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

Mailed: November 15, 2018

Cancellation No. 92058950

PDR Cigars USA Inc.

v.

Variety House Dist. LLC

Wendy Boldt Cohen, Interlocutory Attorney:

This case now comes before the Board on Petitioner's motion to reopen its testimony period, or to alternatively allow time to file the testimony of Kim Ullrich Flores.[1] *See* 60 TTABVUE. The motion is fully briefed.[2]

For the Board to reopen Petitioner's trial period, Petitioner must establish that its 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). In *Pioneer Invest. Svs. Co. v. Brunswick Assoc. L.P.*, 507 U.S. 380 (1993), as adopted by the Board in *Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997), the Supreme

[1] Petitioner filed the testimony of Kim Ullrich Flores on September 19, 2018. *See* 61 TTABVUE.

[2] The Board has considered the parties' submissions. The parties' arguments are set forth in their respective briefs and will not be summarized herein except as necessary to explain the Board's order.

Respondent filed an additional response (and duplicate thereof) on September 28, 2018. *See* 65 TTABVUE; 66 TTABVUE. A party is permitted a single response to a motion, no further papers (including surreply briefs) will be considered by the Board. *See* Trademark Rule 2.127; *Pioneer Kabushiki Kaisha v. Hitachi High Technologies America, Inc.*, 74 USPQ2d 1672, 1677 (TTAB 2005). In view thereof, Respondent's filings at 65 TTABVUE and 66 TTABVUE will not be considered.

Court clarified the meaning and scope of "excusable neglect," as used in the Federal Rules of Civil Procedure and elsewhere. The 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.

Pioneer Invest. Svs. Co., 507 U.S. at 395.

In its motion, Petitioner asserts that because the testimony deposition of Kim Ullrich Flores was rescheduled and because the transcript of the Flores testimony was not provided to Petitioner until September 18, 2018, Petitioner seeks an additional two days to file the Flores testimony. 60 TTABVUE 3.

Regarding the first *Pioneer* factor, there does not appear to be any evidence of prejudice to Respondent. Prejudice to the nonmovant as contemplated under the first *Pioneer* factor must be more than mere inconvenience or delay and more than the nonmovant's loss of any tactical advantage which it otherwise would enjoy as a result of movant's delay or omission. TBMP § 509.01(b)(1). Prejudice to the nonmovant is prejudice to the nonmovant's ability to litigate the case. *See Pumpkin Ltd. v. The Seed Corps,* 43 USPQ2d 1582, 1587 (TTAB 1997)(*citing Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997)); TBMP § 509.01(b)(1). The Board is not persuaded that there is any prejudice in Respondent's ability to litigate this case and Respondent does not argue there

is any prejudice. Therefore, this factor weighs in favor of a finding of excusable neglect.

Regarding the second *Pioneer* factor, Petitioner filed the motion to reopen two days after expiration of its trial period. Accordingly, the impact of the delay upon this proceeding is insignificant; this factor weighs in favor of finding excusable neglect.

Turning to the third *Pioneer* factor, Petitioner alleges that it was unable to get the transcript of Ms. Flores' testimony because, in part, of rescheduling necessitated by Ms. Flores' "conflicting personal obligations." 60 TTABVUE 3. Petitioner asserts that instead of engaging in motion practice, it re-noticed the Flores testimony for a later date. *See id*. The Board finds this factor as weighing in favor of finding excusable neglect.

Finally, regarding the fourth *Pioneer* factor, there is no evidence of bad faith on Petitioner's part. The Board notes that Petitioner has not abused the privilege of suspensions or extensions of time. This factor weighs in favor of finding excusable neglect.

On balance and keeping in mind the Board's policy of deciding cases on the merits, Petitioner's failure to timely act during its trial period is the result of excusable neglect. In view thereof, the motion to reopen is **granted as modified herein**. Petitioner is allowed until September 19, 2018 to file the Flores testimony with the Board. Inasmuch as Petitioner filed the Flores testimony with the Board on September 19, 2018, the Flores testimony is

hereby deemed timely filed. Because the Flores testimony has already been filed as permitted herein and Petitioner does not seek additional time for any other purpose, the Board does not find it necessary to otherwise reopen testimony.

Proceedings are resumed. Dates are reset[3] as follows:

Defendant's 30-day Trial Period Ends	December 30, 2018
Plaintiff's Rebuttal Disclosures Due	January 14, 2019
Plaintiff's 15-day Rebuttal Period Ends	February 13, 2019
BRIEFS SHALL BE DUE AS FOLLOWS:	
Plaintiff's Main Brief Due	April 14, 2019
Defendant's Main Brief Due	May 14, 2019
Plaintiff's Reply Brief Due	May 29, 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, the manner and timing of taking testimony, matters in evidence, 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

[3] Respondent file a copy of its pretrial disclosures with the Board. *See* 67 TTABVUE. "A party making a pretrial disclosure is not required to file routinely a copy of such disclosure with the Board." TBMP § 702.01.

scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).