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

Proceeding	91194974
Party	Plaintiff Promark Brands Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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

PROMARK BRANDS INC. AND H. J. HEINZ COMPANY'S OPPOSITION TO MOTION TO EXTEND THE TIME FOR REBUTTAL EXPERT DISCLOSURES AND COMPLETION OF DISCOVERY

I. INTRODUCTION

On March 2, 2012, Opposers ProMark Brands Inc. and H. J. Heinz (collectively, "Heinz") filed a Motion to Compel, seeking to set a date certain by which GFA's rebuttal expert disclosures will be due. Even though GFA had had 60 days – double the customary time period for providing ***rebuttal*** disclosures – and Heinz offered to extend the close of discovery by an additional 30 days, GFA wanted more time without any explanation, and from Heinz's perspective, without any progress having occurred on the expert discovery front. After receiving Heinz's Motion to Compel, GFA filed the aforementioned Motion to Extend on the afternoon of the same day. In its Motion to Extend, for the first time, GFA has provided some additional detail as to why it believes it should be entitled to approximately 120 days to provide its rebuttal expert disclosures. However, none of these details justifies such a lengthy extension.

When the parties were attempting to agree to a rebuttal expert disclosure schedule, outside counsel for Heinz was told that GFA's proposed expert could not complete his analysis until May 1, 2012. No further details were provided. Counsel did not discuss, even in general terms, why the expert needed this additional time. Counsel did not discuss the date of hire of any experts. Counsel did not discuss staging discovery so that at least one rebuttal expert disclosure (if there is more than one) could be provided earlier than May 1, 2012. Moreover, counsel did not discuss scheduling in relation to GFA's outside counsel's travel and trial schedule.

Now, GFA indicates that its expert was not retained until February 29, 2012, and blames the delay, in part, on GFA's outside counsel's travel and trial schedule. GFA also comments that the expert is not "within its control", but does not provide any reasoning as to why the expert requires such a lengthy time period to conduct his analysis. Heinz is not interested in any work product disclosure. Rather, counsel merely requested detail that could be provided—even in general terms—to explain this lengthy extension request. None was provided, and thus, to Heinz, this seemed like a baseless request for an extension.

Second, Heinz's expert report was promptly filed, and the excessive delay appears clearly to be due to a lack of diligence. Of course GFA's counsel's travel and trial schedule is not a proper basis for a lengthy extension request. Here, both GFA and Heinz are represented by large firms with multiple attorneys appearing as attorneys of record in these proceedings. Indeed, GFA has three attorneys of record in this proceeding. The idea that one person's trial schedule would result in such a prolonged delay before even consulting an expert is not credible.[1]

GFA claims in its Motion to Extend that Heinz will suffer no prejudice by the lengthy extension requested. Not so. Heinz has complied with the TTAB schedule. Heinz has gone to

[1] Significantly, Heinz was quite generous in agreeing to extensions regarding GFA's obligations with respect to its expert. It was only after the obvious lack of diligence and unexplained, excessive delay that Heinz found it necessary to seek the intervention of the Board.

considerable time and expense to comply with the expert disclosure schedule. The fact that GFA has not yet brought to market the products identified in the applications under the applied-for marks does not mean that GFA does not intend to do so for the duration of the opposition proceedings. As it stands, for Heinz to comply with the TTAB schedule, while GFA cavalierly ignores that schedule through repeated extensions does prejudice Heinz. Indeed, whenever one party observes the Rules and the other does not, there is obvious prejudice caused to the complying party.

II. CONCLUSION

Heinz moved, in its Motion to Compel, that GFA be ordered to provide any rebuttal expert disclosure no later than March 16, 2012. Heinz reiterates that request here, and opposes any further extension as unnecessary and unjustified.

Dated this 5th day of March, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was sent by ordinary U.S. mail, postage prepaid, with a courtesy copy via email, on this 5th day of March, 2012, to Counsel for Applicant:

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