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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding no.	92071596
Party	Plaintiff Schiebel Industries AG
Correspondence address	PETER J. PHILLIPS LUCAS & MERCANTI, LLP 30 BROAD STREET, 21ST FLOOR NEW YORK, NY 10004 UNITED STATES Primary email: info@lmiplaw.com Secondary email(s): pjphillips@lmiplaw.com (212) 661-8000
Submission	Opposition/Response to Motion
Filer's name	Peter J. Phillips
Filer's email	info@lmiplaw.com, pjp@lmiplaw.com, cphillips@lmiplaw.com
Signature	/Peter J. Phillips/
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Attachments	PETITIONERS OPPOSITION TO RESPONDENTS RETRACTION AND RE-SUBMISSION OF RULE 6b MOTION FOR LEAVE TO SUBMIT TESTIMONIAL EVIDENCE.pdf(238769 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of

US Trademark Reg. No. 5,440,864
Mark: CAMERA COPTERS (& Design)
Registered: April 10, 2018
Serial No.: 86774278
Filed: September 30, 2015
Int. Classes: 9 and 12 only

SCHIEBEL INDUSTRIES AG,

Petitioner,

v.

Cancellation No. 92071596

Camera Copters, Inc.,

Registrant.

Trademark Trial and Appeal Board

Commissioner for Trademarks

P.O. Box 1451

Alexandria, VA 22313-1451

**PETITIONER'S OPPOSITION TO RESPONDENT'S RETRACTION AND RESUBMISSION OF
RULE 6(B) MOTION FOR LEAVE TO SUBMIT TESTIMONIAL EVIDENCE**

Peter J. Phillips
Lucas & Mercanti LLP
30 Broad Street, 21st Fl.
New York, NY 10004
(212) 661-8000
pjp@lmiplaw.com
info@lmiplaw.com
Attorneys for Petitioner
Schiebel Industries AG

Petitioner files this Opposition to Respondent's Retraction and Resubmission of Rule 6(b) Motion for Leave to Submit Testimonial Evidence filed April 10, 2023.

Introduction

Respondent's Motion seeks the extraordinary relief of a retroactive extension of nine (9) months to file its testimonial evidence, alleging "excusable neglect." But Respondent has failed to demonstrate "excusable neglect," and its motion should be denied.

As Respondent's Motion states, Respondent's testimony period ended December 24, 2021. Two days prior, on December 22, 2021, Petitioner filed a Motion to Exclude Evidence, but that Motion did not toll the December 24, 2021 deadline, as stated in the TTAB Decision on the Motion issued May 13, 2022. Now, over nine (9) months after Respondent's testimony period ended on December 24, 2021, on September 27, 2022 Respondent filed its first Motion seeking extraordinary relief under Rule 6(b)(1)(B), Federal Rules of Civil Procedure, that the Board should retroactively extend the time due to "excusable neglect." That Motion was denied, and Respondent filed its present Motion on April 10, 2023. This request is unprecedented and should be denied because Respondent has failed to demonstrate "excusable neglect."

A significant number of deadlines have come and passed since the December 24, 2021 deadline for Respondent to submit testimonial evidence. If Respondent had timely filed testimonial evidence, Petitioner could have sought dispositions of one or more of the three proffered witnesses to obtain cross-examination testimony. That deadline has now passed.

Petitioner's deadline to submit rebuttal disclosures was May 31, 2022, and its 15-day rebuttal period ended June 30, 2022. Those dates have now passed and the opportunity to submit rebuttal evidence is now lost.

Petitioner's Opening Final Brief was due and was filed on August 29, 2022. Based on the state of the record, on evidence Petitioner submitted and Respondent submitted, Petitioner's counsel expended substantial time and effort in preparing its Opening Final Brief, making many strategy decisions in selecting the arguments to present in its Opening Final Brief. Those critical strategy decisions have now been made, and Petitioner has now been invoiced for that significant effort.

To now grant Respondent's Motion would be severely prejudicial to Petitioner based on the significant strategy decisions it has made over the nine (9) months, from December 24, 2021 to September 27, 2022, when Respondent belatedly filed its testimonial evidence. If Respondent's motion is granted, the prejudice to Petitioner could not be removed by simply resetting the schedule. While Petitioner should and could have the opportunity for depositions and rebuttal, its Opening Final Brief would need to be revised, resulting in prejudice to the Petitioner.

Even if the filing of Petitioner's Motion to Exclude Evidence tolled the period for Respondent to file testimonial evidence originally from December 24, 2021, that reset date would have been May 15, 2022, two days after the Board's May 13, 2022 decision on that Motion. Respondent never sought clarification of the testimony close date to the Board, and even if it did, it should have filed its testimony by May 15, 2022. That date was over four (4) months ago, and the events described above have occurred since that date.

Respondent has submitted evidence of a medical condition of its counsel, including a letter from an attending physician. That letter makes reference to “modest deficits with complex attention and executive function domains” and that medication “significantly impacted her executive function” from November 2021 through January 2022. But this letter is not sufficient evidence of a disability to attend to her responsibilities as counsel in this proceeding and to meet deadlines; or at the very least seek time extensions at or around the deadline for submitting testimonial evidence, or even seek assistance of counsel to attend to deadlines. Even if her condition was sufficient to constitute “excusable neglect,” the physician’s letter only covered the period November 2021 through January 2022. This left from February

1, 2022 until September 27, 2022 (when Respondent belatedly filed its testimony), a period of almost eight months. Respondent has not submitted any evidence justifying a finding of “excusable neglect” over this almost eight month period.

Standard For Determining “Excusable Neglect”

Respondent has failed to demonstrate that its failure to timely submit its testimonial evidence was due to “excusable neglect.” In determining whether a moving party has demonstrated “excusable neglect” under Rule 6(b)(1)(B), Federal Rules of Civil Procedure, the following factors are relevant:

1. The prejudice to the opponent;
2. The length of the delay, and its potential impact on the course of the proceedings;
3. The causes for the delay, and whether those causes were in the reasonable control of the moving party; and
4. The moving party’s good faith.

Albright as Next Friend of Doe v. Mountain Home Sch. Dist., 926 F.3d 942, 952 (8th Cir. 2019). The first three factors weigh heavily against a finding of “excusable neglect,” and even one of three factors is sufficient grounds to deny Respondent’s Motion here.

Significant Prejudice to Nonmovant Petitioner

Petitioner has described above the significant prejudice to Petitioner if Respondent’s motion was granted. This factor alone should be determinative in denying Respondent's motion.

Length of the Delay is Substantial

The length of the delay is nine (9) months. Even if the deadline for Respondent's testimony were deemed to be May 15, 2022, two days after the Board Decision of May 13, 2022, the length of the delay would be three and one-half (3 ½) months from May 15, 2022 to September 27, 2022. Such delay is substantial, and Respondent has failed to cite any case in which the Board has granted such relief for a party's counsel for such an extended time period of over nine (9) months, or even three and one-half (3 ½) months.. During this delay period, Petitioner lost the opportunity for cross-examination depositions, and to file rebuttal evidence, and prepared and filed its Final Brief. Because granting Respondent's Motion would require all of the intervening deadlines to be reset out of fairness to Petitioner, granting Respondent's Motion would delay the proceedings substantially, and impact not only Petitioner's requested relief, but also the pending caseload on the Board's docket. This factor alone should be determinative in denying Respondent's motion.

The Cause for Delay was Entirely in Reasonable Control of Petitioner

The only reason alleged by Respondent for the delay is a medical condition of Respondent's counsel during November 2021 through January 2022. While Petitioner is sympathetic to Respondent's counsel's alleged medical condition, the physician's letter does not state that Respondent's counsel was entirely incapable of filing testimonial evidence during this period of November 2021-January 2022, and states nothing about counsel's condition from February 2022-September 2022, which would constitute "excusable neglect" from February 2022-September 2022. Respondent's own Exhibit to its original Motion filed September 27, 2022 is an email to its principal discussing the deadline, so Respondent's counsel was clearly not so incapacitated that she was unable to understand enough to enable compliance with that deadline. Respondent also failed to explain in its Motion why it did not have any backup procedures in place which would have potentially caught the deadline before it passed, or soon thereafter,

such as having a support or docket system in place. This factor alone weighs heavily against granting Respondent's Motion.

Moving Party's Good Faith

Petitioner does not challenge Respondent's good faith except that there is insufficient evidence of a total incapacity during November 2021-January 2022, and no evidence of any incapacity from February 2022-September 2022. But even assuming respondent had good faith, this factor alone is insufficient due to the three other factors weighing heavily against Respondent's motion, any one of which should be sufficient to deny relief.

The Most Relevant Caselaw of the Board Does Not Support Respondent's Position

The case of *Pumpkin Ltd. v. Seed Corps., Inc.* 43 U.S.P.Q.2d 1582, (TTAB 1997) ("*Pumpkin*") is particularly relevant if not determinative of this issue. There the Board denied a party's request to reopen its testimony period after three and a half months, which it missed due to a docketing error, because the Board found that "excusable neglect" was not established. The Board recognized that the Board and the Court of Appeals for the Federal Circuit had defined "excusable neglect" as:

"failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected, or unavoidable, hindrance, or accident, or reliance on the care and vigilance of his counsel, or on promises made by the adverse party." 43 U.S.P.Q.2d at 1585.

The Board in *Pumpkin* was careful to evaluate the movant's conduct in view of the Supreme Court's decision of *Pioneer Investment Services Company v. Brunswick Associated Limited Partnership et. al.*, 507 U.S. 380 (1993). Even if *Pioneer* could be viewed as finding that "excusable neglect" is a

somewhat “elastic concept” (*Pioneer*, 507 U.S. at 392; *Pumpkin*, 43 U.S.P.Q.2d 1585), the Board found that failure to docket and file its testimony timely was not due to “excusable neglect.”

In *Pumpkin*, the movant’s failure to properly adhere to the testimonial period deadline resulted in the movant’s failure to file testimony evidence and was not realized until three and a half months later. The Board found that such failure was entirely within the reasonable control of movant, and was not “excusable,” and denied the movant’s Motion to accept late filed testimony. *Pumpkin* at 43 U.S.P.Q.2d 1586–87. Also significantly, the Board in *Pumpkin* noted that the three and one-half month delay in that case had a “not inconsiderable” impact on the Board's, proceedings, and that most contested motions to reopen testimony came before the Board “solely as a result of sloppy practice, or inattention to deadlines,” and that the Board has an interest in deterring such sloppy practice, which weighs heavily against any finding of excusable neglect.

In denying the relief requested in *Pumpkin*, which is the same relief as requested in Respondent's present Motion, the Board found that the dominant factors in the “excusable neglect” analysis were the second and third factors (i.e., length of delay and potential impact on the proceedings, and whether the reason for the delay was within the reasonable control of the movant), notwithstanding the apparent absence of prejudice and bad faith.

In the present case, awareness of the deadline but lack of evidence of complete incapacity during November 2021-January 2022, and no evidence from February 2022-September 2022, should similarly not constitute “excusable neglect.” Respondent’s own Exhibit to its original motion is an email to its principal discussing the proposed testimonial declaration, so Respondent’s counsel was clearly not so incapacitated that she was unable to understand the deadline and the need to comply with that deadline. Respondent also failed to explain in its Motion why it did not have any backup procedures or support personnel in place which could have caught the deadline before it passed, or immediately after. This factor alone weighs heavily against a finding of excusable neglect.

Respondent's Caselaw on Incapacity of Counsel is Insufficient to Justify Relief

Respondent cites two cases involving medical conditions of counsel where the Board found “excusable neglect.” In the case of *Volkswagenwerk AG v. Advance Welding and Mfg.*, 184 U.S.P.Q. 367 (TTAB 1974), the respondent’s counsel suffered a severe illness and underwent surgery as a result of an acute intestinal blockage, causing respondent to miss a deadline to file an answer to an amended petition for cancellation. In the case of *The Coffee Studio LLC v. Reign LLC DBA Coffee Studio*, 129 U.S.P.Q. 2d 1480, 2019 WL 990243 (TTAB, February 28, 2019), petitioner’s counsel was hospitalized with a serious medical condition about nine weeks before petitioner’s deadline for filing its trial evidence, and was intermittently hospitalized requiring medical leave since then. The petitioner filed its testimonial a “relatively short period of time” after it was due and there was no mention of any prejudice to the opposing party.

In contrast to the situations in *Volkswagenwerk* and *Coffee Studio* where the counsel were hospitalized and completely incapacitated, here Respondent’s evidence does not establish that Respondent’s counsel was completely incapacitated, but instead was at most only allegedly partially incapacitated for two months, and there was no evidence of any incapacity for almost nine (9) months before Respondent belatedly filed its testimonial evidence in September 2022. During that nine month period, Petitioner was prejudiced by not seeking any cross-examination testimony, by not filing any rebuttal evidence, and by preparing its final trial brief based on the current state of the evidentiary record using the budget allocated to all of its activities. Respondent’s failure to present any evidence of excusable neglect over those nine (9) months, coupled with prejudice to Petitioner, weigh heavily against granting Respondent the relief it requests.

In the present case, in addition to the second and third factors being dominant, the presence of prejudice to non-movant Petitioner more than greatly tips the balance heavily in favor of denying relief here. Petitioner does not generally contest Respondent's allegation of good faith (fourth factor), but urges that this factor alone does not outweigh the other three factors.

Respondent in its Motion has failed to cite any case decided by the Board in support of the relief requested in the Motion of sufficient evidence to justify “excusable neglect” by counsel over the November 2021-January 2022 time period, and no evidence from February 2022-September 2022 time period. There is simply no precedent which supports the relief requested.

Conclusion

For the foregoing reasons, Petitioner urges that Respondent has failed to demonstrate the required “excusable neglect,” and that its Motion should be denied.

/s/ Peter J. Phillips
Peter J. Phillips
Lucas & Mercanti LLP
30 Broad Street, 21st Fl.
New York, NY 10004
(212) 661-8000
pjp@lmiplaw.com
info@lmiplaw.com
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by email on attorney for Registrant as follows, this day of May 17, 2023.

Lillian Taylor Stajnbaher, Esq.
Lilian Taylor Artist Services
2630 W Broward Blvd, #203-434
Fort Lauderdale, FL 33312
legal@lilliant.com
lil.taylor.esq@gmail.com

Date: May 17, 2023

By: /Cheri Phillips/

Cheri Phillips

LUCAS & MERCANTI, LLP
30 Broad Street, 21st Fl.
New York, NY 10004
Phone (212) 661-8000
Fax (212) 661-8002