been better prepared for the storm since its approach and severe impact were well-known; and states that although respondent has since served its responses to petitioner's document requests, respondent has still not served initial disclosures or responses to interrogatories. Respondent replies that its failure to send its initial disclosures and responses to interrogatories with its responses to petitioner's document requests was an inadvertent error, and that such disclosures are attached to respondent's December 25, 2012, reply brief in support of its cross-motion.²

Inasmuch as respondent seeks to avoid judgment and to have its late service of disclosures and discovery responses

² Respondent titled its reply brief as a "supplemental affirmation of" respondent's counsel.

excused, respondent must establish that its failure to act in a timely manner (i.e., on or before the November 8, 2012, deadline set in the Board's order granting petitioner's motion to compel) was the result of excusable neglect. See *Vital Pharmaceuticals Inc. v. Kronholm*, 99 USPQ2d 1708, 1710 (TTAB 2011).

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 Inv. Servs. Co. v. Brunswick Assocs. L.P., *supra* 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.*, *supra* at 1586 n.7 and cases cited therein.

With regard to the first *Pioneer* factor, there does not appear to be any measurable prejudice to petitioner. It is unlikely that the short time frame will cause petitioner any lost evidence, unavailability of witnesses, or handicap at trial. See *Vital Pharmaceuticals Inc., supra*, 99 USPQ2d at 1710; citing *Pratt v. Philbrook*, 109 F.3d 18, 22 (1st Cir. 1997), and *Paolo Associates Ltd. P'ship v. Bodo*, 21 USPQ2d 1899, 1904 (Comm'r 1990). Indeed, petitioner has not made any of these arguments.

With regard to the second *Pioneer* factor, we find that the eight-day delay in complying with the document request portion of the order compelling discovery, and further thirty-nine day delay in complying with the disclosure and interrogatory portion of the order, when viewed in context with the circumstances created by the hurricane and northeaster that followed quickly thereafter,³ and the fact that discovery is still open, will not have a significant impact on this proceeding.

With regard to the third *Pioneer* factor, there is no question that Hurricane Sandy and the emergency surgery were outside of respondent's reasonable control. From the articles submitted by petitioner, it is clear that the

³ Petitioner submitted, as exhibits to its combined reply in support of sanctions and opposition to reopening, five articles from the *New York Times* discussing the severity of Hurricane Sandy and a northeaster which hit the area "[l]ittle more than a week [there]after."

"mammoth and merciless" hurricane was a "menacing monster of a storm" which caused many deaths, multiple millions to go without power, and general "misery and frustration."

With regard to the fourth *Pioneer* factor, we find no evidence of bad faith on the part of respondent.

On balance, and giving appropriate weight to the third *Pioneer* factor, we find that respondent's failure to timely comply with the Board's order compelling disclosure and discovery resulted from excusable neglect. Accordingly, respondent's cross-motion to reopen the time in which to serve its initial disclosures and responses to petitioner's discovery requests is **granted**; and, in view thereof, petitioner's motion for sanctions is **denied**.

Notwithstanding our denial of the motion for sanctions, we note that respondent had not, until it responded to the motion for sanctions, communicated with petitioner in any way since June 6, 2012. Petitioner previously alleged (in the motion to compel) that respondent has ignored petitioner's telephone calls, voice mail messages, first class mail, and email correspondences. Although we decline to enter sanctions at this time, we remind respondent that the Board expects parties (and their attorneys) to cooperate with one another in the discovery process and looks with extreme disfavor on those who do not. See TBMP § 408.01 (3d ed. rev. 2012).

Schedule

Proceedings are resumed, and dates are reset on the following schedule.

Expert Disclosures Due	6/17/2013
Discovery Closes	7/17/2013
Plaintiff's Pretrial Disclosures	8/31/2013
Plaintiff's 30-day Trial Period Ends	10/15/2013
Defendant's Pretrial Disclosures	10/30/2013
Defendant's 30-day Trial Period Ends	12/14/2013
Plaintiff's Rebuttal Disclosures	12/29/2013
Plaintiff's 15-day Rebuttal Period Ends	1/28/2014

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.