

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

Baxley

Mailed: October 22, 2008

Opposition No. **91176744**

DC Comics and Marvel
Characters, Inc.

v.

Michael Craig Silver

Andrew P. Baxley, Interlocutory Attorney:

On October 10, 2008, opposers filed a motion to extend testimony periods to postpone commencement of trial by sixty days.¹ Applicant indicated in an October 20, 2008 telephone conversation with the Board interlocutory attorney assigned to this case that he opposed that motion.

Full briefing of the motion to extend may not be completed until after the commencement of opposer's testimony period as last reset in the Board's September 4, 2008 order. Therefore, the Board, in its discretion, determined that such motion should be resolved by telephone conference. See Trademark Rule 2.120(i)(1); TBMP Section 502.06(a) (2d ed. rev. 2004). On October 22, 2008, such conference was held between opposers' attorneys Jonathan

¹ Opposers filed a motion "with consent" to extend testimony periods on October 10, 2008 and withdrew that motion later that day. Accordingly, the Board's October 10, 2008 electronic form order is vacated.

Reichman and Michelle Morris, applicant Michael Silver, and Board interlocutory attorney Andrew Baxley.

Opposers seek to postpone commencement of testimony periods herein by sixty days to allow opposers time to review interrogatory responses and responsive documents that applicant served on October 2 and 3, 2008 and prepare witnesses for trial. Opposers contend that applicant did not respond to an e-mail message inquiring as to whether his document production herein is complete. However, applicant stated during the conference that, as far as he could tell, his document production is complete.

Because opposers filed their motion to extend prior to the commencement of trial, they must show that good cause exists for the extension sought. See Fed. R. Civ. P. 6(b)(1). Opposers must demonstrate that the requested extension of time is not necessitated by their lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefor. See *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000). However, the Board is generally liberal in granting extensions before the period to act has lapsed, provided that the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. See, e.g., *American Vitamin*

Products, Inc. v. DowBrands Inc., 22 USPQ2d 1313 (TTAB 1992).

With regard to the trial schedule herein, the Board, by way of the September 4, 2008 order in which it granted opposers' motion to compel, placed opposers in essentially the same position in which they would have been had applicant properly responded to their discovery requests prior to the filing of the motion to compel. In compliance with that order, applicant served responses to interrogatories and document requests, along with responsive documents, on October 2 and 3, 2008, i.e., roughly one month prior to the commencement of opposers' testimony period, as last reset by way of the September 4, 2008 order. Such service should have given opposers ample time in which to prepare for trial.

However, notwithstanding the September 4, 2008 order, applicant waited until the telephone conference to state that his document production was complete.² In addition, the final full week of opposers' testimony period under the schedule set forth in the September 4, 2008 order falls during the week of Thanksgiving, a busy travel time. Accordingly, the Board finds that there is good cause to

² Opposers may seek to exclude at trial any evidence that was properly sought, but not disclosed, during discovery by raising an objection to that evidence during trial and preserving any such objection in their brief on the case. See Fed. R. Civ. P. 37(c)(1); TBMP Section 527.01(e) (2d ed. rev. 2004).

postpone the commencement of trial, albeit for less than the sixty days that opposers seek.

In view thereof, the motion to extend is granted to the extent modified by this order. Testimony periods are reset as follows.

Plaintiff's 30-day testimony period to close: **December 23, 2008**

Defendant's 30-day testimony period to close: **February 21, 2009**

Plaintiff's 15-day rebuttal testimony period to close: **April 7, 2009**

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

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

If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.