

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: March 30, 2005

Opposition No. **91153755**

WALTERS GARDENS, INC.

v.

PRIDE OF PLACE PLANTS, INC.

Cheryl Goodman, Interlocutory Attorney:

As background, the Board order dated November 9, 2004, allowed applicant to take the deposition of Mr. Rick Sorenson outside of its testimony period, sometime during the month of December 2004. The Board also reset the rebuttal period for opposer, which was scheduled to close on January 17, 2005. Mr. Sorenson's deposition was taken on December 22, 2004 and the deposition transcript was filed with the Board on February 11, 2005, with a service date of February 10, 2005 on opposer.

This case now comes up on opposer's motion to reset the rebuttal period and briefing period, filed February 16, 2005 and applicant's motion for a show cause order for failure of opposer to file a brief, filed March 28, 2005.

The Board turns first to opposer's motion to reset dates. In support of its motion, opposer asserts that an extension of time is permitted where applicant failed to

serve the testimony transcript on opposer within thirty days of the completion of the testimony; and that the testimony of Rick Sorenson was taken on December 22, 2005 but opposer did not receive a service copy of the transcript until February 14, 2005.

In response, applicant concedes that it was unable to serve the deposition transcript within thirty days of taking Mr. Sorenson's deposition testimony. However, applicant asserts that although opposer did not receive the "formal service copy" of the deposition transcript until the week following February 7, 2005, opposer previously had obtained a copy of the transcript on January 12, 2005 directly from the court reporting service as well as received an electronic version of the transcript from applicant on February 7, 2005; that even after receiving a copy of the transcript on January 12, 2005 from the court reporter, opposer did not notice any depositions for its rebuttal period; that in any event, the rebuttal period was closed three days prior to the time for service of the deposition transcript under the rule, and therefore, the service of the transcript had no impact on whether opposer would take rebuttal testimony; that as a result, the later service of the deposition transcript does not prejudice opposer and there is no basis for resetting the rebuttal period; that when the issue first arose, opposer's counsel contacted

applicant's counsel and requested an extension of the briefing schedule but not the rebuttal period and applicant agreed; that opposer "completely reneg[ed]" on the parties' agreement by filing its motion to reset the rebuttal and briefing periods prior to finalizing the parties' stipulation to reset the briefing periods; and that "even though there is no need to extend the briefing schedule, as an accommodation" applicant agrees to opposer's proposed extension for the briefing period.

In reply, opposer argues that it filed its motion to reset dates when applicant failed to file the stipulation to extend briefing dates at the time of filing the deposition transcript of Rick Sorenson as the parties had previously agreed; that applicant's failure to file the stipulation voided the parties' prior agreement; that the earlier copies of Mr. Sorenson's transcripts received by opposer did not contain corrections or the errata sheet; that under the rules, "receipt of the official transcript starts the 30-day review period . . . to insure that final testimony of the witness need not be countered"; that "it would be unfair to force the opposer to rely upon an earlier and unofficial version of testimony"; and that applicant's failure to file the stipulation prejudiced opposer because the Board was not on notice of the briefing schedule.

Inasmuch as applicant has indicated that it agrees to an extension of opposer's briefing period, the only issue for consideration is whether a reopening of the rebuttal testimony period is appropriate.

The requirement that a copy of the transcript, with exhibits, be served on every adverse party within the time specified in Trademark Rule 2.125(a) is intended to ensure that each adverse party will have the testimony before it has to offer its own evidence, or, if the testimony in question is rebuttal testimony, to ensure that each adverse party will have the testimony before it has to prepare its brief on the case. TBMP Section 703.01(m) (2d. Ed. Rev. Mar. 2004). Normally, the plaintiff's rebuttal testimony period is scheduled to open 30 days after the close of the defendant's testimony period to be consistent with the requirements of the Rule. See TBMP Section 701.

Due to the testimony of Mr. Sorenson being taken outside of applicant's testimony period on December 22, 2004, the Board's scheduling of the rebuttal period early in January 2005 resulted in opposer not being afforded the thirty day period to receive a service copy of the deposition as required by Trademark Rule 2.125. Although opposer obtained a copy of the deposition transcript prior to the close of its rebuttal period, this transcript was not the service copy required by the rule nor was it the

corrected version with the errata sheet; the service (and corrected) copy of Mr. Sorenson's deposition transcript was served on opposer more than thirty days after the taking of Mr. Sorenson's testimony. On this basis, it was appropriate for opposer to request the resetting of the rebuttal and briefing periods. Trademark Rule 2.125(a); see e.g., *Hewlett-Packard Co. v. Human Performance Measurement, Inc.*, 23 USPQ2d 1390, 1392 n.6 (TTAB 1991) (proper remedy for delay in receiving corrected deposition transcript is to request an extension of briefing period).

To avoid any prejudice to opposer, the Board finds it appropriate to reset both opposer's rebuttal testimony period and the briefing period. Accordingly, opposer's motion is granted.

In view of the resetting of the rebuttal period and resultant resetting of the briefing schedule under Trademark Rule 2.128, applicant's motion for issuance of a show cause order for opposer's failure to file a main brief is denied.

The remaining trial schedule is as follows:

Plaintiff's rebuttal period	May 15, 2005
scheduled to close	

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.