UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: March 29, 2015

Cancellation No. 92057058

Fifty-Six Hope Road Music Limited

v.

Island Food & Fun, Inc.

Robert H. Coggins,
Interlocutory Attorney:

Now before the Board is respondent's motion (filed October 18, 2014) to reopen the time to respond to petitioner's First Set of Requests for Admission, First Set of Requests for Production, and First Set of Interrogatories. The motion is fully briefed.

Motion to Reopen

When the time for taking any required action has expired, a party desiring to take the required action may file a motion to reopen the time for taking that action. The movant, here respondent, must show that its failure to act during the time previously allotted therefor was the result of excusable

neglect.[1] *See* Fed. R. Civ. P. 6(b)(1)(B). In determining the outstanding motion, the Board considers the following excusable neglect factors as set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993), and adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997): (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.

Respondent argues that the length of delay is very small, as petitioner had agreed to allow respondent until October 17, 2014 (one day prior to the filing date of the motion at issue) to provide answers to discovery. However, as petitioner correctly points out, the delay should be calculated from the date the discovery responses were originally due (i.e., March 21, 2014). Respondent maintains that there "will be no adverse effect" - prejudice - if the Board reopens the time sought by the motion, and that it was petitioner's long silence as to respondent's requested suspension of discovery while petitioner concurrently discussed settlement that lulled respondent into

[1] A party seeking to avoid admissions resulting from its failure to timely respond to requests for admissions may make a motion under Fed. R. Civ. P. 6(b)(1)(B) or Fed. R. Civ. P. 36(b). A motion under Rule 6(b)(1)(B) constitutes a motion to reopen the time to serve responses to the outstanding admission requests. *See Giersch v. Scripps Networks, Inc.*, 85 USPQ2d 1306, 1307 (TTAB 2007). This is the relief sought by respondent in the instant motion, and the excusable neglect standard will therefore be applied to the requests for admission (as well as the interrogatories and document requests) at issue.

believing that petitioner would consent to the suspension. Respondent also states that it has acted in good faith at all times.

In response to the motion to reopen, petitioner argues that applicant has not established excusable neglect. Petitioner further argues that reopening the time for respondent to respond to the discovery requests would "significantly prejudice[]" petitioner.

With regard to the first and fourth *Pioneer* factors, the Board finds no specific prejudice to petitioner beyond mere delay, and finds no specific evidence of any bad faith by respondent. Petitioner's brief in opposition to the motion claims that petitioner will be "significantly prejudiced" if the motion is granted; however, petitioner fails to identify any real prejudice. The mere passage of time without additional facts, such as the loss of evidence or unavailability of potential witnesses, is generally not considered prejudicial. *See HKG Indus. Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156, 1157-1158 (TTAB 1998). Further, it is not lost on the Board that petitioner claims the largest delay in this case was the result of respondent's filing of a motion for summary judgment; however, two of petitioner's grounds were disposed of as a direct result of that motion which was necessitated, at least in part, by petitioner's failure to withdraw the two futile grounds after respondent specifically asked petitioner to do so. Petitioner must share in the delay caused by that meritorious motion. Petitioner's credibility having been strained by the argument that it will be "significantly prejudiced," the Board

has carefully scrutinized the remainder of the brief in opposition and finds it equally unavailing. Although respondent sought petitioner's withdrawal of the pleaded grounds of fraud and non-ownership, it was not until after respondent filed its motion for summary judgment - and well after petitioner had served its discovery requests - that petitioner withdrew the ground of non-ownership and the Board disposed of the ground of fraud. Resolution of (by withdrawal and striking) those grounds goes directly to "the subjects on which discovery may be needed."[2] Fed. R. Civ. P. 26(f)(3)(B). In view thereof, the Board is sympathetic to respondent's position as the subjects of discovery had not been settled when petitioner served the discovery requests at issue.[3]

With regard to the second *Pioneer* factor, the Board finds that the delay will have no significant impact on the Board proceeding. With respect to the third and most important *Pioneer* factor, the Board finds that respondent has provided a reasonable explanation for the delay. In view of respondent's well-founded concern as to the insufficiency of two of petitioner's three pleaded grounds for cancellation, combined with petitioner's silence as

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[2] The two futile grounds should have been discussed and quickly withdrawn (or amended, for fraud) during the parties' settlement and discovery conference which required, *inter alia*, discussion of the nature of and basis for all claims. It is most curious that petitioner was unable to substantively discuss respondent's request that these grounds be withdrawn, when the grounds themselves are a topic of the conference. *See* Trademark Rule 2.120(a)(2); Fed. R. Civ. P. 26(f)(2).

[3] It is difficult to understand how petitioner would have been able to uphold its duty to make a good faith effort to seek only such discovery as is proper and relevant to the specific issues involved in the proceeding when the grounds for cancellation were not yet settled.

to respondent's request for suspension of discovery and petitioner's continuing participation in settlement, respondent's request to reopen is reasonable and the Board finds that respondent has shown excusable neglect to support reopening its discovery response period. Accordingly, the motion to reopen is **granted**.

Respondent is allowed until **April 27, 2015**, in which to provide its responses to petitioner's First Set of Requests for Admission, First Set of Requests for Production, and First Set of Interrogatories.[4]

Schedule

Proceedings are resumed. Dates are reset on the following schedule.

Respondent's Discovery Responses Due	4/27/2015
Plaintiff's Pretrial Disclosures	5/27/2015
Plaintiff's 30-day Trial Period Ends	7/11/2015
Defendant's Pretrial Disclosures	7/26/2015
Defendant's 30-day Trial Period Ends	9/9/2015
Plaintiff's Rebuttal Disclosures	9/24/2015
Plaintiff's 15-day Rebuttal Period Ends	10/24/2015

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.

[4] This is not an order compelling discovery; it is merely a scheduling order.