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

Proceeding	91167991
Party	Plaintiff The H.D. Lee Company, Inc. The H.D. Lee Company, Inc. The H.D. Lee Company, Inc. 3411 Silverside Road201 Baynard Building Wilmington, DE 19810 UNITED STATES
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Attachments	ONE FABULOUS FIT - Opposer's Mot to Ext Test Period.PDF (6 pages) (155801 bytes)

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

In the Matter of Serial No. 78/363,351)	
For the Mark: ONE FABULOUS FIT)	
)	
The H.D. Lee Company, Inc.,)	
Opposer)	
)	Opposition No. 91167991
v.)	
)	
Maidenform, Inc.,)	
Applicant.)	

OPPOSER’S MOTION TO EXTEND TESTIMONY PERIOD

Pursuant to Federal Rule of Civil Procedure 6(b)(1) and TBMP § 509.01(a), Opposer H.D. Lee Company, Inc. (“Opposer”), by and through its undersigned counsel, hereby moves the Board to extend the testimony period in the above captioned action by thirty (30) days from the date of the Board’s ruling on this motion, and in support thereof, states as follows:

I. STATEMENT OF FACTS

On July 24, 2006, Opposer served interrogatories and requests for production of documents (“Opposer’s Discovery Requests”) upon Applicant Maidenform, Inc. (“Applicant”). Beginning in August of 2006, Opposer granted Applicant numerous extensions of time to respond to these requests while the parties negotiated a settlement of the dispute.

On September 30, 2006, the discovery period closed in the ONE FABULOUS FIT Opposition. Applicant had not served any discovery requests upon Opposer. Realizing its mistake, on October 18, 2006, Applicant contacted Opposer to request a sixty (60) day reopening of the discovery period. In the interest of reaching an amicable resolution with Applicant, and

out of professional courtesy, Opposer granted Applicant's request. That same day, Applicant served its discovery requests upon Opposer.

On October 20, 2006, Applicant sent Opposer a counter proposal to Opposer's October 11, 2006 settlement proposal. The parties exchanged voicemails and emails throughout the rest of October and November. On November 6, 2006, Opposer informed Applicant via email that Opposer's office was in the midst of a move, and that Opposer would contact Applicant regarding the latest settlement proposal as soon as the move was complete.

On November 14, 2006, Opposer contacted its undersigned counsel to discuss how best to respond to Applicant's most recent settlement offer. Opposer drafted an email, which it believed, in good faith, was sent to Applicant. Thereafter, Opposer did not hear from Applicant.

When Opposer realized the email was never actually sent, Opposer called Applicant on February 16, 2007 to explain the inadvertent oversight. Opposer followed the phone call with an email, attaching the proposal which Opposer intended to send on November 14, 2006.

Having not heard from Applicant regarding the February 16, 2007 proposal, on February 21, 2007, Opposer sent an email to Applicant, requesting an extension of the testimony period. On February 23, 2007, Applicant denied Opposer's request.

Opposer did not anticipate that Applicant would contest its request to extend the trial period request, given that (1) Applicant has not yet provided Opposer with responses to Opposer's Discovery Requests, which were served on July 24, 2006; (2) Opposer's oversight

was inadvertent; (3) Opposer had made no previous requests to extend the testimony period; (4) Opposer granted Applicant extensions of time on many occasions; and (5) Opposer anticipated the reciprocal courtesy of an extension particularly because Opposer allowed Applicant to not only extend, but to reopen the discovery period, so that Applicant would have a chance to serve discovery requests upon Opposer.

II. Good Cause Exists for the Requested Extension of Time

To prevail on its motion to extend the testimony period, Opposer must establish good cause for the requested extension of time. See Societa Per Azioni Chianti Ruffino Esportazione Vinicola Toscana v. Colli Spolentini Spoletoducale SCRL, 59 U.S.P.Q.2d (BNA) 1383 (TTAB 2001); FED. R. CIV. P. 6(b)(1) (a court may enlarge a set time period “for cause shown”).¹

“[T]he Board generally is 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.” Sysco Corp. v. Princess Paper, Inc., 2006 TTAB LEXIS 94, *5 (TTAB 2006). Further, “an application for the enlargement of time under Rule 6(b)(1) normally will be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party.” Kernisant v. City of New York, 225 F.R.D. 422, 431 (E.D.N.Y. 2005) (quoting C. Wright, A. Miller, M. Kane, *Federal Practice and Procedure* § 1165 (2d ed. 1986)).

¹ The standard for extending the testimony period is less stringent than that required to reopen time for taking action, wherein a movant must show that its failure to act during the time previously allotted therefore was the result of excusable neglect. See, e.g., § TBMP 509.01(b).

In the instant case, Opposer seeks an extension of time of the testimony period in good faith so that it may receive and review Applicant's responses to Opposer's Discovery Requests before having to put on its case. Further, Opposer did not unreasonably delay in prosecuting its case; rather, it had a reasonable, good faith belief that the parties were still in the midst of settlement discussions, and that Applicant would consent to extensions of the trial period, as Opposer consented to Applicant's repeated requests for extensions of time. Further, this is the only extension of time Opposer has sought since the beginning of the proceeding. See Societa Per Azioni, 59 U.S.P.Q.2d (BNA) 1383 (granting extension of testimony period and finding persuasive that Opposer had requested no previous extensions of the discovery period).

Applicant will not be prejudiced by the granting of a reasonable thirty day extension. Prejudice to Applicant must be more than the "mere inconvenience and delay caused by [Opposer's] previous failure to take timely action" and "loss of any tactical advantage which it otherwise would enjoy as a result of the movant's delay or omission." See TBMP § 509.01(b)(1). Rather, "prejudice to the nonmovant is prejudice to the nonmovant's ability to litigate the case...".

Finally, Opposer will be prejudiced unfairly if the testimony period is not extended. Opposer cannot submit a complete Notice of Reliance without first receiving, reviewing, and incorporating Applicant's discovery responses, which Applicant has yet to provide to Opposer.²

² Opposer hopes to avoid further procedural disputes, and therefore is not filing a concomitant motion to compel responses to Opposer's Discovery Requests. Opposer has contacted Applicant and requested that the parties agree upon a day on which to exchange discovery requests. If Applicant does not respond promptly, Opposer will be forced to file a motion to compel.

WHEREFORE, Opposer respectfully requests that Opposer's Motion to Extend Testimony Period be granted, and that the close of Opposer's testimony period be set for thirty (30) days from the Board's ruling granting the instant motion.

Respectfully submitted,



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Dated: February 27, 2007

Attorneys for Opposer,
The H.D. Lee Company, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **OPPOSER'S MOTION TO EXTEND TESTIMONY PERIOD** was served on this 27th day of February, 2007, by U.S. Express Mail, postage prepaid, upon the following:

Jennifer A. Prioleau, Esquire
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