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

Proceeding	91122524
Party	Plaintiff X/OPEN COMPANY LIMITED
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Submission	Opposer's Brief in Opposition to Applicant's Motion to Accept Late Service of Responses to Opposer's Discovery Requests
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X/OPEN COMPANY LIMITED,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91122524
	)	
WAYNE R. GRAY,	)	
	)	
Applicant.	)	
	)	
	)	

OPPOSER'S BRIEF IN OPPOSITION TO APPLICANT'S MOTION TO ACCEPT LATE SERVICE OF RESPONSES TO OPPOSER'S DISCOVERY REQUESTS

Opposer X/Open Company Limited ("X/Open") submits this opposition to the motion of Applicant Wayne R. Gray ("Gray") to accept the late service of his responses to Opposer's discovery requests.

I. INTRODUCTION

Applicant, through his motion, seeks to avoid the consequences of his undue delay in serving late discovery responses. Applicant has been guilty of repeated delays in this case, and should not be allowed to escape the consequences of his inaction. Applicant, through his counsel, admits that he received Opposer's discovery requests on August 7, 2003, and that he was aware of the response deadline. In fact, counsel for Applicant was explicitly reminded of the outstanding discovery deadline in Opposer's brief in response to Applicant's motion to extend filed on August 20, 2003. However, counsel for Applicant stated that he first learned that Applicant's discovery responses

were overdue in late October 2003, and even then he inexplicably waited until four weeks later to serve discovery responses on November 25, 2003. Moreover, Applicant delayed until January 27, 2004, more than three months after first learning that the response deadline had expired, to file his motion. In a desperate attempt to excuse his inaction and justify his untimely discovery responses, counsel for Applicant blames his secretary for filing and docketing errors, and goes so far as to blame Opposer for not contacting him regarding the late responses or filing a motion to compel. However, as discussed in detail below, none of these reasons excuse Applicant's untimely discovery responses. Applicant's reasons for his delay are hardly credible, and fall far short of meeting the standard for excusable neglect.

II. RELEVANT BACKGROUND

On August 7, 2003, Opposer served its First Set of Requests for Admissions, First Set of Interrogatories, and First Set of Document Requests on Applicant. Applicant's responses to Opposer's discovery requests were due on or before September 11, 2003.

On the very last day of the discovery period on August 7, 2003, Applicant filed a motion to extend discovery and trial dates.

On August 20, 2003, Opposer filed and served a brief in opposition to Applicant's motion to extend. In its response, Opposer explicitly noted, among other things, that Opposer had served written discovery requests on Applicant on August 7, 2003. Opposer also specifically requested that, in addition to denying Applicant's unsupported motion to extend, the Board order Applicant to serve responses to Opposer's outstanding discovery requests by September 11, 2003 as required under the rules.

On October 6, 2003, well after the close of the discovery period and during the pendency of Applicant's motion to extend, Applicant served his First Set of Interrogatories, First Set of Document Requests, and First Set of Requests for Admissions.

In an order dated October 24, 2003, however, the Board denied Applicant's motion to extend discovery, determined that Applicant's discovery requests were untimely, and informed Opposer that it need not respond to those requests. The Board also reset trial dates, with Opposer's testimony period to close on January 30, 2004.

In late October 2003, counsel for Applicant contends that he first learned that Opposer's discovery requests had been misfiled, and that the deadline for serving responses had not been docketed.

On November 25, 2003, more than four weeks after first learning that the deadline had expired, Applicant served his untimely discovery responses and objections.

On or about January 7, 2004, after the commencement of Opposer's testimony period, counsel for Applicant contacted counsel for Opposer to inquire whether Opposer would accept Applicant's late responses. Opposer refused to accept Applicant's late filed responses.

On January 27, 2004, more than three months after learning that the deadline for serving timely discovery responses had expired, Applicant filed the instant motion.

III. ARGUMENT

When a party fails to respond to a request for discovery during the time allowed, that party is deemed to have forfeited the right to object to the requests on the merits

unless it can be shown that failure to timely respond was the result of excusable neglect. Envirotech Corporation v. Compagnie Des Lampes, 219 USPQ 448 (TTAB 1979); Crane v. Shimano Industrial Co., Ltd., 184 USPQ 691 (TTAB 1975). Similarly, if a party fails to timely respond to requests for admission, the requests will stand admitted unless the party is able to show excusable neglect. TBMP § 407.03.

The standard for determining excusable neglect was set forth by the Supreme Court in Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993), and adopted by the Board in Pumpkin Ltd. v. The Seed Corps, 43 USPQ2d 1582 (TTAB 1997), based upon the following factors: (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. Further, the Board has held that the third Pioneer factor, namely, the reason for the delay, is the most critical to establishing excusable neglect. Pumpkin, 43 USPQ2d at 1586, n. 7.

A. Applicant Has Failed to Adequately Explain His Substantial Delays

Applicant has failed to adequately explain his delay in serving discovery responses and bringing the instant motion. Counsel for Applicant has admitted that he received Opposer's discovery requests in August 2003, and that he gave instructions to his secretary to docket the deadline for filing responses. Counsel argues, however, that his secretary failed to docket the deadline for filing responses; that she misfiled the discovery requests; and that he did not discover the oversight until nearly two months after the expiration of the deadline in late October 2003.

It is well settled that docketing errors and office breakdowns, regardless of who caused them, do not constitute excusable neglect. Baron Philippe de Rothschild, S.A. and Societe Civile de Chateau Lafite-Rothschild v. Styl-Rite Optical Mfg. Co., 55 USPQ2d 1848 (TTAB 2000); Williams v. Five Platters, Inc., 184 USPQ 744 (CCPA 1975); Litton Business Systems, Inc. v. J.G. Furniture Co., 190 USPQ 428 (TTAB 1976).

More important, counsel for Applicant himself was reminded of Opposer's discovery requests and the pending response deadline upon receipt of Opposer's brief in opposition to Applicant's motion to extend served on August 20, 2003. Opposer specifically mentioned, in its brief, the outstanding discovery requests and Applicant's deadline to respond. Surely, counsel for Applicant reviewed this filing, and cannot now blame his staffing difficulties for his own failure to heed the discovery deadline.

Nor has Applicant given any other reasons to excuse his delay in serving timely discovery responses. Applicant attempts to shift the burden to Opposer in an effort to excuse his own inaction. Applicant argues that because Opposer did not contact Applicant or his counsel about his late responses and did not file a motion to compel, that Applicant's late responses and objections should be accepted. However, the timeliness of Applicant's responses was clearly within Applicant's, and not Opposer's, reasonable control. Opposer is not responsible for reminding Applicant of his discovery obligations and deadlines.

Applicant also relies, in support of his position, upon the Board's decisions in Luehrmann v. Kwik Kopy Corp., 2 USPQ2d 1303 (TTAB 1987) and Time Warner

Entertainment Co. v. Jones, 65 USPQ2d 1650 (TTAB 2002). However, these cases are readily distinguishable.

In Time Warner, the Board held that, if a party has not filed a motion to compel, it may not later complain about the *sufficiency* of a party's *timely* discovery responses after trial and in its trial brief. Unlike in Time Warner, here, the issue is whether Applicant has shown excusable neglect to justify his *untimely* discovery responses, and whether such late responses should be deemed admitted. Opposer is not complaining about the *sufficiency* of Applicant's discovery responses at this late stage, nor requesting that the Board order Applicant to serve better or more complete responses. Indeed, under Trademark Rule 2.120(e), Opposer could not have filed a motion to compel (nor can it do so now) because Applicant served his untimely discovery responses and brought the instant motion after the commencement of Opposer's testimony period.

The Luehrmann case is also distinguishable. In that case, a party filed a motion to compel, including a request that the Board order discovery answers without objection, based upon its adversary's untimely discovery responses. However, the Board denied the motion to compel because it found that, unlike this case, there was some question as to the attorney's understanding of the rules and the time to serve the discovery responses. Luehrmann, 2 USPQ2d at 1304. More important, the Luehrmann case is no longer applicable in view of the Board's heightened scrutiny of excusable neglect under Pumpkin and its progeny. See also Baron Philippe de Rothschild, 55 USPQ2d at 1852 ("counsel's misunderstanding or misinterpretation of an unambiguous rule does not constitute excusable neglect.").

B. Applicant's Delay Was Substantial and Prejudicial to Opposer

With respect to the remaining Pioneer factors, the length of delay in this case was substantial. Opposer served its discovery requests on August 7, 2003, and Applicant filed his motion to accept late responses nearly six months later on January 27, 2004. Further, counsel for Applicant claims that he first learned that Applicant's discovery responses were overdue in late October 2003, but even then he inexplicably waited another four weeks to serve his untimely discovery responses on November 25, 2003. More important, Applicant delayed another two months after his untimely discovery responses were served on November 25, 2003, and after Opposer had filed a Notice of Reliance upon such late discovery responses on January 9, 2004, to file the pending motion on January 27, 2004.

As noted above, Applicant has failed to provide any reasonable explanation for his repeated delays in this case. Applicant's delay of nearly six months to bring this motion, including three months between late October 2003 and January 27, 2004 during which Applicant was aware of his late responses, is significant and prejudicial to Opposer. Old Nutfield Brewing Co. v. Hudson Valley Brewing Co., 65 USPQ2d 1701 (TTAB 2002) (delay of four months to file motion to reopen, eight weeks of which occurred after movant had knowledge of need to reopen, held significant and prejudicial). Further, in determining excusable neglect, it is also appropriate for the Board to consider the additional delay of several months that have passed during the briefing (and ultimately to decide) Applicant's motion. Pumpkin, 43 USPQ2d 1587-88.

Moreover, it is not just the length of the delay that is prejudicial to Opposer. Opposer relied upon the fact that Applicant failed to serve timely discovery responses,

and the well-established rule such late responses stand admitted, in planning Opposer's prosecution and trial strategy in this case. For example, Opposer has relied upon Applicant's untimely discovery responses and the applicable Board rules in making decisions during the prosecution of Opposer's case, including whether or not to pursue a motion to compel or to take certain depositions. Further, Opposer has already filed a Notice of Reliance based upon Applicant's untimely discovery responses to Opposer's Requests for Admission. Thus, to allow Applicant at this late stage to avoid any consequences of his untimely discovery responses would dramatically alter the evidentiary record, greatly increase the cost of this opposition, significantly delay the opposition, and seriously compromise Opposer's prosecution and trial strategy.

In sum, Applicant's motion to have Opposer and the Board accept his untimely discovery responses is the equivalent of asking the Board to rule that the deadlines imposed under the rules have no meaning and that undue delay is acceptable. This, clearly, should not be allowed.

C. Applicant's Pattern of Delay and Late Filing of the Instant Motion Evidence Bad Faith

Finally, Applicant's pattern of delay in this case and the late filing of Applicant's discovery responses and this motion, raise a strong inference of bad faith. By the time Applicant filed the instant motion, for example, the Board had already denied Applicant's motion to extend filed on the last day of the discovery period, and rejected Applicant's untimely discovery requests. Further, Applicant was well aware that his discovery responses were overdue in late October 2003, and yet Applicant waited another three months, and after Opposer had filed its Notice of Reliance upon such responses (deemed admitted), to file the pending motion. Indeed, Applicant filed the pending

motion even after the parties' had filed a stipulation to suspend all proceedings pending disposition of several other of Applicant's motions. In short, Applicant's pattern of delay and attempts to blame others for his inaction raise a strong inference bad faith that favors Opposer. Applicant has no one but himself to blame for his repeated delays, and should not be permitted to escape the consequences of ignoring the Board's rules.

IV. CONCLUSION

For the foregoing reasons, Opposer respectfully requests that the Board deny Applicant's motion to accept his untimely discovery responses, deem Opposer's Requests for Admissions admitted, and hold that Applicant has waived all rights to object to Opposer's discovery requests.

Respectfully submitted,

Date: May 3, 2004

By: _____

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of OPPOSER'S BRIEF IN OPPOSITION TO APPLICANT'S MOTION TO ACCEPT LATE SERVICE OF RESPONSES TO OPPOSER'S DISCOVERY REQUESTS was served via first-class mail, postage prepaid and faxed on May 3, 2004, upon counsel for Applicant/Petitioner to the following address and facsimile number:

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