ESTTA Tracking number: **ESTTA208860**

Filing date: **05/02/2008**

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

Proceeding	91172045
Party	Defendant Lightspeed Entertainment, LLC
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Date	05/02/2008
Attachments	opposition to motion to reopen discovery.pdf (13 pages)(757306 bytes)

I hereby certify that this paper or fee is being electronically filed with the United States Patent and Trademark Office on May 2, 2008.

Brian P. Kinder

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.	)	
	)	

OPPOSITION TO MOTION TO REOPEN DISCOVERY

Applicant Lightspeed Entertainment, LLC ("Applicant") hereby opposes Petitioner Monster Cable Products, Inc.'s ("Petitioner") Motion to Reopen Discovery on the grounds that it fails to articulate sufficient grounds to meet even the lower "good cause" threshold, much less the heightened "excusable neglect" standard applicable under the circumstances. See TBMP § 509.01.

I. INTRODUCTION

Mere negotiations and extensions of time are insufficient to demonstrate "excusable neglect" and the most important factor in making such a determination is factor three: "the reason for the delay, including whether it was within the reasonable control of the movant." While Petitioner's moving papers recount the one year of negotiations between the parties and extensions of time relating thereto, they do not even attempt to argue that it was out of their control and offer no reasonable explanation as to why Petitioner did not file a motion to compel or

move for an extension of time prior to the close of discovery. Moreover, Petitioner's moving papers do nothing more than casts aspersions by alleging that Applicant's discovery responses were insufficient (it is noteworthy that Applicant fully responded to 19 interrogatories, 22 categories of document requests, and over 160 requests for admission), but yet entirely fail to explain why Petitioner **sat on Applicant's discovery responses for over a month**[1] before sending a letter at the eve of the close of discovery and therein proposing a ninety (90) day extension[2]. Finally, Petitioner fails to explain why it waited for **WELL OVER TWO (2) MONTHS** after receiving Applicant's discovery responses before filing the instant motion. Accordingly, the motion should be denied on grounds that Petitioner has not demonstrated excusable neglect in that the failure to file was due to circumstances entirely within the control of Petitioner, but Petitioner instead merely rested on its laurels.

II. STANDARD OF REVIEW

Unlike a timely-filed motion to extend, which is judged according to a liberal "good cause" standard, a motion to reopen requires the moving party to

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[1] The Board will note the circular argument that the Petitioner has created for itself. On the one hand, Petitioner is arguing that Applicant's February 11, 2008 production of documents was insufficient and limited to only a handful of documents. On the other hand, Petitioner is in the untenable situation of arguing that their neglect is excusable after having received the responses well over two (2) months prior to filing the instant motion on April 17, 2008.

[2] Despite the complete misrepresentation to the Board in the Declaration of Nicole Smith, Petitioner never asked Applicant to stipulate to reopen the discovery period. *See Smith Decl. ¶ 15.* In fact, the March 12, 2008 letter referred to in the Smith Declaration makes no mention of any proposal to reopen discovery – it merely asks that Applicant consent to a further 90 day extension of the discovery period. *See id., Ex. H.*

show that "its failure to act during the time allowed was the result of **excusable neglect**." TBMP § 509.01 (emphasis added). Moreover, the moving party is required to set forth "with particularity the detailed facts upon which its excusable neglect claim is based and mere conclusory statements are insufficient." Id. As Petitioner concedes, the analysis to be used in determining whether a party has shown "excusable neglect" includes an evaluation of: (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. *See Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993) (emphasis added), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

What Petitioner ignores, however, is that **the third factor is the most important factor** in the analysis. *See Gaylord Entertainment Co. v. Calvin Gilmore Productions, Inc.*, 59 USPQ2d 1369 (TTAB 2000) ("With respect to the **third and most important** of the four factors...."); *see also Atlanta-Fulton County Zoo Inc. v. De Palma*, 45 USPQ2d 1858 (TTAB 1998) ("...several courts have stated that the third Pioneer factor...might be considered the most important factor in a particular case."). More precisely, even where there is "no evidence of a bad faith attempt by opposer to delay" or "specific prejudice to applicants beyond mere delay," a moving party's "inattention to the set schedule...is clearly the most dominant factor" and "such neglect can be neither overlooked or excused." *Id.*

III. ARGUMENT

A. Factor Three – Reason for Delay / Control: Petitioner's Failure to Act Within the Prescribed Time Period Was Due to Circumstances Wholly Within Its Control.

As indicated above, when deciding a motion to reopen, the Board initially considers the third Pioneer factor, namely, "the reason for the delay, including whether it was within the reasonable control of the movant." *Id.* As in *DePalma*, Petitioner here neither contends that it was unaware of the discovery deadlines nor that it was in any way prevented from taking action. *See id.* Instead, Petitioner seeks to turn the inquiry on its head and argues that "the cause of the delay is not due to [Petitioner's] activities, but rests solely with Applicant's repeated requests for extensions of time." *Petitioner's Motion to Reopen Discover*, pg. 5.

As the Board will no doubt acknowledge, the inquiry is into the action – or in this case inaction – of the moving party and does not look to the Applicant. The fact that the parties previously stipulated to extensions of time while they were attempting to negotiate a resolution of this dispute simply has nothing to do with whether the circumstances surrounding Petitioner's failure to act were within its control. As such, this factor goes strongly against Petitioner. Thus, as expressed in *DePalma*, the critical inquiry is whether Petitioner's oversight in filing a motion to extend is excused by its participation in other matters regarding this case. *Id.*

(i) Settlement Negotiations Do Not Justify Petitioner's Inaction and Delay.

The remainder of Petitioner's motion and attempted explanation as to why it failed to take action prior to the close of discovery centers around the allegation that the parties were engaged in settlement discussions and had previously

stipulated to three extensions of time. In that regard, their moving papers attempt to blame Applicant for Petitioner's own inaction by stating that "the passage of time has not been by inexcusable neglect on [Petitioners'] part, but, to the contrary, was due to granting constant extensions to opposing counsel as a matter of professional courtesy." As the Board has held previously, however, the mere existence of settlement negotiations and prior extensions does not justify a party's inaction or delay in terms of reopening the discovery period. *See Atlanta-Fulton County Zoo Inc. v. De Palma*, 45 USPQ2d 1858 (TTAB 1998) ("Parties engaged in proceedings before the Board frequently discuss settlement, but the existence of such negotiations or offers, without more, does not excuse them from complying with the deadlines set by the Board or imposed by the rules."). Moreover, Petitioner does nothing to explain why they took no action for more than a month after receiving Applicant's allegedly incomplete discovery responses, and then waited another month – or TWO (2) MONTHS total – before filing the instant motion. Accordingly, Petitioner's motion should be denied.

(ii) **All Other Arguments by Petitioner Are Relevant Only To Inquiries Under the "Good Cause" Standard and Do Not Satisfy the Requirements for Finding "Excusable Neglect."**

The remaining arguments in Petitioner's motion mirror those that appear in prior cases where the Board has denied a request to reopen on grounds that the moving paper failed to demonstrate excusable neglect. By way of example, in denying a motion to reopen and finding that the circumstances surrounding the failure to act within prescribed time limits were wholly within the control of the moving party, the Board stated as follows:

> "[O]pposer argues that its neglect in this case is excusable; that it has shown ample interest in advancing its position in this case; that opposer's counsel was in steady communication with

> applicants' counsel during the time that opposer's testimony period expired - arranging the logistics for opposer's review of documents; that the parties were continuing to discuss settlement possibilities during the time that the discovery and trial periods lapsed; that opposer cooperated with applicants in allowing applicants additional time to respond to discovery, which has served to further delay opposer's securing of an extension in this matter; that opposer has a meritorious position in this case; and that applicants will not be prejudiced by any minimal delay that would result if the Board resets the discovery and testimony periods. While opposer has extensively argued its position under the "good cause" standard governing an avoidance of a default judgment under Fed. R. Civ. P. 55(c), the showing that must be made to reopen a prescribed time under the Federal Rules of Civil Procedure is set forth at Rule 6(b), made applicable to Board proceedings by Trademark Rule 2.116(a). Rule 6(b) provides for an enlargement of time after the expiration of the specified time period, "where the failure to act was the result of excusable neglect."
>
> *Atlanta-Fulton County Zoo Inc. v. De Palma*, 45 USPQ2d 1858 (TTAB 1998).

It is noteworthy how closely the Petitioner's arguments mirror those set out above. Specifically, the Board will note that Petitioner essentially contends that:

- "...there is no prejudice in reopening the discovery period to the nonmovant." *Petitioner's Motion to Reopen Discovery, pg. 4.*
- "...obtaining substantive information only helps proper adjudication of the case." *Id.*
- "The need for this motion arose from the numerous discovery extensions granted to Applicant." *Id.*
- "Movant, Monster Cable, has acted in good faith throughout these proceedings." *Id.*
- "...the cause of the delay is not due to Monster's inactivities, but rests solely with Applicant's repeated requests for extensions of time." *Petitioner's Motion to Reopen Discovery, pg. 5.*

While Applicant disputes each of the foregoing statements, even if they were true, the Board has already held that such factors are insufficient to support a finding that Petitioner's failure to move within the prescribed period was the result of

excusable neglect. No amount of negotiations, extensions, or lack of prejudice changes the fact that Petitioner had Applicant's discovery responses for OVER TWO (2) MONTHS before it filed the instant motion. As such, the delay is inexcusable and Petitioner's motion should be denied.

B. Factors One and Four – Prejudice and Bad Faith: Petitioner's Motion to Reopen Is Brought With the Bad Faith Intent to Increase Costs and Will Severely Prejudice Applicant's Ability to Defend this Opposition on the Merits.

The truth behind the moving papers is that Petitioner has no hope of proving a likelihood of confusion under the circumstances and simply cannot win this opposition proceeding on the merits. While Applicant fully acknowledges that a side-by-side comparison is not the test for likelihood of confusion, an examination of the images in Exhibit A hereto visually demonstrates the absurd nature of Petitioner's claim that Applicant's action-adventure, comic-book-based productions are likely to be confused with Petitioner's audio-video cable products[3]. Thus, rather than conceding as to the merits of the case, Petitioner desires to apply economic pressure by engaging in irrelevant and costly discovery tactics with the hope of outspending Applicant. Through its own inaction, however, Petitioner has failed to extend the discovery period and now, having realized its mistake, seeks relief from the Board.

Notwithstanding, there is neither justification nor excuse for granting Petitioner's request because blame for the failure to act within the period allowed rests squarely on Petitioner. Moreover, Petitioner would not be prejudiced by denying the motion to reopen the discovery period because, as Petitioner

[3] Applicant is presently awaiting Petitioner's response to an offer to amend the description of goods to read as follows: ""Motion picture films featuring animated characters in the action adventure genre; pre-recorded video tapes and discs featuring animated characters in the action adventure genre; and computer programs, games and software featuring animated characters in the action adventure genre." Kinder Decl., ¶ 5.

concedes, it has already received discovery responses from Applicant. To the extent Petitioner considers them inadequate, Petitioner has an alternate remedy in the form of a motion to compel and has already communicated its intention to so move. Thus, the only reason for seeking to reopen discovery would be to perpetrate the inappropriate litigation tactics set out above. Accordingly, Applicant submits that the motion should be denied.

C. Factor Two – Length of Delay and Impact: Petitioner Sat on Applicant's Discovery Responses for Over One Month Before Contacting Applicant, and Over Two Months Before Filing the Instant Motion.

As the Board has acknowledged, even where the parties have cooperated and expended effort in acquiring documents, "such cooperation does not discharge opposer's obligation to adhere to the set timetable for this proceeding. [Petitioner] brought this case and, in so doing, took responsibility for moving forward on the established schedule." Accordingly, if Petitioner believed that a deposition was necessary, they have simply provided no reasonable justification or excuse for having failed to either notice a deposition within the timetable or, alternatively, to file, on or prior to the close of discovery, a motion to extend.

In the instant matter, Applicant provided discovery responses to Petitioner's first set of discovery – which included responses to 19 interrogatories, 22 categories of document requests, and over 160 requests for admission – on February 11, 2008. At the time that the Applicant responded to the discovery, the discovery period was not set to expire for **well over one (1) month**, or until March 17, 2008. It wasn't until March 12, 2008 – or just two business days prior to the close of discovery (i.e., 3/15 and 3/16 fell on Saturday and Sunday) that Petitioner contacted Applicant and complained about the discovery responses Applicant had provided. Moreover, Petitioner fails to explain why it waited for **well over two**

(2) months after receiving Applicant's discovery responses before filing the instant motion. These delays are completely unjustified and, as indicated in footnote 1, *supra*, the Petitioner cannot escape the circular argument into which it has trapped itself.

2. CONCLUSION

In view of Petitioner's failure to demonstrate excusable neglect, the Petitioner's motion to reopen should be denied.

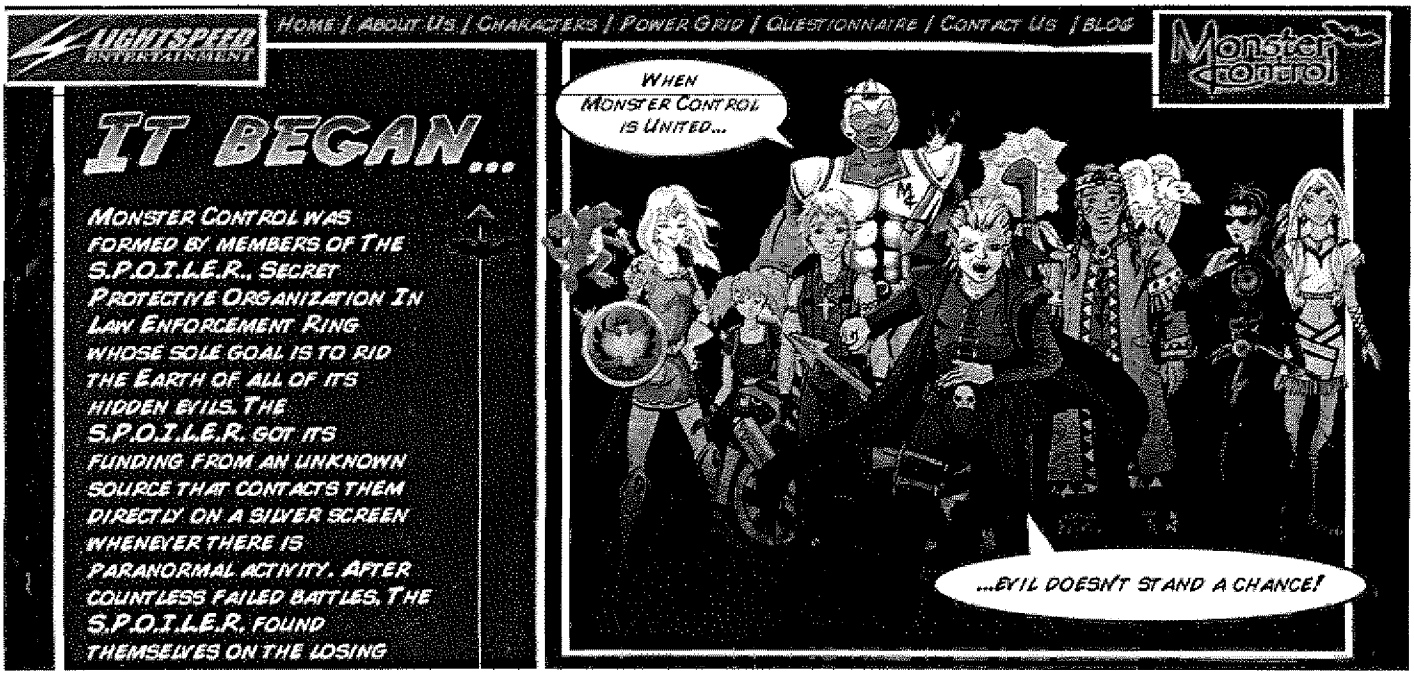
Dated: May 2, 2008

HART, KING & COLDREN

By: _____

Brian P. Kinder
David Christopher Baker
Attorneys for Applicant
Lightspeed Entertainment, Inc.

EXHIBIT A



APPLICANT'S MONSTER CONTROL comics and productions

PETITIONER'S MONSTER cables

DECLARATION OF BRIAN P. KINDER

I, Brian P. Kinder, declare:

1. I am a duly licensed attorney and an associate with the law firm of Hart, King & Coldren, attorney of record for Applicant Lightspeed Entertainment, Inc. ("Applicant"). The facts set forth herein are true of my own personal knowledge and if called as a witness, I could and would competently testify thereto.

2. On February 11, 2008, I served on behalf of Applicant's a full and complete set of responses to Petitioner's First Set of Interrogatories to Applicant, Petitioner's First Set of Requests for Admission, and Petitioner's First Set of Requests for Production of Documents.

3. Between February 11, 2008 and March 12, 2008, I did not receive any communications from Petitioner or counsel for Petitioner.

4. On March 12, 2008, I received a letter from counsel for Petitioner, however, there was nothing in the letter to indicate that Petitioner intended to file a motion to extend discovery.

5. On April 4, 2008, on behalf of Applicant, I conveyed to counsel for Petitioner that Applicant would be willing to amend the description of goods in Applicant's application to read as follows: "Motion picture films featuring animated characters in the action adventure genre; pre-recorded video tapes and discs featuring animated characters in the action adventure genre; and computer programs, games and software featuring animated characters in the action adventure genre."

6. Between March 12, 2008 and April 16, 2008, I placed several phone calls and left unreturned messages for counsel for Petitioner. At no time did I actually speak with counsel for Petitioner. Moreover, at no time has counsel for Petitioner ever requested that Applicant stipulate to a motion to reopen the discovery period.

7. On April 29, 2008, I visited Applicant's website located at monstercontrol.net and captured the image depicted in Exhibit A to Applicant's Opposition to Motion to Reopen Discovery.

8. On April 29, 2008, I visited Petitioner's website located at monstercables.com and captured the image depicted in Exhibit A to Applicant's Opposition to Motion to Reopen Discovery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed May 2, 2008, in Santa Ana, California

Brian P. Kinder

PROOF OF SERVICE
Monster Cable Products, Inc. v. Lightspeed Entertainment, Inc.
Opposition No.: 91172045

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 years and am not a party to the within action. My business address is 200 Sandpointe, Fourth Floor, Santa Ana, California 92707-0507. On March 14, 2008, I caused the foregoing document(s) described as **1) OPPOSITION TO MOTION TO RE-OPEN DISCOVERY,** to be served on the interested parties in this action as follows:

Nicole Smith, Esq.
LaRiviere, Grubman & Payne, LLP
19 Upper Ragsdale Drive, Suite 200
P. O. Box 3140
Monterey, CA 93942

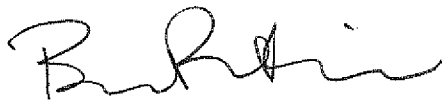
☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid Santa Ana, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

☐ **BY OVERNIGHT COURIER:** I caused such envelope to be placed for collection and delivery on this date in accordance with standard OVERNITE EXPRESS delivery procedures.

☐ **BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the above-referenced person(s).

☒ I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 2, 2008, at Santa Ana, California.



Brian P. Kinder, Esq.