

THIS OPINION IS
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OF THE TTAB

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

coggins

Mailed: December 30, 2015

Cancellation No. 92058772

The Remnant of Israel, Inc.

v.

World Covenant Ministries, Inc.

Before Cataldo, Wellington, and Lykos,
Administrative Trademark Judges.

By the Board:

No main brief having been filed, the Board issued an order on August 21, 2015, under Trademark Rule 2.128(a)(3), allowing Petitioner thirty days in which to show cause why its failure to file a main brief on the case should not be treated as a concession of the case. Now before the Board is Petitioner's September 1, 2015 combined motion to reopen "the briefing deadlines and other scheduling deadlines" and to discharge the show cause order.

Procedural Issue

On September 24, 2015, Respondent filed a brief in response to Petitioner's combined motion; on November 2, 2015, Petitioner filed a reply brief in support of the combined motion; and on December 9, 2015, Respondent filed a sur-reply. Inasmuch as Respondent's responsive brief and Petitioner's reply brief are

untimely, and sur-replies are prohibited, these filings will not be considered. *See* Trademark Rules 2.119(c) and 2.127(a); TBMP § 502.02(b) (2015).

Show Cause Order Discharged

Petitioner states that “it has not lost interest in this case,” and “request[s] that the Board discharge its order to show cause.” It is the policy of the Board not to enter judgment against a plaintiff for failure to file a main brief on the case where the plaintiff, in its response to the show cause order, indicates that it has not lost interest in the case. *See Vital Pharm. Inc. v. Kronholm*, 99 USPQ2d 1708, 1710 (TTAB 2011); TBMP §§ 536 and 801.02(a). Inasmuch as it is clear that Petitioner has not lost interest in this case, the order to show cause under Trademark Rule 2.128(a)(3) is **discharged**, and judgment will not be entered against Petitioner based on a loss of interest in this case.

Motion to Reopen Denied

Petitioner asks the Board to “reopen the briefing deadlines and other scheduling deadlines ... to allow the [parties] an opportunity to file the required documentation.” We construe Petitioner’s request as a motion to reopen the testimony and briefing periods.¹ *See* TBMP § 536.

The requisite showing to be made by a party seeking to reopen an expired period is that of excusable neglect. Fed. R. Civ. P. 6(b)(1)(B). *See also* TBMP §§ 509.01(b)(1) and 536. There are four factors to be considered, within the context of all the relevant circumstances, to determine whether Petitioner’s neglect in this case is

¹ Construing the motion as one to reopen only the briefing deadlines would be futile because, as explained below, there is no evidence of record and no admission of any dispositive element. *See* TBMP § 536.

excusable; they are: (1) the danger of prejudice to Respondent, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within Petitioner's reasonable control, and (4) whether Petitioner has acted in good faith. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993). These factors do not carry equal weight. *See FirstHealth of the Carolinas Inc. v. CareFirst of Maryland Inc.*, 479 F.3d 825, 81 USPQ2d 1919, 1921-22 (Fed. Cir. 2007) (Court affirmed finding of no excusable neglect based on second and third factors, with third weighed heavily in the analysis). We note that several courts have stated that the third factor may be considered the most important in any particular case. *See, e.g., Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 n.7 (TTAB 1997).

Applying the *Pioneer* analysis, there does not appear to be measurable prejudice to Respondent should the Board reopen Petitioner's testimony period and time to file its main brief.

As to the second *Pioneer* factor, a reopening of the testimony period, which closed more than seven months prior to Petitioner's request to reopen that period, would cause substantial delay to this cancellation proceeding. A reopening of the time to file a brief, and its potential impact on judicial proceedings, would cause a less significant delay.

As to the third *Pioneer* factor, Petitioner states that during the discovery conference, counsel for both parties discussed the parties' desire to communicate directly with each other about the possibility of resolving this matter, and that

although the parties attempted to communicate with each other on several occasions, they were unable to actually discuss the matter because of the frequent travel schedule of Petitioner's president. While attempts at settlement are favored, they do not excuse a petitioner's failure to act within the prescribed times. *Vital Pharm. Inc. v. Kronholm*, 99 USPQ2d at 1711 (citing *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1859 (TTAB 1998) (the belief in settlement and/or the existence of settlement negotiations do not justify a party's inaction or delay or excuse it from complying with the deadlines set by the Board or imposed by the rules.)). Moreover, in this case, Petitioner admits that the parties never engaged in settlement discussions due to the frequent travel schedule of Petitioner's president. We cannot under these circumstances accept Petitioner's explanation that its failures to take testimony and file a brief (or obtain an extension of the deadlines for doing so) were due to attempted settlement negotiations. As the Board has previously stated, a plaintiff who brings a proceeding before the Board has the burden of prosecuting its case. *Vital Pharm. Inc.*, 99 USPQ2d at 1711. Petitioner could (and should) have sought extensions of its testimony period before its testimony period closed, and Petitioner could (and should) have sought an extension of its time to file a brief before such time expired. Similarly, we note that client and counsel share the duty to advance prosecution of the case. *See CTRL Sys. Inc. v. Ultraphonics of N. Am. Inc.*, 52 USPQ2d 1300, 1302 (TTAB 1999) (it is well settled that the client and the attorney share a duty to remain diligent in prosecuting the client's case).

We find that the reasons relied upon by Petitioner for its failures to act prior to the close of its testimony period, and prior to the expiration of its time to file its main brief, were within Petitioner's reasonable control. Those reasons (the desire to discuss settlement, without actual discussions) did not prevent Petitioner from taking testimony during the assigned period, from filing a timely brief, or from filing any requests to extend either period prior to the expiration of the period.

As to the fourth *Pioneer* factor, there is no evidence that Petitioner acted in bad faith.

After careful consideration of the *Pioneer* factors and the circumstances of this case, we find that Petitioner's reasons for not actively participating in this case fail to establish excusable neglect, and do not warrant a reopening of this case for the presentation of evidence and/or a reopening of Petitioner's time to file its main brief. Although the first and fourth *Pioneer* factors do not weigh against Petitioner, both the second and third factors weigh heavily against Petitioner. In view thereof, Petitioner's request to reopen testimony and the time for filing a main brief is **denied**.

Petition for Cancellation Denied

Petitioner failed to take any testimony or offer any evidence in its behalf,² Petitioner did not make any registrations of record with its petition for

² The exhibit attached to the combined motion to reopen and to discharge the show cause order is not in evidence. Trademark Rule 2.122(c).

cancellation,³ and Respondent in its answer did not admit to any dispositive allegations.⁴

Because Petitioner, as the party bearing the burden of proof in this proceeding, has not presented testimony or properly introduced any other evidence during its testimony period as proof of the allegations in the petition which have been denied by Respondent, Petitioner cannot prevail on any claim. *Vital Pharm. Inc.*, 99 USPQ2d at 1710 n.11. In view thereof, the petition must fail. Judgment is entered against Petitioner, and the petition for cancellation is **denied**.

³ Indeed, Petitioner did not plead ownership of any registration in the petition for cancellation. Although the ESTTA cover sheet lists one registration as a mark cited by Petitioner as a basis for cancellation, Petitioner did not plead ownership of that registration. Moreover, the mere listing of a registration on the ESTTA cover sheet does not provide current status of, and current title to, a registration as required by Trademark Rule 2.122. *See* TBMP § 704.03(b)(1)(A). *See also Melwani v. Allegiance Corp.*, 97 USPQ2d 1537, 1540 (TTAB 2010). In addition, we note that Respondent alleged in its answer that such registration was cancelled in 2008 – over five years before this proceeding was instituted.

⁴ In its answer, Respondent clearly denied Petitioner's grounds for cancellation.