

under oath, as required by Fed. R. Civ. P. 33. Also, Opposer has so far failed to deliver to Applicant any of the documents it agreed to produce in response to Applicant's requests for production of documents.

II. Argument

The standard for allowing an extension of a testimony period prior to the expiration of that period is good cause. TBMP Section 509. Opposer cites *American Vitamin Products, Inc. v. DowBrands, Inc.*, 22 USPQ2d 1313, 1314 (TTAB 1992), and argues that the stated attempts on counsel's part to communicate with Opposer constitute "good cause" on Opposer's part. Good cause implies a lack of negligence, bad faith, or abuse of the extension privilege on the movant's part. *American Vitamin Products, Inc.*, *supra*, at 1315.

The Board recently discussed the application of the good-cause rule of *American Vitamin*, *supra*, in *Procyon Pharmaceuticals, Inc. v. Procyon Biopharma, Inc.*, 61 USPQ2d 1542. The cancellation petitioner there moved to extend its testimony period because its principal officer was engaged in rearranging the petitioner's laboratory facilities. The Board restated the principles of good cause and denied the motion to extend.

In particular, the Board in *Procyon Pharmaceuticals, Inc.*, *supra*, pointed out that a mere unexplained delay in initiating action does not constitute good cause, citing *Luehrmann v. Kwik Kopy Corp.*, 2 USPQ2d 1303 (TTAB 1987). Further, counsel's mere assertion of an inability to communicate with his or her client does not constitute good cause, citing *SFW Licensing Corp. and Shoppers Food Warehouse Corp. v. Di Pardo Packing Limited*, 60 USPQ2d 1372.

These holdings apply directly to the present case. Opposer's counsel recites contacts with Opposer in Denmark by telephone and says that Opposer needed "additional time to correspond with its U.S. affiliate and to gather information in order to complete discovery responses." Opposer has been almost completely inert, unstirred by its counsel's calls about discovery deadlines, through the original period for response to Applicant's discovery requests, and the first extension of time, and the second extension of time, and the third extension of time, as well as an extension of its testimony period by sixty days. Opposer now confuses diligence on the part of its counsel (which may well exist) with its own diligence, which is lacking.

Opposer has failed to provide detailed factual information as to why it, as opposed to its attorneys, has good cause for its delay. Opposer's motion has no affidavits from Opposer (or its U.S. subsidiary) that could explain its delay. A detailed factual showing is necessary. *HGK Industries, Inc. v. Perma Pipe, Inc.*, 49 USPQ2d 1156, 1158 (TTAB 1998); *SFW Licensing Corp., supra*, at 1375. Certainly the only reason offered, that Opposer is in Denmark, is not sufficient. The Board may take judicial notice that Denmark is an industrialized country of Western Europe, and enjoys the amenities of modern life, such as telephones, facsimile machines, and electronic mail, as well as air cargo service. Opposer's argument here is nothing more than the "mere assertion" of its attorney's inability to communicate with a client, condemned in *Procyon Pharmaceuticals, Inc., supra*, at 1543.

Opposer states it is "gathering information" for its discovery responses, but it does not claim Applicant's discovery requests are so burdensome that it could not have complied earlier, nor does it offer any specific information about what information it

must gather that cannot immediately be had at its corporate office or that of its U.S. subsidiary. Opposer fails to explain (and it cannot explain) why Applicant's requested discovery was so burdensome or unusual that Opposer must spend months "gathering information."

Opposer brought this proceeding and thus carries the burden of going forward in a timely manner. See, e.g., *Procyon Pharmaceuticals, supra*, at 1544. It is unfair to allow a dawdling Opposer to indefinitely delay Applicant's right to obtain a trademark registration. Opposer has thus been guilty of negligence in pursuing its case and is now abusing the privilege of the many extensions of time previously granted.

Finally, Opposer argues that its request for an extension of time will not prejudice Applicant's ability to defend against Opposer's claims. Opposer cites *Regatta Sport Ltd. v. Telus-Pioneer, Inc.*, 20 USPQ2d 1154 (TTAB 1991) for the proposition that "delay alone" does not constitute prejudice. *Regatta, supra*, was a motion to set aside a default judgment entered in a cancellation proceeding. The court applied the "excusable neglect" standard (not relevant in this case) and granted respondent the relief it requested. The court notes that "...petitioner does not contend that it would be substantially prejudiced if the judgment were vacated..." *Regatta, supra*, at 1155. Whether Applicant is prejudiced in this sense by Opposer's delay is not relevant to Opposer's good cause for delay. Applicant is certainly suffering the legal injury of being brought before the Board by Opposer and left there to dangle, unable to gain the benefits of registration of its mark.

III. Motion to Dismiss

If the Board determines Opposer has failed to demonstrate good cause for its delay and denies Opposer's Motion, then Applicant moves the Board to dismiss this opposition with prejudice under 37 CFR 2.132(a). *See, Procyon, supra*, at 1544.

IV. Conclusion

For the foregoing reasons, Applicant respectfully submits that Opposer has not shown good cause for an extension of the testimony period, and that Opposer's Motion should be denied.

Respectfully Submitted,

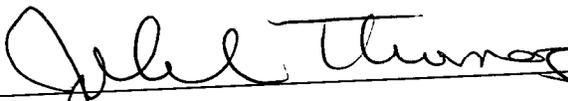
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Brief Of Applicant And Motion To Dismiss In Reply To Opposer's Motion For Extension Of Time was served by First Class Mail upon Susan M. Freedman, Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P., 1300 I Street, N.W., Washington, D.C. 20005-3315, this 23 day of January, 2003.


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Re: Opposition 125,203; Serial No. 78/059,125
Novo Nordisk A/S v. Innoject, Inc.

Dear Sirs:

Enclosed for filing please find the following:

1. Brief of Applicant and Motion to Dismiss in Reply to Opposer's Motion for Extension of Time;
2. A return postcard, which I would appreciate you date-stamping and returning to me upon receipt.

By copy of this letter, we are serving a copy of the enclosed Brief upon the attorney for Opposer via first class mail.

Thank you for your assistance.

Yours truly,

John A. Thomas

JAT/sdj
Enclosures

cc: Innoject, Inc. (w/enclosure)
Susan M. Freedman, Esq. (w/enclosure)