

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

Mailed: April 2, 2012

Opposition No. 91198059

Skin Sense, Inc.

v.

Susan A. Surico DBA Desert City
Enterprises

**M. Catherine Faint,
Interlocutory Attorney:**

Opposer's motion, filed February 7, 2012, to compel discovery, to extend discovery, pre-trial disclosure and trial dates is noted.

A motion to compel must be filed prior to the commencement of the first testimony period as originally set or reset. See Trademark Rule 2.120(e)(1); and TBMP §523.03 (3d ed. 2011). Cf. TBMP § 528.02 for an explanation of "as originally set or reset." If testimony periods are reset prior to the opening of the plaintiff's testimony period-in-chief, a motion to compel filed before a first trial period opens is timely. However, once the first trial period opens, a motion to compel filed thereafter is untimely, even if it is filed prior to the opening of a rescheduled testimony period-in-chief for plaintiff. Cf.

See La Maur, Inc. v. Bagwells Enterprises, Inc., 193 USPQ 234 (Comm'r 1976).

By Board orders dated March 8, 2011 and January 26, 2012, opposer's thirty-day testimony period was reset to close on February 11, 2012, meaning that it opened on January 12, 2012. Inasmuch as opposer's motion was filed well after commencement of its testimony period, opposer's motion to compel is untimely.

Accordingly, opposer's motion to compel is denied as untimely.

The Board construes opposer's motion to extend discovery as one to reopen discovery. The standard for reopening a period that has expired is excusable neglect. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997). Here opposer has given no reason other than applicant's late response to discovery requests. Further, the Board notes that discovery was set to close in this case on November 13, 2011, but opposer did not serve its discovery requests on applicant until November 11, 2011.¹ Such lack of diligence on the part of opposer in failing to conduct discovery, and file its motion to compel during that time period, or to seek an extension of discovery, does not meet

¹ Attached to opposer's discovery requests are "Certificates of Service" denoting service of a "First Amended Notice of Opposition" on Oct. 26, 2011. As such they do not indicate service of opposer's document production requests and requests for admission on that date. In its motion to compel, opposer states that service occurred on Nov. 11, 2011.

even the more liberal good cause standard for extending opposer's discovery period. See *National Football League v. DNH Management LLC*, 85 USPQ2d 1852, 1854 (TTAB 2008) ("the Board is liberal in granting extensions of time before the period to act has elapsed so long as the moving party has not been guilty of negligence or bad faith and the privilege of extension is not abused" and the moving party has the burden of persuading the Board that it was diligent in meeting its responsibilities; motion denied because opposer failed to make the minimum showing necessary to establish good cause to extend discovery); *Luemme, Inc. v. D. B. Plus Inc.*, 53 USPQ2d 1758, 1760-61 (TTAB 1999) (diligence not shown; discovery requests not served until last day of the discovery period); and *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000) (applicant's motion to extend discovery denied when counsel knew of unavailability of witness a month before, yet delayed until last day to seek an agreement on an extension of time).

While opposer is acting pro se, the Board still requires all parties appearing before it to follow the Board's rules. Both sides were provided with information regarding the Board's rules and procedures during the discovery conference and in the resulting order.

Accordingly, opposer's motion to reopen discovery is denied.

Applicant is reminded that, if a party provides an incomplete response to a discovery request, that party may be thereafter precluded, upon a motion to strike or objection, from relying at trial on information from its records which was properly sought in the discovery request, but which was not included in the response thereto, unless the response is supplemented in a timely fashion pursuant to Fed. R. Civ. P. 26(e). *See Bison Corp. v. Perfecta Chemie B.V.*, 4 USPQ2d 1718 (TTAB 1987); and TBMP § 408.02 (2d ed. rev. 2004).

While no order to suspend pending disposition of the motion to compel was issued, the Board considers these proceedings to have been suspended as of the filing date of opposer's motion. Opposer's motion to extend trial dates is granted. Accordingly, dates are reset as set out below.

Plaintiff's Pretrial Disclosures Due	4/17/2012
Plaintiff's 30-day Trial Period Ends	6/1/2012
Defendant's Pretrial Disclosures Due	6/16/2012
Defendant's 30-day Trial Period Ends	7/31/2012
Plaintiff's Rebuttal Disclosures Due	8/15/2012
Plaintiff's 15-day Rebuttal Period Ends	9/14/2012

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.

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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.
