THIS ORDER IS NOT A PRECEDENT OF THE TTAB

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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

February 14, 2024

Cancellation No. 92077633

Zuffa, LLC

v.

Byron Belin

William D. Jackson, Interlocutory Attorney:

This proceeding now comes before the Board for consideration of Petitioner's motion, filed November 9, 2023, to reopen time and to suspend proceedings.[1] The motion is fully briefed.

The Board has carefully considered all of the parties' arguments, presumes the parties' familiarity with the bases for their filings, and does not recount the facts or arguments here except as necessary to explain this decision. *See Guess? IP Holder LP v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

[1] 38 TTABVUE. In this order, the Board cites to the proceeding record by the TTABVUE docket entry number and TTABVUE page number, in accordance with the guidance provided in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 106.03, 702.05 and 801.01 (2023). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any number(s) following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear. The Board expects that the parties will use this method of citing to the record throughout this proceeding.

I. Background

On June 9, 2023, after the close of discovery, Respondent filed a motion to withdraw and amend its deemed admissions.[2] One week later, on June 16, 2023, Petitioner filed a motion for summary judgment.[3] In connection with its response to the motion for summary judgment,[4] Respondent filed a declaration of Respondent including attached exhibits not previously produced during discovery.[5] The Board granted Respondent's motion to amend its deemed admissions and denied Petitioner's motion for summary judgment, finding that Respondent's declaration testimony created a genuine dispute of material fact with regard to Petitioner's claims of non-use in commerce, abandonment, lack of bona fide intent to use and fraud.[6]

Petitioner now moves to reopen time for forty-five (45) days for the limited purpose of taking Respondent's deposition testimony and following up on any newly-disclosed information and/or documentation revealed therein. Respondent's declaration filed in connection with its response to Petitioner's motion for summary judgment introduced new evidence after the deadline for fact discovery.[7] Petitioner argues that, given that the Board determined that the declaration and new evidence attached thereto provided a sufficient basis to hold there was a material fact in dispute, it must be

[2] 27 TTABVUE. Discovery closed on May 4, 2023. 25 TTABVUE 1.
[3] 28 TTABVUE.
[4] 33 TTABVUE.
[5] 34 TTABVUE.
[6] 37 TTABVUE 19-25.
[7] Respondent states in his declaration supporting his opposition to Petitioner's motion for summary judgment that "my counsel will supplement my initial disclosures to include these documents." 34 TTABVUE 2-4, ¶¶ 2, 5, 8, 11 and 12. Respondent also states that his counsel will supplement his initial disclosures to identify previously undisclosed witnesses. *See id.* at 2-3, ¶¶ 3, 4.

allowed to take Respondent's discovery deposition to test the veracity of the testimony and new evidence that was not part of the record prior to the close of discovery, the absence of which upon Petitioner relied.

In response Respondent argues that Petitioner's motion is actually an improper motion for reconsideration of the Board's October 27, 2023 order. Respondent asserts that, in its order, the Board stated that discovery was closed and that Petitioner asserts the incorrect legal standard in its motion. Respondent further argues that, even if Petitioner has asserted the correct legal standard, it has failed to make a showing of excusable neglect.

II. Analysis

A. Motion for Reconsideration

The Board initially addresses Respondent's argument that Petitioner's motion is an improper motion for reconsideration of the Board's order dated October 27, 2023 pursuant to Trademark Rule 2.127(b), 37 C.F.R. § 2.127(b).[8] In particular, Respondent contends that Petitioner's motion is a request for reconsideration of the Board's statement in its order that discovery remained closed.

Contrary to Respondent's assertion, Petitioner is not seeking reconsideration of a decision of the Board, as the Board's order dated October 27, 2023 does not address the issue of reopening discovery. The Board's statement regarding the status of discovery referenced by Respondent was made in the context of Respondent's motion

[8] Trademark Rule 2.127(b), 37 C.F.R. § 2.127(b), provides that "[a]ny request for reconsideration or modification of an order or decision issued on a motion must be filed within one month from the date thereof. A brief in response must be filed within twenty days from the date of service of the request."

to withdraw and amend deemed admissions, which is unrelated to the present motion. It is obvious that Petitioner's present motion seeks to reopen discovery in light of Respondent's new summary judgment evidence pursuant to Fed. R. Civ. P. 6(b)(1)(B).

Because the Board's prior order did not address the issue of reopening discovery, Trademark Rule 2.127(b) is inapplicable to the present motion, and Respondent's arguments to the contrary are without merit.

B. Motion to Reopen Discovery

Proceeding to the merits of Petitioner's motion, where the time for taking required action, as originally set or as previously reset, has expired, a party desiring to take the required action must file a motion to reopen the time for taking that action. The movant must show that its failure to act during the time previously allotted therefor was the result of excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B); TBMP § 509.01(b)(1). The analysis to be used in determining 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), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). These cases hold that 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.

Pioneer, 507 U.S. at 395; *Pumpkin Ltd.*, 43 USPQ2d at 1586. Ultimately, however, the determination of whether or not a party's neglect is excusable lies within the discretion of the Board. *FirstHealth of the Carolinas, Inc. v. CareFirst of Md. Inc.*, 479 F.3d 825, 81 USPQ2d 1919, 1921 (Fed. Cir. 2007).

It has been held that the third *Pioneer* factor, i.e., "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 FirstHealth of the Carolinas, Inc.*, 81 USPQ2d at 1921-22 (Court affirmed finding of no excusable neglect based on second and third factors, with third weighed heavily in the analysis); *Luster Prods. Inc. v. Van Zandt*, 104 USPQ2d 1877, 1879 (TTAB 2012) (applicant made a calculated strategic decision, within its control, not to take discovery in the hope opposer had lost interest in the case, even though the parties held settlement discussions and opposer requested an extension of the discovery period before it closed).

The Board therefore turns initially to the third *Pioneer* factor. Here, while Petitioner had the opportunity to depose Respondent during discovery, Respondent's summary judgment declaration was based upon documents that had not been produced during discovery. Although Petitioner served discovery requests upon Respondent during discovery, Respondent did not produce the documents in question until its response to Petitioner's motion for summary judgment, after the close of discovery. Furthermore, Petitioner was otherwise diligent in gathering evidence. Because Petitioner was unaware of the documents relied upon by Respondent in his

declaration, its delay in seeking to depose Respondent about said documents was beyond its control. This factor therefore favors Petitioner.

Respondent argues that Petitioner's decision not to depose Respondent prior to the close of discovery was a strategic decision and that as a result Petitioner's failure was not excusable. However, Respondent ignores his own declaration and related supporting documents produced after the close of discovery. While Petitioner may have made a strategic decision, this decision was made based upon incomplete information from Respondent. Respondent's argument therefore is unavailing.

Turning to the first *Pioneer* factor, the "prejudice to the nonmovant" contemplated under the first 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.*, 43 USPQ2d at 1587. Respondent has not pointed to any specific loss of evidence or witness testimony as a result of Petitioner's delay. Accordingly, this factor weighs in favor of finding excusable neglect.

Turning to the second *Pioneer* factor, the length of the delay and its potential impact on the proceedings, the Board must evaluate the total length of the delay incurred as a result of Petitioner's failure to timely file a response, including the time for the Board to consider the instant motions. *See, e.g., Coffee Studio LLC v. Reign*

LLC dba Coffee Studio, 129 USPQ2d 1480, 1483 (TTAB 2019) (*citing Pumpkin Ltd.*, 43 USPQ2d at 1588); *Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1702-03 (TTAB 2002); *PolyJohn Enters. Corp. v. 1-800-Toilets Inc.*, 61 USPQ2d 1860, 1862 (TTAB 2002) ("[T]he calculation of the length of the delay in proceedings also must take into account the additional, unavoidable delay arising from the time required for briefing and deciding such motions").

In this case, the Board issued the denial of summary judgment on October 27, 2023, and Petitioner filed its motion to reopen discovery twelve days later. The total delay to date therefore is approximately three months. The Board finds that this delay, in addition to the time and resources spent on Petitioner's motion, has not had a significant impact on the proceeding, and Respondent does not argue to the contrary. Because this delay is not a particularly long period of time, we find the second *Pioneer* factor to be neutral.

Finally, with respect to the fourth *Pioneer* factor, whether Petitioner acted in good faith, there is no evidence that Petitioner's delay was the result of bad faith. Accordingly, the Board finds this factor also weighs in favor of finding excusable neglect.

C. Summary

Based upon the foregoing, Petitioner has shown that its failure to act during the time previously allotted for discovery was the result of excusable neglect. As a result, Petitioner's motion to reopen discovery is **granted.** Discovery is reopened for **forty-five (45) days** from the date of this order for the limited purpose of taking

Respondent's deposition testimony and following up on any newly-disclosed information and/or documentation revealed therein.

III. Proceedings Resumed

Proceedings are resumed. Trial dates are reset as follows:

Plaintiff's Pretrial Disclosures Due	4/14/2024
Plaintiff's 30-day Trial Period Ends	5/29/2024
Defendant's Pretrial Disclosures Due	6/13/2024
Defendant's 30-day Trial Period Ends	7/28/2024
Plaintiff's Rebuttal Disclosures Due	8/12/2024
Plaintiff's 15-day Rebuttal Period Ends	9/11/2024
Plaintiff's Opening Brief Due	11/10/2024
Defendant's Brief Due	12/10/2024
Plaintiff's Reply Brief Due	12/25/2024
Request for Oral Hearing (optional) Due	1/4/2025

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).