UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: June 17, 2008

Opposition No. **91172045**

Monster Cable Products, Inc.

v.

Lightspeed Entertainment, LLC

Cheryl Goodman, Interlocutory Attorney:

This case now comes up on the following motions:

1) opposer's motion, filed April 17, 2008, to reopen discovery and

2) opposer's motion, filed May 21, 2008, to compel.

The Board turns first to opposer's motion to reopen.

In support of its motion, opposer maintains that it requires a reopening of discovery due to the need to take discovery depositions as a result of applicant's inadequate discovery responses served on February 11, 2008. With regard to whether opposer has established excusable neglect, opposer argues that there is no prejudice to applicant if discovery is reopened; that any delay in obtaining the information "helps proper adjudication of the case"; that it "has acted in good faith throughout these proceedings" by "repeatedly" acquiescing to applicant's requests for extensions of time to serve discovery; and that any delay "is not due to Monster's activities but rests solely with

Applicant's repeated requests for extensions of time." The correspondence attached to the motion to reopen indicates that the majority of the extension requests were granted in the context of the parties' settlement negotiations.

In response, applicant argues that mere settlement negotiations and extensions of time are insufficient to demonstrate excusable neglect. Applicant submits that opposer has not adequately explained its reason for the delay also contending that opposer's delay is inexcusable. Applicant points out that at the time applicant served its discovery responses on February 11, 2008, discovery was still open, yet opposer waited two months after receiving applicant's discovery responses and one month after the close of discovery to file its motion to reopen. Lastly, applicant argues that it will be prejudiced by the reopening of discovery and that opposer's motion is brought in bad faith.

In reply, opposer argues that opposer's counsel was "cognizant of the TTAB dates and has tried to work its issues out with opposing counsel [regarding discovery] before resorting to the last resort of reopening discovery" and that the motion to reopen is the result of applicant's "bad faith attempts to deprive Monster from the discovery to which it is entitled." Opposer also maintains that it did not unreasonably delay in filing the motion to reopen as it

acted "promptly once it was clear no additional good faith attempts to resolve the situation were forthcoming" and that the time it took to review applicant's responses--5 weeks--is not an "'unjustified delay.'"

As the parties recognize, the standard for considering opposer's motion to reopen is one of excusable neglect. The factors to be considered are (1) the danger of prejudice to the non-moving party; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the moving party; and (4) whether the moving party has acted in good faith.[1] *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 USPQ2d 1582 (TTAB 1997).

Considering the *Pioneer* factors along with all relevant circumstances, the Board finds that opposer has not demonstrated excusable neglect.

With regard to the first and fourth *Pioneer* factors, the Board finds no specific prejudice to applicant beyond mere delay, and the Board finds no specific evidence of a bad faith attempt by opposer to delay this case. Therefore,

[1] While all relevant circumstances are considered, the factors are not equally weighted: "the reason-for-delay" factor has been held to be the most important. *See Pumpkin, supra* at fn. 7 and cases cited therein.

these factors are either neutral or weigh in opposer's favor.

With regard to the second *Pioneer* factor, the Board finds that the delay has a significant potential impact on the judicial proceedings because reopening discovery would extend proceedings by any additional time set for discovery as well as the sixty day period between the close of discovery and trial. Thus reopening discovery runs counter to the Board's interest in expeditious adjudication of this case.[2] Therefore, this factor weighs against opposer.

With respect to the third and most important *Pioneer* factor, the Board finds that the reason for delay weighs heavily against opposer as the circumstances were solely within opposer's control.

Opposer's reason for failing to timely seek an extension of the discovery period is that it was attempting in good faith to resolve the situation regarding applicant's allegedly deficient discovery responses. However, nothing in opposer's explanation addresses opposer's failure to timely seek an extension of time of the discovery period prior to its close.

In short, while opposer's counsel advises that it was well aware of the deadlines in this case, opposer attempts to lay the blame for any delay on applicant pointing to

[2] Opposer did not specify how much time it was seeking in a reopened discovery period.

applicant's allegedly inadequate discovery responses as well as opposer's previous agreement in extending applicant's time to serve said discovery responses.

Counsel's excuse for having failed to timely seek an extension of the discovery period is unavailing. Opposer's attempts to resolve the discovery dispute notwithstanding, opposer's counsel cannot escape the unfortunate fruits of excusable neglect by simply blaming applicant. Opposer received applicant's discovery responses a month before the close of discovery and it was incumbent upon opposer to review the discovery responses prior to the close of discovery so as to determine if an extension was necessary to take discovery depositions. Opposer cannot now blame its attempts to resolve any discovery disputes or applicant for its failure to timely seek an extension of discovery as applicant's alleged shortcomings with regard to discovery are not at issue. It was opposer's wholly within opposer's control to timely seek an extension of the discovery period. *See e.g. American Vitamin Products Inc. v. Dowbrands Inc*. 22 USPQ2d 1313 (TTAB 1992) (respondent's concerns regarding its ability to conduct follow-up discovery and to file appropriate discovery motions do not constitute excusable neglect for respondent's failure to timely request an extension of the discovery period) *Landeen v. Phonebillit, Inc.*, Case No. 1:04-cv-1815-LJM-WTL, 2007 WL 1703754 (S.D. Ind. June 12, 2007) (discovery disputes between the parties

do not constitute excusable neglect). Therefore, the Board finds the third Pioneer factor weighs against opposer.

On balance, the Board finds that opposer has failed to establish excusable neglect to reopen the discovery period. In view thereof, opposer's request to reopen the discovery period in this proceeding is denied.

The Board now turns to opposer's motion to compel.

Opposer advises that it served discovery responses in January 18, 2007 and provided "a year's worth of extensions . . . as a professional courtesy even when the parties were no longer in settlement negotiations" agreeing to one final two-week extension in January 2008 for applicant to serve discovery requests. On February 11, 2008, applicant served its discovery responses. However, opposer complains that the discovery consists of "objections with virtually no substantive responses to discovery . . . and that the documents or information are nonresponsive resulting in its March 12, 2008 letter to applicant "requesting responsive discovery so that . . . the parties could have a meaningful discussion regarding the responses." Opposer further advises that "nothing more was sent from Applicant for the duration of the discovery period" in response to this correspondence. Opposer seeks for applicant to supplement its responses to interrogatories, requests for admissions and to produce responsive documents. Opposer also seeks a discovery sanction under Trademark Rule 2.120(g) and Fed.R.Civ.P. 37(b)(2(B).

In response, applicant argues that the motion suffers from "two serious procedural defects" namely that opposer has failed to "fulfill its meet and confer obligations to the Board" and that a motion to compel is not the appropriate procedure with regard to testing the sufficiency of applicant's responses to opposer's request for admissions. Applicant maintains that opposer's counsel's March 12, 2008 letter fails to satisfy opposer's "obligations . . . to attempt to resolve discovery issues" as the letter simply states that applicant's document production was "unacceptable" and nothing in the letter mentions applicant's response to interrogatories or requests for admissions. It is applicant's position that it has fully responded to the discovery propounded by petitioner. Applicant also argues that opposer has not "articulate[d] any shortcomings in the [discovery responses] because there are none to be found" and that opposer's interrogatories were "inartfully crafted . . . to be rendered incomprehensible."

First, to the extent that opposer seeks a discovery sanction, such request is denied as premature as no discovery order has issued.

With regard to the motion to compel, the Board finds that opposer never made a good faith effort to resolve the discovery dispute as required by Trademark Rule 2.120(e).

Trademark Rule 2.120(e) requires that the party make a good faith effort to resolve the discovery dispute prior to

the filing of the motion to compel. As applicant has pointed out, opposer's only correspondence with regard to applicant's allegedly deficient discovery responses makes no reference to applicant's responses to opposer's interrogatories or requests for admissions. Therefore, applicant was never put on notice regarding what opposer considered to be allegedly deficient discovery responses with regard to opposer's interrogatory requests and requests for admissions. With regard to opposer's requests for production, the Board finds that opposer's general references in the March 12, 2008 correspondence that applicant's responses to the request for production are not "meaningful", and that the "vast majority of what was produced . . . was not responsive" are insufficient to communicate to applicant with the necessary specificity any deficiencies with respect to its particular responses to these discovery requests.

Accordingly, the Board finds that the March 12, 2007 letter standing alone is insufficient to establish opposer's efforts to resolve the discovery dispute prior to the filing of the motion to compel. Moreover, it is apparent no efforts were made to meet and confer in an attempt to resolve the dispute prior to filing the motion to compel given the fact that opposer seeks better responses to all its discovery requests.

In view thereof, opposer's motion to compel is denied without prejudice for lacking a good faith effort to resolve the discovery dispute.

The Board makes the following observation, however. From a cursory review of applicant's discovery responses, it appears that some of opposer's complaints may have merit. Therefore, the Board strongly suggests to the parties that they meet and confer by telephone to resolve and/or narrow the discovery dispute. Additionally, prior to filing any further discovery motions, the moving party must call the assigned interlocutory attorney for a telephone conference so that a determination can be made with respect to the parties' good faith efforts to resolve the discovery dispute. In this context, the Board expects that the parties will be able to provide sufficient support of their good faith efforts to narrow the scope of the discovery dispute by engaging in direct dialog and discussion. Moreover, should the parties need to avail themselves of Board intervention, it is expected that any discovery requests still in dispute will be limited in number. The Board expects each party and its attorney to cooperate in the discovery process and to make a good faith effort to satisfy the discovery needs of its adversary. *See* Fed. R. Civ. P. 26(g). *See also Johnson Pump/General Valve Inc. v. Chromalloy American Corp.*, 13 USPQ2d 1719 (TTAB 1989).

Proceedings are considered suspended retroactive to the filing of the motion to compel. Proceedings are resumed.

Trial dates are reset as follows:

DISCOVERY PERIOD TO CLOSE:	**CLOSED**
30-day testimony period for party in position of plaintiff to close:	**August 19, 2008**
30-day testimony period for party in position of defendant to close:	**October 18, 2008**
15-day rebuttal testimony period for party in position of plaintiff to close:	**December 2, 2008**

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.l25.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

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The USPTO published a notice of final rulemaking in the Federal Register on August 1, 2007, at 72 F.R. 42242. By this notice, various rules governing Trademark Trial and Appeal Board inter partes proceedings are amended. Certain amendments have an effective date of August 31, 2007, while most have an effective date of November 1, 2007. For further information, the parties are referred to a reprint of the final rule and a chart summarizing the affected rules, their changes, and effective dates, both viewable on the USPTO website via these web addresses:
http://www.uspto.gov/web/offices/com/sol/notices/72fr42242.pdf
http://www.uspto.gov/web/offices/com/sol/notices/72fr42242_FinalRuleChart.pdf

By one rule change effective August 31, 2007, the Board's standard protective order is made applicable to all TTAB

inter partes cases, whether already pending or commenced on or after that date. However, as explained in the final rule and chart, this change will not affect any case in which any protective order has already been approved or imposed by the Board. Further, as explained in the final rule, parties are free to agree to a substitute protective order or to supplement or amend the standard order even after August 31, 2007, subject to Board approval. The standard protective order can be viewed using the following web address: http://www.uspto.gov/web/offices/dcom/ttab/tbmp/stndagmnt.htm