

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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GCP

Mailed: September 29, 2014

Opposition No. 91204897  
(**Parent Case**)  
Opposition No. 91204941

*John G. Marino*

v.

*Laguna Lakes Community  
Association, Inc.*

**By the Trademark Trial and Appeal Board:**

These consolidated proceedings now come before the Board for consideration of (1) Opposer's motion (filed May 30, 2014) to extend the close of Opposer's testimony period, and (2) Applicant's cross-motion (filed June 9, 2014) for involuntary dismissal under Trademark Rule 2.132.

**Opposer's Motion to Extend**

The Board first turns to Opposer's motion to extend the close of his testimony period. To prevail on his motion, Opposer must establish good cause for the requested extension of time. *See* Fed. R. Civ. P. 6(b)(1); TBMP § 509.01 (2014).

In support of his motion, Opposer maintains that his counsel, during the pendency of Opposer's testimony period, has been involved in trial preparation in a case pending in the Palm Beach Circuit Court in Florida styled *Hopkins v.*

*Geltech Solutions, Inc.*, Case No. 50-2008-CA 017955, where a trial is to commence the week of May 19, 2014. Accordingly, Opposer requests a brief extension of his testimony period in order to submit certain non-party deposition testimony as evidence which Opposer argues would save time and money of both parties.

In response, Applicant argues that Opposer has failed to demonstrate the requisite good cause that would justify Opposer's extension request. Specifically, Applicant maintains that Opposer waited until the very last day of its testimony period to notify the Board for the first time that his counsel was having scheduling issues due to the press of other litigation and nonetheless has failed to provide a statement of any facts demonstrating Opposer's actions to mitigate the delay in seeking its extension request or take action in anticipation of a known trial schedule which overlapped with Opposer's testimony period. Further, Applicant contends that the requested extension should be denied because any extension of time to file declarations as testimony is improper given that the parties never agreed in writing to the use of declaration testimony. Finally, Applicant argues that, to the extent Opposer desired to submit the discovery depositions of Applicant's 30(b)(6) deponents, Opposer could have easily submitted these discovery depositions without Board permission.

**Decision**

It is settled that the press of other litigation, in appropriate circumstances, is sufficient to make out a "good cause" showing under Fed. R. Civ. P. 6(b)(1). *See*

*Societa Per Azioni Chianti Ruffino Esportazione Vinicola Toscana v. Colli Spolentini Spoletoducale SCRL*, 59 USPQ2d 1383 (TTAB 2001).

We find that such circumstances exist in this case. Opposer has set forth sufficient facts relating to its counsel's other litigation matters in a sufficient manner to warrant a finding that good cause exists for the requested extension of Opposer's testimony period.<sup>1</sup>

Accordingly, Opposer's motion to extend the close of its testimony period is **GRANTED** to the extent noted below.

Although the Board has granted Opposer's motion to extend the close of his testimony period, the Board does so pursuant to the following guidelines:

**1. Testimony By Declaration Or Affidavit**

Trademark Rule 2.123(b) provides, in relevant part, that “[b]y written agreement of the parties, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit by such witness or witnesses.” In this instance, because the parties have not entered into a written stipulation to submit any testimony by affidavit or declaration, Opposer is **precluded** from submitting any declarations or affidavits from any party or non-party as testimony in this consolidated case.

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<sup>1</sup> As noted above, Opposer's unconsented motion to extend time was filed at the end of Opposer's testimony period. The better practice would have been to file the motion early in the testimony period, as soon as it became apparent that the press of other litigation would make an extension of time necessary, and that Applicant would not consent to such an extension.

**2. Discovery Depositions of Adverse Party**

Trademark Rule 2.120(j)(1) provides that “[t]he discovery deposition of a party or of anyone who at the time of taking the deposition was an officer, director or managing agent of a party, or a person designated by a party pursuant to Rule 30(b)(6) or Rule 31(a) of the Federal Rules of Civil Procedure, may be offered in evidence by an adverse party.” Accordingly, Opposer may, if he so chooses, submit the discovery depositions of any of Applicant’s officers and/or designated 30(b)(6) deponents pursuant to a notice of reliance in his reset testimony period, as set forth below.

**3. Discovery Depositions of Opposer or Non-Parties**

Trademark Rule 2.120(j)(2) provides, however, that “[e]xcept as provided in paragraph (j)(1) of this section, the discovery deposition of a witness, whether or not a party, shall not be offered in evidence unless the person whose deposition was taken is, during the testimony period of the party offering the deposition, dead; or out of the United States (unless it appears that the absence of the witness was procured by the party offering the deposition); or unable to testify because of age, illness, infirmity, or imprisonment; or cannot be served with a subpoena to compel attendance at a testimonial deposition; or there is a stipulation by the parties; or upon a showing that such exceptional circumstances exist as to make it desirable, in the interest of justice, to allow the deposition to be used.”

Based upon the record, the Board finds that none of the exceptions enumerated in Trademark Rule 2.120(j)(2) are present in this consolidated case. Moreover, the Board finds that Opposer has failed to demonstrate that exceptional circumstances exist as to make it desirable, in the interest of justice, to submit as evidence the discovery deposition of Opposer or any non-party deponent. Accordingly, Opposer is **precluded** from submitting the discovery deposition of Opposer or any non-party deponents during its reset testimony period.

**4. Documents Produced By Applicant During Discovery**

Opposer is **precluded** from submitting under a notice of reliance, during its reset testimony period as provided below, any documents obtained from Applicant through written discovery, except to the extent that they are admissible by notice of reliance under the provisions of Trademark Rule 2.122(e). *See* Trademark Rule 2.120(j)(3)(ii).

**5. Submission of Written Disclosures, Interrogatory Answers, Responses to Requests for Admission**

Pursuant to Trademark Rule 2.120(j)(5), Opposer may submit, under a notice of reliance, Applicant's written disclosures, answers to Opposer's interrogatory requests, and/or responses to Opposer's requests for admission, during his reset testimony period. The notice of reliance filed by Opposer must be supported by a written statement explaining why Opposer needs to rely upon each of the written disclosures or discovery responses, and absent such statement the Board, in its discretion, may refuse to consider said disclosures and/or responses.

Opposer may submit any other appropriate evidence and/or take any appropriate testimony not specifically discussed above during his reset testimony period but only in accordance with Board rules regarding the submission of such evidence or taking of such testimony. *See generally* Chapter 700 of the TBMP.

**Applicant's Motion for Involuntary Dismissal**

Inasmuch as the Board has granted Opposer's motion to extend the close of his testimony period, Applicant's motion for involuntary dismissal is deemed premature and, therefore, will be given no further consideration.

**Trial Schedule**

These consolidated proceedings are hereby resumed.

Opposer's testimony period recommences on **October 3, 2014 and closes on October 10, 2014**. Opposer may submit evidence during this reset testimony period pursuant to the guidelines set forth in this order and in accordance with the rules of practice governing *inter partes* proceedings before the Board. To the extent it is necessary for Opposer to supplement his pretrial disclosures, Opposer must do so immediately and serve its supplementation upon Applicant **before** he submits any evidence and/or takes any testimony during his reset testimony period.

Remaining trial dates are reset as follows:

Defendant's Pretrial Disclosures Due	<b>10/25/2014</b>
Defendant's 30-day Trial Period Ends	<b>12/9/2014</b>
Plaintiff's Rebuttal Disclosures Due	<b>12/24/2014</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>1/23/2015</b>

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.

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