

ESTTA Tracking number: **ESTTA28023**

Filing date: **03/11/2005**

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

<b>Proceeding</b>	91160266
<b>Party</b>	Plaintiff Mr. Christopher Brooks Mr. Christopher Brooks 83 Myrtle Boulevard Larchmont, NY 10538 UNITED STATES
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<b>Submission</b>	Opposition/Response to Motion
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<b>Signature</b>	/s/ Evan Gourvitz/
<b>Date</b>	03/11/2005
<b>Attachments</b>	Memorandum in Opp to Applicants Motion to Suspend.pdf ( 6 pages )



deadline to respond to Opposer's motion, and knew that it would not receive further extensions. Instead of preparing a substantive response, Applicant cobbled together the present motion – a motion for an extension of time disguised as a motion to suspend – and filed it on the day its response was due in an attempt to buy more time. Despite the purported illness of certain of its members, Applicant, a Limited Liability Company, is believed to have other managers not addressed in its motion capable of aiding counsel in preparing its response to Opposer's motion. The parties are not engaged in meaningful settlement negotiations, and Applicant remains represented by the attorney who represented it during much of the course of the application at issue. The Board should recognize Applicant's transparent attempt to excuse its neglect, deny Applicant's motion to suspend, and hold that by its failure to substantively and timely respond to Opposer's summary judgment motion that motion should be granted as unopposed.

As an initial matter, Applicant's motion is somewhat incoherent, suggesting the lack of thought and slapdash nature of its preparation. While Applicant claims to seek a suspension of the proceedings (App. Mot. at 1-2), it ignores the fact that the matter already was suspended by the TTAB on January 8, 2005 pending disposition of Opposer's motion for summary judgment. What Applicant truly is seeking is an unprecedented extension of time of six months, under TBMP 509.01(a), to reply to Opposer's pending motion.

A motion for an extension of time must “set forth with particularity the facts said to constitute good cause for the required extension; mere conclusory allegations lacking in factual detail are not sufficient.” TBMP § 509.01.

Moreover, a party moving to extend time must demonstrate that the requested extension of time is not necessitated by the party's own lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefor. The Board will “scrutinize carefully” any motion to extend time, to determine whether the requisite good cause has been shown.

*Id.* (and cases cited therein).

Here, Applicant has failed to meet this standard. Applicant already has had more than seventy days to respond to Opposer's summary judgment motion. (*See* Gourvitz Decl. ¶¶ 2-9.) Why it needs six more months is never stated or supported in its motion or declaration.

*The Purported Illness of Applicant's Members*

Applicant has cited the illness of its members Zulme Calloway and Chris Calloway, and the fact that its member Cabella Calloway Langsam has needed to personally care for both of them, as one ground for its requested relief. (App. Mot. at 2; Langsam Decl. ¶¶ 3-4.) Yet Applicant and Ms. Langsam have failed to specify the nature of the illnesses of Zulme Calloway or Chris Calloway, when these illnesses commenced, why they believe these illness require a highly extraordinary six-month suspension of time, why these illnesses prevent Ms. Langsam from providing the assistance necessary for counsel to respond to Opposer's motion, and why other capable members of Applicant, a Limited Liability Company, cannot provide whatever assistance Applicant's counsel now alleges it needs to respond to Opposer's motion. Indeed, Opposer understands that Applicant has at least one other capable member or manager, Andrew Langsam, who could assist with the preparation of such a response. Moreover, on March 8, 2005 Applicant's counsel informed Opposer's counsel that Chris Calloway would like to meet with Opposer on March 14-18 or March 21-25. (Gourvitz Decl. ¶ 10.) If Ms. Calloway is well enough to travel to New York and meet with Opposer, she clearly is well enough to assist Applicant and its longtime counsel with the preparation of Applicant's response to Opposer's summary judgment motion. Moreover, if Ms. Calloway is feeling better, Opposer presumes that Ms. Langsam no longer needs to care for her (*see* Langsam Decl. ¶ 4) to an extent that would

preclude her from assisting Applicant with the preparation of its response to Opposer's motion for summary judgment.

*Purported Settlement Negotiations*

Applicant's counsel states that another reason for requesting suspension is that the parties "are engaged in settlement negotiations." (App. Mot. at 2; Langsam Decl. ¶ 5.) There are no meaningful negotiations ongoing. (See Gourvitz Decl. ¶¶ 2-3.) Even if there were, the Board should not grant the requested relief, since Opposer does not consent. See *MacMillan Bloedel Ltd. v. Arrow-M Corp.*, 203 U.S.P.Q. 952 (T.T.A.B. 1979) (order suspending proceedings for settlement vacated once it came to Board's attention that other party objected to suspension on such basis).

*Purported Change in Representation*

Finally, Applicant seeks suspension because "Applicant is no longer represented by the law firm Kelley, Drye & Warren" and "requires a reasonable amount of time to obtain new primary counsel to represent its action in this matter." (App. Mot. at 2; Langsam Decl. ¶ 6.) Yet, as evidenced by the present motion, Applicant continues to be represented in this action by its counsel Marc Karlin, attorney of record for much of the application at issue in this proceeding and the attorney who represented Applicant in the prior litigation between the parties in the U.S. District Court for the Southern District of New York and in the Second Circuit Court of Appeals. (See Notice of Opp., Ex. B.) Mr. Karlin clearly is the attorney for Applicant most knowledgeable about the facts and law relevant to the parties' dispute, and should be more than capable of preparing Applicant's opposition to Opposer's motion for summary judgment.<sup>1</sup>

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<sup>1</sup> Even if the withdrawal of co-counsel were a basis for some relief, six months is far more than the amount of time the TTAB grants under such circumstances. Cf. TBMP § 510.03(a) (if a party's attorney files request to withdraw as counsel and request is granted, Board will suspend

## CONCLUSION

Accordingly, for the reasons set forth above, the Board should deny Applicant's motion in its entirety and enter judgment for Opposer on its unopposed motion for summary judgment. In the event the Board does decide to suspend this matter, or to grant Applicant a further extension of time to respond to Opposer's motion for summary judgment, this extension should be for no more than 30 days more than its most recent extension until February 22, 2005, and in any event should be less than the six months requested by Applicant.

Dated: New York, New York  
March 11, 2005

Respectfully submitted,

FROSS ZELNICK LEHRMAN  
& ZISSU, P.C.

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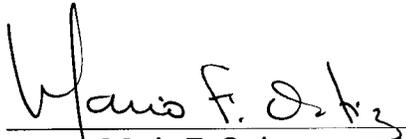
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proceedings and allow a stated period of time, usually 30 days, to appoint a new attorney or authorized representative, or to file a paper stating that the party desires to represent itself, failing which the Board may issue an order to show cause why default judgment should not be entered against the party). To Opposer's knowledge Applicant's co-counsel never filed with the TTAB a request to withdraw as counsel.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copy of the DECLARATION OF EVAN GOURVITZ IN OPPOSITION TO APPLICANT'S MOTION TO SUSPEND, and MEMORANDUM IN OPPOSITION TO APPLICANT'S MOTION TO SUSPEND, was served via first class mail, to Marc A. Karlin, Esq., Karlin & Karlin, A.P.L.C., 3701 Wilshire Blvd. Suite 1035, Los Angeles, CA 90010 Associate Attorneys for Applicant Creative Arts by Calloway, LLC, on this 11<sup>th</sup> day of March 2005.

  
Mario F. Ortiz