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UNITED STATES PATENT AND TRADEMARK OFFICE
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October 17, 2018

Cancellation No. 92064739

Ryan Kopf

v.

Lisa Rhyne

By the Trademark Trial and Appeal Board:

On July 13, 2018, the Board issued an order to show cause under Trademark Rule 2.128(a)(3), 37 C.F.R. § 2.128(a)(3) because the time for Petitioner to file its trial brief had expired without Petitioner filing a brief. Petitioner filed, on August 13, 2018, a "motion to continue" stating the parties had previously engaged in settlement discussions and that the settlement could be concluded with a brief extension of time to allow the parties to finalize it. The motion did not otherwise respond to the Board's order to show cause.

Respondent argued in response to Petitioner's motion to continue that any settlement discussions between the parties stalled in mid-2017, nearly a year prior to the filing of the motion to continue, when Petitioner informed Respondent the draft agreement was unacceptable. Respondent states no further updates on settlement were exchanged between the parties after October 18, 2017, until Petitioner

transmitted a draft to Respondent on August 13, 2018, the date Petitioner filed its motion to continue. Respondent also argues that Petitioner has not responded to the show cause order and has not shown excusable neglect for failure to file its trial brief.

Trademark Rule 2.128(a)(3) is meant to save the Board the burden of determining a case on the merits where the parties have settled, but have neglected to notify the Board, or where the plaintiff has lost interest in the case. *Vital Pharm., Inc. v. Kronholm*, 99 USPQ2d 1708, 1709-10 (TTAB 2011); *see also* TBMP § 536 (2018). 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. *See* TBMP § 536. If a show cause order issues under Trademark Rule 2.128(a)(3) and the plaintiff files a response indicating it has not lost interest in the case, the show cause order will be discharged. *See Vital Pharm.*, 99 USPQ2d at 1710.

The Board construes Petitioner's motion to continue as an indication that it has not lost interest in this case. Accordingly, the order to show cause under Trademark Rule 2.128(a)(3) is **discharged**. However, the fact that an order to show cause for failure to file a brief has been discharged does not necessarily result in acceptance of a late-filed brief or in a resetting of plaintiff's trial period, particularly where, as in this case, there is no motion to reopen, there is no trial brief, there is no evidence of record and there are no material admissions of fact.[1] *See* Trademark Rule 2.128(a)(3); *see also Vital Pharm.*, 99 USPQ2d at 1710.

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[1] While Petitioner included exhibits to its petition to cancel, it did not allege ownership of, or attach, a federal registration. Such exhibits are not evidence in this proceeding as they were never introduced into evidence during Petitioner's trial period. Trademark Rule 2.122(c); 37 C.F.R. § 2.122(c). *See Intersat Corp. v. Int'l Telecoms. Satellite Org.*, 226 USPQ 154, 155 n.3

Petitioner's response to the show cause order does not demonstrate that its failure to act is due to excusable neglect under the factors enumerated in *Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993), as applied by the Board in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586-87 (TTAB 1997): (1) the danger of prejudice to the nonmovant; (2) the length of the delay and its potential impact on the case; (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.

The reason for the delay may be considered the most important factor in a particular case. *See Pumpkin*, 43 USPQ2d at 1586 n.7. To the extent Petitioner claims that its delay is due to settlement negotiations between the parties, it is well established that the mere existence of settlement negotiations does not justify a party's inaction or delay. *See Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 USPQ2d 1858, 1859 (TTAB 1998) (failure to timely move to extend testimony period was due to counsel's oversight and mere existence of settlement negotiations did not justify party's inaction or delay).

The parties were engaged in settlement negotiations for several months in 2017 and failed to execute an agreement. Respondent does not agree that the parties were involved in settlement negotiations during Petitioner's trial period or at the time Petitioner's trial brief was due. Petitioner has shown that it is capable of filing motions to extend as the trial schedule in this case was sought by Petitioner's June

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(TTAB 1985) (exhibit attached to pleading not evidence on behalf of party to whose pleading exhibit is attached unless identified and introduced in evidence as exhibit during period for taking testimony).

29, 2017 filing, but Petitioner simply failed to file any further motions to extend or suspend before its testimony period started, or even before it expired. Petitioner brought this case and, in doing so, took responsibility for moving forward on the established schedule. Accordingly, this factor weighs heavily against reopening any deadlines. *See Vital Pharm.*, 99 USPQ2d at 1711. There is no evidence or argument regarding potential prejudice to Respondent or whether Petitioner acted in good faith, so these factors are neutral. Petitioner's trial period ended on January 10, 2018, and it did not submit any evidence or otherwise file any papers in this proceeding until its August 13, 2018 motion to continue in response to the Board's show cause order, a lengthy delay which weighs against a finding of excusable neglect.

On balance, Petitioner's inattention to the schedule governing this proceeding, failure to seek extensions or suspensions or otherwise take action, and the attendant delay establish that Petitioner's neglect was not excusable, even if Petitioner had filed a motion to reopen, which it did not. To the contrary, Petitioner's settlement efforts did not prevent Petitioner from taking testimony, submitting evidence, or requesting extensions of time to do so. While it is true that the law favors judgments on the merits wherever possible, it is also true that the Board is justified in enforcing its procedural deadlines. Accordingly, because Petitioner allowed its testimony period to lapse and did not demonstrate excusable neglect, and because all testimony periods have expired and Petitioner has taken no testimony or submitted any other evidence, this proceeding is **dismissed with prejudice**.

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