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

Proceeding	91184978
Party	Defendant Walgreen Co.
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Submission	Motion to Extend
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Attachments	Contested Motion for 90-Day Extension.pdf (6 pages)(258082 bytes)

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

McNEIL-PPC, Inc.)	In re Trademark Application
)	Serial No. 76/682,070
Opposer,)	
)	Opposition No. 91184978
v.)	
)	Trademark: WAL-ZYR
WALGREEN COMPANY,)	
)	
Applicant.)	

CONTESTED MOTION FOR 90-DAY EXTENSION OF ALL DEADLINES

Pursuant to Rule 6(b) of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.116(a), Applicant Walgreen Company (“Walgreens”), by and through its attorneys, hereby moves the Trademark Trial and Appeal Board (the “Board”) for a ninety-day extension of all deadlines in the above-captioned opposition. Opposer McNeil-PPC, Inc. (“McNeil”) would not consent to this Motion. Accordingly, in support of this Motion, Walgreens states as follows:

BACKGROUND

1. This opposition was instituted on July 1, 2008.
2. On October 8, 2008, Walgreens served McNeil with interrogatories, document requests, and a Notice of 30(b)(6) Deposition. It was agreed that the parties would postpone scheduling the 30(b)(6) deposition until after McNeil provided Walgreens with its written discovery responses and with responsive documents.
3. On November 14, 2008, McNeil sent Walgreens its written responses to Walgreens’ discovery requests. However, McNeil did not produce any documents at that time.
4. As of January 12, 2009, McNeil still had not produced any documents. Thus, Walgreens sent McNeil an e-mail requesting responsive documents and suggesting February 25, 2009 or March 4, 2009 as dates for the 30(b)(6) deposition of McNeil. (All correspondence and contact between the parties was through their respective attorneys.)

5. On January 28, 2009, McNeil sent Walgreens an e-mail stating that McNeil needed until February 6, 2009 to provide deposition dates and to produce McNeil's documents. (As time would tell, McNeil did not produce its documents until February 19, 2009, which was 134 days after Walgreens served McNeil with document requests.) McNeil explained that it had not produced documents yet, because two of McNeil's outside counsel attorneys had needed to work on other matters and had been unavailable to complete the document production.

6. Given the delay, Walgreens suggested that the parties file a joint motion to extend the opposition deadlines by sixty days, so the parties would have sufficient time to prepare expert disclosures which, at that time, were due on February 7, 2009. McNeil agreed, Walgreens filed the consented motion with the Board, and the Board granted the motion.

7. On February 6, 2009, McNeil contacted Walgreens and said Walgreens' proposed deposition dates were not workable. McNeil suggested the dates of March 23, 2009 or March 27, 2009 instead. The dates were two-and-a-half months after Walgreens sent its January reminder regarding the 30(b)(6) deposition. Walgreens' counsel had a scheduling conflict on March 23, 2009, so Walgreens agreed to the March 27, 2009 date. The parties agreed the deposition would take place at McNeil's attorney's office in New York, NY.

8. McNeil had identified Mr. Rohonish Hooda in its Initial Disclosures as a potential witness. Thus, on February 27, 2009, Walgreens sent McNeil a Notice of Deposition for the individual deposition of Mr. Hooda to take place at 1:00 pm on March 26, 2009 in New York, NY. Walgreens chose this date, because Walgreens was already scheduled to travel to New York for the 30(b)(6) deposition of McNeil on March 27, 2009. Mr. Hooda was scheduled to be McNeil's 30(b)(6) witness.

9. McNeil contacted Walgreens and said that, while Walgreens is entitled to take two depositions of Mr. Hooda, one in his capacity as McNeil's 30(b)(6) witness, and the other of him individually, McNeil preferred that Walgreens take only one deposition during the

scheduled trip, and that Walgreens return to New York for the second deposition if Walgreens determined after having taken the first deposition that the second deposition was still necessary.

10. Walgreens wanted to avoid a second trip to New York, and due to time concerns, Walgreens did not want to reschedule the 30(b)(6) deposition for a date even later than March 27, 2009 when Mr. Hooda might be available on two consecutive days. However, Walgreens understood McNeil's desire to avoid a second deposition if it were unnecessary. Thus, Walgreens suggested taking the 30(b)(6) deposition on March 26, 2009, and then taking Mr. Hooda's individual deposition on March 27, 2009 only if Walgreens still felt it necessary.

11. McNeil would not agree to this plan. McNeil said Mr. Hooda was not available on any day prior to March 27, 2009, and that Walgreens would have to return to New York for the second deposition if Walgreens wanted to proceed with the deposition scheduled for March 27, 2009.

WALGREENS HAS GOOD CAUSE FOR EXTENSION OF DEADLINES

12. April 8, 2009 is the expert disclosure deadline for both parties. Walgreens needs to review the content of McNeil's 30(b)(6) testimony to prepare any expert disclosures, which could include an expert report or survey. Further, since the 30(b)(6) deposition will be the first deposition taken by Walgreens in this case, depending on what is said at the deposition, other depositions or follow-up discovery may also be needed.

13. McNeil's 30(b)(6) deposition is scheduled for March 27, 2009, just nine business days before the deadline. Nine business days is not enough time for Walgreens to do all that it may need to do to prepare expert disclosures. (Walgreens also would not have had enough time had the 30(b)(6) deposition been scheduled for March 23, 2009.)

14. Thus, on March 13, 2009, Walgreens suggested that the parties agree to a sixty-day extension of all deadlines. (Walgreens has since determined a ninety-day extension is necessary due to the complexity of preparing expert disclosures.)

15. However, McNeil refused to consent to the sixty-day extension. McNeil said it would consent only to thirty-day extension, with the explanation that McNeil is concerned about *Walgreens'* delay in this case. In particular, McNeil alleged that Walgreens delayed in providing deposition dates for Walgreens' witnesses, in responding to a letter that McNeil sent Walgreens on February 17, 2009 regarding Walgreens' discovery responses, and in producing documents.

16. McNeil's refusal and explanation surprised Walgreens, because Walgreens has good cause for the extension. Walgreens needs McNeil's 30(b)(6) testimony to prepare any expert disclosures, expert report, or survey. Further, a second non-30(b)(6) deposition or other follow-up discovery may be needed. Since McNeil would not agree to make Mr. Hooda available for his individual deposition until after the 30(b)(6) deposition, further delay is likely. Walgreens needs more than a thirty-day extension of the expert disclosure deadline to complete all of this.

17. Walgreens is not looking to point the finger of blame at any party, but Walgreens' conduct did not necessitate the extension. Walgreens contacted McNeil on January 12, 2009 regarding deposition dates, and Walgreens diligently tried to schedule the 30(b)(6) deposition well in advance of the expert disclosure deadline. Still, McNeil was not able to produce its witness until March 23, 2009 or March 27, 2009.

18. McNeil's allegations regarding delay by Walgreens are irrelevant to Walgreens' request for an extension and to this Motion. The allegations, even if true, have no bearing on McNeil's ability to provide its 30(b)(6) witness in a timely manner, and they have no bearing on McNeil's obligation to do so.¹ TBMP § 403.03 (stating "a party is under an obligation to respond to an adversary's request for discovery during the time allowed therefor under the applicable rules, irrespective of . . . an adversary's failure to respond to a pending request for discovery." See, e.g., *Ramada Franchise Sys., Inc. v. Royal Vale Hospitality*, 2004 WL 2966948 (N.D. Ill. 2004) (noting in dicta that court had extended the discovery deadline for the sole

¹ McNeil's allegations are also moot, because Walgreens has since provided deposition dates, held a teleconference with McNeil's counsel to address McNeil's February 17, 2009 letter, and produced responsive documents.

purpose of allowing plaintiff to depose defendants' witnesses who were unavailable for depositions prior to the close of discovery); *North River Ins. Co. v. Wachovia Bank*, 2007 WL 2668135 (N.D. Ga. 2007) (extending deposition period for the sole purpose of allowing plaintiff to depose defendant's key witness, who was unavailable for deposition during the discovery period).

CONCLUSION

19. In conclusion, Walgreens has good cause for a ninety-day extension of the expert disclosure deadline and discovery dates, and Walgreens' conduct did not necessitate the extension. Therefore, Walgreens respectfully moves the Board to grant this Motion and to extend all open deadlines by ninety days as shown below. The Board may elect to adjust these dates to avoid deadlines falling on Saturdays and Sundays.

Expert Disclosure Due:	July 7, 2009
Discovery Closes:	August 6, 2009
Plaintiff's Pretrial Disclosures:	September 20, 2009
Plaintiff's 30-day Trial Period Ends:	November 4, 2009
Defendant's Pretrial Disclosures:	November 19, 2009
Defendant's 30-day Trial Period Ends:	January 3, 2010
Plaintiff's Rebuttal Disclosures:	January 18, 2010
Plaintiff's 15-day Rebuttal Period Ends:	February 17, 2010

Date: March 25, 2009

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this "Contested Motion for 90-Day Extension of all Deadlines" was served by Federal Express in a prepaid envelope on the date indicated below and to the following:

Laura Popp-Rosenberg
Fross Zelnick Lehrman & Zissu, P.C.
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Date: March 25, 2009

Caroline Stevens