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

Proceeding	91184197
Party	Defendant POWERTECH INDUSTRIAL CO., LTD.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

United Parcel Service of America, Inc., :

Opposer : Opposition No. 91184197

v.

Powertech Industrial Co., Ltd., :

Applicant :

APPLICANT'S RESPONSE IN OPPOSITION TO OPPOSER'S MOTION
TO EXTEND TESTIMONY PERIODS

Pursuant to Section 2.127(a) of the Trademark Rules of Practice and Rule 6(b) of the Federal Rules of Civil Procedure, Applicant, Powertech Industrial Co., Ltd. (Applicant) respectfully responds in opposition to Opposer's Motion to Extend Testimony Periods.

INTRODUCTION

The subject proceeding before the TTAB, Applicant respectfully submits that Opposer's Motion to Amend the Notice of Opposition be denied based upon negligence, bad faith and the privilege of extensions being abused.

STATEMENT OF FACTS

Opposer filed its Notice of Opposition to Registration of Applicant's U.S. Serial Number 77/176,134 for the mark "HYBRID GREENS UPS" on 19 May 2008.

Counsel for the parties agreed to accept service of discovery by e-mail as if served by U.S. Mail. Apparently (although not known by Applicant) on 26 January 2009, Opposer served Interrogatories/Request for Admission/Document Requests on Applicant by e-mail on the last day permitted for the serving of such discovery requests.

Applicant did not receive Opposer's e-mails since the e-mails were not properly addressed to Applicant's attorneys e-mail address: rkl@rklpatlaw.com. Opposer had knowledge of Applicant's proper e-mail address and such e-mail address is accessible on the records of the TTAB from the time of filing of Applicants answer to the Notice of Opposition filed by the Opposer.

Opposer's counsel contacted Applicant's Attorney on 5 March 2009 and Opposer's counsel was informed that Applicant's Attorney did not receive the e-mails and thus, Opposer agreed to provide duplicate copies of Opposer's discovery requests and permit Applicant additional time to respond. Both parties acted in cooperation to reset the testimony period to allow the post-discovery period activity.

Applicant served its responses to Opposer's discovery requests on 16 April 2009 (prior to the date requested by the Opposer) which were apparently received by Opposer on 20 April 2009.

Thus, by Opposer's own admission, Applicant's Responses to Opposer's discovery requests were received at least as early as 20 April 2009.

Opposer's testimony period ended on 23 June 2009.

At approximately 11:00 a.m. on the morning of the last day of Opposer's testimony period, Opposer sent an e-mail to the Applicant's Attorneys requesting a Stipulation of Time to Extend the Testimony Period.

Applicant's Attorney immediately called Opposer's attorney indicating that no Stipulation to the Time Extension request could be made since Applicant resides in Taiwan, R.O.C. and that by the time Applicant's Attorney received the Opposer's e-mail, it was the middle of the night in Taiwan, R.O.C. and Applicant could neither provide authorization nor make any comments with regard to the Request. Opposer was fully aware that Applicant has a business in Taiwan, R.O.C. and the time difference precluded any possible response being made by the Applicant.

Applicant's Attorney, irrespective of the time difference, immediately e-mailed the Applicant to determine whether any authorization could be given. However, the undersigned Attorney fully understood that there would be no response since it was the middle of the night in Taiwan, R.O.C. and that the testimony period would end on 23 June 2009.

ARGUMENT

Ordinarily, the TTAB is liberal in granting Extension of Times 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, American Vitamin Products, Inc. v. Dowbrands Inc., 22 USPQ 2d 1313, 1315 (TTAB 1992).

In the subject case Applicant contends that Opposer has been guilty of negligence, bad faith and has abused the privilege of extensions.

In the Procyon Pharmaceuticals Inc. v. Procyon BioPharma Inc. cancellation proceeding before the TTAB, 61 USPQ 2d 1542, the Petitioner did not notify the Respondent that it required additional time to take testimony prior to a letter being sent by facsimile to the Respondent on the penultimate day of Petitioner's testimony period. As held by the TTAB: "Petitioner had a duty to diligently plan how it would prove its case during that prescribed testimony period. The occurrence of an insufficiently explained rearrangement of Petitioner's laboratory facilities during its assigned testimony period – and the asserted inability of its principal officer to submit and prepare evidence as a result thereof – does not, in our view, constitute good cause for the Extension requested on the last day of the testimony period."

The Opposer has been guilty of negligence in this proceeding. In the Opposer's Motion to Extend the Time of Taking Testimony, the Petitioner had the duty to plan how it would prove its case during the testimony period. The Opposer simply has stated that the Opposer mistakenly believed that additional time was available in Opposer's testimony period. Apparently this was due to an administrative error and a scheduling issue. However, Opposer has not indicated how it would prove its case during an extended testimony period and has given some vague indication that there was some error associated with the scheduling docket.

The Opposer has made the statement that Opposer has not yet taken all of the testimony that it seeks to present in this proceeding. In fact the Opposer has taken no testimony in this proceeding during the original testimony period. Opposer makes inference to the fact that it has not completed the taking of its testimony and presentation of its evidence, however, no testimony in any manner was taken during the extended testimony period. No indication has ever been given to Applicant that any testimony was taken during the testimony period.

Opposer, concurrently with the filing of the Opposer's Motion to Extend the Time of Testimony additionally filed a Motion to Amend the originally filed Notice of Opposition. The Opposer has indicated in this Motion to Extend the Time of its Testimony Period that "Opposer has just recently learned of additional grounds for opposition through information disclosed by Applicant in discovery responses served after the close of discovery". In fact, any additional grounds would have been in the possession of the Opposer at the time of the filing of the Notice of Opposition and the only basis of such grounds was in Applicant's Responses to the discovery requests made by the Opposer which were in the hands of the Opposer at least as early as 20 April 2009.

The Opposer has been guilty of bad faith in these proceedings. Opposer had ample time to take testimony during the original testimony period (where the Opposer took no testimony). The Opposer then e-mailed the Applicant's Attorney on the last day of Opposer's testimony period with the full realization that the

Applicant's Attorney could not receive any response or comment from Applicant by the time that Opposer's testimony period would be ended.

Opposer in this Motion to Extend the Time for Taking Testimony has inferred that some culpability rests in the hands of the Applicant. As stated in the Motion to Extend the Time for Taking of Testimony Opposer has stated: "Applicant's counsel is attempting to contact his Client regarding this instant Motion. However, Applicant's Counsel has not yet been able to obtain word from his Taiwan-based Client regarding this Motion.". Opposer's attorney is well aware (from the inception of this Notice of Opposition) that Applicant is based in Taiwan, R.O.C. and that no possible comment or instructions could be obtained by Applicant's Counsel by the end of Opposer's testimony period.

The Opposer's attorney then has stated: "Thus, Applicant has not refused to give its consent to the extension of time Opposer seeks through this Motion. Applicant has simply been unable to respond in time, thereby rendering this Motion necessary.". The Opposer's attorney was well aware of the time differential between the United States and Taiwan, R.O.C. and was well aware that there could be no response made by Applicant and Applicant's Attorney before the end of the testimony period.

Thus, it is believed that "bad faith" is shown by Opposer in this procedure.

It is believed that the Opposer has abused the privilege of extensions. Opposer filed the Motion to Extend the Time of Taking Testimony on the very last day and within a few hours of the ending of Opposer's testimony period.

Opposer has submitted that there would be “no prejudice” to Applicant resulting from the requested Extension of Time. In fact, Opposer has filed a contemporaneous motion to amend the Notice of Opposition. Applicant will be highly prejudiced by the Motion to Amend the Notice of Opposition since Applicant has a family of marks associated with the issues being brought up in the Motion to Amend the Notice of Opposition and is using the marks in commerce at the present time within the United States.

CONCLUSION

For the above reasons, Applicant respectfully requests that the TTAB deny Opposer’s Motion to Extend the Testimony Period.

Respectfully submitted,



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Dated

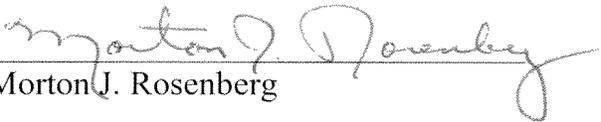
Attorney for Applicant
POWERTECH INDUSTRIAL CO., LTD.

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing
“Applicant’s Response in Opposition to Opposer’s Motion to Amend the Notice of
Opposition” was served this day via electronic and 1st class mail, pursuant to
agreement, addressed to:

Stephen M. Schaezel, Esquire
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This 6TH day of July, 2009.


Morton J. Rosenberg