

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

wbc

Mailed: August 9, 2016

Opposition No. 91226948

Zenith Optimedia Group Limited

v.

Aline Murta

Wendy Boldt Cohen, Interlocutory Attorney:

By the Board's March 18, 2016 order, Applicant's answer was due April 27, 2016. On April 28, 2016, Applicant filed a motion to extend time to file her answer using the ESTTA form which indicates Opposer has provided its consent. On April 28, 2016, Opposer filed its response contesting the motion and noting it did not provide consent.¹ The Board has considered the parties' submissions and

¹ It appears Applicant's use of the ESTTA form which indicates Opposer's consent was in error. Under Patent and Trademark Rule 11.18(b),

[b]y presenting to the Office ... any paper, the party presenting such paper ... is certifying that ... (1) All statements made therein of the party's own knowledge are true, all statements made therein on information and belief are believed to be true, and all statements made therein are made with the knowledge that whoever, in any matter within the jurisdiction of the Office, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or knowingly and willfully makes any false, fictitious or fraudulent statements or representations, or knowingly and willfully makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be subject to the penalties set forth under 18 U.S.C. 1001, and any other applicable criminal statute, and violations of the provisions of this section may jeopardize the probative value of the paper,

See also Fed. R. Civ. P. 11; TBMP § 527.02 (2016). Applicant must take greater care in the allegations made in its filings with the Board. Failure to do so could result in

presumes the parties' familiarity with the factual bases for the motion, and does not recount them here except as necessary to explain the Board's order.

Insofar as Applicant's motion was filed after the expiration of its time to file its answer, the motion, although captioned as a motion to extend, is a motion to reopen its time to file an answer, not a motion to extend. *See* TBMP § 509.01.

For the Board to reopen Applicant's time to file an answer, Applicant must establish that its failure to act in a timely manner was the result of excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B); TBMP § 509.01(b)(1). In *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993), as adopted 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. v. Brunswick Associates L.P., 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

sanctions, which may include judgment. *See* Trademark Rule 2.116(a); *Carrini Inc. v. Carla Carini, Srl*, 57 USPQ2d 1067, 1071 (TTAB 2000).

in a particular case. *See Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 at 1586, n.7 and cases cited therein.

Regarding the first *Pioneer* factor, there does not appear to be any evidence of prejudice to Opposer. Prejudice to the nonmovant as contemplated under the first *Pioneer* factor must be more than mere inconvenience or delay. Prejudice to the nonmovant is prejudice to the nonmovant's ability to litigate the case. *See DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2001); *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1587 (TTAB 1997) (*citing Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997)); TBMP § 509.01(b)(1). Regarding the second *Pioneer* factor, Applicant filed the motion one day after the deadline for its answer. Accordingly, the impact of the delay upon this proceeding is insignificant and weighs in favor of a finding of excusable neglect. Turning to the third *Pioneer* factor, the Board finds that Applicant's failure to timely act was caused by its search for an attorney and efforts to raise funds to defend itself in this proceeding. Finally, regarding the fourth *Pioneer* factor, there is no evidence of bad faith on Applicant's part.

In view thereof, and bearing in mind the Board's policy of deciding cases on the merits where possible, the motion to reopen time to file an answer is **granted** as modified herein.² Applicant is allowed, as noted in the trial schedule below, until August 25, 2016 to file its answer.

² Applicant is advised, however, that the Board will look with disfavor upon any further failure to comply with deadlines set by the Board or the Trademark Rules of Practice.

Proceedings are resumed. Dates are reset as follows:

Time to Answer	8/30/2016
Deadline for Discovery Conference	9/29/2016
Discovery Opens	9/29/2016
Initial Disclosures Due	10/29/2016
Expert Disclosures Due	2/26/2017
Discovery Closes	3/28/2017
Plaintiff's Pretrial Disclosures	5/12/2017
Plaintiff's 30-day Trial Period Ends	6/26/2017
Defendant's Pretrial Disclosures	7/11/2017
Defendant's 30-day Trial Period Ends	8/25/2017
Plaintiff's Rebuttal Disclosures	9/9/2017
Plaintiff's 15-day Rebuttal Period Ends	10/9/2017

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 2.125.

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 2.129.