TTAB

Attorney Docket: 080437.92129US
BOX – TTAB – NO FEE

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

HAGIE MANUFACTURING CO., Opposer, v. BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT Applicant.	Opposition No.: 91158034 Application No.: 76/454,861 Mark: XDRIVE

APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO REOPEN TESTIMONY

Applicant, by its attorney, hereby objects to Opposer's Motion to Reopen Testimony and again moves for dismissal of this Opposition for failure by Opposer to prosecute under 37 CFR § 2.132. As indicated therein, "the party in the position of plaintiff shall have fifteen days from the date of service of the motion to show cause why judgment should not be rendered against him." Accordingly, Opposer had until November 1, 2004 to show cause as to why it failed to take testimony and has not attempted to do so.

Pumpkin Ltd. v. The Seed Corps, 43 USPQ2d 1582 (TTAB 1997) clearly dictates the standard for showing good cause based upon excusable neglect:

> "Opposer's motion to reopen its testimony period is governed by Fed.R.Civ.P. 6(b), made applicable to Trademark Trial and Appeal Board proceedings by 37 CFR 2.116(a); since opposer's previously-assigned testimony period already had lapsed by date that opposer

> filed its motion, opposer is not entitled to have its testimony period reopened unless [the] board, in its discretion, determines that opposer's failure to present testimony or other evidence during previously-assigned period was result of excusable neglect.
>
> . . .Whether [a] party's neglect is "excusable" within [the] meaning of Rule 6(b)(2) is determined by taking into account all relevant circumstances surrounding party's omission, including danger of prejudice to non-movant, length of delay and its potential impact on judicial proceedings, reason for delay, including whether it was within reasonable control of movant, and whether movant acted in good faith, and party must be held accountable for acts and omissions of its chosen counsel." (1582)

Opposer has not attempted in its motion to prove that its failure to take testimony was excusably neglectful, but simply suggests that it was assuming that a settlement between the parties would be reached. Opposer indicates that "it was Opposer's belief that the parties were close to an agreement on terms regarding resolution of the instant opposition," but does not provide any documentation to substantiate this statement.

In fact, the parties were no longer attempting to reach a settlement during the Opposer's testimony period. There was not any contact between the parties during that 30-day period. The last correspondence between the parties with any mention of settling this matter was on July 1, 2004. At that time, Opposer's counsel indicated in email correspondence to the office of the undersigned that his client "has since formally withdrawn all outstanding offers to settle this matter." Additionally, he indicated that the Applicant's "offer has prompted [his] client to focus its efforts on the opposition, rather than on settlement."

Assuming that the parties had been attempting to resolve this matter through a settlement agreement, which is not the case during the relevant time period, Opposer was not excused from taking testimony or diligently seeking to preserve its right to take testimony with a stipulated extension. "It is well established that the mere existence of settlement negotiations alone does not justify a party's inaction or delay." *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1859 (TTAB 1998). Accordingly, Opposer's motion to reopen should be denied.

Although the point is moot, Applicant feels that it is necessary to address additional inaccurate statements made by the Opposer in the Motion. Therein, Opposer indicates that Applicant has been "dilatory in providing discovery responses" and "less than forthcoming in providing the requested discovery." Applicant requested and was granted extensions by the Opposer in all instances in which Applicant required additional time to respond to a discovery request. Opposer did not file any motions with the Board regarding Applicant's now alleged failure to be responsive to discovery requests. The time to address those alleged failures was during the discovery period. In no way is this an excuse for Opposer's failure to take action during its testimony period. The discovery argument is nothing more than a diversionary argument having nothing whatsoever to do with Opposer's inexcusable neglect.

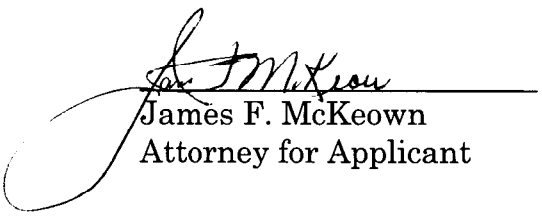
Based on the remarks herein, Applicant requests that the Board deny Opposer's Motion to Reopen Testimony and dismiss this Opposition with prejudice

as requested in Applicant's Motion for Dismissal for Failure to Take Testimony under 37 CFR § 2.132.

Respectfully submitted,

BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT

November 1, 2004



James F. McKeown
Attorney for Applicant

CROWELL & MORING, LLP
P.O. Box 14300
Washington, DC 20044-4300
Telephone No.: (202) 624-2500
Facsimile No.: (202) 628-8844
JFM:rcs

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO REOPEN TESTIMONY was served on counsel for the Opposer, this 1st day of November, 2004, by sending same via First Class Mail, postage prepaid, to:

Brett J. Trout, Esq.
The Law Offices of Brett J. Trout, P.C.
300 S.W. 5th Street, Suite 222
Des Moines, Iowa 50309

Rebecca C. Swan