

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

EJW

Mailed: January 6, 2015

Opposition No. 91211873

Green Ivy Educational Consulting, LLC

v.

Green Ivy Holdings LLC

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

This case now comes up for consideration of Applicant's contested motion (filed December 19, 2014) to reopen its time to file its response to Opposer's motion for reconsideration filed on November 26, 2014. In order to quickly inform Opposer as to whether it should file a reply brief to its motion, the Board addresses Applicant's motion before the due date for filing its reply brief.

By way of background, Opposer filed and served its motion for reconsideration on November 26, 2014, by U.S. first class mail. In view thereof, Applicant's response thereto was due no later than December 16, 2014. *See* Trademark Rules 2.119(c) and 2.127(a). Three days after that due date, Applicant filed the subject motion for "enlargement of time, or in the alternative to reopen time" to file its opposition brief. In support of its motion, Applicant explains that it did not receive its service copy of the motion for

reconsideration until December 9, 2014, and that it is unknown why thirteen days passed before it arrived at counsel's office. Applicant also argues that granting the motion will not prejudice Opposer, that the delay to the proceeding is minimal, and that its motion is not submitted for delay or for any other improper purpose. Applicant requests until December 23, 2014, to file its response.

In response, Opposer argues, *inter alia*, that Applicant has failed to explain why it did not file a motion for an extension of the filing deadline before the deadline passed and that Applicant's failure to meet the deadline is symptomatic of a pattern of delay in this proceeding.

As a threshold matter, insofar as Applicant's motion was filed after the deadline for responding to Opposer's motion for reconsideration, the Board treats Applicant's motion as one seeking to reopen the period to respond to Opposer's motion. *See* Fed. R. Civ. P. 6(b) (When an act is to be done within a specified time, the Court may "upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect"). Accordingly, the appropriate standard for considering Applicant's motion is whether Applicant has shown excusable neglect for its failure to timely respond to opposer's motion. *See Pioneer Inv. Svcs. Co. v. Brunswick Assoc. Ltd. P'shp*, 507 U.S. 380, 395 (1993); *FirstHealth of the Carolinas Inc. v. CareFirst of Md. Inc.*, 479 F.3d 825, 81

USPQ2d 1919, 1921-22 (Fed. Cir. 2007); and *Pumpkin Ltd. v. Seed Corps*, 43 USPQ2d 1582, 1586 n.7 (TTAB 1997).

In *Pioneer*, the Supreme Court stated that a determination of excusable neglect 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*, 507 U.S. at 395.

The Board turns first to the first *Pumpkin* factor, that is, whether there is any prejudice to Opposer for reopening the time for Applicant to file its opposition brief. While Opposer objects to Applicant's motion, Opposer has not shown that its evidence or witnesses have been lost as a result of Opposer's delay. In view thereof, the Board concludes that there is not any measurable prejudice to Opposer should the Board reopen the time for filing the opposition brief. *HKG Industries Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156, 1157 (TTAB 1998). Mere delay or loss of tactical advantage, without more, has not been found to constitute prejudice. *See, e.g., Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997), *cited in Pumpkin*, 43 USPQ2d at 1587. Accordingly, this factor weighs in favor of Applicant.

Turning to the second factor, namely, the length of the delay and its potential impact on the proceedings, the Board notes that Applicant filed its

motion three days after the due date and that Applicant filed its response to Opposer's motion on December 23, 2014, the requested enlargement date. Notwithstanding the time required by the Board to review the subject motion, the delay to this proceeding caused by Applicant's delay is insignificant. Thus, this factor also weighs in favor of Applicant.

As regards the third *Pioneer* factor, Applicant explained that its counsel did not receive the service copy of Opposer's motion for thirteen days. Implicit in this explanation is that the U.S. mail delivery, which is beyond Applicant's control, impacted Applicant's counsel's ability to timely prepare, file and serve its opposition brief. The Board finds that the delay in receiving Opposer's motion was beyond Applicant's control. The Board has noted previously the "poor service" of and delays caused by the U.S. Postal Service. *See S. Industries Inc. v. Lamb-Weston Inc.*, 45 USPQ2d 1293, 1295 (TTAB 1997). *Cf. Sinatra v. Heckler*, 566 F.Supp. 1354, 1356 (E.D.N.Y.1983) (noting holiday-induced delays in the federal mails). However, Applicant did not explain why the delayed delivery impacted Applicant's submission of a timely response once counsel received the service copy. In view of the foregoing, the Board finds that this factor is neutral.

Finally, with respect to the fourth *Pioneer* factor, *i.e.*, whether Applicant acted in bad faith in delaying its submission of its responsive brief, there is no evidence of bad faith on its part. This factor, therefore, weighs in favor of Applicant.

After careful consideration of the *Pioneer* factors and the relevant circumstances in this case, in view of the absence of prejudice to Opposer, the lack of evidence of any bad faith on the part of Applicant, and the circumstances which caused Applicant's delay in following the required deadline, the Board, in its discretion, finds in balancing the four factors set forth in *Pioneer* that Applicant has shown excusable neglect in support of its motion to reopen its time to file its brief in response to Opposer's motion for reconsideration. Accordingly, Applicant's motion is **granted**. In view thereof, Applicant's responsive brief filed on December 23, 2014, is accepted and Opposer is allowed until **FIFTEEN DAYS** from the mailing date of this order to submit its reply brief in support of its motion for reconsideration, should it wish to do so.

This proceeding is **SUSPENDED** pending the Board's consideration of Opposer's request for reconsideration. Opposer's testimony period and subsequent trial dates will be reset, if necessary, upon the Board's consideration of Opposer's motion.

☼☼☼