

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

Issued: March 16, 2012

Opposition No. **91194974**
(parent)

Opposition No. 91196358

Promark Brands Inc. and H.J.
Heinz Company¹

v.

GFA Brands, Inc.

Cheryl S. Goodman, Interlocutory Attorney:

A telephone conference was convened on March 16, 2012, with respect to opposer's motion, filed March 2, 2012, to compel applicant's rebuttal expert disclosures, and applicant's motion, filed March 2, 2012, to extend time to provide rebuttal expert disclosures.²

Present for the telephone conference were Cecilia Dickson, counsel for opposer, and David Cross, counsel for applicant. Present for the Board was the above identified interlocutory attorney.

¹ H.J. Heinz Company has been joined rather than substituted as a party to this proceeding because the assignment occurred after the commencement of the proceeding, and prior to trial. TBMP Section 512 (3d ed. 2011). Recorded on May 5, 2011, at the Office's Assignment Branch at Reel/Frame: 4534/0456.

² The parties had agreed among themselves to extend applicant's rebuttal expert disclosure deadline from February 8, 2012 to March 9, 2012; the Board suspended proceedings for expert

Applicant sought to extend time to serve its rebuttal expert disclosures to May 1, 2012, and to extend discovery to June 1, 2012; opposer sought to compel applicant's expert rebuttal disclosures no later than March 16, 2012.

Opposer argues that "the late retention [of an expert] should not prejudice Heinz" and submits that the requested extension is not reasonable. Opposer submits that Heinz "should not be required to suffer the consequences of GFA or its proposed lack of diligence in arranging for a timely rebuttal." Heinz submits that it will be prejudiced by the extension.

In its cross-motion to extend, applicant argues that it "encountered difficulties in locating a survey expert" and determined that it needed to hire two survey experts. Applicant identified the second survey expert in mid-February 2012, engaging this expert at the end of February 2012.

In the telephone conference, applicant in response to the motion to compel and in reply to the motion to extend, provided further detail regarding the need for an extension, including engaging the second expert and the planned use of the second expert and the services to be provided. Applicant advised that it is now prepared to disclose its first testifying expert and this expert's critique.

discovery on February 8, 2012 with proceedings resuming on March

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Applicant has also disclosed the name of the second expert, but advised that according to the expert, the completed report and rebuttal survey likely will not be available until May 1, 2012.

Opposer reiterated its concern regarding prejudice to opposer including the possibility that applicant could proceed to use the mark in connection with frozen foods during the extended discovery period, also pointing out that it was able to timely comply with the expert disclosure deadline and applicant should be able to do the same. Opposer also contended that based on applicant's arguments at the telephone conference, it appears that applicant is attempting to circumvent the expert disclosure deadline in seeking a rebuttal survey and that the survey critique should be sufficient rebuttal.

In response to opposer's argument regarding the rebuttal survey, applicant argued that a survey is an appropriate means of rebuttal, and that opposer's criticisms regarding the survey are premature at this point.

The standard for granting an extension of time is good cause. See Fed. R Civ. P. 6(b) and TBMP § 509 (3rd ed. rev. 2011) and authorities cited therein. The Board generally is liberal in granting extensions of time before the period to act has elapsed so long as the moving party has not been

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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).

The Board found good cause for granting the extension.

Accordingly, the motion to extend is granted, as corrected, with an adjustment with respect to the close of discovery which should be May 31, 2012, rather than June 1, 2012. In view of the granting of the motion to extend, the motion to compel is denied. However, opposer is expected to make its expert disclosures of its first expert and first expert's report (critique) within FIVE DAYS of the date of this order in view of applicant's counsel's representations that it will be using this expert as a testifying expert, and his report is now available.³ Opposer can proceed with discovery of at least the first expert during this extended discovery/disclosure period. TBMP Section 401.03.

Dates are reset as follows:

Expert Disclosures Due	5/1/12
Discovery Closes	5/31/12
Plaintiff's Pretrial Disclosures	7/15/12
Plaintiff's 30-day Trial Period Ends	8/29/12
Defendant's Pretrial Disclosures	9/13/12
Defendant's 30-day Trial Period Ends	10/28/12
Plaintiff's Rebuttal Disclosures	11/12/12
Plaintiff's 15-day Rebuttal Period Ends	12/12/12

³ Objections regarding the rebuttal survey are properly left for trial. The Board does not entertain motions in limine. TBMP Sections 707.01 and 527.01(f) (3d ed. 2011).

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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.