UNITED STATES PATENT AND TRADEMARK OFFICE
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August 16, 2018

Opposition No. **91229847**

Christie Brinkley Skincare, LLC

v.

Alumier Europe Ltd[1]

Yong Oh (Richard) Kim, Interlocutory Attorney:

Under the Board's institution order of August 31, 2016, discovery closed on May 8, 2017, Opposer's pretrial disclosures were due on June 22, 2017, and Opposer's testimony period was scheduled to open on July 8, 2017.

On June 28, 2017, Applicant filed a paper styled "Motion to Reschedule Discovery," pursuant to which Applicant seeks to "reschedule the discovery calendar by pushing all dates forward by an amount that the Board regards as reasonable."[2] *Motion to Reschedule Discovery*, 7 TTABVUE 2. The filing notes that "[o]n or about June 23, 2017, [Opposer] served [its] pretrial disclosure." *Id.*

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[1] By the filing of Applicant's answer on October 11, 2016, the appearance of new counsel on behalf of Applicant has been noted and Applicant's correspondence information has been accordingly updated. *See Jacques Moret Inc. v. Speedo Holdings B.V.*, 102 USPQ2d 1212, 1216 (TTAB 2012) (law firm that filed motion recognized as counsel of record for the party on whose behalf the motion was filed).

[2] Although the motion is uncontested, the Board has declined to grant the motion as conceded for the reasons stated in this order.

As Applicant's motion comes after the close of discovery, the Board views Applicant's request as one to reopen discovery. For a party to reopen the time for taking a required action, it must set forth with particularity the detailed facts demonstrating that its failure to timely act was the result of excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B); *Gaylord Entm't Co. v. Calvin Gilmore Prods. Inc.*, 59 USPQ2d 1369, 1372 (TTAB 2000).

A determination of excusable neglect takes into account four factors: (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. *See Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 (TTAB 1997). Depending on the circumstances, the third factor may be deemed to be the most important. *Id.*, n.7.

By Applicant's account, it does not appear that Applicant made much of the six-month period allowed for discovery. Applicant explains that "[f]ollowing the Answer, [Applicant] waited to be contacted by [Opposer] in connection with scheduling a discovery conference by 11/9/2016 [but] [n]o communication from [Opposer] was ever received." *Motion to Reschedule Discovery*, 7 TTABVUE 2. Applicant further states that it "assumed that [Opposer] had either lost interest in the opposition or was delaying discovery." *Id.*

These explanations provide little excuse for Applicant's failure to take discovery during the time allowed. Discovery in Board proceedings is not governed by any

concept of priority of discovery. *See Miss America Pageant v. Petite Prods., Inc.*, 17 USPQ2d 1067, 1070 (TTAB 1990). As such, Applicant was under no obligation to wait for Opposer to serve discovery requests before propounding its own. While the Board recognizes that Opposer is the plaintiff in this matter, Applicant cannot point to Opposer's inaction as the reason for its own inaction. If Applicant chose not to act in the hope that Opposer has "lost interest in the opposition," Applicant did so by its own choice and at its own peril. Moreover, Applicant's reference to the Board's ACR procedure and Applicant's interest in potentially exploring the use of the procedure in this matter provides no cause for reopening discovery, considering that Opposer has already served its pretrial disclosures and was ready to proceed to trial at the time Applicant filed its motion. To reopen discovery to allow Applicant to explore the possibility of utilizing a procedure intended to expedite the disposition of a Board proceeding and then to provide for another period of discovery will only serve to further delay the conclusion of this matter at this point in the proceeding. Therefore, the second and third factors weigh heavily against a finding of excusable neglect.

As to the first and fourth factors, there is insufficient information in the record from which the Board can conclude prejudice to Opposer or good faith on the part of Applicant. Accordingly, these factors are neutral.

In view thereof, the Board does not find excusable neglect on the part of Applicant to warrant a reopening of discovery. Applicant's motion is hereby **DENIED**.

Dates are **RESET** as follows:

Plaintiff's 30-day Trial Period Ends	**9/30/2018**
Defendant's Pretrial Disclosures Due	**10/15/2018**
Defendant's 30-day Trial Period Ends	**11/29/2018**
Plaintiff's Rebuttal Disclosures Due	**12/14/2018**
Plaintiff's 15-day Rebuttal Period Ends	**1/13/2019**
Plaintiff's Opening Brief Due	**3/14/2019**
Defendant's Brief Due	**4/13/2019**
Plaintiff's Reply Brief Due	**4/28/2019**
Request for Oral Hearing (optional) Due	**5/8/2019**

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, matters in evidence, the manner and timing of taking testimony, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence.

Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

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