

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
General Email: TTABInfo@uspto.gov

JK

January 2, 2025

Opposition No. 91281471

Wonderful Citrus LLC

v.

Flavorful Brands, LLC

By the Board:

This proceeding is before the Board for consideration of Opposer's timely response to the Board's August 27, 2024 show cause order which was issued for Opposer's failure to file a main brief on the case.

Authorities and Analysis

It is not the policy of the Board to enter judgment against a plaintiff for failure to file a main brief on the case if the plaintiff still wishes to obtain an adjudication of the case on the merits. *Vital Pharm. Inc. v. Kronholm*, 99 USPQ2d 1708, 1709-10 (TTAB 2011). If a show cause order is issued pursuant to Trademark Rule 2.128(a)(3) and the plaintiff files a response indicating that it **has not lost interest** in the case, the Board will discharge the show cause order, and judgment will not be entered against plaintiff based on the presumption of lack of interest stemming from its failure to file a main brief. *Conopco, Inc. v. Transom Symphony Opco, LLC*, 2022

USPQ2d 504, at *4 (TTAB 2022); *Vital Pharm. Inc. v. Kronholm*, 99 USPQ2d at 1710.

If the plaintiff files no response to the show cause order, or files a response indicating that it has lost interest in the case, judgment may be entered against the plaintiff. Notwithstanding that a plaintiff may have shown that it is still interested in having the Board decide the case on its merits, unless it included with its response a motion to reopen its time for filing its brief, a plaintiff may not have a second chance to file a brief. *Id.* If the plaintiff files a motion to reopen that is granted by the Board based on plaintiff's showing of excusable neglect, plaintiff will then be afforded an opportunity to file its main trial brief, and the Board will reset the times for filing that brief and all remaining briefs on the case.

Even if the show cause order is discharged, the plaintiff may not be accorded an opportunity to present a brief for consideration because a late-filed brief may not be accepted and the time for filing a brief may not necessarily be reset. *Id.* The plaintiff's claims may be dismissed if plaintiff placed no evidence in the record. In other words, even if a plaintiff avoids entry of judgment based on loss of interest, it may still face dismissal for failure to prosecute unless it files, and the Board grants, a motion to reopen the plaintiff's testimony period, and the plaintiff files admissible evidence or testimony during its reopened testimony period. TBMP § 536.

In response to the show cause order, Opposer affirmatively states it has not lost interest in the case. 13 TTABVUE 4. Accordingly, the show cause order is hereby discharged, and judgment will not be entered against Opposer based on the presumption of lack of interest stemming from the failure to file a main brief.

Opposer included with its response a motion wherein it seeks to reopen “discovery and the briefing schedule,” or in the alternative to reopen the trial periods. 13 TTABVUE 7. The motion is supported by the declaration of its in-house counsel of record. 13 TTABVUE 9.

Opposer must show its failure to act during the time previously allotted therefor was the result of excusable neglect. Fed. R. Civ. P. 6(b)(1)(B). The analysis used to determine whether a party has shown excusable neglect was set forth by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380 (1993), and adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). The excusable neglect determination must take into account all relevant circumstances surrounding the party’s omission or delay, including 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. *See, e.g., Dating DNA LLC v. Imagini Holdings Ltd.*, 94 USPQ2d 1889, 1892-93 (TTAB 2010) (weighing all four factors together, motion to reopen discovery denied; opposer’s “oversight” in failing to timely serve initial disclosures and seek an extension of the discovery period does not constitute excusable neglect). TBMP § 509.01(b)(1).

A party moving to reopen its time to take required action must set forth with particularity the detailed facts upon which its excusable neglect claim is based; mere conclusory statements are insufficient. *Gaylord Entm’t. Co. v. Calvin Gilmore Prod.*

Inc., 59 USPQ2d 1369, 1372 (TTAB 2000) (no specific reasons for former counsel's inaction). For purposes of making the excusable neglect determination, it is irrelevant that the failure to timely take the required action was the result of counsel's neglect and not the neglect of the party itself. Under our system of representative litigation, a party must be held accountable for the acts and omissions of its chosen counsel. *Id.*, at 1373.

Regarding the first factor, "prejudice to the nonmovant" contemplated under this factor must be more than the mere inconvenience and delay caused by the movant's previous failure to take timely action, and more than the nonmovant's loss of any tactical advantage that it otherwise would enjoy as a result of the movant's delay or omission. Rather, "prejudice to the nonmovant" is prejudice to the nonmovant's ability to litigate the case, e.g., where the movant's delay has resulted in a loss or unavailability of evidence or witnesses that otherwise would have been available to the nonmovant. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d at 1587, (citing *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997)); *Paolo's Assoc. L.P. v. Bodo*, 21 USPQ2d 1899, 1904 (Comm'r 1990).

Opposer argues all the same witnesses that were previously available will still be available, and the mere passage of time is generally not considered to be prejudicial in the absence of other facts such as the loss of witnesses. Consistent with these points, the Board finds that the record does not indicate Applicant will be prejudiced. Thus, this factor favors finding excusable neglect.

As for the second factor, the length of the delay and its potential impact on judicial proceedings, Opposer acknowledges the length of the delay is “not insubstantial,” and maintains the delay would be even longer if the Board were to enter judgment and “force Opposer to initiate cancellation proceedings.” 13 TTABVUE 5. It further argues that when the show cause order issued, Opposer reached out to Applicant to attempt to finalize settlement.

Under the schedule as reset, trial would have ended June 15, 2024, and briefing of the case would have ended September 28, 2024. The delay which can be attributed to Opposer’s failure to engage in trial and brief the case has been several months and has impacted the opportunity of the Board to reach a decision on the merits. This factor is neutral.

Turning to the third factor, it has been held that “the reason for the delay, including whether it was within the reasonable control of the movant,” may be deemed to be the most important of the *Pioneer* factors in a particular case. *See, e.g., FirstHealth of the Carolinas Inc. v. CareFirst of Maryland Inc.*, 479 F.3d 825, 81 USPQ2d 1919, 1921-22 (Fed. Cir. 2007) (Court affirmed a finding of no excusable neglect based on the second and third factors, with the third weighed heavily in the analysis). TBMP § 509.01(b)(1).

In this proceeding, as most recently reset on April 10, 2023, discovery closed December 3, 2023, and Opposer’s testimony period closed March 2, 2024. 10 TTABVUE 1. In its motion, Opposer explains:

As of August 1, 2023, the parties had essentially agreed to a written settlement proposition, expect (sic) for two minor provisions: the sell off

date for Applicant's products bearing the applied for mark, and whether Opposer would object to another mark for which Applicant may seek registration for in the future. Opposer's counsel communicated the terms of the agreement last (on August 1, 2023) and was awaiting a response from Applicant's counsel. With the understanding, that these two outstanding issues were minor, and essentially ministerial in nature, and that parties had effectively settled the case, Opposer removed the Board's future deadlines from counsel's calendar. However, Applicant's counsel never responded, and this matter inadvertently fell off Opposer's counsel's radar.

13 TTABVUE 3. Opposer's counsel incorrectly assumed that "the deal was done' and the proceeding was effectively over," and counsel made the mistake of removing the case deadlines from the docketing system. 13 TTABVUE 5. In the motion Opposer's counsel acknowledges the error and that the deadlines should not have been removed until the agreement was signed and proceedings were officially terminated. *Id.* Opposer also explains that counsel was so certain the parties had an agreement in place that it chose not to file an opposition to another of Applicant's applications in reliance on the belief of the parties' agreement. Opposer maintains that if the Board were to deny the motion, it would provide Applicant with no incentive to finalize the agreement and the parties will relitigate this matter in the form of a cancellation proceeding. 13 TTABVUE 6.

The determination of excusable neglect, including this factor, is an equitable one, taking into account all relevant circumstances. Here, the most relevant and recurrent circumstance is that Opposer's counsel and Opposer believed, even if incorrectly, that the parties had reached an agreement and only needed to address "two minor provisions left for Applicant to weigh in on" before being in a position to ministerially file the appropriate motion or notice to have the Board terminate the

proceeding. 13 TTABVUE 5. It follows that Opposer also believed engaging in trial and putting evidence in the record was not necessary in view of the supposed settlement.¹ Opposer's counsel attests that Applicant did not respond to a communication setting forth the "final revisions of the settlement agreement," and the record does not show otherwise (i.e., Applicant did not file a brief contesting this description of counsel's communications). 13 TTABVUE 10. On this record, it appears Opposer's certainty in a settlement having been reached, and resultant removal of the case deadlines from its docketing system, were based on a document-based and plausible belief, rather than gamesmanship or bad faith. Clearly, the better practice would have been for Opposer's counsel to wait until securing an affirmative and definitive response from Applicant before removing the case from the docket, or at least to be more diligent in managing the details of settlement. Nonetheless, Opposer's belief that the settlement was final is credible, and with the possibility of an ultimate settlement, if appropriate, rather than judgment and dismissal of the

¹ Here, the record does not include evidence. Also, the Board notes that during the discovery period, Opposer's pleaded Registration No. 5161708 was cancelled, on September 29, 2023, pursuant to Trademark Act Section 8. Cancelled registrations have no probative value. *Black & Decker Corp. v. Emerson Elec. Co.*, 84 USPQ2d 1482, 1490 (TTAB 2007) (pleaded registrations made of record; cancelled registration has no probative value). It is not evidence of anything except that the registration issued; it is not evidence of any presently existing rights in the mark shown in the registration, or that the mark was ever used. *Action Temporary Serv. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("a canceled registration does not provide constructive notice of anything"); *A&H Sportswear Co. v. Yedor*, 2019 USPQ2d 111513, at *5 n.4 (TTAB 2019) ("a cancelled registration is not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act"); *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018) (a cancelled registration is only evidence that the registration issued, and is not evidence of use of the mark at any time).

opposition, the parties maintain the opportunity to carry out the terms of settlement and coexist. This factor somewhat favors finding excusable neglect.

As for the fourth factor, the record clearly does not reflect that Opposer acted in bad faith. As Opposer further explains, as soon as it learned of its error, it reached out to Applicant in what appears to have been a sincere effort to complete the settlement agreement. This factor favors finding excusable neglect.

After full consideration, including affording each of the four *Pioneer* factors its appropriate weight, the Board finds that Opposer has shown the requisite excusable neglect to reopen the trial periods.² This opposition will proceed to trial.

To be clear, the Board has an interest in concluding the cases on its docket. To this end, and to avoid further delay, the Board will not entertain any unconsented motion to suspend or extend the schedule deadlines as set forth in this order.

Resumption and Schedule

Proceedings are resumed, and trial dates are reset as follows:

Plaintiff's Pretrial Disclosures Due	1/21/2025
Plaintiff's 30-day Trial Period Ends	3/7/2025
Defendant's Pretrial Disclosures Due	3/22/2025
Defendant's 30-day Trial Period Ends	5/6/2025
Plaintiff's Rebuttal Disclosures Due	5/21/2025
Plaintiff's 15-day Rebuttal Period Ends	6/20/2025
Plaintiff's Opening Brief Due	8/19/2025
Defendant's Brief Due	9/18/2025
Plaintiff's Reply Brief Due	10/3/2025
Request for Oral Hearing (optional) Due	10/13/2025

² Opposer has not shown the requisite excusable neglect to reopen discovery; accordingly, the Board grants the relief in the alternative that Opposer sought in its motion.

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).

TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing. **Note:**

Opposition No. 91281471

Parties are strongly encouraged to check the entire document before filing.³ The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the [ESTTA help](#) webpage.

³ To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.