ESTTA Tracking number: **ESTTA205650**

Filing date: **04/17/2008**

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

| | |
|---|---|
| Proceeding | 91172045 |
| Party | Plaintiff<br>Monster Cable Products, Inc. |
| Correspondence Address | Matthew A. Powelson<br>LaRiviere, Grubman & Payne, LLP<br>19 Upper Ragsdale DriveSuite 200<br>Monterey, CA 93940<br>UNITED STATES<br>uspto@lgpatlaw.com |
| Submission | Motion to Reopen |
| Filer's Name | Nicole A. Smith |
| Filer's e-mail | uspto@lgpatlaw.com |
| Signature | /Nicole A. Smith/ |
| Date | 04/17/2008 |
| Attachments | Motion to Reopen Discovery 4-17-08.pdf ( 7 pages )(953545 bytes ) |

Date of Filing: April 17, 2008
I hereby certify that this paper or fee is being electronically filed with the United States Patent and Trademark Office on the date indicated above.
Typed or Printed Name of Person Electronically Filing Paper or Fee: Tabatha Morgan
Signature: Tabatha Morgan

**IN THE**

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**TRADEMARK TRIAL AND APPEAL BOARD**

| | | |
|---|---|---|
| MONSTER CABLE PRODUCTS, INC. | ) | |
| | ) | Opposition No.: 91172045 |
| Opposer, | ) | Serial No.: 78/614,307 |
| v. | ) | |
| | ) | |
| LIGHTSPEED ENTERTAINMENT, LLC, | ) | |
| | ) | |
| Applicant. | ) | |
| | ) | |

**NOTICE OF MOTION AND MOTION TO REOPEN DISCOVERY**

Pursuant to TBMP §509.01(b) and Trademark Rule 2.120(a), Opposer MONSTER CABLE PRODUCTS, INC., (hereinafter "Opposer" or "Monster") files this motion to reopen discovery with the Trademark Trial and Appeal Board ("Board").

NOTICE IS ALSO GIVEN that Opposer requests that a telephonic hearing, pursuant to Trademark Rule 2.120 (i), will be held on this motion unless the Board determines no hearing is necessary.

The need for this motion to reopen discovery arose from a year's worth of discovery extensions granted by Monster to Applicant after which no substantive responses were produced.

Upon these results, Monster realized that a discovery deposition would be necessary, for which a motion to reopen discovery is needed. Since discovery depositions must be both noticed and held within the discovery period, Monster respectfully requests a reopening of the discovery period.

## STATEMENT OF FACTS

Monster served discovery on Applicant on Thursday, January 18, 2007 which were due on February 22, 2007. No discovery responses were sent. Applicant contacted Monster's counsel seeking an extension and received an extension until March 30, 2007. Upon receiving no discovery responses, Monster sent out a letter on April 13, 2007, see Declaration of Nicole A. Smith, Exhibit A. [1]

On August 13, 2007, Monster sent out a second letter regarding the lack of discovery responses, see NAS Decl. Exhibit B. Monster was contacted by opposing counsel and granted another 4-week extension on August 14, 2007, see NAS Decl. Exhibit C. On October 15, 2007, Monster granted another 60 day extension to opposing counsel pursuant to Applicant's request, see NAS Decl. Exhibit D. On December 13, 2007, Monster granted an additional extension of 30 days, see NAS Decl. Exhibit E.

On January 3, 2007, Monster notified Applicant's counsel that discovery was propounded almost a year ago and the client was unwilling to grant any additional extensions, see NAS Decl. Exhibit F. On January 11, 2008, Applicant hired new counsel and Monster was requested to grant one last 30 day extension, see NAS Decl., Exhibit G.

---

[1] All exhibits referenced in this Motion to Reopen discovery refer to Exhibits attached to the Declaration of Nicole A. Smith concurrently filed with this motion and, for the sake of brevity, will be referenced merely as "NAS Decl. Exhibit ___" from here onward.

Monster and Applicant's counsel discussed the discovery requests propounded a year prior and Monster's counsel expressly made clear that an extension would only be granted for substantive responses. Applicant's counsel expressed that its client Lightspeed needed additional time to gather documents and send them to him. Applicant's counsel gave verbal assurances that substantive responses to the discovery would be forthcoming and its client was searching through files. Upon these assurances Monster's counsel granted a 30-day extension.

On February 11, 2008, Applicant's counsel sent a stack of documents as discovery responses to Monster's requests. Aside from a few materials Monster already had, the documents consisted almost entirely of internet print-outs from the USPTO website. The purpose of these print-outs is unclear as the marks did not involve Applicant.

On March 12, 2007, Monster gave notice to opposing counsel regarding the unacceptable discovery requests and indicated that a Motion to Reopen Discovery would be filed. Monster invited Applicant's stipulation to the motion. No such stipulation was received.

## ARGUMENT

I. Opposer's situation warrants the reopening of the discovery period because the unsuccessful discovery efforts are not resulting from any neglect on the part of Opposer Monster Cable.

The analysis to be used in determining whether a party has shown 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 USPQ2s 1582 (TTAB 1997). These cases hold that the excusable neglect determination must take into account all relevant circumstances surrounding the party's omission or delay, including (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.

In examining the first and second prongs, the danger of prejudice to the nonmovant and the delay's impact on the judicial proceedings, it becomes clear that there is no prejudice in reopening the discovery period to the nonmovant and the delay involved in obtaining substantive information only helps proper adjudication of the case. The need for this motion arose from the numerous discovery extensions granted to Applicant by Opposer in the good faith belief that Applicant would produce responsive information. Clearly time is not an issue for Applicant because Applicant requested over a year's worth of discovery extensions from Opposer. Moreover, upon reopening of discovery both sides may utilize this period to obtain substantive discovery information which can only help in the proper adjudication of the case. After Applicant's abuse of Opposer's indulgences and professional courtesy it has become clear that Monster will only obtain relevant information with a discovery deposition and a motion to compel (which will be filed at a later date).

The third and fourth prongs of the analysis address the reason for the delay and movant's good faith. Movant, Monster Cable, has acted in good faith throughout these proceedings: Applicant asked for repeated extensions of time to produce its discovery and, as a matter of professional courtesy, Monster repeatedly acquiesced to Applicant's requests for additional time. Thus the case dragged on for over a year while Monster waited for discovery responses. Upon issuing an ultimatum, Monster was assured by Applicant's counsel that it only needed an additional 30 days to get documents from its client and Monster granted one last extension on the condition that responsive internal documents were forthcoming. Upon

production, Monster discovered that it received little more that last minute internet print-outs from the PTO's website as a response to its requests – a stark departure from what was promised to it in order to get the last extension of time.

Thus, from the facts it is clear that the cause of the delay is not due to Monster's activities but rests solely with Applicant's repeated requests for extensions of time. Monster acted in good faith by granting the extensions in the hopes that Applicant would produce documents responsive to the discovery but this never occurred. Consequently, it is clear that a discovery deposition is needed, which can only be conducted within the discovery period.

II. Opposer requests a telephonic hearing with the Interlocutory Attorney on this case, pursuant to Trademark Rule 2.120(i) regarding the motion to reopen unless the Board determines that no hearing is necessary for its rendering of an opinion.

Opposer hereby requests a telephonic hearing with the Interlocutory Attorney to resolve the motion to reopen discovery. Pioneer Kabushiki Kaisha dba Pioneer Corporation v. Hitachi High Technologies America, Inc., 74 U.S.P.Q.2d 1672 (T.T.A.B. 2005); see also United States Patent & Trademark Office, Permanent Expansion of Telephone Conferencing on Interlocutory Matters in Inter Partes Cases Before the Trademark Trial and Appeal Board at http://www.uspto.gov/web/offices/com/sol/og/2000/week25/pattele.htm (May 23, 2000).

## CONCLUSION

Monster respectfully requests the reopening of the discovery period. Throughout discovery Monster has been indulgent with opposing counsel, granting extensions to discovery responses for almost a year, receiving little in return. The passage of time has not been by inexcusable neglect on Monster's part but, to the contrary, was due to granting constant extensions to opposing counsel as a matter of professional courtesy. Monster received minimal

responses to discovery, despite promises to the contrary and it is clear to Monster's counsel that discovery depositions will be the only means of procuring substantive answers. Thus, the granting of Monster's Motion to Reopen Discovery is not the result of any neglect but instead is rooted in prudent adherence to the TTAB's discovery procedures and should be granted.

Dated: April 17, 2008

Respectfully submitted,

LARIVIERE, GRUBMAN & PAYNE, LLP

By

Nicole A. Smith
19 Upper Ragsdale Drive, Suite 200
P.O. Box 3140
Monterey, CA 93942
(831) 649-8800
Attorneys for Opposer
Monster Cable Products, Inc.

## CERTIFICATE OF SERVICE

I, Tabatha Morgan, paralegal to Nicole A. Smith of LARIVIERE, GRUBMAN & PAYNE, LLP, attorneys for Opposer, hereby certify that a true and complete copy of the foregoing

**NOTICE OF MOTION AND MOTION TO REOPEN DISCOVERY**

was served on Applicant's attorney,

Brian P. Kinder
Hart King & Coldren
200 Sandpointe, 4th Floor
Santa Ana, CA 92707

postage prepaid by first-class mail on April 17, 2008.

Executed on April 17, 2008 at Monterey, California.

Tabatha Morgan
Paralegal