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

|                               |  |
|-------------------------------|--|
| <b>Proceeding</b>             | 91161657   |
| <b>Party</b>                  | Defendant<br>Holyfield, Louise<br>Holyfield, Louise<br>5609 Bent Trail<br>Dallas, TX 75248 |
| <b>Correspondence Address</b> | Nancy T. Navarro<br>Navarro Law Office<br>PO Box 166851<br>Irving, TX 75016                |
| <b>Submission</b>             | APPLICANT'S RESPONSE AND OBJECTION TO<br>OPPOSER'S MOTION TO REOPEN TIME                   |
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| <b>Signature</b>              | /lovella/  |
| <b>Date</b>                   | 06/02/2005   |
| <b>Attachments</b>            | Response to Motion to Extend.pdf ( 6 pages )   |

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

CARTIER INTERNATIONAL B.V.,  
Opposer,

- v -

LOUISE HOLYFIELD,  
Applicant.

Opposition No.: 91161657  
Serial No.: 78113375

June 2, 2005

**APPLICANT'S RESPONSE AND OBJECTION TO OPPOSER'S  
MOTION TO REOPEN TIME**

Opposer has moved to reopen the time for filing its response to Applicant's Rule 56(f) Request for Discovery. Applicant hereby responds in opposition of granting Opposer's Motion to Reopen Time.

**I. INTRODUCTION**

On January 13, 2005, Applicant served discovery on Opposer. Responses and answers to Applicant's discovery was due on February 17, 2005. Instead of timely responding to Applicant's discovery, Opposer's Counsel contacts Applicant's counsel right before the deadline to request a thirty (30) day extension of time to respond to the discovery. Applicant granted an extension of time to Opposer to respond to Applicant's discovery requests by **March 19, 2005**, giving Opposer 30 days extra to respond as requested. Opposer, instead of providing Applicant with responses as agreed, filed a Motion for Summary Judgement on **March 21, 2005**, a couple of days after the agreed extended deadline to respond. Applicant, in need of discovery to answer Opposer's Summary Judgement Motion, filed a rule 56(f) declaration on April 19, 2005. Under the Board's rules, the due date for Opposer to file a response to the Rule 56(f) declaration was May 9, 2005. However, the Opposer missed this deadline and Opposer now asks the Board to extend the time for filing. It is

clear Opposer never had an intention of responding to Applicant's discovery. Yet by requesting an extension of time under the pretense that it needed more time to respond to Applicant's discovery, Opposer failed to act in good faith. Since parties in an opposition are encouraged to file Summary Judgment Motions and to work with each other to resolve discovery disputes, it would have been more efficient and cost effective for Opposer to reveal its intention of filing a Motion for Summary Judgment and for the parties to agree on an alternate discovery strategy that would have provided Applicant with all information it needs to respond to Opposer's Summary Judgment Motion. Instead, by engaging in gamesmanship and underhanded tactics, the Opposer wastes the time and resources of the parties as well as this Board. In addition, the reason provided by Opposer for requesting an extension of time is unjustified and will only further delay proceedings and result in a further unnecessary waste of time and resources. Accordingly, the Board should deny the Opposer's request to reopen time.

## **II. THE BOARD SHOULD NOT REOPEN THE TIME FOR FILING OPPOSER'S RESPONSE**

In order to reopen the time for taking an action, the moving party must show that its failure to act during the allotted time was the result of excusable neglect. Fed.R.Civ.P.6(b).

Under *Pioneer*, for excusable neglect a party must show the following:

- 1) the danger of prejudice to the nonmovant;
- 2) the length of the delay and its potential impact on the judicial proceedings;
- 3) the reason for the delay and whether it was within the reasonable control of the movant; and
- 4) whether the movant acted in good faith.

TMBP § 509.01(b); *Pioneer Investment Services Company v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993).

Given the past history of conduct engaged in by the Opposer, it is clear that Opposer, as movant in this instance, has not acted in good faith.

**A) The reason for the Delay is not Excusable**

The TMBP has observed that “it has been held that the third *Pioneer* factor, i.e. the reason for delay, including whether it was within the reasonable control of the moveant,” may be deemed to be the most important factor of the *Pioneer* factors.” See TBMP § 509.01 (Motions to Reopen Time) page 500-42 (b) citing *Pumpkin Ltd. v. The Seed Corps*, 49 USPQ2d 1582, 1587 TTAB 1997). The TBMP also stated that “although many excusable neglect decisions which were issued prior to the Board’s 1997 *Pumpkin* decision may no longer be controlling under the somewhat more flexible excusable neglect standard set out in *Pioneer* and *Pumpkin* (e.g. decisions holding that a failure to act due to counsel’s docketing errors, is, *per se*, not the result of excusable neglect), they nonetheless may be directly relevant to the Board’s analysis under the third *Pioneer* excusable neglect factor.” TBMP § 509.01 (Motions to Reopen Time) page 500-42.

In the case at bar, the reason for the Opposer’s delay was allegedly a result of a docketing error. Yet, a docket error is clearly within the full control of Opposer and its counsel. Opposer’s alleges that “Opposer’s counsel actually had Opposer’s response virtually complete and ready to file on May 9”, however, choose to wait until what “Opposer believed to be the last day to file the response.” As such, Opposer’s counsel lateness in filing the response is not excusable neglect since it had both the opportunity to meet the deadline and control of the means by which to do so. The fact that Opposer’s counsel is involved with multiple Opposition proceedings does not justify an extension of the deadline as it amounts to no more than allegation that it had other work to do. Simply put, we are all busy and having other matters to handle does not justify excusable neglect in this matter.

Moreover, given the past conduct of Opposer in this proceeding, it is unlikely that Opposer had acted in good faith and therefore the Board should take the past conduct of Opposer into consideration.

**B. There is Danger of Prejudice to the Nonmovant**

The granting of Opposer's Motion to Reopen Time, even if it is just one day, is prejudicial to Applicant. If granted, the Board has to take time to consider Opposer's late response to Applicant's 56(f) Declaration. Applicant's 56(f) Declaration is just a mere request to have Opposer submit some discovery responses that are overdue and that Applicant is entitled to have in order to defend its rights. It should be noted that Applicant received and responded to Opposer's discovery in this matter at great expense and burden. Thus, Applicant is asking no more from Opposer than what Applicant has already done to further the merits in this case.

**C. The length of the delay and the Potential Impact on the Judicial Proceedings**

As noted above, even if the delay was of just one day, there is a negative impact on Judicial Proceedings in this matter. The Courts have found that even short delays are prejudicial despite findings of good faith and no prejudice to the adverse party. For example, in *Kyle v. Campbell Soup Co.*, 28 F.3d 928 (9th Cir. 1994), the Circuit reversed an order enlarging the time to file a post-trial motion for attorney's fees where the moving attorney had mistakenly added three days to the 30-day time limit for such motions. Despite the district court's findings of good faith and no prejudice to the adverse party, the Circuit held that counsel's mistake in interpreting and applying unambiguous rules was not excusable neglect. 28 F.3d at 931.

In the case at bar, even if the delay is short, the Board is put in the position to rule on a new motion that further delays the opposition on the merits. Opposer's response is to a rule 56(f) Declaration that merely seeks to obtain discovery that Opposer has refused to submit to Applicant

since the beginning of the Opposition proceeding. Granting the Opposer's motion will just culminate in a waste of the Board's time and the further waste of the parties' time and resources.

**D. The movant has not acted in good faith.**

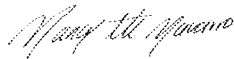
Opposer's motion to extend is merely being filed to delay the proceedings which is not acting in good faith. Opposer has previously delayed this Opposition proceeding. Applicant's discovery requests sent January 13, 2005 were due February 17, 2005 (including the 5 additional days for service by mail). Acting in good faith, Applicant agreed with Opposer to a 30 day extension of time until March 19, 2005 to answer discovery. To date, Applicant has not received responses from Opposer to its discovery. Instead, Opposer filed a Summary Judgement Motion on March 21, 2005, a couple of days after the agreed upon extended deadline to respond.

If Opposer strongly believes that there is a likelihood of confusion between the marks, then Opposer should allow the Board to rule on the case by its merits rather than filing motions to delay proceedings.

**III. CONCLUSION**

For the reasons set forth above, Applicant respectfully requests that the Board deny Opposer's request to extend the time for Opposer to file its Response to Rule 56(f) Declaration by one day. Opposer is the initiator of this action and there is no excusable reason why time should be extended

Respectfully submitted,



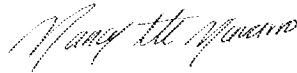
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**CERTIFICATE OF SERVICE**

On June 2, 2005 Applicant's Applicant's Response and Objection to Opposer's Motion to Reopen Time was sent by Express Mail to Fred W. Hathaway, Esq., Burns, Doane, Swecker & Mathis, L.L.P., Post Office Box 1404 Alexandria, VA 22313-1404, counsel for Opposer.

Dated: June 2, 2005

Respectfully submitted,



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