ESTTA Tracking number: **ESTTA459711**
Filing date: **03/02/2012**

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

Proceeding	91194974
Party	Defendant GFA Brands, Inc.
Correspondence Address	MARTA LEVINE QUARLES BRADY LLP 411 EAST WISCONSIN AVE MILWAUKEE, WI 53202 UNITED STATES marta.levine@quarles.com, david.cross@quarles.com
Submission	Motion to Extend
Filer's Name	John E. Conour
Filer's e-mail	john.conour@quarles.com, david.cross@quarles.com, tm-dept@quarles.com
Signature	/John E. Conour/
Date	03/02/2012
Attachments	91194974 and 6358 Motion.PDF (25 pages)(841189 bytes)

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

PROMARK BRANDS INC., & H.J. HEINZ COMPANY,	**Opposition Nos. 91194974** **91196358**
Opposers,	U.S. Trademark Application 77/864,305 For the Mark **SMART BALANCE** Published in the Official Gazette on April 20, 2010
v.	
GFA BRANDS, INC.,	U.S. Trademark Application 77/864,268 For the Mark **SMART BALANCE** Published in the Official Gazette on August 10, 2010
Applicant.	

MOTION TO EXTEND THE TIME FOR REBUTTAL EXPERT DISCLOSURES AND COMPLETION OF DISCOVERY

In accordance with Rule 403.04 of the Trademark Trial and Appeal Board Manual of Procedure, and for the reasons set forth in the attached Brief and Declaration, GFA Brands, Inc. requests that the date for close of rebuttal expert disclosures be extended until 05/01/2012, and that the close of Discovery be extended until June 1, 2012 all subsequent dates be reset accordingly.

Time to Answer : CLOSED
Deadline for Discovery Conference : CLOSED
Discovery Opens : CLOSED
Initial Disclosures Due : CLOSED
Expert Disclosure Due : 05/01/2012
Discovery Closes : 06/01/2012
Plaintiff's Pretrial Disclosures : 07/16/2012
Plaintiff's 30-day Trial Period Ends : 07/30/2012
Defendant's Pretrial Disclosures : 08/14/2012

Defendant's 30-day Trial Period Ends : 09/28/2012
Plaintiff's Rebuttal Disclosures : 10/12/2012
Plaintiff's 15-day Rebuttal Period Ends : 11/11/2012

Respectfully submitted,

Dated: March 2, 2012

By: _____

John E. Conour
QUARLES & BRADY LLP
300 North LaSalle Street, Suite 4000
Chicago, Illinois 60654
Telephone: (312) 715-5168

Attorney for Applicant, GFA Brands, Inc.

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that GFA Brands, Inc.'s MOTION TO EXTEND THE TIME FOR REBUTTAL EXPERT DISCLOSURES AND COMPLETION OF DISCOVERY is being electronically filed with the United States Patent and Trademark Office, Trademark Trial and Appeal Board, on the date set forth below. The undersigned further certifies that on the date set forth below, a copy of the foregoing Motion was sent by first class mail, postage pre-paid, with a courtesy copy via email, upon on the following counsel for Opposers:

Cecilia R. Dickson
Jones Day
500 Grant Street
Suite 4500
Pittsburgh, PA 15219-2514

crdickson@jonesday.com

March 2, 2012

Attorney for Applicant, GFA Brands, Inc.

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

PROMARK BRANDS INC., & H.J. HEINZ COMPANY,	**Opposition Nos. 91194974** **91196358**
Opposers,	U.S. Trademark Application 77/864,305 For the Mark **SMART BALANCE** Published in the Official Gazette on April 20, 2010
v.	
GFA BRANDS, INC.,	U.S. Trademark Application 77/864,268 For the Mark **SMART BALANCE** Published in the Official Gazette on August 10, 2010
Applicant.	

GFA'S BRIEF IN SUPPORT OF ITS MOTION TO EXTEND THE TIME FOR REBUTTAL EXPERT DISCLOSURES AND COMPLETION OF DISCOVERY

SUMMARY OF ARGUMENT

In January, 2012, Opposers named a survey expert and provided a strength of mark and confusion survey expert report. GFA needs to rebut what appears to be a seriously flawed survey, and GFA needs more time than allowed under the current schedule for rebuttal expert reports. Opposers have refused GFA's request to extend the close of discovery about two and a half months, from the current deadline of March 9, 2012 to June 1, 2012. This extension is necessary to allow GFA and its experts up to and including May 1, 2012 to disclose any rebuttal expert witness reports and then to allow both sides an opportunity for expert discovery.

GFA therefore respectfully requests that the Board extend the current discovery deadline and subsequent deadlines in accordance with GFA's request -- all of which have been necessitated by the difficulty GFA has encountered in locating and retaining appropriate potential rebuttal expert witnesses to respond to Opposers' survey expert witness.

PROCEDURAL STATUS AND THE FACTS CONCERNING GFA'S NEED FOR ADDITIONAL TIME TO PROVIDE REBUTTAL EXPERT REPORTS

This consolidated opposition proceeding is based upon GFA's intent to use applications. Opposers filed notices of opposition to those applications on May 20, 2010 and September 2, 2010. The parties have stipulated to several extensions of time throughout this proceeding, but now, unfortunately, we must seek approval from the Board to adjust the schedule. Notably, any delay of the resolution of this proceeding can only prejudice GFA, because GFA has yet to use the mark in accordance with its intent to use applications.

In accordance with the scheduling order in effect at the time, Opposers disclosed on the January 9, 2012 (the deadline for any expert witnesses that it intended to rely upon), a report and survey performed by Dr. Barry A. Sabol. After reviewing this survey and consulting with GFA personnel, counsel for GFA promptly began contacting survey experts to analyze what appears to be a flawed survey.

As explained in the accompanying declaration of GFA's counsel, David Cross, GFA immediately encountered difficulties in locating a survey expert who was both qualified and available to assist in this analysis. As of January 29, 2012, GFA had identified and retained one survey expert, Leon Kaplan, to assist in certain aspects of GFA's analysis of Opposers' survey. (GFA disclosed Mr. Kaplan's identity to Opposers solely for the purpose of allowing him to see certain discovery that had been designated as "expert and attorney's eyes only" by Opposers under the Protective Order.) After further consultation with Mr. Kaplan, GFA decided to retain a second survey expert to handle a separate part of the analysis of the survey performed by Opposers' expert. After additional searching, GFA identified a qualified and available survey expert in mid-February, 2012. Due to counsel for GFA's travel and deposition schedule in

another pending matter (a patent case venued in the Eastern District of Wisconsin), the formal engagement of this additional survey expert was not completed until February 29, 2012.

GFA has not yet decided whether it will be naming one or both of these survey experts as actual testifying witnesses. Under Rule 401.03 GFA does not need to provide information concerning expert witnesses who are acting solely in a consulting basis until such time as it decides to use them as testifying experts.

GFA has been informed by the second expert that he is not able to complete his portion of the analysis until about May 1. Based on that information from the expert, counsel for GFA conferred with Ms. Cecilia Dickson, counsel for Opposers, on Tuesday, February 28, 2012. During that call, counsel for GFA explained that it had encountered difficulty in lining up this expert, that it had just been able to do so, and that should GFA decide to use him to testify, this expert could not complete his portion of the analysis and an expert report until about May 1.

Because of that, counsel for GFA proposed a May 1 deadline for any rebuttal expert reports for testifying experts. He also proposed that the current scheduled discovery close date of March 9 be extended to June 1, 2012, with the remaining pretrial disclosure, trial period, and rebuttal period deadlines being rescheduled with essentially the same intervals as they now appear in the scheduling order.

Ms. Dickson asked counsel for GFA on February 28 if he were in a position to provide more detail for the reasons the expert's report could not be done before May 1. Counsel for GFA explained that he considered the specifics of the expert analysis to be undertaken to be work product, and that he was not in a position to disclose more detail. Ms. Dickson said she would consult with others about the proposed schedule.

The next day, Ms. Dickson sent counsel for GFA a letter claiming that GFA had not provided "any reason" for the proposed May 1 extension. She further cited as reasons for Opposers' refusal to consent to the proposed new schedule two TTAB decisions where requests to extend discovery deadlines were refused. In each case, however, the requests for extensions were made by parties that had made no effort to engage in any discovery. Furthermore, unlike here, those requests were not supported by any plausible explanation for the request.

GFA responded early the next day with an email message reiterating that the additional expert GFA had searched for and had just recently retained cannot complete a thorough analysis of Opposers' survey and prepare a report until about May 1. GFA also repeated that the specifics of what the expert plans to do are subject to work product protection. GFA should not be required to disclose that confidential work product before testifying expert reports are due. GFA requested that Opposers' counsel reconsider its position and agree to the May 1 date. Opposers have given no indication that they are willing to do so.

ARGUMENT

GFA's request for an extension, since it is being made before the expiration of any discovery deadline, is subject to the Board's generally "liberal" good cause standard for granting extensions of time before the period to act has elapsed. See National Football League v. DNH Management LLC, 85 U.S.P.Q. 2d ____, 1852 (TTAB 2008). Furthermore, although GFA need not prove lack of prejudice to Opposers, GFA's requested extension prejudices Opposers in no conceivable way. It appears that Opposers are trying to deprive GFA of the ability to use the expert witnesses of its choosing or require GFA to disclose confidential litigation strategy decisions protected by the work product doctrine. See TTAB Rule 509.01(b)(1) (any prejudice

to the non-movant must be "more than the non-movant's loss of any tactical advantage which it otherwise would enjoy as a result of the movant's delay or omission.")

The Board has admonished parties to opposition proceedings about the need to work cooperatively to accommodate the schedule of lawyers and each other's witnesses so as to complete discovery without the need of the Board's assistance. See generally Luehrmann v. Kwik Kopy Corp., 2 U.S.P.Q. 2d 1303, 1304 (TTAB 1987) (reminding opposing parties of their obligation to work cooperative in accommodating fact witness schedules and to work together to complete fact discovery without "saddling" the Board with "needless motions").

The Board has taken particular pains to encourage parties to work cooperatively with the often more complex scheduling issues that arise when a party decides to use expert testimony in an opposition proceeding. See generally Rule 401.03. Specifically, Rule 401.03 states that the "provisions regarding the timing of expert disclosure are intended to facilitate the taking of any necessary discovery by any party or parties adverse to this disclosing party, in regard to the proposed expert witness, and to allow the adverse party or parties to determine whether it will be necessary to rely on a rebutting expert. Parties are expected to cooperate in the process of exchanging information about any testifying experts." Parties are encouraged to discuss the possibility of expert witnesses during the discovery conference, and the "parties should revisit these discussions whenever it appears that a testifying expert witness may become involved in the case."

Opposers' disclosure of their survey expert in January 2012, has necessitated such "additional discussions." GFA has attempted to engage Opposers in addressing the expert discovery issues raised by Opposers' expert disclosure. Initially, Opposers were cooperative in agreeing on February 3, 2012, to GFA's request for an extension of the rebuttal expert disclosure

deadline and the discovery deadline, which at that time was set to close on about February 7, 2012. That agreement led to a stipulation filed with the Board on February 6, 2012, providing for a 30 day stay of all discovery to allow the parties' time to work through a revised schedule that would accommodate any rebuttal expert disclosures from GFA and then allow the parties to engage in orderly expert discovery. However, because of the difficulty GFA encountered in locating and retaining the appropriate expert witnesses needed to analyze Opposers' survey, GFA was not in a position to propose a new schedule until February 28.

As the Board's rules recognize, expert witnesses, because of their potential importance in a case and because they are not direct employees of any party, can present particular problems for discovery. That has occurred here. GFA has proposed a reasonable method for addressing these difficulties by revising the schedule as set forth above. GFA respectfully requests that the Board reset the dates in accordance with GFA's request.

Dated this 2nd day of March, 2012.

s/David R. Cross
David R. Cross
Marta S. Levine
Johanna M. Wilbert
Quarles & Brady LLP
411 East Wisconsin Avenue, Suite 2040
Milwaukee, Wisconsin 53202-4497
Telephone: (414) 277-5495
Facsimile: (414) 978-8942
Email: DRC@quarles.com
Email: marta.levine@quarles.com
Email: jwilbert@quarles.com

Certificate of Service and Transmittal:

I certify that this correspondence is being electronically transmitted in PDF format to the Trademark Trial and Appeal Board through the Electronic System for Trademark Trials and Appeals (ESTTA) on the date indicated below, with a copy in PDF format sent by e-mail to Cecilia R. Dickson, Jones Day, 500 Grant Street, Suite 4500, Pittsburgh, Pennsylvania 15219.

Date: 3/02/12

s/David R. Cross
David R. Cross

EXHIBIT A

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

PROMARK BRANDS INC., & H.J. HEINZ COMPANY,	**Opposition Nos. 91194974** **91196358**
Opposers,	U.S. Trademark Application 77/864,305 For the Mark **SMART BALANCE** Published in the Official Gazette on April 20, 2010
v.	
GFA BRANDS, INC.,	U.S. Trademark Application 77/864,268 For the Mark **SMART BALANCE** Published in the Official Gazette on August 10, 2010
Applicant.	

STIPULATION TO SUSPEND PROCEEDINGS

Commissioner for Trademarks
P.O. Box 1451
Alexandria VA 22313-1451

Subject to the approval of the Trademark Trial and Appeal Board, the parties, by their respective counsel, hereby stipulate and agree to suspend this proceeding for 30 days, pursuant to Rule 2.117(c) of the Trademark Rules of Practice.

Counsel for the Applicant affirms that this stipulation to suspend proceedings is supported by good cause. The parties are engaged in communications regarding the orderly exchange of expert witness discovery. Before the expiration of the suspension, the parties plan to submit a proposed scheduled to govern the proceedings once the suspension ends. The parties exempt from this suspension request the Applicant's responses to requests for admission served by Opposers on January 25, 2012. Cecilia R. Dickson, one of the attorneys for the Opposers, consented to and joins in this request.

EXHIBIT A

Dated this 6th day of February, 2012.

David R. Cross
Marta S. Levine
Johanna M. Wilbert
Quarles & Brady LLP
411 East Wisconsin Avenue, Suite 2040
Milwaukee, Wisconsin 53202-4497
Telephone: (414) 277-5495
Facsimile: (414) 978-8942
Email: DRC@quarles.com
Email: marta.levine@quarles.com
Email: jwilbert@quarles.com

Certificate of Service and Transmittal:

I certify that this correspondence is being electronically transmitted in PDF format to the Trademark Trial and Appeal Board through the Electronic System for Trademark Trials and Appeals (ESTTA) on the date indicated below, with a copy in PDF format sent by -email to Cecilia R. Dickson, Jones Day, 500 Grant Street, Suite 4500, Pittsburgh, Pennsylvania 15219.

Date: 2/06/12

David R. Cross

QB\15795347.1

Electronic System for Trademark Trials and Appeals

Receipt

Your submission has been received by the USPTO.
The content of your submission is listed below.
You may print a copy of this receipt for your records.

ESTTA Tracking number: **ESTTA454816**
Filing date: **02/06/2012**

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

Proceeding.	91194974
Applicant	Defendant GFA Brands, Inc.
Other Party	Plaintiff Promark Brands Inc.

Motion for an Extension of Answer or Discovery or Trial Periods With Consent

The Close of Discovery is currently set to close on 02/07/2012. GFA Brands, Inc. requests that such date be extended for 30 days, or until 03/08/2012, and that all subsequent dates be reset accordingly.

Time to Answer :	CLOSED
Deadline for Discovery Conference :	CLOSED
Discovery Opens :	CLOSED
Initial Disclosures Due :	CLOSED
Expert Disclosure Due :	02/07/2012
Discovery Closes :	03/08/2012
Plaintiff's Pretrial Disclosures :	04/22/2012
Plaintiff's 30-day Trial Period Ends :	06/06/2012
Defendant's Pretrial Disclosures :	06/21/2012
Defendant's 30-day Trial Period Ends :	08/05/2012
Plaintiff's Rebuttal Disclosures :	08/20/2012
Plaintiff's 15-day Rebuttal Period Ends :	09/19/2012

The grounds for this request are as follows:

- *The parties are engaged in communications regarding the orderly exchange of expert witness discovery.*

GFA Brands, Inc. has secured the express consent of all other parties to this proceeding for the extension and resetting of dates requested herein.

GFA Brands, Inc. has provided an e-mail address herewith for itself and for the opposing party so that any order on this motion may be issued electronically by the Board.

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Respectfully submitted,
/Marta Levine/
Marta Levine
marta.levine@quarles.com, david.cross@quarles.com
crdickson@jonesday.com
02/06/2012

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EXHIBIT B

JONES DAY

500 GRANT STREET • SUITE 4500 • PITTSBURGH, PENNSYLVANIA 15219.2514
TELEPHONE: +1.412.391.3939 • FACSIMILE: +1.412.394.7959

Direct Number: (412) 394-7954
crdickson@JonesDay.com

JP008682:tsh/1245383
931063-205019

February 29, 2012

VIA ELECTRONIC MAIL

David R. Cross, Esq.
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202

Re: Promark Brands Inc. and H.J. Heinz Company vs. GFA Brands, Inc.

Dear David:

This letter follows up our conversation yesterday regarding your proposal to further extend the discovery period, such that GFA Brands, Inc. would not provide its expert disclosure and rebuttal expert report until May 1, 2012. We simply cannot agree to such a long extension, particularly where we have not been provided with any reason necessitating an extension of this duration. In marked contrast, we were quite prompt in disclosing the information pertaining to our expert.

For example, you will recall that we served our expert disclosure and expert report on January 9, 2012. By operation of the TTAB rules, a rebuttal expert disclosure and report is due within 30 days. On January 29, 2012, you identified an independent expert to whom you wanted to send certain deposition transcripts, pursuant to the terms of the Protective Order. Indeed, in one of those depositions, you had asked one of our corporate representative questions about our expert report. We consented to the release of the transcripts pursuant to the terms of the Protective Order. At no time, however, have you disclosed this independent expert as a testifying expert. On February 3, 2012, you requested an extension of the rebuttal expert disclosure deadline and the discovery deadline, which at that time was set to close on February 7, 2012. We agreed to a 30 day stay, based, in part, on the representation that within a week or so we would have information on when to expect your rebuttal expert disclosure and report, and could proceed with scheduling and concluding expert discovery. A stipulation was filed with the Board to that effect and a 30 day stay was granted. Two days later, on February 8, 2012, the Board, in response to the separate notification of our January 2012 expert disclosure, independently issued an order staying the proceedings "for the taking of expert discovery", and indicated that proceedings would resume on March 2, 2012, with discovery re-set to close on March 9, 2012. Despite following up with you a couple of times, until yesterday, we did not hear anything regarding even a proposal to schedule expert discovery since the opposition

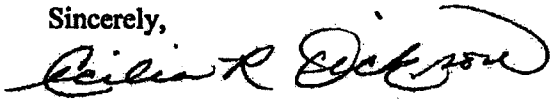
EXHIBIT B

proceeding was stayed. As of the date of this letter, no disclosure or any other expert-related discovery materials have been provided by you to us.

While the Board makes clear that parties are to cooperate in the process of exchanging expert witness information and conducting discovery, the Board has also made clear that mere delay in initiating discovery does not constitute good cause for an extension of the discovery period. *See National Football League v. DNH Management LLC*, 85 USPQ2d 1852 (TTAB 2008) (opposers' motion to extend discovery period denied where opposers did not serve written discovery requests until final day of discovery, and did not attempt to depose applicant during prescribed discovery period, and evidence does not support opposers' claim that they delayed discovery because parties were engaged in settlement discussions); *Luehrmann v. Kwik Kopy Corp.*, 2 USPQ2d 1303, 1305 (TTAB 1987) (no reason given why discovery was not taken during the time allowed). Given the already extended discovery period in this opposition to accommodate document production and fact witness depositions, further broad, unexplained extensions of time to conduct expert discovery do not, based on the information we have received to date, appear warranted.

Accordingly, in an effort to resolve this matter without the need to resort to the Board for relief, we will entertain any counter-proposal to reset the deadlines to a more reasonable time frame until March 5, 2012. We will not consider anything greater than a 30 day extension resetting the close of discovery to April 9, 2012, with your rebuttal expert disclosure due no later than March 16, 2012. If we are unable to reach agreement, we will have no choice but to avail ourselves of relief from the Board.

Sincerely,



Cecilia R. Dickson

cc: Marta S. Levine, Esq.
Johanna M. Wilbert, Esq.
Timothy P. Fraelich, Esq.

EXHIBIT C

Schmit, Jane (MKE x1660)

From: Cross, David R. (MKE x1669)
Sent: Thursday, March 01, 2012 9:39 AM
To: Cecilia R Dickson
Cc: Levine, Marta S. (MKE x1675); Wilbert, Johanna M. (MKE x1495); Timothy Fraelich
Subject: RE: Heinz v. GFA: Expert discovery scheduling

I do not have time now respond to everything in your letter at this point, other than to say we disagree, including disagreeing that I supposedly gave no reason for the schedule I proposed or the implication that we are seeking a delay merely for delay's sake. As I explained on the 28th, the additional expert we have searched for and have just recently retained cannot complete a thorough analysis of your survey and prepare a report until about May 1. As you assumed without prompting during our call on the 28th, the specifics of what he plans to do are work product. We should not be required to disclose those specifics before our testifying expert reports are due.

Is there any chance that you would reconsider your position and agree to the May 1 date for us to disclose any rebuttal exert reports?

Thanks.

Dave

From: Cecilia R Dickson [mailto:crdickson@JonesDay.com]
Sent: Wednesday, February 29, 2012 4:25 PM
To: Cross, David R. (MKE x1669)
Cc: Levine, Marta S. (MKE x1675); Wilbert, Johanna M. (MKE x1495); Timothy Fraelich
Subject: Heinz v. GFA: Expert discovery scheduling

David- Please see the attached letter following up on our discussion yesterday.

Cecilia

JONES DAY | **Cecilia R. Dickson**

500 Grant Street, Suite 4500, Pittsburgh, PA 15219-2502 • **Direct:**412.394.7954 • **Fax:** 412.394.7959 •
crdickson@jonesday.com
Jones Day - One Firm Worldwide

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EXHIBIT C

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

PROMARK BRANDS INC., & H.J. HEINZ COMPANY,	**Opposition Nos. 91194974** **91196358**
Opposers,	U.S. Trademark Application 77/864,305 For the Mark **SMART BALANCE** Published in the Official Gazette on April 20, 2010
v.	
GFA BRANDS, INC.,	U.S. Trademark Application 77/864,268 For the Mark **SMART BALANCE** Published in the Official Gazette on August 10, 2010
Applicant.	

DECLARATION OF DAVID R. CROSS IN SUPPORT OF GFA'S MOTION TO EXTEND THE TIME FOR REBUTTAL EXPERT DISCLOSURES AND THE COMPLETION OF DISCOVERY

DAVID R. CROSS, being first duly sworn on oath, deposes and says as follows:

1. I am a partner with Quarles & Brady LLP located in Milwaukee, Wisconsin. I am lead counsel for applicant, GFA Brands, Inc. in this opposition proceeding. I provide the following information based on my personal knowledge.

2. This consolidated opposition proceeding is based upon GFA's intent to use applications against which Opposers filed notices of opposition on May 20, 2010 and September 2, 2010. As the docket reflects, the parties have, for various reasons, stipulated to several extensions of time throughout this proceeding. These stipulations were in part due to the need for the parties to cooperatively complete fact discovery, which GFA had diligently pursued through interrogatories, document requests, and two fact witness discovery depositions that took place at Opposers' counsel's office in Pittsburgh on January 17, 2012. Now, however, Opposers have refused GFA's reasonable request for a revised schedule to accommodate GFA's need to

retain rebuttal experts to respond to Opposers' survey expert. Regrettably, we must therefore trouble the Board with a matter that should otherwise have been resolved cooperatively.

3. As explained in more detail below, GFA requests up to and including May 1, 2012 to disclose any rebuttal expert witness reports because of the difficulties that it has had in locating appropriate, qualified and available experts to complete a thorough analysis of the survey disclosed by Opposers on January 9, 2012. Importantly, GFA's request for the May 1 date is not part of a negotiating strategy under which GFA has requested more time than it believes it legitimately needs. Instead, the May 1 date is based on the statement received from GFA's retained expert that it is likely to take up to about May 1 for that expert to thoroughly analyze and complete his portion of a rebuttal addressing the survey upon which Opposers rely performed by Dr. Barry A. Sabol.

4. After reviewing Dr. Sabol's survey disclosed by Opposers in January, and consulting with GFA personnel, I promptly began contacting survey experts to analyze Dr. Sabol's survey. I immediately encountered difficulties in locating survey experts who were both qualified and available to assist in this analysis. As of January 26, 2012, I had located and retained a survey expert, Leon Kaplan, who is available to assist in certain aspects of GFA's analysis of Dr. Sabol's survey. I disclosed Mr. Kaplan's identity to Opposers solely for the purpose of allowing him to see certain discovery that had been designated as expert and attorneys' eyes only by Opposers under the protective order. We have not, however, identified Mr. Kaplan as a testifying witness as of this time.

5. After further consultation with Mr. Kaplan and GFA, we decided to retain a second survey expert to handle a separate part of the analysis of what we anticipate will be a rebuttal of Dr. Sabol's survey report. This required me to do additional searching.

6. Because of GFA's desire to retain a second expert to address a separate part of our anticipated rebuttal, and to allow for an orderly exchange of expert discovery, I contacted Opposers' counsel, Ms. Cecilia Dickson, before GFA's deadline for rebuttal expert reports. We agreed to a stipulation dated February 6, 2012, to suspend proceedings for 30 days to allow the parties to work through a proposed schedule for the orderly exchange of expert witness discovery once the proceedings resumed in early March. (A copy of that stipulation is attached hereto as Exhibit A.)

7. After several weeks of contacting possible survey experts, I identified a qualified and available survey expert in mid-February, 2012.

8. However, due to the expert's limited availablity and due to my difficult travel and deposition schedule during the last half of February in another pending matter (a patent case venued in the Eastern District of Wisconsin with an impending discovery deadline), I was not able to complete the formal engagement of this additional survey expert until February 29, 2012.

9. GFA has not yet decided whether it will name one or both of the two survey experts it has retained to actually provide trial testimony. Under the rules of the TTAB, GFA does not need to provide information concerning expert witnesses who are acting solely in a consulting basis until such time as it decides to use them as testifying experts. If it does name both experts to testify, GFA will have them focus on different aspects of the rebuttal, so as to avoid unneeded repetition.

10. Importantly, I have been informed by our recently engaged survey expert that he is not able to complete his portion of the analysis and an accompanying report until about May 1. Based on that information, I conferred with Ms. Dickson on Tuesday, February 28, 2012. During that call, I explained that GFA had encountered difficulty in lining up the second expert

witness, that I had just been able to do so formally, and that should GFA decide to use this expert witness to testify, he could not complete his analysis and report until about May 1.

11. Because of that, I proposed a May 1 deadline for any rebuttal expert reports for testifying witness, that the month of May be used to complete depositions of expert witnesses, and that the current scheduled close of discovery date of March 9 be extended to June 1, 2012, with the remaining pre-trial disclosure, trial period, and rebuttal period deadlines being rescheduled with essentially the same intervals as they now stand in the current schedule.

12. Ms. Dickson asked me if GFA was in a position to provide more detail for the reasons the expert's report could not be done before May 1. I responded by explaining that GFA did indeed consider the specifics of any expert witness analysis to be subject to work product protection at this time and, therefore, I stated that I was not in a position to provide more detail. Ms. Dickson seemed to understand, at least as of the end of our February 28 telephone conversation.

13. However, the next day Ms. Dickson sent me a letter (a copy of which is attached as Exhibit B) claiming that I had not provided any reason for the proposed May 1 extension. She insisted that our rebuttal expert disclosure be due no later than March 16, 2012, about two weeks from now.

14. I responded to Ms. Dickson early on March 1 with the message (a copy of which is attached hereto as Exhibit C) reiterating that the additional expert GFA had searched for and had just recently retained cannot complete a thorough analysis of Opposers' survey and prepare a report until about May 1. I asked whether she would reconsider her position and agree to the May 1 date. Opposers have given no indication that they are willing to do so at least as of this time.

Dated this 2nd day of March, 2012.

s/David R. Cross
David R. Cross