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

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| Proceeding | 91217486 |
| Party | Plaintiff<br>Brood Soda, LLC |
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| Submission | Motion to Reopen |
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| Date | 08/26/2015 |
| Attachments | Motion to Reopen.pdf(123595 bytes ) |

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK AND TRIAL APPEAL BOARD
Opposition No. 91217486
Application # 86229370

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| Brood Soda, LLC,<br>Opposer,<br>v.<br><br>Oregon Honey Products, LLC<br>Applicant | )<br>)<br>)<br>)<br>)<br>) | MOTION TO REOPEN TESTIMONY PERIOD |

Brood Soda, LLC submits the following Motion to Reopen Opposer's Testimony Period:

FACTS

On July 22, 2014, Opposer filed a Notice of Opposition against Application Number 86229370. Subsequently, the Board set a Case Schedule including the following due dates:

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| 1. Initial Disclosure: | October 30, 2014 |
| 2. Expert Disclosures: | February 27, 2015 |
| 3. Plaintiff's pre-trial disclosures: | May 13, 2015 |
| 4. Plaintiff's 30-day Trial Period Ends: | June 27, 2015 |
| 5. Defendant's 30-day Trial Period Ends: | August 26, 2015 |

The Parties then engaged in the following correspondence and communication:

On or about September 29, 2014, Opposer and Applicant engaged in a phone Discovery Conference.

On or about October 8, 2014, Opposer sent email to Applicant requesting a copy of the term sheet of the terms discussed during the Discovery Conference.

On or about October 10, 2015, Applicant sent email to Opposer reiterating its position and proposing settlement terms.

On or about October 28, 2015, Applicant and Opposer, during a phone conversation, agreed to postpone disclosures in favor of discussing a settlement, which the Parties believed to be imminent.

On or about January 26, 2015, Applicant sent email to Opposer requesting a phone call and for settlement negotiations to continue.

On or about March 27, 2015, Applicant sent email to Opposer stating that it would like to reach a settlement and accused Opposer of acting in bad faith.

On or about March 30, 2015, Opposer's counsel sent email to Applicant denying bad faith and explaining that Opposer's counsel intended to withdraw and that the remainder of negotiations should be addressed to the owner of Brood Soda, LLC, rather than to counsel.

On or about July 11, 2015, Opposer hired new legal counsel.

On August 4, 2015, Opposer, through new counsel, sent email to Applicant asking to reach a productive settlement.

On August 6, 2015, Applicant sent email to Opposer indicating willingness to talk about settlement proposals.

On August 7, 2015, Applicant filed a Motion to Dismiss in this matter.

At all times pertinent hereto, Opposer has acted in good faith. Any delay in Opposer's filing Disclosures, or tendering discovery and testimony was based in full expectation of the Parties'

reaching an amicable settlement. At no time pertinent hereto has Opposer willfully or intentionally ignored the Case Schedule or the Trademark Rules.

ARGUMENT

**I. Reopening of Testimony Period**

Opposer's testimony period expired June 27, 2015. However, Trademark Rule 509, incorporating FRCP 6(b), empowers the Board to order the period enlarged upon motion "made after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). Opposer maintains that any failure to act during the applicable time periods was due to excusable neglect born of good faith reliance upon the settlement process.

Accordingly, Opposer moves to Reopen its Testimony Period under 37 CFR 2.116(a) and TBMP § 509, *et.seq*.

**II. Excusable Neglect**

Rule 2.132(a) permits an Opposer, who has not taken testimony or offered any other evidence, to respond to a motion for judgment under 2.132(a) by filing a motion to reopen its testimony period based upon a showing of "good and sufficient cause." The Board has further held that the "good and sufficient cause" standard set out in Trademark Rule 2.132(a) is equivalent to the "excusable neglect" standard which a party would have to satisfy to have its testimony period reopened under Rule 6(b) of the Federal Rules of Civil Procedure. *Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1702 (TTAB 2002); *PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860, 1860-61 (TTAB2002); *HKG Industries Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156, 1157 (TTAB 1998); *Grobet File Co. of America Inc. v. Associate Distributors Inc.*, 12USPQ2d 1649, 1651 (TTAB 1989). In short, if

"excusable neglect" is shown, the Board may grant Opposer's Motion to Reopen Opposer's Testimony Period.

In determining the presence of excusable neglect in the context of a motion to reopen a plaintiff's testimony period, the Board has relied on the Supreme Court's discussion in *Pioneer Investment Services Co. v. Brunswick Associates Limited Parnership* 507 U.S. 380, 123 L.Ed.2d 74, 113 S.Ct. 1489 (1993) (hereinafter *Pioneer*), which cites four non-exclusive factors.

According to the Court, 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. . .the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Pioneer,* 507 U.S. at 395.

Therefore, any determination to allow Opposer's Motion must be based upon application of *Pioneer* factor analysis to the facts in the instant record.

Turning first to the third *Pioneer* factor, i.e., the reason for the delay and whether it was in the reasonable control of the Opposer, this factor, given the "equitable" nature of the determination, supports a finding of excusable neglect. While the Applicant and Opposer were actively engaged in settlement discussions through January 2015, it was clearly a choice by both parties to delay the Case Schedule in order to pursue settlement negotiations. As early as March 30, 2015, Applicant was on notice that Opposer would finalize settlement negotiations *pro se.*

Applicant made no subsequent attempt to contact Opposer to finalize settlement negotiations after March 2015.

Had Applicant believed that Opposer was engaged in bad faith delay during the negotiation period, the proper course of action would have included Applicant's filing of motions to further the Case Schedule, such as a Motion to Compel disclosures. *Luster Products, Inc. v. John M. Van Zandt d/b/a Zanza USA*, 104 USPQ2d 1877 (TTAB2012). Applicant filed no such motion. Had Applicant believed its interests would be harmed by any delay in settlement negotiations, it could have prepared discovery requests based upon Opposer's pleaded claim. *Id,* at 1879. Applicant filed no such motion. Had Applicant believed that the settlement negotiations were not ongoing, it could and should have filed a Motion to Dismiss for Failure to Prosecute upon the close of Opposer's testimony period ending June 27, 2015, but before the Opening of Applicant's Testimony period beginning July 26, 2015. Trademark Rule 2.132. Applicant made no such motion until Opposer attempted to finalize negotiations, and that after the Opening of Applicant's testimony period.

Only after Opposer made correspondence August 4, 2015 did Applicant renew communication with Opposer. The form of Applicant's communication was twofold: an indication of Applicant's willingness to continue negotiations and summarily, service of a Motion to Dismiss.

Even if Applicant believed that Opposer had lost interest in settling or had no intent to negotiate further, Opposer's email communication of August 6, 2015, should have been a clear indication that Opposer still intended to negotiate. As Judge Baxley wrote in *Luster Products, Inc. v. John M. Van Zandt d/b/a Zanza USA*, 104 USPQ2d 1877 (TTAB2012), "One generally

only seeks settlement of a case in which one has an interest. An opposer without interest in a case need not reach settlement with an applicant and can instead allow the case to be dismissed by way of an applicant's motion to dismiss for prosecute under 2.132(a) following the expiration of its testimony period, or by failing to respond to an order to show cause under Trademark Rule 2.128(a)(3) after failing to file a brief on the case." Opposer does not wish to allow the case to be dismissed because until Applicant's Motion to Dismiss of August 7, 2015, Opposer believed itself to be in fruitful settlement talks and continues to be willing to reach a mutually satisfactory negotiated settlement.

Given the "equitable" nature of the determination, and the fact that any failure to adhere to the Case Schedule was due to the parties' expectation of fruitful settlement negotiations, the third *Pioneer* factor supports a finding of excusable neglect.

Turning next to the first *Pioneer* factor, i.e., the danger of prejudice to applicant, there has been no showing that any of applicant's witnesses and evidence have become unavailable as a result of the delay in proceedings. *See, e.g., Pratt v. Philbrook*, 109 F.3d 18 (1st Cir.1997). *See also Paolo's Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1904 (Comm'r 1990). In view thereof, Applicant's ability to defend against Opposer's claims has not been prejudiced by Opposer's failure to adhere strictly to the Trial Schedule, and the first *Pioneer* factor supports a finding of excusable neglect.

Turning to the fourth *Pioneer* factor, good faith, at all times the Opposer has acted in good faith to negotiate a productive settlement. In fact, Applicant's Motion to Dismiss was prompted by Opposers' attempt to finalize settlement negotiations after a four month period of non-communication by the Applicant. There is no basis in this record for finding that Opposer's failure to present evidence during its assigned testimony period was the result of bad faith on the

part of Opposer or its counsel. Rather, any failure to present evidence is suggestive of Opposer's good faith in the constructive settlement process that both parties had undertaken but not yet completed. Consequently, the fourth *Pioneer* factor supports a finding of excusable neglect.

Turning finally to the second *Pioneer* factor, i.e., the length of the delay and its potential impact upon judicial proceedings, this factor, when considered in the totality of the circumstances, weighs in favor of a finding of excusable neglect. As stated, the parties' communication was admittedly punctuated by lapses. These lapses were however, indicia of the parties' expectation that settlement negotiations would be fruitful. They were not indications of bad faith, subterfuge, or an intent to burden the Board. Opposer continues to believe it and Applicant can and will arrive at a settlement that does not require adjudication by the Board.

It is Applicant's Motion to Dismiss rather than any lapses in negotiations or nefarious designs that now burdens the judicial proceedings. Given the heavy caseload considered by the Board, spurious filings unnecessarily and unfairly burden the system and thereby create undue delay. *Pumpkin, Ltd. dba Pumpkin Masters v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). If Applicant's assertion of its willingness to talk, made August 6, 2015, was true, then its motion of August 7, 2015, is untimely, spurious, and without regard to the serious resource limitations of the Board.

Applicant's failure to act according to the Case Schedule is evidence that Applicant, like Opposer, believed settlement negotiations to be continuing. Since the lapses in negotiation have in themselves had no detrimental impact upon the judicial proceedings, and would have been irrelevant had Applicant finalized negotiations, the second *Pioneer* factor supports a finding of excusable neglect.

Because the determination of "excusable neglect" is an equitable one, and the *Pioneer* factors support a finding of excusable neglect, the Board may and should allow Opposer's Motion to Reopen Testimony Period in reliance upon 37 CFR § 2.116 (a). Further, the Board is urged to consider that since the Opposer has a fundamental right to protect its duly registered mark, it is most equitable that the Board give every opportunity to Opposer to enforce such rights. Upon said equity, the Board may and should allow Opposer's Motion to Reopen Testimony Period in reliance upon 37 CFR § 2.116 (a).

**III. Likelihood of Confusion**

If Opposer's Motion to Reopen Testimony Period is granted, Opposer intends to provide the types of specific proof regarding Likelihood of Confusion required in the hallmark case, *in re E.I. DuPont de Nemours & Co.,* 476 F2d 1357, 177 USPQ 563 (C.C.P.A. 1973), and its progeny. To wit: Opposer intends to tender evidence of 1) the relation of the good of the Opposer and those of the Applicant (both carbonated beverages appealing to sophisticated tastes); 2) areas of product expansion of Opposer's goods into the product area of Applicant's goods; 3) channels of trade for Opposer's goods and the product area of the Applicant's goods (specialty markets); 4) nature of the consumer of each party's goods; 5) sophistication of consumers of each party's goods; 6) the fame of Opposer's mark; 7) possible appeal to the same market of each parties' goods; 8) length of time that, and conditions under which, there may have been concurrent use; 9) alleged actual confusion between the goods of Applicant and those of Opposer; or, 10) the extent of potential confusion between the goods of Applicant and those of Opposer.

Opposer has relied on the good-faith representations of Applicant regarding its intent to arrive at an amicable settlement, and has neither maliciously filed the instant action nor intentionally failed to prosecute the action. Opposer's belief and faith in the power of dispute

resolution should not be construed as an implicit request to dismiss the action. Rather, Opposer requests that Opposer's Motion to Reopen Opposer's Testimony Period be granted.

Respectfully Submitted,

AUGUST 25, 2015

Dated

JONATHAN H. LEHMAN, PRESIDENT
BROOD SODA LLC
PRO SE

CASES


*Grobet File Co. of America Inc. v. Associate Distributors Inc.*, 12USPQ2d 1649, 1651 (TTAB 1989) ----4

*in re E.I. DuPont de Nemours & Co.*, 476 F2d 1357, 177 USPQ 563 (C.C.P.A. 1973)----------9

*Luster Products, Inc. v. John M. Van Zandt d/b/a Zanza USA*, 104 USPQ2d 1877 (TTAB2012) ----------5

*Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1702 (TTAB 2002)----------3

*Paolo's Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1904 (Comm'r 1990) ----------7

*Pioneer Investment Services Co. v. Brunswick Associates Limited Parnership* 507 U.S. 380, 123 L.Ed.2d 74, 113 S.Ct. 1489 (1993)----------4

*PolyJohn Enterprises Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860, 1860-61 (TTAB2002); *HKG Industries Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156, 1157 (TTAB 1998)----------4

*Pratt v. Philbrook*, 109 F.3d 18 (1st Cir.1997) ----------7

*Pumpkin, Ltd. dba Pumpkin Masters v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). ----------8

## CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Motion to Reopen Testimony Period has been served on counsel set forth below by mailing said copy on August 27, 2015, via First Class Mail, postage prepaid, to said counsel set forth below.

Attorney for Applicant:
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