

THIS OPINION IS
NOT A PRECEDENT
OF THE TTAB

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

coggins

Mailed: November 21, 2013

Cancellation No. 92055416

IQM2, Inc.

v.

Granicus, Inc.

**Before Bucher, Lykos, and Hightower,
Administrative Trademark Judges.**

By the Board:

No main brief having been filed, the Board issued an order on October 7, 2013, under Trademark Rule 2.128(a)(3), allowing petitioner thirty days in which to show cause why its failure to file a main brief on the case should not be treated as a concession of the case. Now before the Board is petitioner's November 7, 2013, response thereto.¹

Late Response

As an initial matter, we note that petitioner's response to the show cause order was filed one day late. However, in

¹ Petitioner's response fails to indicate proof of service on respondent as required by Trademark Rule 2.119. In order to expedite this matter, respondent is directed to the following URL where it may view a copy of the filing:
<http://ttabvueint.uspto.gov/ttabvue/v?pno=92055416&pty=CAN&eno=9>

view of the potentially dispositive nature of the show cause order, we exercise our discretion to consider the late response.

By way of the response, petitioner states that it "maintain[s] its belief as set forth in [the] petition for cancellation" that it is "harmed" (para. 3) by the subject registration and that the subject mark is "merely descriptive" and/or "generic" (para. 2). Petitioner further states that it "has been attempting to obtain cooperation from other third parties who are similarly harmed" (para. 3); that it attempted "in good faith to reach an amicable resolution of this case through settlement" with respondent but discussions "stalled as terms were not agreed to" (para. 4); and that its failure to file a main brief should not be construed as petitioner's "loss of interest in the case" (para. 5). After these explanations, petitioner requests an additional thirty days in which to file its main brief.

Show Cause Order Discharged

It is the policy of the Board not to enter judgment against a plaintiff for failure to file a main brief on the case where the plaintiff, in its response to the show cause order, indicates that it has not lost interest in the case. *See Vital Pharm. Inc. v. Kronholm*, 99 USPQ2d 1708, 1710 (TTAB 2011). *See also* TBMP § 801.02(a) (3d ed. rev.2 2013). Inasmuch as it is clear that petitioner has not lost interest

in this case, the order to show cause under Trademark Rule 2.128(a)(3) is hereby **discharged**, and judgment will not be entered against petitioner based on a loss of interest in this case.

Motion to Reopen Briefing Denied

Although petitioner has requested an additional thirty days in which to file its main brief, it would be futile to reopen that time. *See Vital Pharm. Inc.*, 99 USPQ2d at 1710 n.11 ("In cases where there is no evidence of record, and there are no material admissions of fact, absent a request to reopen the testimony period, and the corresponding, requisite showing of excusable neglect to reopen the testimony period, it would be futile to reopen only the time to file a plaintiff's main brief."). As explained in TBMP § 536:

It is not unusual for a plaintiff to file a response to the Board's 37 CFR § 2.128(a)(3) order to show cause in a case in which the plaintiff cannot bear its burden of proof, regardless of whether the Board reopens the time for the plaintiff to file its brief. If the record shows (1) that plaintiff failed, during its testimony period, to take any testimony or offer any other evidence in its behalf, (2) that plaintiff failed to make (if applicable) a pleaded registration properly of record with its complaint, and (3) that defendant in its answer did not admit to any dispositive allegations, the Board, in lieu of reopening the briefing schedule, may proceed to enter judgment against plaintiff for failure to prove its case, absent the filing of, and granting of, a motion to reopen testimony brought by plaintiff.

In the present case, petitioner failed to take any testimony or offer any evidence in its behalf, petitioner did

not make any registrations of record with its petition for cancellation,² respondent in its answer did not admit to any standing or dispositive allegations,³ and petitioner failed to include with its response to the show cause order a motion to reopen its main testimony period.⁴ In view thereof, the motion to reopen time to file a main brief is **denied**, and we may proceed to enter judgment against petitioner for failure to prove its case. *Vital Pharm. Inc.*, 99 USPQ2d at 1710 n.11.

Accordingly, because petitioner, as the party bearing the burden of proof in this proceeding, has not presented testimony or properly introduced any other evidence during its testimony period as proof of the allegations in the petition which have been denied by respondent, petitioner cannot prove its standing, and, therefore, cannot prevail on any claim. *See Nobelle.com LLC v. Qwest Communications Int'l Inc.*, 66

² Indeed, petitioner did not plead ownership of any registration in the petition for cancellation.

³ In its answer, respondent clearly denied petitioner's standing and grounds for cancellation.

⁴ Even if we could somehow construe petitioner's response to the show cause order to include a motion to reopen testimony, petitioner has not, on the response before us, established excusable neglect for its failure to take testimony. *See Pioneer Invs. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993); *Vital Pharm. Inc.*, 99 USPQ2d at 1710; Fed. R. Civ. P. 6(b)(1)(B); and TBMP § 509.01(b)(1). Although petitioner made no argument for excusable neglect and did not include many facts or details on which we could analyze such an argument, petitioner did state that it attempted to negotiate settlement with respondent but that discussions stalled. We note, however, that the mere existence of settlement negotiations does 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. *Vital Pharm.*

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USPQ2d 1300, 1303 (TTAB 2003) ("standing is an essential element of petitioner's case which, if it is not proved at trial, defeats petitioner's claim."). In view thereof, the petition must fail. Judgment is entered against petitioner, and the petition for cancellation is **denied**.

Inc., 99 USPQ2d at 1711, *citing Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1859 (TTAB 1998).