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TTAB

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RSC

January 27, 2021

Opposition No. 91230071

*Report It Systems Inc.*

*v.*

*Anonymous Alerts, LLC*

**Before Thurmon, Deputy Chief Administrative Trademark Judge,  
Wellington, and Pologeorgis, Administrative Trademark Judges.**

**By the Board:**

On July 30, 2020, the Board issued an order pursuant to Trademark Rule 2.128(a)(3) allowing Opposer time to show cause why the Board should not treat Opposer's failure to file a brief as a concession of the case.<sup>1</sup> Opposer timely filed a combined response to the show cause order and a motion to reopen the deadline for its pretrial disclosures and to reset all subsequent trial dates.<sup>2</sup> Accordingly, this proceeding is before the Board for consideration of Opposer's combined response and motion. Applicant filed a brief in opposition thereafter, and Opposer did not file a reply brief.

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<sup>1</sup> Opposer's main brief was due June 25, 2020. *See* 39 TTABVUE.

<sup>2</sup> 41 TTABVUE.

## **I. Preliminary Matter**

Neither Opposer's combined response to the show cause order and motion to reopen nor Applicant's response include proof of service as required by Trademark Rule 2.119(a), 37 C.F.R. § 2.119(a). It is clear that Applicant is aware of Opposer's submission as it timely filed a response brief. Accordingly, we have considered Opposer's combined response and motion to reopen. However, because Opposer did not file a reply brief, and there is no other indication that Opposer received service of Applicant's response, we will not consider Applicant's response. Nonetheless, because Applicant clearly opposes Opposer's response to the show cause order and the motion to reopen we will not treat the combined response and motion as conceded, but will consider it on the merits. *Promgirl Inc. v. JPC Co.*, 94 USPQ2d 1759, 1760 n.1 (TTAB 2009).

## **II. Show Cause Order**

"The purpose of Trademark Rule 2.128(a)(3) is to save the Board the burden of determining a case on the merits where the parties have settled, but have neglected to notify the Board itself, or where the plaintiff has lost interest in the case." *Vital Pharms., Inc. v. Kronholm*, 99 USPQ2d 1708, 1709-10 (TTAB 2011); *see also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 536 (2020). If a show cause order issues under Trademark Rule 2.128(a)(3) and the plaintiff files a response indicating it has not lost interest in the case, the show cause order will be discharged. *See Vital Pharms.*, 99 USPQ2d at 1710.

In its response, Opposer states that the parties have been engaged in ongoing settlement efforts, however negotiations have recently stalled and Opposer intends to continue with the opposition proceeding. Because Opposer has demonstrated it has not lost interest in this case, the show cause order is **discharged**, and the Board will not enter judgment against Opposer on the basis of lack of interest stemming from its failure to file a brief on the case.

### **III. Motion to Reopen**

Turning to the issue of reopening Opposer's trial period, Opposer bears the burden of establishing that its failure to comply with the Board's deadlines was the result of excusable neglect. Fed. R. Civ. P. 6(b).<sup>3</sup> *See also* TBMP § 509.01(b). In determining excusable neglect, the Board considers the following factors as set forth in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993), and adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997): (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.

The determination of whether a party's neglect is excusable is "at bottom an equitable one, taking into account all relevant circumstances[.]" *Pioneer*, 507 U.S. at 395; *accord FirstHealth of the Carolinas v. CareFirst of Maryland Inc.*, 479 F.3d 825,

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<sup>3</sup> Fed. R. Civ. P. 6(b) is applicable to Board inter partes proceedings by Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a).

81 USPQ 2d 1919, 1922 (Fed. Cir. 2007); *Pumpkin Ltd.*, 43 USPQ2d at 1584 n.2. Ultimately, however, the determination of whether or not a party's neglect is excusable lies within the discretion of the Board. *FirstHealth of the Carolinas*, 81 USPQ2d at 1921.

We first consider the third *Pioneer* factor, i.e., the reason for the delay and whether it was within Opposer's reasonable control. Opposer does not contend it was unaware of its pretrial disclosures deadline, the closing date of its testimony period, or the deadline for its main brief. Rather, Opposer asserts its deadlines were missed due to its good faith settlement negotiations with Applicant, and that Opposer "expected to continue negotiations until such a resolution was reached."<sup>4</sup> Opposer continues that the "onset of the COVID pandemic in early 2020 complicated the normal course of business for Opposer and its counsel and compounded the circumstances under which the deadlines were allowed passed."<sup>5</sup>

The parties had reset dates in this proceeding on numerous occasions prior to passing of the deadline for Opposer's pretrial disclosures, which was last reset as December 3, 2018.<sup>6</sup> After this deadline passed Opposer filed four more requests to extend dates (without requesting the reopening of the deadline for its pretrial disclosures) such that Opposer's testimony period ended on January 12, 2020.<sup>7</sup> In

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<sup>4</sup> 41 TTABVUE 5.

<sup>5</sup> *Id.*

<sup>6</sup> 27 TTABVUE.

<sup>7</sup> 28 TTABVUE, 29 TTABVUE, and 33 TTABVUE through 39 TTABVUE. Opposer's March 4, 2019, request for an extension was denied for failure to provide a status report on the parties' settlement negotiations. 32 TTABVUE.

view of the numerous extensions granted by the Board in this proceeding, Opposer was clearly aware of the Board's practice of granting extensions of dates to accommodate settlement efforts. Opposer "brought this case and, in so doing, took responsibility for moving forward on the established schedule." *Atlanta-Fulton Cty. Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 18560 (TTAB 1998). Moreover, "it is well established that the mere existence of settlement negotiations alone does not justify a party's inaction or delay." *Atlanta-Fulton Cty. Zoo*, 45 USPQ2d at 1859; *see also Vital Pharms.*, 99 USPQ2d at 1711; *cf Fairline Boats plc v. New Howmar Boats Corp.*, 59 USPQ2d 1479, 1480 (TTAB 2000) (denying motion to extend deadlines under the more lenient standard of good cause, noting mere existence of settlement negotiations or proposals without more do not justify petitioner's delay in proceeding with testimony). The existence of settlement discussions did not prevent Opposer from serving its pretrial disclosures, taking testimony or filing its brief during the assigned period, or from filing a motion to extend or suspend its relevant deadlines. *Vital Pharms.*, 99 USPQ2d at 1711; *Atlanta-Fulton Cty. Zoo*, 45 USPQ2d at 1859. At all relevant times, it remained within Opposer's control to ascertain that its reset trial period was approaching and passing, and to seek an additional extension of its assigned testimony period in order to accommodate the parties' settlement efforts.

We next turn to Opposer's reliance on the COVID-19 pandemic. While the pandemic is outside Opposer's reasonable control, Opposer's passing reference to the pandemic is insufficient. Opposer's pretrial disclosures and the close of its testimony

period were both prior to the onset of the pandemic in the United States.<sup>8</sup> Opposer has not specifically explained how the pandemic prevented it from meeting the deadlines in this proceeding, or requesting an extension of time to do so. *See HKG Indus. Inc. v. Perma Pipe, Inc.*, 49 USPQ2d 1156, 1158 (TTAB 1998) (motion to reopen denied because the movant failed to provide detailed factual information in support); *see also Gaylord Entm't Co v. Calvin Gilmore Prods. Inc.*, 59 USPQ2d 1369, 1372-73 (TTAB 2000).

In view of the foregoing, Opposer has not established that its failure to meet the deadlines in this proceeding, or file a motion to extend its time for doing so, was beyond its reasonable control. Accordingly, the third *Pioneer* factor weighs heavily against a finding of excusable neglect.

Turning to the second *Pioneer* factor, the length of delay and its potential impact on the proceedings, we must evaluate the total length of the delay caused by Opposer's failure to meet the Board's deadlines, including the time for the Board to consider this motion. *See, e.g., Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1702–1703 (TTAB 2002); *Poly John Enters. Corp. v. 1-800-Toilets, Inc.*, 61 USPQ2d 1860, 1862 (TTAB 2002). Opposer contends the length of delay and potential impact on the proceedings is insignificant in view of how long this

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<sup>8</sup> For example, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which recognized that the COVID-19 pandemic imposed significant hardships, was enacted on March 27, 2020. *See* the official notice on the Office's website at: <https://www.uspto.gov/about-us/news-updates/uspto-announces-extension-certain-patent-and-trademark-related-timing>. While the deadline for Opposer's main brief may have been during the pandemic, as discussed below, it would be futile to reopen the time for filing briefs. *See Vital Pharms.*, 99 USPQ2d at 1710 n. 11.

proceeding has been pending and because it is requesting an abbreviated trial schedule. However, the delay caused by Opposer's failure to take action is significant. Although the parties agreed to numerous extension of time, in the absence of a suspension the Board presumes the parties are working toward settlement simultaneously with preparing for trial and any other pertinent deadlines. Opposer's pretrial disclosure deadline passed more than two years ago, its testimony period closed one year ago, and its main brief was due seven months ago. If we were to grant Opposer's motion this would delay resolution of this case by several additional months,<sup>9</sup> and runs counter to the Board's interest in an expeditious adjudication of its cases. *See Pumpkin Ltd.*, 43 USPQ2d at 1588 ("The Board, and parties to Board proceedings generally, clearly have an interest in minimizing the amount of the Board's time and resources that must be expended on matters ... which come before the Board solely as a result of a sloppy practice or inattention to deadlines on the part of litigants or their counsel."); *see also Poly John Enters. Corp.*, 61 USPQ2d at 1862 (same). Accordingly, the second *Pioneer* factor also weighs heavily against a finding of excusable neglect.

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<sup>9</sup> While Opposer attempts to offset the delay by requesting an expedited schedule and mutual exchange of pretrial disclosures, Applicant has not consented to this deviation from the Board's rules and standard schedule. The Board will not approve a unilateral motion of one party to implement a change to the standard trial procedure.

Regarding the first and fourth *Pioneer* factors, there is no evidence of any prejudice to Applicant beyond mere delay,<sup>10</sup> and no evidence of bad faith on the part of Opposer.

The factors for determining excusable neglect are not necessarily weighed equally, and the Board, in its discretion, can consider the circumstances of the case when weighing and balancing the factors. *See, e.g., FirstHealth of the Carolinas*, 81 USPQ2d at 1922 (affirming the Board’s finding of no excusable neglect based on second and third *Pioneer* factors, with third weighted heavily in the analysis); *Pumpkin Ltd.*, 43 USPQ2d at 1588 (“The dominant factors in the ‘excusable neglect’ analysis in this case are the second and third *Pioneer* factors. The absence of prejudice and bad faith in this case, under the first and fourth *Pioneer* factors, is outweighed by the combination of circumstances under the second and third *Pioneer* factors which are present in this case[.]”); *see also, e.g., Vital Pharms.*, 99 USPQ2d at 1710 (finding no excusable neglect based on second and third factors, with third weighted heavily in the analysis); *Atlanta-Fulton County Zoo*, 45 USPQ2d at 1860 (same). After careful consideration of the *Pioneer* factors and all of the relevant circumstances in this case, we find on balance that Opposer’s failure to timely act was not the result of excusable neglect. In view of this finding, Opposer’s motion to reopen is **denied**.

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<sup>10</sup> Prejudice under the first factor contemplates prejudice to the non-movant’s ability to litigate the case due to, for example, the loss or unavailability of evidence or witnesses which otherwise would have been available to the non-movant. *Pumpkin Ltd.*, 43 USPQ2d at 1587.

Inasmuch as Opposer's motion to reopen is denied, and the record includes no evidence or admissions upon which Opposer can carry its burden of proof,<sup>11</sup> the Board may enter judgment against Opposer for failure to prove its case. *Old Nutfield Brewing Co.*, 65 USPQ2d at 1704 (judgment entered under Trademark Rule 2.132(a) where opposer's motion to reopen its testimony period denied for failure to establish excusable neglect); *see also Gaylord Entm't.*, 59 USPQ2d at 1372 (show cause order discharged but plaintiff failed to show excusable neglect to reopen case). In view of the record, judgment is hereby entered against Opposer and the opposition is **dismissed with prejudice**.

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<sup>11</sup> While Opposer attached a copy of its certificate of registration to its notice of opposition, (1 TTABVUE 7) that copy is not competent evidence to show "the current status of and current title to the registration," as required by Trademark Rule 2.122(d)(2), 37 C.F.R. § 2.122(d)(2). *See Syngenta Crop. Prot. Inc. v. Bio-Chek LLC*, 90 USPQ2d 1112, 1116-17 (TTAB 2009); *see also Hard Rock Café Int'l (USA) Inc. v. Elsea*, 56 USPQ2d 1504, 1511 (TTAB 2000) (status and title copies prepared three years prior to opposition not reasonably contemporaneous). Moreover, the printed Internet materials submitted as an exhibit to Opposer's notice of opposition (1 TTABVUE 9-12) are not evidence on behalf of Opposer as they were not properly identified and introduced in evidence during trial. Trademark Rule 2.122(c), 37 C.F.R. § 2.122(c). *See* TBMP § 317.