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

Proceeding	91197479
Party	Defendant Aristocrat Technologies Australia Pty Ltd
Correspondence Address	LAUREN KRUPKA ARISTOCRAT TECHNOLOGIES INC 7230 AMIGO ST LAS VEGAS, NV 89119-4306 UNITED STATES Lauren.Krupka@aristocrat-inc.com
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Date	09/12/2011
Attachments	DEEP FREEZE Opposition to Motion for Extension 091211.pdf ( 15 pages ) (3300004 bytes )

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

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

In the Matter of Trademark Application Serial No. 77785826  
For the Mark DEEP FREEZE

Faronics Corporation	)	
	)	
Opposer	)	
	)	Opposition No.: 91197479
v.	)	
	)	
Aristocrat Technologies Australia Pty Ltd.	)	
	)	
Applicant	)	

**APPLICANT’S REPLY IN OPPOSITION OF OPPOSER’S**  
**MOTION FOR AN ENLARGEMENT OF TIME**

Aristocrat Technologies Australia Pty Ltd. (“Applicant”) hereby submits this Reply in Opposition to “Opposer’s Motion for an Enlargement of Time of the Dates Set Forth on the Approved Scheduling Order of July 14, 2011” on the basis that good cause has not been shown.

This Opposition is timely in accordance with 37 CFR 2.127 insofar as the fifteen day deadline fell on a Saturday and thus the deadline was pushed to September 12, 2011, the following Monday. 37 CFR § 2.196.

**1. Opposer’s Lack of Diligence in Completing this Proceedings**

An extension of time may be granted by the Board upon a showing of good cause, see Fed. R. Civ. P. 6(b); however, the Board “will scrutinize carefully any such motions’ in determining whether good cause has been shown, including the diligence of the moving party during the discovery period.” Luemme, Inc. v. D.B. Plus Inc., 1999 TTAB LEXIS 72 at 4

(TTAB 1999). Here, as in Luemme, “there is no evidence in the record to show that petitioner has been diligent during the discovery period.” 1999 TTAB LEXIS at 7. In fact, Opposer cites the same reasons for its inability to meet discovery deadlines in this Motion for an extension as cited in the previous Motion for extension, filed July 6, 2011 (“July Motion”), namely other litigation matters and Opposer’s Counsel’s upcoming family vacation, with no evidence of movement toward keeping the proceedings going. The July Motion for a 30 day extension (the “July Extension”) was granted by the TTAB without Applicant’s consent (see Section 2 below for more on that point), which moved the Expert Disclosure date to August 29, 2011. During the 30 days of the July Extension, Opposer, who cited in the July Motion that Opposer’s Counsel was taking a family vacation in August, Opposer made seemingly no effort to advance these proceedings. The July Extension took place entirely during the month of August so if the planned vacation was cause for the need for the July Extension, it follows that the month of August would allow Opposer’s Counsel to catch up and meet all deadlines. Instead, three days prior to the deadline for Expert Disclosures, Opposer filed a motion for this additional extension (“August Motion”), again partially basing its argument for good cause on its Counsel’s family vacation.

A demonstration of diligence has certainly not been shown here where a vacation is cited twice as the cause for the need for what would be a total of a 60 day extension. Additionally, all that was required of Opposer at this point was Expert Disclosures; Opposer only needed to make an effort to meet that particular deadline, not complete all discovery, and it would have certainly been diligent in keeping the proceedings moving.

While Applicant appreciates the press of other litigation, such litigation is likely to be ongoing and Opposer cannot continue to request extension after extension based on this

argument, as attorneys will always have other matters pending, many which are particularly urgent or pressing.

Additionally, while this August Motion is the second motion for extension at this point in the proceedings, it is in fact the *third* extension requested by Opposer in this matter overall, the very first being filed and granted on March 3, 2011. Applicant consented to an initial 30 day extension in this matter at Opposer's request in order to work toward settlement, which proved unsuccessful. Three extensions in this matter are surely exorbitant and two extensions were certainly reasonable enough for Opposer to complete all tasks involved up to this point.

## **2. The July Motion was Mistakenly Granted as a Consent Motion**

The July Motion was mistakenly granted by the TTAB as a consent motion, which additionally precluded Applicant from its fifteen day period to oppose the Motion under 37 CFR 2.127, TBMP 509. The July Motion expressly stated that such extension was not consented to by Applicant. See Exhibit A. Eight days later on July 14, 2011, the July Motion was granted by a paralegal and such grant stated, "Opposer's *consented motion* filed July 6, 2011 to extend disclosure, discovery and trial dates is granted" (emphasis added). See Exhibit B. While a consent motion is usually granted and can be done by a Board Paralegal, action on a motion without consent is deferred until after the "expiration of the nonmoving party's time to file a brief in opposition to the motion," and is to be decided upon by the Board, not a Board Paralegal. TBMP 509.02. Thus, Applicant should not have to now endure another 30 days waiting for proceedings to resume on this when its right to reply in opposition of the July Extension was mistakenly taken away and Opposer has made the same arguments for good cause in this August Motion as in the July Motion.

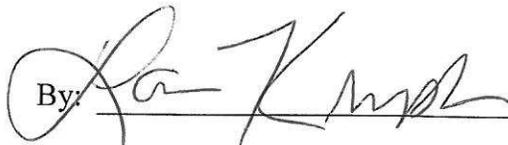
**Conclusion**

Applicant respectfully requests that the Board deny Opposer's request for this third extension of time in this matter. Opposer continues to cite the same arguments, including twice citing a family vacation, for each extension with no progress by Opposer toward moving the proceedings forward. As the Board stated in Luemme, "the Board should not have to remind [Opposer] that it brought this...proceeding in the first instance, and that it carries the burden of going forward in a timely manner. Neither the Board nor [Applicant] will sit idle for the convenience of [Opposer's] travel schedule." 1999 TTAB LEXIS at 8.

Respectfully Submitted,

Aristocrat Technologies Australia Pty Ltd

Dated: September 12, 2011

By:  \_\_\_\_\_

Lauren Krupka  
Aristocrat Technologies, Inc.  
7230 Amigo Street  
Las Vegas, NV 89119  
702-599-6818  
Attorney for Applicant

# EXHIBIT A



thirty days for the discovery period due to a busy docket and a scheduled vacation in August. After a follow up request for a reply, Applicant's Counsel finally responded that Applicant would not consent to the thirty day extension, nor would Applicant consent to any further extensions on the case. The present motion is based on the demands of litigation of Counsel for the Opposer.

Specifically, as set forth in the Declaration of James E. Shlesinger accompanying this Motion, a client of Mr. Shlesinger's has been sued in Federal District Court for patent infringement. The suit was filed after the current scheduling order was set on March 3, 2011. No notice was given about the law suit to Mr. Shlesinger or his client before its filing in April. Mr. Shlesinger has represented his client for thirty years. He is their principal attorney, and is the principal attorney representing the client in the patent litigation. The demands of the patent litigation, have required that Opposer seek a thirty day extension of the existing scheduled dates.

With respect to a motion for an extension of time, if the motion is filed prior to the expiration period as originally set forth or previously extended, the moving party need only show good cause for the requested extension. TBMP 509.01. In this case, the good cause standard applies, since discovery is not set to close until August 29, 2011. Mr. Shlesinger notified

Opposition No. 91197479

Applicant's Counsel on June 30, 2011, of the need for an extension of time, or two months prior to the close of discovery.

The press of other litigation has been recognized to constitute good cause for an extension of time. See Societa Per Azioni Chianti Ruffino Esportazione Vinicola Toscana v. Colli Spolentini Spoletoducale SCRL 59 USPQ2d 1383 (TTAB 2001). As set forth above, Counsel for the Opposer, represents another client in a patent infringement law suit filed subsequent to the prior entry of the scheduling order in the present case. Counsel for the Opposer is the principal attorney representing the client in the patent litigation and is also the principal attorney representing the Opposer in this proceeding.

This is not a case in which the excusable neglect standard applies, nor is it one where the party seeking an extension has waited until the waning days of the close of the deadline for discovery or testimony in order to make its request. Counsel for the Opposer, on recognizing the need for an additional time, promptly notified Applicant's Counsel of such. Applicant's Counsel waited sixteen days before responding with the statement that not only would the extension not be granted, but that her client would not consent to any further extension on the matter which, implies that an extension would not be granted regardless of the situation.

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Opposer submits that the good cause standard has been satisfied, and requests that its Motion be granted.

Respectfully submitted,

FARONICS CORPORATION

Date:

July 6, 2011

By:

James E. Shlesinger  
James E. Shlesinger  
Counsel for Opposer

SHLESINGER, ARKWRIGHT &  
GARVEY LLP  
5845 Richmond Highway  
Suite 415  
Alexandria, Virginia 22303  
(703) 684-5600

**CERTIFICATE OF SERVICE**

It is hereby certified that this Opposer, Faronics Corporation's Motion for an Enlargement of Time of the Dates Set Forth in the Approved Scheduling Order of March 3, 2011, has been served upon Applicant by mailing a copy thereof by prepaid first class mail to Lauren Krupka, Counsel for Applicant, Aristocrat Technologies, Inc. 7230 Amigo Street, Las Vegas, Nevada 89119 this 6<sup>th</sup> day of July, 2011.

By:

James E. Shlesinger  
James E. Shlesinger

nsm



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vacation on August 6, 2011, and had a full plate of work before then.

3. On June 30, 2011, having not heard back from Ms. Krupka, I sent a follow up e-mail to her advising as to whether she had received my June 20 message, and whether she would consent to the requested extension.

4. Ms. Krupka responded to my follow up advising that her client would not consent to a thirty day extension, would consent to a fourteen day extension but would not consent to any further extensions in the case.

5. In April, 2011, and subsequent to the only extension filed in this case, a longstanding client of my firm, and, whom I have represented for 30 years, was sued for patent infringement in federal district court. The lawsuit was filed without prior notice. The suit has put increased demands on me to such an extent that the demands of this litigation have resulted in me not being able to adequately address the present opposition proceeding.

I declare under penalty of perjury the above to be true.

Date: July 4, 2011

By:   
James E. Shlesinger

# EXHIBIT B

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

MT

Mailed: July 14, 2011

Opposition No. 91197479

FARONICS CORPORATION

v.

Aristocrat Technologies  
Australia Pty Ltd

**Monique Tyson, Paralegal Specialist:**

Opposer's consented motion filed July 6, 2011 to extend disclosure, discovery and trial dates is granted. Trademark Rule 2.127(a).

Such dates are reset in accordance with opposer's motion.

Expert Disclosures Due	8/29/11
Discovery Closes	9/28/11
Plaintiff's Pretrial Disclosures	11/12/11
Plaintiff's 30-day Trial Period Ends	12/27/11
Defendant's Pretrial Disclosures	1/11/12
Defendant's 30-day Trial Period Ends	2/25/12
Plaintiff's Rebuttal Disclosures	3/11/12
Plaintiff's 15-day Rebuttal Period Ends	4/10/12

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

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on the adverse party within thirty days after completion of taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSITION TO OPPOSER'S MOTION FOR AN ENLARGEMENT OF TIME was served on Opposer's Attorney on this 12th day of September 2011, by U.S. Mail, postage prepaid, at the correspondence address of record in the U.S. Patent and Trademark Office:

JAMES E. SHLESINGER  
SHLESINGER ARKWRIGHT & GARVEY LLP  
5845 RICHMOND HIGHWAY, SUITE 415  
ALEXANDRIA, VA 22303

  
\_\_\_\_\_  
Lauren Krupka