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

Proceeding	91206251
Party	Plaintiff Elevation Management, LLC
Correspondence Address	ROCHELLE D ALPERT MORGAN LEWIS & BOCKIUS LLP ONE MARKET, SPEAR STREET TOWER SAN FRANCISCO, CA 94105 UNITED STATES ralpert@morganlewis.com, sftrademarks@morganlewis.com, jrubel@morganlewis.com, shall@morganlewis.com, ylolua@morganlewis.com
Submission	Opposition/Response to Motion
Filer's Name	Rochelle D. Alpert
Filer's e-mail	ralpert@morganlewis.com, shall@morganlewis.com, sftrademarks@morganlewis.com, ylolua@morganlewis.com
Signature	/RDA/
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Attachments	Oppos. to App's Mot to Extend Time - page 1.pdf(46070 bytes) Oppos. to App's Mot to Extend Time - page 2.pdf(50662 bytes) Oppos. to App's Mot to Extend Time - page 3.pdf(51534 bytes) Oppos. to App's Mot to Extend Time - page 4.pdf(53178 bytes) Oppos. to App's Mot to Extend Time - page 5.pdf(30306 bytes) Oppos. to App's Mot to Extend Time - page 6.pdf(56598 bytes)

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

In the matter of application Serial No. 85/171,899
Filed November 8, 2010
For the mark **THE ELEVATION GROUP**
Published in the OFFICIAL GAZETTE on APRIL 3, 2012

ELEVATION MANAGEMENT, LLC,

Opposer,

v.

FINISH STRONG VENTURES, INC.,

Applicant.

Opposition No.: 91,206,251

**OPPOSITION TO APPLICANT'S MOTION FOR EXTENSION OF TIME
TO FILE OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT**

Opposer Elevation Management, LLC ("Elevation" or "Opposer") hereby responds to the Motion for an Extension of Time filed by Applicant Finish Strong Venture, Inc. ("Applicant") on May 23, 2013. Applicant seeks three (3) weeks to file its opposition to Elevation's Motion for Summary Judgment on the narrow issue of Applicant's lack of use of the THE ELEVATION GROUP designation at the time of the filing of the application at issue. Noticeably missing from Applicant's extension request is any reference to Applicant's own delay and gamesmanship in these proceedings. As the facts set forth below reveal, any and all delay in this proceeding is entirely due to Applicant's own doing. Applicant, not Elevation, waited until days before the April 1, 2013 close of the discovery date to first serve its Initial Disclosures. Yet, its request for extension entirely ignores this critical fact, and wrongly complains about Elevation's supposed effort to stymie discovery by filing its Motion for Summary Judgment.

FACTUAL BACKGROUND

Elevation's opposition alleged two claims for denying the application at issue based on Elevation's incontestable federal trademark registration for the mark ELEVATION PARTNERS® — (1) likelihood of confusion and (2) Applicant's lack of use at the filing date of the use-based application.

After stipulating to a ten-day extension to serve initial disclosures at the request of Applicant's counsel (allegedly due to Hurricane Sandy), Opposer neither timely served its initial disclosures on November 12, 2012 nor requested a further extension. Declaration of Rochelle D. Alpert ("Alpert Decl.") ¶ 2. In contrast, Elevation timely served its Initial Disclosures on November 12, 2012. *Id.* ¶ 4.

In fact, Applicant did nothing at all to pursue the defense of the opposition for nearly five months. *Id.* ¶¶ 2-3. As the April 1, 2013 close of discovery date approached, having not received even Applicant's Initial Disclosures, Elevation prepared a Motion for Summary Judgment on the narrow issue of Applicant's non-use of the applied-for designation at the time of its November 8, 2010 application — an issue pleaded in Elevation's Notice of Opposition.

On March 29, 2013, days before discovery closed, Applicant bothered to serve what only can be characterized as boilerplate Initial Disclosures *concurrently with* discovery requests. These documents were served *only three days* before the close of discovery. *See* Alpert Decl. ¶¶ 2-3, Exs. A and B. This delay in proceeding reveals the gamesmanship of Applicant, not any wrongdoing by Opposer. Indeed, arguably Applicant's discovery is entirely untimely since it was served concurrently with, not after, service of Initial Disclosures, when initial disclosures are to be served *prior to* a party being allowed to serve discovery. *Dating DNA, LLC v. Imagini Holdings, Ltd.*, 94 USPQ2d 1889 (TTAB 2010).

Since neither Applicant's Initial Disclosures nor the discovery served addressed the issue of Applicant's use for the services it is seeking to register THE ELEVATION GROUP designation, Elevation determined it appropriate to proceed with its Motion for Summary Judgment on the very narrow issue of Applicant's non-use at the time of filing its application. As a Motion for Summary Judgment can be filed *at any point* between the moving party's service of its Initial Disclosures and the opening of the Plaintiff's testimony period, Elevation timely filed its motion. T.B.M.P. § 528.02.

Elevation did not file the motion as a "strategic ploy to shift the burden and costs of the proceeding to Applicant," as Applicant alleges without any support in its extension request. Revealingly in this regard, Applicant's counsel called counsel for Elevation on Friday, April 26, 2013, and left a voicemail seeking to stay discovery pending the determination of the Motion for Summary Judgment. *See* Alpert Decl. ¶ 5. Such a request, of course, is entirely inconsistent with Applicant's position asserted in its extension request.

Furthermore, when Applicant contacted Elevation's counsel on May 21, 2013 via email seeking an extension of its time to oppose the Motion for Summary Judgment — almost four weeks (27 days) after Opposer filed and served its Motion for Summary Judgment — Opposer consented to a one (1) week extension to accommodate the Applicant's asserted needs. *See* Alpert Decl. ¶ 6, Ex. C. This one week extension was an appropriate accommodation given the narrow scope of Elevation's summary judgment motion, the amount of time Applicant had taken to seek the extension, and the justification provided for the request. Not surprisingly, Applicant's counsel never referenced any shifting of burdens or any allegations as to the impropriety of the Motion for Summary Judgment. *Id.*

ARGUMENT

It is well established that an extension request must be supported with particularity to demonstrate good cause for the request. T.M.B.P. § 509.01(a). Applicant has failed to meet this standard for several independent reasons.

First, Applicant relies on the incompleteness of discovery as “good cause” to extend its time to respond to the Summary Judgment Motion. This argument fails on its face and on the indisputable facts of this matter. Any discovery delay is entirely of Applicant’s own doing, since Applicant failed to timely serve the required Initial Disclosures, which are a prerequisite to a party having the right to even engage in discovery. T.T.A.B. Rule 2.120(a)(3) (“A party must make its initial disclosures *prior to* seeking discovery....”) (Emphasis added).

Second, none of the discovery requests Applicant belatedly served on Elevation bears any relevance to the single issue Elevation raised in its Motion for Summary Judgment — Applicant’s own non-use of the applied-for designation at the time of filing its application at issue. *See* Alpert Decl. ¶ 3, Ex. B. Indeed, the discovery Applicant served, like its Initial Disclosures, at best can be characterized as “canned,” seeking irrelevant and totally inapplicable discovery.

Third, it is simply irrelevant that Elevation’s time to respond to these requests was suspended by its summary judgment motion. Neither one interrogatory nor one request for production of documents that Applicant belatedly and improperly served has anything to do with *Applicant’s* own use of the applied-for designation at the time it filed its Application. What’s more, even if these discovery responses were relevant — which they are not — Applicant had the means to address any need for discovery to effectively oppose the Motion for Summary Judgment. As provided in the Board’s rules, Applicant could have requested the specific information it needed to file a response. Fed. R. Civ. P. 56(d); T.B.M.P. § 528.06. Yet, no such

particularized discovery request has been timely made. T.M.B.P. § 528.06. It has not because there is no discovery needed by Applicant from Elevation to file a response to the Summary Judgment Motion.

CONCLUSION

For each of the foregoing reason, Elevation respectfully requests that Applicant's request for an extension should be denied and Applicant's Response to the Motion for Summary Judgment should be ordered to be filed forthwith. It is Applicant, not Opposer, who continues to try to game and delay this proceeding. Such conduct should not be countenanced.

Dated: May 31, 2013

Respectfully submitted,
MORGAN, LEWIS & BOCKIUS, LLP

By: /s/ Rochelle D. Alpert
Rochelle D. Alpert
Attorney for Opposer
Elevation Management, LLC

Rochelle D. Alpert
Stephanie L. Hall
Morgan, Lewis & Bockius, LLP
One Market, Spear Street Tower
San Francisco, CA 94105
Telephone: (415) 442-1326
Facsimile: (415) 442-1001
Email: ralpert@morganlewis.com
shall@morganlewis.com

CERTIFICATE OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is One Market, Spear Street Tower, **San Francisco**, CA 94105.

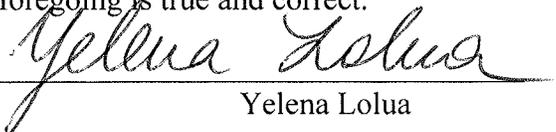
On **May 31, 2013**, I served the within documents:

OPPOSITION TO APPLICANT'S MOTION FOR EXTENSION OF TIME TO FILE OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT

- (BY MAIL)** I placed the sealed envelope(s) for collection and mailing by following the ordinary business practices of Morgan, Lewis & Bockius LLP, **San Francisco**, California. I am readily familiar with the firm's practice for collecting and processing of correspondence for mailing with the United States Postal Service, said practice being that, in the ordinary course of business, correspondence with postage fully prepaid is deposited with the United States Postal Service the same day as it is placed for collection.
- (BY OVERNIGHT DELIVERY)** I placed the sealed envelope(s) or package(s) designated by the express service carrier for collection and overnight delivery by following the ordinary business practices of Morgan, Lewis & Bockius LLP, **San Francisco**, California. I am readily familiar with the firm's practice for collecting and processing of correspondence for overnight delivery, said practice being that, in the ordinary course of business, correspondence for overnight delivery is deposited with delivery fees paid or provided for at the carrier's express service offices for next-day delivery the same day as the correspondence is placed for collection.
- (BY EMAIL)** by transmitting via electronic mail the document(s) listed above to each of the person(s) as set forth below.

Robert B. Golden
Lackenbach Siegel LLP
Lackenbach Siegel Building
One Chase Road
Scarsdale, NY 10583-4156

Executed on **May 31, 2013**, at **San Francisco**, California. I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.


Yelena Lolua