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

Baxley

Mailed: June 30, 2005

Opposition No. 91156531

Verilux, Inc.

v.

Linaya Gail Hahn

Before Hairston, Grendel and Holtzman,
Administrative Trademark Judges

By the Board:

Opposer failed to take testimony or file evidence during its testimony period, which closed on March 22, 2004. See Trademark Rule 2.132(a). Opposer then failed to file a brief on the case by the September 3, 2004 due date therefor. See Trademark Rule 2.128(a)(1).

On October 6, 2004, the Board issued an order to show cause why the Board should not treat opposer's failure to file a brief as a concession of the case under Trademark Rule 2.128(a)(3). After opposer failed to respond thereto, the Board, in a December 21, 2004 order, entered judgment against opposer and dismissed this opposition with prejudice.

On February 3, 2005, opposer filed a motion to vacate judgment pursuant to Fed. R. Civ. P. 60(b)(1) and TBMP Section 544 (2d ed. rev. 2004). On February 14, 2005,

opposer filed a motion to suspend proceedings herein pending disposition of a civil action between the parties.[1] Applicant has filed briefs in response to both of opposer's motions.

In support of its motion to vacate judgment, opposer contends that, since the commencement of this proceeding, responsive communications from applicant, including applicant's answer, have been delayed because her attorney is a sole practitioner; that, after applicant failed to respond to interrogatories that opposer served, opposer believed that applicant was no longer interested in defending this opposition; that, near the time that opposer's brief on the case was due, three attorneys left the law firm of opposer's counsel and a paralegal went on maternity leave; that these departures left an increased workload for the remaining attorneys; that, because of confusion over which attorneys would handle this case, opposer failed to prosecute this opposition; that opposer has been denied due process by entry of judgment against it; and that its failure to file a brief was the result of mistake, inadvertence and excusable neglect. Accordingly, opposer asks that the Board vacate entry of judgment against

[1] The civil action is styled *Verilux, Inc. v. Hahn*, Case No. 3:05 CV254 PCD, filed February 9, 2005 in the United States District Court for the District of Connecticut.

opposer, issue a new scheduling order, and allow opposer to file its brief.

In response thereto, applicant contends that opposer has not set forth reasons that justify relief from judgment; that disorganization, carelessness, and lack of diligence by opposer's counsel is insufficient to meet the excusable neglect standard set forth in Fed. R. Civ. P. 60(b)(1); and that, after serving interrogatories, opposer's lack of follow-up contact with applicant caused applicant to believe that opposer was no longer interested in receiving responses thereto or pursuing this opposition. Accordingly, applicant asks that the Board deny applicant's motion.

Opposer did not take testimony or file evidence during its testimony period.[2] See Trademark Rule 2.132(a). With no evidence in the record, it would be futile to vacate judgment and reset only the briefing schedule herein. Unless opposer's testimony period is reopened, opposer cannot file any testimony and/or evidence and thus cannot prevail in this opposition. See *Gaylord Entertainment Co.*

[2] Although opposer contends that applicant did not serve responses to opposer's interrogatories, the Board notes that opposer did not file a motion to compel and did not file a reply brief to rebut applicant's contention that opposer had no follow-up contact with applicant regarding applicant's failure to so serve. Accordingly, opposer will not be heard to complain about applicant's failure to respond to discovery requests. See TBMP Section 523.04 (2d ed. rev. 2004). Further, inasmuch as applicant filed her answer to the notice of opposition, opposer's belief that applicant was not interested in defending this opposition appears to be without merit.

v. Calvin Gilmore Productions Inc., 59 USPQ2d 1369 (TTAB 2000); TBMP Sections 534.02 and 536 (2d ed. rev. 2004).

For the Board to reopen opposer's testimony period, opposer must show that its failure to take appropriate action prior to the close of its testimony period was the result of excusable neglect. See Fed. R. Civ. P. 6(b). In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 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 Investment Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 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 v. The Seed Corps, supra* at fn. 7 and cases cited therein.

Accordingly, we turn to the third *Pioneer* factor and note that opposer has failed to explain why it did not take testimony or offer evidence during its testimony period. See *Williams v. The Five Platters, Inc.,* 184 USPQ 744 (CCPA 1975); *Marriott Corp. v. Pappy's Enterprises, Inc.,* 192 USPQ 735 (TTAB 1976). Although opposer contends that three attorneys and a trademark paralegal left the law firm of opposer's counsel "[a]round the time [o]pposer's [b]rief was due," opposer's brief on the case was not due until more than five months after the close of opposer's testimony period. Opposer's failure to explain why it failed to act during its testimony period cuts strongly against a finding of excusable neglect.

Opposer's contention that it has been denied due process by entry of judgment in this case is not well-taken. The Board is justified in enforcing procedural deadlines. See *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 1554, 18 USPQ2d 1710, 1713 (Fed. Cir. 1991). Opposer brought this case and, in so doing, took responsibility for moving it forward in accordance with the trial schedule set forth in the notice instituting this proceeding, but failed to do so. See *Atlanta-Fulton County Zoo, Inc. v. DePalma,* 45 USPQ2d 1858, 1860 (TTAB 1998). Instead, opposer waited

until more than ten months after the close of its testimony period to act.

With regard to the second *Pioneer* factor, we find that the delay caused by opposer's failure to take testimony or offer evidence during its testimony period and its motion to vacate judgment is significant in that the delay has disrupted the orderly administration of this case. Both the Board and parties before it have an interest in minimizing the amount of the Board's time and resources that must be expended on matters, such as opposer's motion to vacate judgment, which come before the Board solely as a result of the movant's sloppy practice. The Board's interest in deterring such practice weighs against a finding of excusable neglect under the second *Pioneer* factor.

With regard to the first *Pioneer* factor, we find that there is no evidence of significant prejudice to applicant, and, with regard to the fourth *Pioneer* factor, we find that there is no evidence of bad faith on the part of opposer. On balance, we find that opposer's failure to timely act before the close of its testimony period was not caused by facts constituting excusable neglect and thus opposer has failed to make the showing necessary to reopen its testimony period.

Because opposer has filed no testimony or other evidence herein and thus cannot prevail in this opposition, opposer's motion to vacate judgment is denied.[3]

[3] In view of this disposition, we need not consider opposer's motion to suspend pending the outcome of the recently filed civil action.