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

Proceeding	91204296
Party	Defendant Sparkle Life LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

JJI INTERNATIONAL, INC.

Opposer,

v.

SPARKLE LIFE, LLC

Applicant.

Serial No.: 85356064

Mark: SPARKLE LIFE

Opposition No.: 91204296

**APPLICANT'S MEMORANDUM OF LAW IN OPPOSITION TO OPPOSER'S
MOTION TO EXTEND THE SCHEDULING ORDER AND CROSS-MOTION TO
DISMISS OPPOSITION**

Applicant, Sparkle Life, LLC ("Applicant") hereby requests that the Board, pursuant to Rule 6(b) of the Federal Rules of Civil Procedure and TBMP § 509, deny Opposer's Motion to Extend the Scheduling Order, and pursuant to 37 C.F.R. § 2.132 and TBMP § 535, grant Applicant's Cross-Motion to Dismiss for failure of Opposer JJI International, Inc. ("Opposer") to prosecute. As grounds for its response and cross-motion, Applicant submits that Opposer has failed to show good cause why an extension should be granted because it waited until the last day of the testimony period to notify the Board that it was allegedly having scheduling problems to set dates for testimony of its own witnesses. Such conduct constitutes negligent disregard of the Board's May 17, 2013 order re-setting testimony periods and should result in a denial of Opposer's request

for additional time. In addition, because Opposer has failed to submit any evidence in support of its Notice of Opposition, Applicant's Cross-Motion to Dismiss should be granted.

STATEMENT OF FACTS

On March 14, 2012, the Board issued its original scheduling order, setting the testimony periods in the above-captioned Opposition proceeding. Opposer was given from January 17, 2013 to February 17, 2013 to submit its evidence during its testimony period. In addition, Opposer's Pretrial Disclosures were due on January 1, 2013. See Notice and Trial Dates Set; Answer Due, Docket # 2, March 12, 2012.

On January 1, 2013, the last day Opposer's disclosures were due, Opposer filed its Notification of Intent to Employ Expert Witness. Docket #13. On January 18, 2013, the Board suspended proceedings for sixty (60) days for the sole purpose of affording Applicant the opportunity to take discovery limited to Opposer's designated expert witness. Docket #16. On May 17, 2013, the Board issued a new scheduling order resetting the remaining dates. Opposer was given from August 13, 2013 to September 13, 2013 to submit its evidence during its testimony period as reset. Docket #19.

On July 30, 2013, Opposer served Applicant with its Pretrial Disclosures via first class mail. In its disclosure, Opposer cited it intended to take the testimony of Lisa Weingeroff, President of JJI International, Inc., and Dale Kincaid, Chief Executive Officer of JJI International, Inc. The witnesses would discuss (1) the adoption and use of Opposer's Trademark, (2) the manufacture and distribution of products bearing Opposer's mark, (3) sales and marketing, (4) documents produced by Opposer during discovery and (5) Applicant's use of its Trademark. See Opposer's Pretrial Disclosures, Exhibit A. At no point after submitting its Pretrial Disclosures did Opposer

contact Applicant regarding the setting of depositions of either individual listed in its Pretrial Disclosure.

On September 13, 2013, the very last day of Opposer's testimony period, Opposer's filed its Motion to Extend the Scheduling Order without consent. Opposer did not attempt to contact Applicant's counsel regarding the extension. The sole reason cited for the need for the extension was that "its undersigned counsel is currently involved in a significant, multiple-week long jury trial in a case pending in the United States District Court for the District of Rhode Island, Ira Green, Inc. v. Military Sales & Service Co., C.A. No.: 10-207 S" and that "the undersigned counsel has been unavailable to take witness testimony during its Trial Period." Docket # 19.

Opposer offers no excuse as to why being "involved in a significant, multiple-week long jury trial", the dates of which were known to Opposer as early as early as May, 2013, precluded it from participating in its scheduled testimony period. Additionally, Opposer's Motion offers no excuse as to why it failed to contact Applicant to discuss resetting the testimony periods. No excuse is given why Opposer waited until the end of its testimony period to seek an extension or seek a more convenient time to take testimony and prosecute the action it instituted. Moreover, Opposer has not submitted an affidavit in support of its Request to Extend.

During the months preceding its testimony period and the period itself, Opposer never once contacted Applicant to notify it that it was unable to take its testimony during its testimony period. Opposer not only failed to take its testimony during its testimony period but also failed to submit any evidence in support of its Opposition.

It is clear that, by instituting a specious opposition proceeding, only to ignore all relevant trial dates set forth by the Board and then requesting an extension at the eleventh hour, Opposer seeks merely to maintain this action as long as possible and keep a cloud of doubt over Applicant's

trademark application. Opposer's habit of waiting until the last day to file crucial scheduling pleadings should not be rewarded. Applicant respectfully requests that the Board deny Opposer's Motion to Extend the Scheduling Order and grant Applicant's Cross-Motion to Dismiss the Opposition for failure to prosecute.

ARGUMENT

1. Petitioner's Motion to Extend Testimony Periods Should Be Denied For Failure to Show Good Cause

A party must demonstrate good cause to obtain an extension of its testimony period. F.R.C.P. 6(b); TBMP 509. To show good cause, a party must not be guilty of negligence or bad faith in seeking the extension. Luemme Inc. v. D.B. Plus Inc., 53 U.S.P.Q.2d 1758 (TTAB 1999); Luehrmann v. Kwik Kopy Corp., 2 U.S.P.Q.2d 1303 (TTAB 1987). Here, Opposer waited until the very last day of its testimony period to notify the Board for the first time that it was allegedly having scheduling problems with its own witnesses. Its motion contains no affidavits or memorandum of law but simply states that "counsel has been unavailable to take witness testimony during its Trial Period" because of a trial of which it was fully aware coincided with its testimony period. Moreover, Opposer has provided no details as to why it was unable to make advanced arrangements for the taking of testimony, or why it failed to notify Applicant or the Board about the scheduling conflict before the final day of its testimony period.

Opposer also provided absolutely no excuse as to why it failed to submit any evidence at all. Opposer's cavalier approach to the final trial period in a proceeding it chose to bring should not be condoned. Indeed, in essentially the same circumstances, the Board recently denied a motion to extend, and ultimately dismissed the petition with prejudice. In Biogenesis Enterprises, Inc. v. Firefreeze Worldwide, Inc., Cancellation No. 25,183, 1998 TTAB LEXIS 530 (TT AB, Feb. 10,

1998), where Petitioner waited until the last day of its testimony period to seek an extension, the Board denied petitioner's motion for summary judgment as untimely, and further denied its motion to extend its testimony periods because it failed to explain why it presented no evidence during its testimony period and waited for the last day of the period to seek an extension. The Board further dismissed the petition to cancel with prejudice for the failure of petitioner to prosecute. *I d.* at *6. The same result should follow here.

Opposer's assertion that its other case prevented advanced warning of the conflict between the co-pending litigation and the proceeding it initiated is not good cause to grant an eleventh-hour extension under existing Board precedents. In Procyon Pharmaceuticals Inc. v. Procyon Biopharma Inc., 61 USPQ2d 1542, 1543-44 (TTAB 2001), the Board denied the request for an extension because petitioner failed to explain how activity of rearranging its laboratory facilities during relevant time period prevented taking testimony. No detailed information was provided regarding petitioner's apparent difficulty in preparing and submitting its evidence or why petitioner waited until the last day of its testimony period to request the extension. *Id.*

Moreover, in Luemme Inc. v. D.B. Plus Inc., 53 U.S.P.Q.2d at 1760-61, the Board denied petitioner's motion to extend discovery and testimony periods where petitioner served written discovery requests on the last day of the discovery period, made no attempt to depose Registrant during the period, and offered vague assertions that it needed additional time due to Petitioner's travel schedule. Noting that it was the petitioner who brought the proceeding, the Board held that the petitioner should have taken steps to avoid its scheduling problems, such as pursuing timely discovery and filing a motion early in the discovery period. *Id.* at 1761. Accord Luehrmann v. Kwik Kopy Corp., 2 U.S.P.Q.2d at 1305 (summer scheduling problems for witnesses no excuse where petitioner waited until last day of period to seek extension).

Opposer was similarly negligent here in not having timely scheduled its testimony or submitted any evidence during its testimony period and not having sought an earlier request for extension from Opposer or before the Board. Because it has not shown good cause for the extension, Opposer's motion should be denied.

2. Opposer's Sparse Motion Fails to Set Forth Facts with Specificity

A motion to extend must set forth with particularity the facts said to constitute good cause for the requested extension; mere conclusory allegations lacking in factual detail are not sufficient. Moreover, a party moving to extend time must demonstrate that the requested extension of time is not necessitated by the party's own lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefor. See T.B.M.P. § 509.01(a). Here, Opposer's sparse motion generally alleges that counsel was busy due to co-pending litigation. What is missing, however, is a statement of any facts demonstrating Opposer's actions to mitigate the delay or take action in anticipation of a known trial schedule which overlapped with Opposer's testimony period.

Board decisions make it clear that while counsel's schedule may be good cause to support an extension in some circumstances, counsel must be diligent in mitigating any conflicts and seeking an extension expediently. See 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).

Opposer's motion states no facts which support a finding of diligence. See National Football League v. DNH Management LLC, 85 USPQ2d 1852, 1854 (TTAB 2008) (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). For this reason alone, Opposer's motion should be denied.

3. Applicant Has Been Prejudiced By Opposer's Delay

It is clear that Applicant has been, and continues to be prejudiced by Opposer's dilatory actions, only to request an extension of time at the eleventh hour. The continued uncertainty about the resolution of this action, and the ultimate status of Opposer's trademark application, creates a pall over Applicant's business concerning its mark. Applicant should not be permitted to maintain this action, keep Applicant's application in limbo for years, and dampen Applicant's business prospects with a litigation it instituted and fails to prosecute.

4. Applicant's Cross-Motion to Dismiss the Opposition for Failure of Opposer to Prosecute should be Granted

Opposer's failure to submit any evidence during its testimony period demands dismissal with prejudice of this opposition. Where Opposer has failed to take any testimony or offer any other evidence during the opening testimony, the Board may dismiss the opposition. 37 C.F.R. § 2.132; TBMP 535; Biogenesis Enterprises, Inc. v. Firefreeze Worldwide, Inc., Cancellation No. 25,183, 1998 TTAB LEXIS 530 (TTAB, Feb. 10, 1998).

For the reasons set forth above, Petitioner has not demonstrated reasons amounting to excusable neglect for failing to submit any evidence during its testimony period. Hewlett-Packard Co. v. Olympus Corp., 18 U.S.P.Q.2d 1710 (Fed. Cir. 1991) (dismissal of opposition with prejudice for failure to show excusable neglect for presenting evidence during testimony period);

Grobet File Co. of America Inc. v. Associated Distributors Inc., 12 U.S.P.Q.2d 1649 (TTAB 1989) (same).

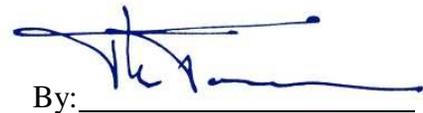
Thus, Registrant's Cross-Motion to Dismiss should be granted. However, should the Board deny Registrant's Cross-Motion, Registrant requests pursuant to 37 C.F.R. § 2.132(a) that the testimony periods for Applicant in the position of defendant be reset.

CONCLUSION

For the foregoing reasons, Opposer's Motion to Extend the Scheduling Order should be denied and Applicant's Cross-Motion to Dismiss should be granted. In addition, should the Board deny Applicant's Cross-Motion, Applicant requests that the testimony period for Applicant in the position of defendant be reset.

Dated: October 3, 2013
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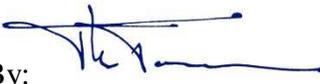
Mark: SPARKLE LIFE

Opposition No.: 91204296

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Applicant's Memorandum of Law in Opposition to Opposer's Motion to Extend the Scheduling Order and Cross-Motion to Dismiss Opposition has been duly served by E-mail to cscott@scottbushlaw.com, smcgurk@scottbushlaw.com and pstroke@scottbushlaw.com, as well as by depositing such copy with the U.S. Postal Service, First Class Mail in a postage pre-paid envelope addressed to: CRAIG M SCOTT, SCOTT & BUSH LTD, ONE TURKS HEAD PLACE 4TH FLOOR, PROVIDENCE, RI 02903 on this third day of October, 2013.

Date: October 3, 2013

By: 

Thomas E. Toner