ESTTA Tracking number: **ESTTA47079**
Filing date: **10/03/2005**

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

Proceeding	91164493
Party	Plaintiff Pearle Vision, Inc., and Pearle Inc ,
Correspondence Address	Michael D. Fishman Rader, Fishman & Grauer PLLC 39533 Woodward Ave., Ste. 140 Bloomfield Hills, MI 48304 UNITED STATES tmdocketing@raderfishman.com
Submission	Unconsented Motion and Brief in Support of Motion to Extend Discovery and Testimony Periods
Filer's Name	Tracy L. Zawaski
Filer's e-mail	tmdocketing@raderfishman.com, jmg@raderfishman.com
Signature	/tlz/
Date	10/03/2005
Attachments	Unconsented Motion to Extend.pdf (4 pages) Exhibit A.pdf (1 page) Exhibit B.pdf (3 pages)

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

PEARLE VISION, INC. and PEARLE, INC.	)	
Opposers,	)	
v.	)	Opposition No.: 91164493 Serial No.: 78/249,467 Mark: PEARL EYES
INKA DOERRING,	)	
Applicant.	)	

UNCONSENTED MOTION AND BRIEF IN SUPPORT OF MOTION
TO EXTEND DISCOVERY AND TESTIMONY PERIODS

Opposers, Pearle Vision, Inc. and Pearle, Inc., by and through their attorneys, Rader, Fishman & Grauer PLLC, pursuant to 37 TBMP §§ 509.01, 509.01(a), and 509.02, C.F.R. § 2.120(a) and Fed. R. Civ. P. 6(b)(1), respectfully request that the Trademark Trial and Appeal Board ("Board") extend the discovery and testimony periods in the above-identified opposition proceeding for a period of sixty (60) days set to run from the date of the Board's decision on the motion. This period will permit the parties to continue their settlement negotiations and enter into an appropriate settlement agreement.

BRIEF IN SUPPORT OF MOTION TO EXTEND
DISCOVERY AND TESTIMONY PERIODS

I. Statement of Facts

In the instant action, the Scheduling Order was issued by the Trademark Trial and Appeal Board on March 15, 2005. The discovery period was scheduled to open on April 4, 2005, and close

on October 1, 2005. Applicant filed its Answer on April 20, 2005, and the parties have been involved in continuous settlement negotiations.

Opposers submit that, during this entire period, the parties have been negotiating in good faith. Specifically, the parties' counsel have exchanged several drafts of a settlement agreement. Most recently, on September 27, 2005, Opposers' counsel received further instructions from Opposers, and counsel is in the process of making further revisions to the previously-circulated settlement agreement. In view of the parties' negotiations and the anticipated settlement, discovery has not commenced. As a result, no depositions have been taken and no protective order has been entered into in this proceeding.

Counsel for Opposers attempted to contact Applicant by telephone and electronic mail on September 30, 2005, seeking Applicant's consent to extend the discovery and testimony periods. A copy of the electronic mail transmission is attached as Exhibit A. On October 3, 2005, Opposers' counsel contacted Applicant's counsel via telephone and facsimile, again seeking Applicant's consent to extend the discovery and testimony periods. A copy of the facsimile transmission is attached as Exhibit B. Applicant's counsel has not responded to Opposers' requests, however, and therefore consent to extension of the discovery and testimony periods has not been provided.

II. Argument

The standard for allowing an extension of a prescribed period prior to expiration of that period is good cause pursuant to 37 TBMP § 509.01 and Fed. R. Civ. P. 6(b)(1), made applicable to Board proceedings by 37 C.F.R. § 2.116(a). The discovery period may be extended upon stipulation of the parties approved by the Board, or upon motion granted by the Board, or by order of the Board pursuant to C.F.R. §2.120(a).

Despite Opposers' efforts, Applicant has failed to respond to Opposers' request for consent to extend the discovery and testimony periods. Opposers are hopeful that this matter might be

resolved and that a settlement agreement will be executed. However, in the absence of such an agreement, it would be highly prejudicial for Opposers to be precluded from taking discovery and testimony. Therefore, Opposers submit that they have demonstrated good cause for the extension.

Further, the Board has been liberal in granting extensions of time before the period to act has elapsed, so long as the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. Opposers have worked diligently to keep this case moving forward as evidenced by the parties' settlement negotiations. Also, this is the first request for an extension of the discovery and testimony periods in this action. Therefore, no abuse of extensions exists. Finally, pursuant to TBMP § 112 and 37 C.F.R. § 2.196, the discovery period closes today, the first business day after October 1, 2005. As a result, this Motion is timely.

III. Conclusion

In accordance with the foregoing showing of good cause, Opposers request a sixty (60) day extension of the Discovery and Testimony Periods and that the new periods be set to run from the date of the Board's decision on the motion.

Respectfully submitted,

Date: October 3, 2005

By: _____

Michael D. Fishman
Tracy L. Zawaski
Linda E. Sudzina
RADER, FISHMAN & GRAUER PLLC
39533 Woodward Avenue, Suite 140
Bloomfield Hills, Michigan 48304
(248) 594-0654 telephone
(248) 594-0610 facsimile
PTO Customer Number 010291

Attorneys for Opposers

CERTIFICATE OF FILING

I hereby certify that this correspondence is being filed electronically with The Trademark Trial and Appeal Board (TTAB) utilizing the Electronic System for Trademark Trials and Appeals (ESTTA).

Dated: October 3, 2005

Jill Gibson

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing *Unconsented Motion and Brief in Support of Motion to Extend Discovery and Testimony Periods* on Applicant by causing a true and correct copy thereof to be sent on October 3, 2005, by first class mail, postage prepaid to:

Anthony Colesanti
Colesanti & Associates LLC
P.O. Box 954
Bristol, RI 02809

Date: October 3, 2005

Jill Gibson

R0315061.DOC

Tracy L. Zawaski

From: Mary Margaret L. O'Donnell
Sent: Friday, September 30, 2005 10:39 AM
To: 'anthony@colesanti-law.com'
Cc: Linda E. Sudzina; Tracy L. Zawaski; Litigation Paralegals; Michael D. Fishman
Subject: Pearl Vision / Inka Doerring -- US TM Opposition

65430-0419

Dear Mr. Colesanti:

Following my voicemail message, Linda Sudzina is currently out on maternity leave and we are following up on this matter in her absence.

So we may have sufficient time to obtain our client's comments on the agreement and get the agreement finalized, please advise whether you will consent to a 60-day extension of all deadlines.

As the discovery cut-off deadline runs tomorrow October 1, 2005, we'd appreciate it if you could respond to this message today.

Best regards,

Mary Margaret

Mary Margaret L. O'Donnell, Esq.
Rader, Fishman & Grauer PLLC
39533 Woodward Ave., Suite 140
Bloomfield Hills , Michigan 48304
+1-248-594-0649 direct
+1-248-594-0610 facsimile
mmlo@raderfishman.com

CONFIDENTIAL AND PRIVILEGED INFORMATION IMPORTANT: The enclosed message and any attachments are intended for the addressee only and are privileged and confidential. If you are not the addressee, then please DO NOT read, copy or distribute the message or any attachment. Please reply to the sender that you received the message in error and delete it. Thank you.

Exhibit A

RADER,
FISHMAN
& GRAUER
PLLC

Worldwide Intellectual Property Matters • Patents • Trademarks
Litigation • Copyrights • U.S. and Foreign Portfolio Management
Computer and Internet Law • Trade Secrets • Unfair Competition

FAX TRANSMISSION

Date: 10/3/2005

To: Anthony Colesanti

Company:

From: Tracy L. Zawaski

Subject:

URGENT - DEADLINE TODAY

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable laws. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have receive this communication in error, please notify us immediately by telephone and return original message to us at the above address via U.S. Postal Service.
Thank you.

39533 Woodward Ave., Suite 140 Bloomfield Hills MI 48304 ph. 248-594-0600 fax 248-594-0610

http://www.raderfishman.com

Exhibit B

Sent Message Status Report

Sent:	11:57:38 10/3/2005
To:	Anthony Colesanti
Organisation:	
Fax number:	1 401-633-6054 (Fax fine)
Pages sent:	2 (1 min 22 sec)
From:	Tracy L. Zawaski (TLZ)
Message ID:	5A030003

Exhibit B

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Tracy L. Zawaski

From: Mary Margaret L. O'Donnell
Sent: Friday, September 30, 2005 10:39 AM
To: 'anthony@colesanti-law.com'
Cc: Linda E. Sudzina; Tracy L. Zawaski; Litigation Paralegals; Michael D. Fishman
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Exhibit B