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Filing date: **09/05/2012**

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

Proceeding	91200575
Party	Plaintiff Hershey Chocolate & Confectionery Corporation, The Hershey Company
Correspondence Address	PAUL C LLEWELLYN KAYE SCHOLER 425 PARK AVENUE NEW YORK, NY 10022 UNITED STATES pllewellyn@kayescholer.com, jeischeid@kayescholer.com
Submission	Opposition/Response to Motion
Filer's Name	Paul C. Llewellyn
Filer's e-mail	pllewellyn@kayescholer.com
Signature	/paul c. llewellyn/
Date	09/05/2012
Attachments	opposition.pdf (6 pages)(25386 bytes) Llewellyn decl.pdf (16 pages)(635120 bytes)

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

	x	
HERSHEY CHOCOLATE & CONFECTIONERY CORPORATION and THE HERSHEY COMPANY,	:	
	:	
Opposers,	:	Opposition No. 91200575
	:	
v.	:	
	:	
KENNETH B. WIESEN,	:	
	:	
Applicant.	:	
	:	
	x	

**OPPOSITION TO APPLICANT’S REQUEST
FOR EXTENSION OF TIME TO OPPOSE MOTION**

Opposers Hershey Chocolate & Confectionery Corporation (“HC&CC”) and The Hershey Company (“Hershey Company,” and, together with HC&CC, “Hershey”) hereby oppose Applicant Kenneth B. Wiesen’s (“Applicant”) Request for Extension of Time to Oppose Motion on the grounds that it is untimely and baseless.

**APPLICANT FAILED TO RESPOND TO HERSHEY’S MOTION
OR REQUEST AN EXTENSION IN A TIMELY MANNER**

As set forth more fully in the motion itself, Hershey filed its Motion to Strike Applicant’s Expert Disclosure on August 9, 2012, after Applicant served Hershey with a purported expert disclosure less than five minutes before midnight on July 9, 2012 (the deadline to serve expert disclosures), and only after having received Hershey’s expert disclosure earlier on July 9, 2012. By all appearances, Applicant failed to note the deadline for expert disclosures, and drafted and signed his last-minute purported his purported expert disclosure himself, without the involvement of any expert, in an effort to meet the deadline. *See generally*, Motion to Strike

Applicant's Expert Disclosure and supporting Declaration of Paul C. Llewellyn dated August 9, 2012.

Hershey served a true and correct copy of its Motion to Strike Applicant's Expert Disclosure upon Applicant via electronic mail and by United States first class mail, postage prepaid, on Thursday, August 9, 2012. See Motion to Strike Applicant's Expert Disclosure, Certificate of Service dated August 9, 2012; *see also* Declaration of Paul C. Llewellyn ("Llewellyn 9/5/2012 Decl.") ¶ 2.. Pursuant to 37 C.F.R. § 2.119(c), and the Board's March 8, 2012 order granting the parties the benefit of the additional five day grace period for papers served by first class mail regardless of method of service, Applicant's response to Hershey's Motion to Strike was due within twenty (20) days of the date of service of said motion, Wednesday, August 29, 2012.

Applicant failed to file any response to Hershey's Motion to Strike by August 29, 2012, or to seek any extension of that deadline from the Board or to request Hershey's consent to such an extension prior to August 29, 2012. Rather, Applicant contacted counsel for Hershey to request an extension of time **after the deadline passed**, in the mid-afternoon on Friday, August 31, 2012. Llewellyn 9/5/2012 Decl., Exh. A. What is more, Applicant provided no explanation for having waited until after the deadline had passed even to request Hershey's consent to an extension. This is not the first deadline Applicant has missed in the course of this proceeding, nor the first time that he has been advised he has missed a deadline. Particularly given Applicant's concurrent effort (discussed below) to compound and extent these proceedings unnecessarily, the Board should not allow Applicant – who is himself a practicing attorney – to continue to contravene the deadlines clearly set under its rules and in its orders.

**APPLICANT SEEKS TO EXTEND THE DISCOVERY PERIOD
ALMOST AN ENTIRE MONTH AFTER THE CLOSE THEREOF**

Also without any explanation for his extensive delay, and further evidencing a pattern of disregarding the Board's rules and deadlines Applicant also now seeks to extend the discovery period, **almost an entire month after** the discovery period closed on August 9, 2012.

Applicant asserts that the basis for this request is Hershey's alleged "fail[ure] to comply with [Applicant's] discovery requests and Interrogatory requests." Applicant's Request for Extension of Time. However, a review of the sequence of discovery in this case belies this assertion: Hershey served its objections and responses to Applicant's Requests for Production of Documents on March 21, 2012, and served its initial production of documents on Applicant on May 4, 2012. Llewellyn 9/5/2012 Decl. ¶ 4. Hershey served its objections and responses to Applicant's Amended First Set of Interrogatories on April 13, 2012. Llewellyn 9/5/2012 Decl. ¶ 5. Applicant first raised issues with respect to Hershey's responses to Applicant's discovery requests via a letter dated June 4, 2012, a month or more after Hershey submitted its responses to Applicant's discovery requests. Llewellyn 9/5/2012 Decl. ¶ 6. Hershey sought to resolve these discovery issues in good faith, responding with detailed information just three days after receiving Applicant's letter, on June 7, 2012. Llewellyn 9/5/2012 Decl. ¶ 7.

Another month later, on July 6, 2012, Applicant responded to Hershey's June 7, 2012 letter, requesting additional information and documents with respect to Hershey's discovery responses. Llewellyn 9/5/2012 Decl. ¶ 8. Again, Hershey sought to address these issues, responding again in detail on July 20, 2012. Llewellyn 9/5/2012 Decl. ¶ 9.

Applicant raised with counsel for Hershey the issue of scheduling a call with the Interlocutory Attorney to address Applicant's concerns, and, on August 2, 2012, counsel for Hershey provided dates of availability for such a call. Llewellyn 9/5/2012 Decl. ¶ 10 & Exh. B.

.Applicant then sent an email to the interlocutory attorney on August 7, 2012 proposing a time that counsel for Hershey had advised Applicant would not work. Llewellyn 9/5/2012 Decl. ¶ 10 & Exh. C. In an August 8, 2012 email, Applicant withdrew that proposed time, advising the Interlocutory Attorney “we will get back to you with other proposed dates . . .” Llewellyn 9/5/2012 Decl. ¶ 11 & Exh. D. However, Applicant never contacted counsel for Hershey to further discuss any alleged discovery concerns or to select another date for a call, and never proposed any other times to the Interlocutory Attorney. Llewellyn 9/5/2012 Decl. ¶ 11.

Now, nearly a month after the close of discovery, and a month of silence with respect to any alleged discovery issues, and without any explanation or justification, Applicant asks the Board to extend discovery. However, Applicant stipulated and agreed that the discovery period in this matter would close on August 9, 2012, a stipulation that the Board acknowledged and accepted on June 12, 2012. *See Consented-To Motion Regarding Scheduling of Proceeding; Board Order (June 12, 2012).*

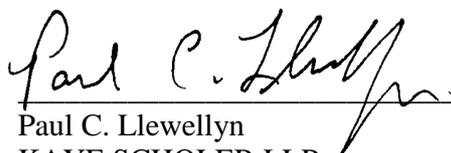
Applicant has had ample time and opportunity to schedule a call with the Interlocutory Attorney to discuss discovery issues and to seek an extension of the discovery period, but, until now, has demonstrated neither urgency to schedule such a call nor any interest in extending the discovery period. Only now, after weeks of inexplicable delay and a month after the close of discovery, does Applicant seek an extension of time to move with respect to discovery issues.

Applicant has failed to diligently pursue any discovery issues, has again disregarded the Board’s deadlines, and has not even made an effort to demonstrate that there are any genuine discovery issues that need to be addressed. The Board should not allow Applicant to continue to flout its rules and deadlines, and Applicant’s request should be denied.

CONCLUSION

Throughout this proceeding, Hershey properly and timely responded to discovery requests and engaged in good faith discussions with respect to discovery disputes, adhering to the deadlines jointly proposed by the parties and approved by the Board and to the rules governing these proceedings. Despite his awareness of and participation in setting these deadlines, Applicant has developed a pattern of missing such deadlines, none more egregiously than his latest failures to respond or even request an extension until well after the deadlines have passed. Extending the discovery deadline would unfairly delay the proceeding to determine Hershey's trademark rights, and give Applicant a second bite at the apple that he does not deserve. As such, and in light of Applicant's willful and continuing disregard of the deadlines in this proceeding, Hershey respectfully requests that the Board deny Applicant's requests to extend (1) the time to respond to Hershey's Motion to Strike, (2) the discovery period, and (3) all other dates in this proceeding.

Date: September 5, 2012
New York, New York



Paul C. Llewellyn
KAYE SCHOLER LLP
425 Park Avenue
New York, NY 10022
Telephone: (212) 836-8000

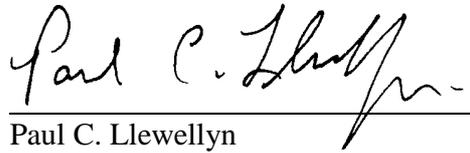
John P. Rynkiewicz
KAYE SCHOLER LLP
The McPherson Building
901 Fifteenth Street, N.W.
Washington, DC, N.Y. 10022
Telephone: (202) 682-3500

Attorneys for Opposers

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused the foregoing OPPOSITION TO APPLICANT'S REQUEST FOR EXTENSION OF TIME TO OPPOSE MOTION to be served this 5th day of September, 2012, by e-mail and by U.S. first class mail, postage prepaid, upon the following correspondent of record for Applicant:

KENNETH B. WIESEN
1 OLD COUNTRY RD.
SUITE 360-B
CARLE PLACE, NY 11514
wiesenlaw@gmail.com


Paul C. Llewellyn

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

	x	

HERSHEY CHOCOLATE & CONFECTIONERY CORPORATION and THE HERSHEY COMPANY,	:	
	:	
Opposers,	:	Opposition No. 91200575
v.	:	
KENNETH B. WIESEN,	:	
	:	
Applicant.	:	
	:	

	x	

DECLARATION OF PAUL C. LLEWELLYN IN SUPPORT OF OPPOSERS' OPPOSITION TO APPLICANT'S REQUEST FOR EXTENSION OF TIME

I, Paul C. Llewellyn, declare:

1. I am a partner at the law firm of Kaye Scholer LLP and counsel for Opposers Hershey Chocolate & Confectionery Corporation and The Hershey Company ("Hershey"). I make this declaration based upon my personal knowledge and the documents attached hereto.

2. On August 9, 2012, Hershey served its Motion to Strike Applicant's Expert Disclosure upon Applicant by first class mail and by electronic mail.

3. Attached hereto as **Exhibit A** is a true and correct copy of an August 31, 2012 e-mail to me sent on behalf of Applicant Kenneth B. Wiesen ("Applicant") and sent from Applicant's e-mail address, requesting consent to adjourn Hershey's Motion to Strike for thirty days.

4. Hershey served its objections and responses to Applicant's Requests for Production of Documents on March 21, 2012, and served its initial production of documents to Applicant on May 4, 2012.

5. Hershey served its objections and responses to Applicant's Amended First Set of Interrogatories on April 13, 2012.

6. On June 4, 2012, Applicant sent a letter to me concerning Hershey's discovery responses.

7. On June 7, 2012, I sent a letter in response to Applicant's June 4 letter addressing Applicant's discovery issues, together with a chart setting forth Hershey's discovery responses, categorized by Applicant's discovery requests.

8. On July 6, 2012, Applicant sent me another letter concerning Hershey's discovery responses.

9. On July 20, 2012, I sent another letter to the Applicant addressing the issues raised in Applicant's July 6, 2012 letter, together with a privilege log relating to certain documents about which Applicant had inquired.

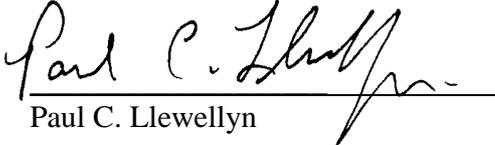
10. On August 2, 2012, after Applicant raised with me the issue of scheduling a call with the Interlocutory Attorney to address Applicant's discovery issues, I emailed Applicant some dates and times of availability for such a call. *See **Exhibit B.*** On August 7, 2012, Applicant sent an email to the Interlocutory Attorney proposing a different time than the ones that I had provided to Applicant. *See **Exhibit C.***

11. In an August 8, 2012 email, Applicant withdrew that proposed time, advising the Interlocutory Attorney "we will get back to you with other proposed dates . . ." *See **Exhibit D.***

Applicant never contacted me to further discuss any alleged discovery concerns or to select another date for a call, and never proposed any other times to the Interlocutory Attorney.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Bethlehem, Pennsylvania 5th day of September, 2012.


Paul C. Llewellyn

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of September, 2012, I caused a true and correct copy of this DECLARATION OF PAUL C. LLEWELLYN IN SUPPORT OF OPPOSERS' OPPOSITION TO APPLICANT'S REQUEST FOR EXTENSION OF TIME to be served by email and by United States first class mail, postage prepaid, upon the following:

KENNETH B. WIESEN
1 OLD COUNTRY RD.
SUITE 360-B
CARLE PLACE, NY 11514
wiesenlaw@gmail.com

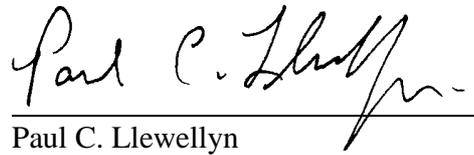

Paul C. Llewellyn

EXHIBIT A

Llewellyn, Paul

From: KENNETH WIESEN [wiesenlaw@gmail.com]
Sent: Friday, August 31, 2012 2:18 PM
To: Llewellyn, Paul
Subject: Hershey v. Wiesen

Dear Mr. Llewellyn, Mr. Wiesen has been out of town and has asked me to request your consent to adjourn your motion for 30 days. Please advise if this is agreeable. Thank you.

Lori Connors, Legal Asst
KENNETH B. WIESEN
1 Old Country Road, Ste. 360B
Carle Place, New York 11514
516-742-2212

EXHIBIT B

Llewellyn, Paul

From: Kenny Wiesen [wiesenlaw@gmail.com]
Sent: Monday, August 06, 2012 2:45 PM
To: Llewellyn, Paul
Subject: Re: Opposition No. 91200575 HERSHEY v. WIESEN

Follow Up Flag: Follow up
Flag Status: Completed

Paul

I don't know if we can schedule it but between 11:30 and 2pm I am available on Wednesday.

Kenny

Sent from my iPhone

On Aug 2, 2012, at 5:42 PM, "Llewellyn, Paul" <PLlewellyn@kayescholer.com> wrote:

Ken –

Following up on our discussion the other day, I could join in a call to the Board at the following times:

1. Friday August 3, any time before 3 pm.
2. Monday August 6, between 4 and 5 pm.
3. Tuesday August 7, between 4 and 5pm.
4. Wednesday August 8, any time before 2 pm.

If some of these times work for you as well, let's propose them to the Board.

Paul

Paul C. Llewellyn

<image001.png>

425 Park Avenue | New York, New York 10022

T: +1 212.836.7828 | F: +1 212.836.6463

PLlewellyn@kayescholer.com | www.kayescholer.com

From: Kim, Yong O (Richard) [<mailto:Richard.Kim2@USPTO.GOV>]
Sent: Thursday, July 26, 2012 3:16 PM
To: 'KENNETH WIESEN'
Cc: Llewellyn, Paul; Eischeid, John
Subject: RE: Opposition No. 91200575 HERSHEY v. WIESEN

I suggest that the parties confer and propose to the Board 3 mutually agreeable dates and times

From: KENNETH WIESEN [<mailto:wiesenlaw@gmail.com>]
Sent: Thursday, July 26, 2012 3:10 PM
To: Kim, Yong O (Richard)
Cc: PLlewellyn@kayescholer.com; jeischeid@kayescholer.com
Subject: Opposition No. 91200575 HERSHEY v. WIESEN

Yong Oh (Richard) Kim
Interlocutory Attorney
Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
(571) 272-7326

Re: Opposition No. 91200575

Dear Mr. Kim,

Over the past several months I have tried to work out discovery issues with counsel for Hershey and we have come to an impasse. I wonder if we can prevail upon you to allow us to speak to you about these issues any other discovery or procedural matters that opposer may also have.

If you can offer us a date & time or dates & times of your availability I would be most appreciate. I previously discussed with Counsel for Hershey that I would be making this request and he is also CC'd on this communication.

Thank you,

Kenneth B. Wiesen

Applicant

1 Old Country Rd. Suite 360-B

Carle Place, NY 11514

516-835-1500

* * * *

IRS CIRCULAR 230 DISCLOSURE: To ensure compliance with Treasury

Department regulations, we inform you that any U.S. federal tax advice contained in this correspondence (including any attachments) is not intended or written to be used, and cannot be used for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

EXHIBIT C

Llewellyn, Paul

From: Kenny Wiesen [wiesenlaw@gmail.com]
Sent: Tuesday, August 07, 2012 11:05 PM
To: Kim, Yong O (Richard)
Cc: Llewellyn, Paul; Eischeid, John
Subject: Re: Opposition No. 91200575 HERSHEY v. WIESEN

Mr. Kim,

I realize this is very short notice but do you have time for a conference call tomorrow Wednesday anytime after 2pm?

If not we will provide three dates and times that we are mutually available with some greater time between our request and the proposed dates.

Thank you

Kenneth Wiesen

On Jul 26, 2012, at 3:15 PM, "Kim, Yong O (Richard)" <Richard.Kim2@USPTO.GOV> wrote:

I suggest that the parties confer and propose to the Board 3 mutually agreeable dates and times

From: KENNETH WIESEN [<mailto:wiesenlaw@gmail.com>]
Sent: Thursday, July 26, 2012 3:10 PM
To: Kim, Yong O (Richard)
Cc: PLlewellyn@kayescholer.com; jeischeid@kayescholer.com
Subject: Opposition No. 91200575 HERSHEY v. WIESEN

Yong Oh (Richard) Kim

Interlocutory Attorney

Trademark Trial and Appeal Board

U.S. Patent and Trademark Office

(571) 272-7326

Re: Opposition No. 91200575

Dear Mr. Kim,

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If you can offer us a date & time or dates & times of your availability I would be most appreciate. I previously discussed with Counsel for Hershey that I would be making this request and he is also CC'd on this communication.

Thank you,

Kenneth B. Wiesen

Applicant

1 Old Country Rd. Suite 360-B

Carle Place, NY 11514

516-835-1500

EXHIBIT D

Llewellyn, Paul

From: Kenny Wiesen [wiesenlaw@gmail.com]
Sent: Wednesday, August 08, 2012 12:11 AM
To: Kim, Yong O (Richard)
Cc: Llewellyn, Paul; Eischeid, John
Subject: Re: Opposition No. 91200575 HERSHEY v. WIESEN

Mr. Kim,

I goofed. Mr. Llewellyn just pointed out to me that I had proposed a time that he is not available. Rather than suggest another time on short notice we will get back to you with other proposed dates that offer some greater gap between the date of our request and the proposed dates.

Sorry for the confusion.

Kenneth Wiesen

On Jul 26, 2012, at 3:15 PM, "Kim, Yong O (Richard)" <Richard.Kim2@USPTO.GOV> wrote:

I suggest that the parties confer and propose to the Board 3 mutually agreeable dates and times

From: KENNETH WIESEN [<mailto:wiesenlaw@gmail.com>]
Sent: Thursday, July 26, 2012 3:10 PM
To: Kim, Yong O (Richard)
Cc: PLlewellyn@kayescholer.com; jeischeid@kayescholer.com
Subject: Opposition No. 91200575 HERSHEY v. WIESEN

Yong Oh (Richard) Kim

Interlocutory Attorney

Trademark Trial and Appeal Board

U.S. Patent and Trademark Office

(571) 272-7326

Re: Opposition No. 91200575

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prevail upon you to allow us to speak to you about these issues any other discovery or procedural matters that opposer may also have.

If you can offer us a date & time or dates & times of your availability I would be most appreciate. I previously discussed with Counsel for Hershey that I would be making this request and he is also CC'd on this communication.

Thank you,

Kenneth B. Wiesen

Applicant

1 Old Country Rd. Suite 360-B

Carle Place, NY 11514

516-835-1500