UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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wbc

Mailed: October 25, 2019

Opposition No. 91240198

Poreba Machine Tool Company LLC

v.

Fabryka Obrabiarek RAFAMET Spólka Akcyjna

By the Trademark Trial and Appeal Board:

As last reset, Opposer's testimony period ended May 10, 2019. *See* 7 TTABVUE 2. During its testimony period, Opposer failed to introduce any evidence or testimony. Applicant then filed a motion to dismiss for failure to take testimony under Rule 2.132. *See* 9 TTABVUE. Opposer filed a combined brief in opposition to the motion to dismiss and a motion to extend its disclosure and testimony periods. *See* 11 TTABVUE. Applicant opposes the motion to reopen.[1] *See* 12 TTABVUE.

The Board first addresses the motion to extend.

Motion to Extend/Reopen

As an initial matter, Opposer's motion captioned as a "motion to extend" its disclosure and testimony periods was filed after expiration of those time

[1] The Board has considered the parties' submissions and presumes the parties' familiarity with the factual bases for the motions, and does not recount them here, except as necessary to explain the Board's decision.

periods. If a motion to extend is filed prior to the expiration of the period as originally set or previously extended, the motion is one to extend a period that has not yet closed (often referred to as a motion to "extend"), and the moving party need only show good cause for the requested extension. If, however, the motion is not filed until after the expiration of the period as originally set or previously extended, the motion is one to extend a period that has closed (often referred to as a motion to "reopen"), and the moving party must show that its failure to act during the time allowed therefor was the result of excusable neglect. *See* Fed. R. Civ. P. 6(b); *Vital Pharmaceuticals, Inc. v. Kronholm*, 99 USPQ2d 1708, 1710 n.10 (TTAB 2011).

In view thereof, the Board construes and considers Opposer's captioned motion to extend as a motion to reopen.

For the Board to reopen an expired period, Opposer must establish that his 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) (2019). In *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380, 395 (1993), as adopted by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the Supreme 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.

Regarding the first *Pioneer* factor, the Board is not persuaded that there is prejudice to Applicant. 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, such as the loss of potential witnesses, which has not been alleged here. *See Pumpkin Ltd.,* 43 USPQ2d at 1587 (*citing Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997)); TBMP § 509.01(b)(1). Although Applicant alleges that it has had to alter its marketing plans and this matter "prevents Applicant from using its trademark in the U.S.," there are no allegations that persuade the Board that Applicant is unable to litigate this case and as such, this factor weighs in favor of finding excusable neglect. 12 TTABVUE 6.

Regarding the second *Pioneer* factor, Opposer's testimony period closed May 10, 2019 with the motion to reopen filed June 11, 2019. Accordingly, based on the facts of this proceeding, the impact of the delay upon this proceeding is not significant but it is not insignificant either; this factor is neutral in the Board's excusable neglect analysis.

Turning to the third *Pioneer* factor, Opposer asserts that it needs additional time to "gather information"; and that some of the events to be investigated occurred in Poland. 11 TTABVUE 2-33. This factor is within Opposer's control and there are no facts on the record which indicate Opposer's failure to act was

not within its control. Accordingly, this factor weighs against a finding of excusable neglect.

Finally, regarding the fourth *Pioneer* factor, there is no evidence of bad faith on Opposer's part. Prior to the instant motion, Opposer has neither sought an extension of time nor a reopening of time. This factor weighs in favor of finding there is excusable neglect.

After consideration of all the factors and the parties' filings, Opposer has shown the requisite excusable neglect, although just barely. However, based on the record before it, the Board is not persuaded that discovery or that all disclosure deadlines should be reopened. To the extent that Opposer seeks a reopening of discovery deadlines, the motion is **denied**.[2] Notwithstanding the foregoing, the Board **grants** Opposer's motion to reopen, as modified herein, its pretrial disclosure[3] and testimony periods. The Board has generously allowed Opposer additional time to present its case, it expects Opposer to comply with the Board's deadlines. Failure to do so could result in judgment against Opposer.

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[2] Opposer seeks to reopen "Disclosure and Trial Dates." 11 TTABVUE 2. Inasmuch as "disclosure" could include certain discovery disclosure deadlines (e.g., initial disclosures, expert disclosures), the Board has addressed (and denied) reopening discovery deadlines.

[3] Pursuant to Trademark Rule 2.121(a), a party's time for pretrial disclosures will be reset when that party's testimony period is reset. *See* MISCELLANEOUS CHANGES TO TRADEMARK TRIAL AND APPEAL BOARD RULES, 81 Fed. Reg. 69950, 69963 (October 7, 2016) ("The Office is further amending § 2.121(a) to add that the resetting of a party's testimony period will result in the rescheduling of the remaining pretrial disclosure deadlines without action by any party. These amendments codify current Office practice.").

Motion to Dismiss

In view of the Board's order, Applicant's motion to dismiss under Rule 2.132 is **moot** and will be given no further consideration.

Schedule

Proceedings are resumed. Dates are reset as indicated below:

Plaintiff's Pretrial Disclosures Due	November 5, 2019
Plaintiff's 30-day Trial Period Ends	December 20, 2019
Defendant's Pretrial Disclosures Due	January 4, 2020
Defendant's 30-day Trial Period Ends	February 18, 2020
Plaintiff's Rebuttal Disclosures Due	March 4, 2020
Plaintiff's 15-day Rebuttal Period Ends	April 3, 2020
BRIEFS SHALL BE DUE AS FOLLOWS:	
Plaintiff's Main Brief Due	June 2, 2020
Defendant's Main Brief Due	July 2, 2020
Plaintiff's Reply Brief Due	July 17, 2020

General Information

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).