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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. and H.J. Heinz Company
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Attachments	Opposers' Reply ISO Motion for an Extension.pdf (4 pages)(22660 bytes)

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

PROMARK BRANDS INC. and
H. J. HEINZ COMPANY,

Opposers,

vs.

GFA BRANDS, INC.,

Applicant.

**Opposition No. 91194974 (Parent)
and Opposition No. 91196358**

U.S. Trademark Application 77/864,305
For the Mark **SMART BALANCE**

U.S. Trademark Application 77/864,268
For the Mark **SMART BALANCE**

**PROMARK BRANDS INC. AND H. J. HEINZ COMPANY'S
REPLY IN SUPPORT OF THEIR MOTION FOR EXTENSION**

Opposers, ProMark Brands Inc. and H. J. Heinz Company, hereby submit this Reply Brief in support of their Motion for Extension. Opposers have moved the Board for a 45-day extension of the expert discovery deadline, and have requested that all other dates be reset accordingly. As indicated in Opposers' Motion, Opposers seek this extension to accommodate the transition of this matter from Cecilia R. Dickson, who is no longer with Jones Day and is no longer representing Opposers in this opposition.

On June 21, 2012, the Board re-opened discovery in this proceeding for the purpose of expert discovery with respect to Philip Johnson, whose "rebuttal" expert report was belatedly served on April 28, 2012. Pursuant to the Board's Order, expert discovery concerning Mr. Johnson was to be completed by July 21, 2012. To accommodate the parties' schedules, counsel for the parties agreed, prior to Ms. Dickson's departure, to conduct Mr. Johnson's deposition on July 25, 2012. However, in view of Ms. Dickson's departure, Opposers' counsel, Timothy P. Fraelich and Angela R. Gott, who is making her first appearance in this proceeding with this filing, will need additional time to review the case file and prepare to take Mr. Johnson's

deposition. Accordingly, Opposers have filed the present Motion to allow Mr. Fraelich and Ms. Gott sufficient time to do so.

Applicant has opposed Opposers' Motion, stating that an extension of 10 business days "should be ample time for Mr. Fraelich, who has appeared on Opposers' filings throughout this dispute, to pick-up where his former colleague, Ms. Dickson, has left off." Notably, however, Applicant does not dispute that Ms. Dickson was the principal counsel of record in this matter. Likewise, Applicant presumably does not dispute that Mr. Fraelich has had little involvement in this matter to date beyond his "appear[ance] on Opposers' filings." Furthermore, it is beyond dispute that Ms. Gott was not involved in this matter whatsoever prior to Ms. Dickson's departure.

Opposers look forward to a swift resolution of this proceeding by the Board, and would like to proceed as soon as possible with putting on its testimony and evidence for trial. However, Opposers are requesting this 45-day extension of time to allow time for Opposers' counsel to review the pleadings, the discovery exchanged, the motions that have been filed and resolved to date, and to prepare for and take the deposition of Mr. Johnson. Applicant acknowledges that Opposers should be permitted time to transition this matter, but the five-to-ten business days proposed by Applicant for this purpose is inadequate.

Because Opposers' Motion was filed before the expiration of the period for expert discovery as previously extended by the Board, Opposers "need only show good cause for the requested extension." TBMP § 509.01; *see also* Fed. R. Civ. P. 6(b). Opposers submit that the departure of Opposers' principal counsel of record in this proceeding is good cause for its requested extension. Moreover, Opposers' requested extension is not necessitated by Opposers' own lack of diligence or unreasonable delay. Nor is Opposers' Motion necessitated by any

inattentiveness of this proceeding, gamesmanship, or willful behavior intended to cause delay. To the contrary, upon receiving notice of Ms. Dickson's planned departure, Mr. Fraelich promptly contacted Applicant's counsel to request their consent to an extension and filed the instant Motion. Opposers have never sought to unreasonably delay this proceeding, and have been very generous in consenting to requested extensions of time by Applicant. Opposers' request for additional time to allow an involuntary substitution of its counsel is a sound reason for seeking additional time.

For all of the foregoing reasons, Opposers respectfully request that the Board grant their requested 45-day extension of the expert discovery deadline and that all remaining dates be reset accordingly.

Dated this 23rd day of July, 2012.

Respectfully submitted,

/Timothy P. Fraelich/

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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 23rd day of July, 2012, to Counsel for Applicant:

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