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

Proceeding	91201830
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Attachments	MOTION TO EXTEND DISCOVERY AND TRIAL DATES.pdf(406702 bytes)

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

THE CORPS GROUP,

Opposer,

v.

AFTERBURNER, INC.,

Applicant.

Opposition No. 91201830

Application No. 85094889



Mark:

APPLICANT’S MOTION TO EXTEND DISCOVERY AND TRIAL DATES

In accordance with Fed. R. Civ. P. 6(b) and TBMP § 509, Opposer hereby moves the Board to extend the time permitted for discovery under the Order by thirty (30) days and to modify the current trial dates accordingly as measured prospectively from the date of the Board’s ruling on this motion. As set forth below, good cause exists for this extension request because, despite Applicant’s best efforts, Applicant cannot complete the discovery it needs to defend itself within the current schedule. Applicant’s motion should therefore be granted to ensure its right to a fair and full trial.

Applicant has consulted Opposer and Applicant understands that Opposer has not consented to the extension sought in this motion.

LEGAL STANDARD

The standard for allowing an extension of a prescribed period prior to the expiration of that period is “good cause.” See Fed. R. Civ. P. 6(b) and TBMP § 509. The Board is generally liberal in granting extensions of time so long as the moving party has not been 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); and *Sunkist Growers, Inc. v. Benjamin Ansehl Co.*, 229 USPQ 147 (TTAB 1985).

BACKGROUND

Applicant, Afterburner, Inc., applied to register the above-referenced mark shown comprising a three-dimensional depiction of an entire pilot flight suit as worn by Applicant's employees and contractors in the course of rendering Applicant's services. Opposer, The Corps Group, has opposed registration of Applicant's mark on the grounds that the mark is not capable of distinguishing Applicant's services and has not acquired distinctiveness.

On August 25, 2016, the parties held the discovery conference and on September 15, 2016 they exchanged initial disclosures. Between December 5, 2016 and December 9, 2016, Applicant's counsel prepared rough drafts of its first set of interrogatories, request for production of documents and request for admissions. On December 14, 2016, Applicant received from the US Air Force a motion for leave to file an amicus brief and the proffered amicus brief. The brief introduced a new issue concerning possible illegal activity by Applicant in the use of its mark.

Before and after the Christmas and New Year holidays, the Applicant and its counsel engaged in intense discussions regarding the amicus brief's impact on this opposition and Applicant's reputation. Applicant's attorney also engaged in discussions with the Interlocutory Attorney about the Applicant's frantic concerns and the lack of procedural guidance involving amicus briefs. On January 23, 2016, Applicant served Opposer its expert disclosures. The order denying the Air Force motion was issued on

January 30, 2017 – twenty-days prior to the close of the discovery period. The order maintained the trial dates as set in the Board’s order of July 16, 2016.

To date, Applicant has received no discovery requests or any additional disclosures from Opposer.

REQUEST FOR EXTENSION OF DISCOVERY

The TBMP gives no guidance indicating whether inter partes proceedings will be suspended or extended pending determination by the Board of a motion for leave to file an amicus brief. This may be because such motions are rarely filed in Board proceedings and the Board may need the flexibility to decide about any trial dates extensions or suspensions on a case by case basis. In this case, Applicant believes that the current trial dates schedule did not provide a reasonable opportunity for Applicant to fully assess the impact and effect of a highly prejudicial amicus brief as it relates to this opposition, and to conduct related key activities prior to the end of the discovery period. For the following reasons, Applicant believes there is good cause for this extension request.

The Air Force’s amicus brief in this case presented Applicant an exigent circumstance that may have compromised the evidentiary and procedural protections afforded Applicant, thus warranting an extension for discovery and trial dates. Applicant believes that if the Board truly evaluates motions to file amicus briefs against the backdrop of the rules governing opposition proceedings, then it should find good cause exists to extend discovery.

When a case is pending before the Board and the opposition record is open, the parties share the protection of important procedures and evidentiary rules - the

opportunities to take discovery, to present rebuttal evidence and to cross-examine witnesses, to name a few - each of which is vital to the integrity of the adjudicative process. These general principles guided the Board in its determination to deny Air Force's motion for leave to file an amicus brief and the decision to give the brief itself no consideration. However, the forty-four page brief, rife with prejudicial and unsubstantiated assertions, is still part of record and available for online public viewing. This has caused Applicant's officers much concern and time devoted to removing the amicus brief from the TTABVue website. Time that otherwise would have been available to complete discovery with Opposer.

Although the amicus brief contains a heading that it does not support either party in this case, Opposer most certainly has enjoyed the disruption by this "friend-of-the-court" during the discovery period. Indeed, Applicant has knowledge or information to form a belief that the Air Force and Opposer both planned to forward Opposer's objective to stop registration of Applicant's mark. Both have insinuated that Applicant's mark is a "uniform" (See Air Force amicus brief in general and Opposer's Notice of Opposition ¶ 10), despite the fact that Applicant's mark is a plain flight suit that can be bought at retail by any pilot. Opposer has also sought to litigate in the press the use of Applicant's mark by contacting several active and retired military pilots. Finally, in a phone call to the Air Force's attorney, Joel B. Lofgren, he admitted that the Air Force was aware of this opposition for years. Yet, not until the near end of the opposition discovery period did the Air Force intervene with an amicus brief to pursue its assertions of possible illegal activity by the Applicant in the use of its mark.

Applicant believes that the efforts of this close relationship resulted in the filing

of the amicus brief in which the Air Force sought to introduce new claims and evidence and to advance Opposer's objective in this case ultimately. Applicant also believes the filing of the amicus brief was used to disrupt and convolute the focus of Applicant's discovery efforts and possibly counterbalance any future sworn testimony.

Applicant appreciates the Board's commitment to considering the views of amicus curiae, and that commitment obviously should not extend to amicus briefs that present new claims appropriate for a notice of opposition or petition for cancellation. Yet, Applicant considers that it is this type of amicus brief that may compromise the litigation process beyond the proceedings before the Board. Applicant presumes the Board's final decision may be reviewed by a US court of appeals. Although the Board was wary of the procedural and evidentiary defects in the amicus brief, an appellate court might be less mindful of these problems and the brief's prejudicial taint -- especially if said brief is part of the record and submitted by a branch of the United States Armed Forces. It is impossible to gauge the damaging effect that the assertions and evidence of the Air Force's amicus brief will have on Applicant's reputation and, ultimately, the resolution of this case.

The Air Force's assertions of possible illegal activity by Applicant caused a significant disruption during the discovery period and altered the focus of Applicant's discovery efforts. It alerted Applicant of possible collusion between Opposer and the Air Force and gave notice to a possible future claim of illegal activity never before indicated by anyone in the over 20-year history of Applicant.

Because the TBMP is silent on whether inter partes proceedings should be suspended or extended during the determination of a motion to file an amicus brief, and

the Board made said determination after it was possible for Applicant to file timely discovery requests, it is only fair for the Board to extend time for discovery and reset the trial dates. It should be noted that no prior extensions have been requested or granted and the extension requested herein will not prevent the Board from rendering a decision in a timely manner.

CONCLUSION

Given the totality of circumstances, Applicant respectfully submits that the reasons above constitute good cause for its motion to extend. There is no evidence of bad faith on the part of Applicant or prejudice to Opposer other than delay, which the Board, hopefully, would not characterize as significant.

Applicant respectfully requests that the Board grant Applicant's motion for an extension of the discovery period by thirty (30) days and modify the current trial dates accordingly as measured prospectively from the date of the Board's ruling on this motion.

This 12th day of February, 2017.

Respectfully submitted,

By: /s/ Michael C. Mason
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this correspondence, APPLICANT'S MOTION TO
EXTEND DISCOVERY AND TRIAL DATES, has been sent via email, with consent to:

J. Kevin Fee
Jordana S. Rubel
Morgan, Lewis & Bockius LLP
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This 12th day of February, 2017.

/s/ Michael C. Mason

Michael C. Mason