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By Christie L. Cermak  
Christie L. Cermak

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

**In the Matter of:**  
**Application Serial No.: 78/164,521**  
**Filed: September 16, 2002**  
**For the Mark: XOCOLATE**  
**Our Reference No.: BSSO 7 00013**

SONAFI S.A.,	)	
	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91/159,665
	)	
RANDY JUDD,	)	
	)	
Applicant.	)	

**OPPOSITION TO APPLICANT'S MOTION TO REOPEN PERIOD  
FOR TAKING DISCOVERY**

Opposer, Sonafi S.A. (hereinafter "Sonafi" or "Opposer") hereby opposes Applicant's, Randy Judd, (hereinafter "Judd" or "Applicant") Motion to Reopen Period for Taking Discovery.

Applicant has failed to show good cause for reopening the Discovery Period. Applicant had full and fair opportunity to seek discovery and intentionally did not do so. Failure by Applicant to serve discovery was within Applicant's control and was intentional. This is not a situation involving neglect, excusable or otherwise. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). In *Pumpkin*, the Board concluded that a party's failure to take action within the set time period is



“wholly within the reasonable control of [the party and]... weighs heavily against a finding of excusable neglect.” Id at 1588. Applicant merely failed to take timely action. As in *Pumpkin*, there can also be no misunderstanding as to the deadline for taking discovery or extending the Discovery Period which further weighs against a finding of excusable neglect. Id. In this respect, the discovery deadline was set in the original Trial Order issued by the Board on March 3, 2004, the order was never changed. Applicant was aware of the deadline and chose not to take discovery.

Opposer timely filed its discovery. Once Applicant received Opposer’s discovery request, Applicant apparently changed its trial strategy and decided it wanted to file discovery. This change in trial strategy after the end of discovery does not change the facts. Failure to file discovery requests within the Discovery Period was fully within the control of Applicant which is not excusable neglect. *Pumpkin*. Applicant has presented no basis to conclude it has shown good cause to reopen the discovery period.

Reopening the Discovery Period would harm Opposer. Opposer relied upon applicant’s failure to serve discovery to structure its trial plan. If applicant is allowed to reopen discovery and serve discovery requests, Opposer would be forced to revisit its trial plan which damages Opposer by increasing the costs of this opposition.

Applicant’s motion to reopen is untimely. It was filed over a month after Applicant allowed the Discovery Period to expire. If there had been a need for discovery, it was apparent weeks ago. Again, Opposer will be damaged by this delay and increased cost in the proceedings. The time to file the motion was also known by Applicant.

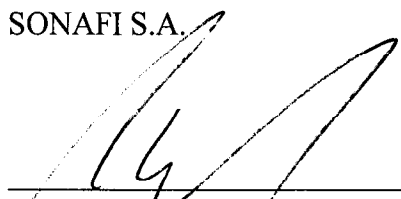
With respect to the extensions of time discussed in Applicant’s motion, the stipulated extension of time for the Trial Dates is irrelevant to reopening of the Discovery Period. The extension of time for the remaining Trial Dates was merely procedural and was filed before the due

date had expired. Further, the extension of time was necessitated by the failure of Applicant to fully respond to outstanding discovery requests properly filed within the Discovery Period. To date, Opposer has still not received the documents referenced in response to Opposer's document request. The proper extension of time sought before the expiration date is not to assist only one party, but is mutual.

Opposer respectfully submits that Applicant's motion to reopen discovery is based only on Applicant's failure to take timely actions that were clearly in the control of Applicant. The discovery deadline was unambiguously set forth in the trial order received by Applicant. An alleged mistaken belief by Applicant is still within the full control of Applicant. This is not excusable neglect. The motion to reopen does not present a showing of good cause, is untimely and will harm Opposer. Accordingly, Opposer requests that applicant's motion to reopen discovery be denied.

SONAFI S.A.

By:

  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSITION TO APPLICANT'S MOTION TO REOPEN PERIOD FOR TAKING DISCOVERY was served on Applicant, Randy Judd, by first class mail, postage prepaid, this 12<sup>th</sup> day of November 2004, to the attorneys for Applicant at the address below:

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this 12<sup>th</sup> day of November, 2004.

  
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