

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

Baxley

Mailed: March 24, 2014

Opposition No. **91203399**

iCourier Software Systems Ltd.

v.

E-filliate, Inc.

Before Kuhlke, Cataldo, and Hightower,  
Administrative Trademark Judges.

By the Board:

This case now comes up for consideration of opposer's motion (filed December 30, 2013) to reopen testimony periods. The motion has been fully briefed.

As an initial matter, opposer, a Canadian limited liability company appearing *pro se*, filed an eighteen-page reply brief in support of its motion. Because that reply brief exceeds the ten-page limit for reply briefs on motions in Board proceedings, the reply brief has received no consideration.<sup>1</sup> See Trademark Rule 2.127(a); *Saint-Gobain*

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<sup>1</sup> A cursory review of that reply brief indicates that opposer seeks therein, among other things, to disqualify applicant's attorney based on allegedly "unethical conduct," most notably serving insufficient responses to opposer's discovery requests. However, opposer failed to file a motion to compel prior to the commencement of trial and therefore will not be heard to complain about the sufficiency of applicant's discovery responses. See TBMP Section 523.04 (3d ed. rev.2 2013).

Further, opposer, on July 15, 2013, filed a motion for an extension of time to respond the motion to compel that applicant untimely filed on June 30, 2013, wherein it stated that it was

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*Corp. v. Minn. Mining and Mfg. Co.*, 66 USPQ2d 1220 (TTAB 2003).

In support of the motion to reopen, opposer contends that it only "now realizes" that it did not have any evidence properly made of record and that it previously believed in error that evidence that it served upon applicant and evidence that it filed as exhibits to its motion for summary judgment was properly of record as trial evidence. Accordingly, opposer asks that the Board reopen its testimony period and reset time for final briefing.

In response, applicant contends that opposer has engaged in dilatory tactics throughout this proceeding; that applicant would be prejudiced by reopening; that opposer unreasonably delayed by failing to seek to reopen its testimony period until more than seven months after the close of that testimony period; that the reason for opposer's delay is not compelling and was within its

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investigating whether it was appropriate to seek disqualification of applicant's attorney. As the Board stated in its August 16, 2013 order,

There are two general categories upon which to base petitions to disqualify an attorney from Board *inter partes* proceedings: (1) the attorney's conflict of interest, and (2) the attorney's potential appearance as a witness. ... Because neither of the foregoing situations appears to be applicable in this case, there appears to be no basis for a petition to disqualify applicant's attorney. See Patent and Trademark Rule 11.18(b).

Based on the foregoing, to the extent that opposer's reply brief is intended as a petition to disqualify applicant's attorney, that petition will receive no consideration.

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control; and that opposer has not acted in good faith throughout this proceeding. Accordingly, applicant asks that the Board deny opposer's motion.

In *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993), as discussed by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the Supreme Court clarified the meaning and scope of "excusable neglect," as used in the Federal Rules of Civil Procedure and elsewhere. The Court held that the determination of whether a party's neglect is excusable is:

at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . [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.

*Pioneer Investment Services Co.*, 507 U.S. at 395. In subsequent applications of this test, several courts have stated that the third *Pioneer* factor, namely the reason for the delay and whether it was within the reasonable control of the movant, might be considered the most important factor in a particular case. See *Pumpkin, Ltd.*, 43 USPQ2d at 1586 n.7 and cases cited therein.

The Board turns initially to the third *Pioneer* factor, the reason for the delay, including whether it was within opposer's reasonable control. We find that opposer's

failure to take appropriate action in a timely manner was caused by its alleged mistaken belief that evidence that it submitted with its summary judgment motion and unspecified evidence that it served upon applicant at an unspecified time was of record as trial evidence.<sup>2</sup> We further find that such mistaken belief was entirely within opposer's control.

Because the Board clearly stated in its April 5, 2013 order that the motion for summary judgment would receive no consideration, opposer had no reasonable basis for believing that any documents filed as exhibits to that motion were of record as trial evidence. Further, even if we had decided the motion for summary judgment, evidence filed in connection with that motion is filed in connection with a pretrial device. See TBMP Section 528.01. As such, that evidence does not form part of the evidentiary record to be considered at final hearing unless it is also properly introduced in evidence during the appropriate testimony period. See *Zoba International Corp. v. DVD Format/LOGO Licensing Corp.*, 98 USQP2d 1106, 1115 n.10 (TTAB 2011); TBMP Section 528.05(a)(1). Moreover, service of unspecified evidence upon applicant at an unspecified time is

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<sup>2</sup> The Board expects all parties, whether or not they are represented by counsel, to comply with applicable procedural rules. We further note that a party may be precluded, upon timely objection by its adversary, from relying as trial evidence upon information and documents properly requested but not produced in discovery. See Fed. R. Civ. P. 37(c)(1).

insufficient to make that evidence of record at trial. See generally Trademark Rule 2.122(e); TBMP Section 704.

Indeed, evidence must be made of record by filing it with the Board to be considered at final hearing. Based on the foregoing, the third *Pioneer* factor weighs strongly against a finding of excusable neglect.

We will next consider the second *Pioneer* factor and find that the length of the delay and its potential impact on this case is significant. Opposer did not file its motion to reopen until more than seven months after the close of its testimony period. In addition to the time between the close of discovery and the filing of opposer's motion to reopen, the Board must take into account the additional, unavoidable delay arising from the time required for briefing and deciding such motions. See *Luster Products Inc. v. Van Zandt*, 104 USPQ2d 1877, 1880 (TTAB 2012). The Board and parties before it have an interest in minimizing the amount of the Board's time and resources that must be expended on matters, such as opposer's motion, which come before the Board solely as a result of one party's failure to follow clear and straightforward procedural rules. See *PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860, 1862 (TTAB 2002).

If the Board were to reopen opposer's testimony period for the limited purpose of allowing opposer time in which to

file under notice of reliance the evidence submitted with opposer's motion for summary judgment, so reopening would require a resetting of all testimony periods prior to final briefing. See generally Trademark Rule 2.121; TBMP Section 701. Resetting testimony periods would push back the due date for opposer's brief on the case by at least five additional months. Based on the foregoing, we find that the second *Pioneer* factor weighs strongly against a finding of excusable neglect.

With regard to the fourth *Pioneer* factor, whether opposer acted in good faith, we note that opposer received at least four extensions of time to serve responses to applicant's discovery requests (see February 12, 2013, March 5, 2013, March 29, 2013, and April 5, 2013 orders), and that, on April 4, 2013, the day prior to the due date for opposer's discovery responses under the March 29, 2013 order, opposer filed a motion for summary judgment. The Board, in the April 5, 2013 order, declined to consider the motion for summary judgment because "opposer's motion appears to be nothing more than a subterfuge to avoid serving responses to applicant's discovery requests."<sup>3</sup> When

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<sup>3</sup> The Board further stated as follows:

A cursory review of opposer's motion indicates that, other than one reference to the previous standard for summary judgment in the preamble of its motion, opposer essentially argues the merits of its case as one would at final hearing, instead of arguing the

opposer eventually served discovery responses on April 8, 2013,<sup>4</sup> more than three months after applicant served its discovery requests, its interrogatory responses consisted entirely of general objections. In addition, although opposer stated in response to the vast majority of applicant's document requests that it would "provide applicant non-privileged materials in its possession in as much [sic] they exist subject to a protective order," opposer does not appear to have produced any discovery documents. Opposer's dilatory tactics and failure to provide substantive interrogatory responses and responsive discovery documents indicate that opposer failed to make a good faith effort to meet applicant's discovery needs. See TBMP Section 408.01. In view of opposer's conduct in this case, we find that any assertion of good faith by opposer in seeking to reopen testimony periods seven months after the close of its testimony period is highly suspect.

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appropriate standard for entry of summary judgment, i.e., that there is no genuine dispute as to any material fact remaining for trial, and that it is entitled to entry of judgment as a matter of law. In addition, opposer presents scant evidence in support of its motion.

(citations omitted)

<sup>4</sup> Opposer's responses to discovery requests were included as exhibits to the motion to compel and motion for entry of discovery sanctions that applicant filed on June 30, 2013, during its testimony period.

With regard to the first *Pioneer* factor, the danger of prejudice to applicant, we find that this factor is at best neutral. In view of the foregoing, we find that opposer has failed to persuade us that opposer's failure to act in a timely manner before the close of its testimony period was caused by facts constituting excusable neglect. Opposer's motion to reopen testimony periods is therefore denied.

Although the Board generally disfavors default judgments, the Board is also justified in enforcing procedural deadlines. See *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 1554, 18 USPQ2d 1710, 1713 (Fed. Cir. 1991). Opposer brought this case and, in so doing, took responsibility for moving it forward in accordance with the trial schedule, but failed to do so. See *Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 USPQ2d 1858, 1860 (TTAB 1998). Because opposer has failed to offer any testimony or trial evidence in this case, judgment is hereby entered against it, and the opposition is dismissed with prejudice. See Trademark Rule 2.132(a).



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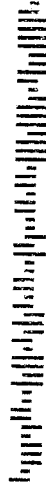
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