

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

MBA/CME

Mailed: March 5, 2013

Opposition No. 92055426

Run It Consulting, LLC

v.

Leander Lodi, by Assignment  
from Augusto Lodi d/b/a  
American Muscle<sup>1</sup>

**Michael B. Adlin, Administrative Trademark Judge:**

This case now comes up for consideration of petitioner's motion "to serve pretrial disclosures late and/or for an extension of trial dates," filed February 5, 2013. Respondent opposes the motion.

Pursuant to the Board's order of April 4, 2012, petitioner was allowed until January 24, 2013 to serve pretrial disclosures, but allowed the deadline to pass and did not serve its pretrial disclosures until February 5, 2013. Petitioner asserts that "good cause exists" to reopen its time to serve pretrial disclosures because petitioner did not grant authorization to its counsel to serve pretrial disclosures "until after the close of business on January

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<sup>1</sup> Respondent's May 18, 2012 "notice of recordation of assignment," is noted and Leander Lodi has been substituted as party defendant in this proceeding. Substitution as opposed to joinder is appropriate here because assignor is deceased. See TBMP § 512.01 (3d ed. rev. 2012).

24, 2013." Petitioner's Motion, p. 2. Petitioner argues that the delay "was simply due to [p]etitioner's inability to get back to counsel in a timely manner" and "was not meant to slow the instant proceedings nor will prejudice result to [respondent] by the granting of the instant motion." *Id.* In the alternative, if "good cause [is] not found," petitioner requests that trial dates be extended sixty days so that petitioner's late-served pretrial disclosures "will give sufficient notice" to respondent. *Id.* at p. 3. Petitioner argues that this request "is within the spirit and letter" of TBMP Section 702.01, which provides that when a party fails to make the required pretrial disclosures, an adverse party may move to delay or reset any subsequent testimony or pretrial disclosure deadlines. *Id.*

Respondent argues that petitioner has failed to show "good cause" because petitioner: (1) has not explained "why it could not get back to its counsel before the established deadline" and its motion is not supported by any evidence whatsoever; Respondent's Response, pp. 1-2; (2) "does not provide any detail on when its counsel received authorization to make its pretrial disclosures" and that this authorization may have come as early as the "close of business" on January 24, 2013; *id.* at p. 3; and (3) was well aware of its pretrial disclosure deadline because it had

been set for "almost ten months" and respondent denied petitioner's December 27, 2012 request to extend the deadlines in the proceeding. *Id.* at p. 2.

With respect to petitioner's alternative request for a sixty-day extension of the trial dates, respondent argues that the remedy described in TBMP § 702.01 is intended to provide relief to an adverse party not to petitioner who "seeks to reset the trial dates to cure its own failure..." *Id.* at p. 4. Respondent further asserts that petitioner "would receive an immense benefit in that its untimely pretrial disclosures would suddenly become timely if the trial dates were reset." *Id.*

#### Decision

Petitioner served its pretrial disclosures after the pretrial disclosure deadline, and thus petitioner seeks in its motion to reopen rather than extend its time to serve pretrial disclosures. See TBMP § 509.01. In order to reopen the now-expired pretrial disclosure deadline, petitioner must establish "excusable neglect" (rather than "good cause" as the parties seem to argue in their filings). *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1852 (TTAB 2000) ("Pursuant to Fed. R. Civ. P. 6(b)(2), the requisite showing for reopening an expired period is that of excusable neglect."). As the Board stated in *Baron Philippe*:

In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), the Supreme Court set forth four factors to be considered in determining excusable neglect. Those factors are: (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. In subsequent applications of this test by the Circuit Courts of Appeal, several courts have stated that the third factor may be considered the most important factor in a particular case. See *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 at fn. 7 (TTAB 1997).

*Id.*

Turning to the third factor first, it is clear that the reason for the delay was entirely within petitioner's reasonable control and petitioner does not claim otherwise. As respondent points out, petitioner was aware of the pretrial disclosure deadline, having requested respondent's consent to an extension of the deadlines on December 27, 2012, which respondent denied. Petitioner could have filed a motion to extend with the Board, but chose not to do so. Moreover, there is no evidence that petitioner's failure to timely instruct its counsel was anything but a voluntary choice. Accordingly, this factor weighs heavily against finding excusable neglect.

Turning next to the remaining factors, although the twelve-day delay was relatively short, petitioner did not serve its pretrial disclosures until three-days before the opening of its testimony period such that there could have been some prejudice to respondent, depending on what, if anything, respondent sought in discovery and respondent's trial preparation plans to date, if any. However, given that respondent failed to introduce any evidence of prejudice, and the minimally late service of disclosures does not, without more, constitute prejudice, factor one is neutral. Factor two weighs only slightly against finding excusable neglect. Finally, respondent implies that petitioner acted in bad faith, arguing that petitioner's explanation for its delay is vague and unsupported by a declaration and petitioner could have served a copy of its pretrial disclosures on respondent via electronic transmission. We do not find that petitioner's conduct rises to the level of bad faith, but there also is no evidence that petitioner acted in good faith, and therefore, the last factor is neutral.

Weighing all of the factors together, petitioner's failure to timely serve its pretrial disclosures was entirely within its reasonable control and there was at least some delay. Because the other factors are neutral, petitioner has not established excusable neglect and

petitioner's motion is accordingly hereby **DENIED**. Trial and disclosure dates remain as set in the Board's order of April 4, 2012.<sup>2</sup>

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<sup>2</sup> Based on the current record, there does not appear to be a valid basis for respondent to move to quash or object to the testimonial deposition of Markus Trillsch, currently noticed for March 7, 2013. Indeed, petitioner served its pretrial disclosures prior to the opening of trial, and well prior to what appears to be the only testimonial deposition petitioner intends to take. Respondent has not even established that it served discovery requests which would have identified Mr. Trillsch, or that he was unaware of Mr. Trillsch prior to receiving petitioner's pretrial disclosures. However, if respondent requires additional time to prepare for the Trillsch deposition, it may file an appropriate motion and seek resolution via a teleconference. Under the circumstances, the Board will likely be liberal in granting a reasonable extension of time to allow respondent time to prepare for the Trillsch testimony deposition.