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

Proceeding	91207333
Party	Defendant IP Application Development LLC
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Submission	Opposition/Response to Motion
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Signature	/Daniel P. Hope/
Date	02/05/2015
Attachments	Applicant's Opposition to Motion for Extension and Supporting Exhib-its(2015.02.05).pdf(324698 bytes)

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

RXD MEDIA, LLC	:	
	:	
Opposer	:	Opposition No. 91207333
	:	Serial No. 77/927,446
v.	:	
	:	
IP APPLICATION DEVELOPMENT LLC	:	Opposition No.91207598
	:	Serial No. 77/913,563
	:	
Applicant.	:	

**APPLICANT’S OPPOSITION TO OPPOSER’S
REQUEST FOR EXTENSION OF DISCOVERY AND TRIAL SCHEDULE**

Pursuant to TBMP § 509 and Fed. R. Civ. P. 6(b), Applicant IP Application Development LLC (“Applicant”) hereby opposes Opposer RxD Media, LLC’s request for an extension of the discovery and trial schedule in this proceeding. As discussed below, yet another extension of these already long-delayed proceedings, which have prevented Applicant from obtaining a registration of its IPAD Mark for more than two years, would be unfair to Applicant. Opposer has not provided any compelling reason for a further extension, and has not identified any specific discovery that cannot be obtained absent an extension. Accordingly, Opposer’s motion should be denied.

FACTS

Opposer commenced these consolidated opposition proceedings in October 2012. (Dkt 1.)¹ To date, the discovery period has already been open for almost 20 months.

Since 2013, Applicant has consented to Opposer’s requests for extensions of the discovery period four (4) times, totaling almost a full year of additional discovery. (Dkt 7, 13,

¹ “Dkt __” refers to the documents listed in the prosecution history section of the TTABVue record of Opposition No. 91207333.

15 & 17.) During that time, the parties served and responded to written discovery, produced documents, and counsel for the parties worked to appropriately tailor the scope of discovery with respect to virtually every relevant issue. To date, Applicant has produced more than 1,000 pages of documents in response to Opposer's discovery requests.

In 2014, Opposer's prior counsel withdrew and Applicant waited eight (8) months for Opposer to appoint new counsel. (*See* Dkt 29.) Opposer never provided any justification for its failure to obtain counsel for this long period. Instead, Opposer filed the same motion, month after month, stating without support that Opposer had "continued to work diligently to obtain new counsel and has made additional progress in those efforts" and that "it will be unable to finalize its agreement with new counsel on or before [the operative deadline, but] anticipates that it will be able to retain new counsel within the next 30 days." (*See, e.g.*, Dkt 21, 22, 24, 26 & 27.)

Following Opposer's appointment of new counsel, the Board issued an order on December 15, 2014 resuming proceedings and setting February 9, 2015 as the discovery deadline. (Dkt 30.) On December 29, 2014, Opposer's new counsel served a new set of interrogatories and requests for production of documents. Applicant timely served its written responses and objections to those discovery requests on January 28, 2015 (Ex. 1), and produced responsive documents on February 2, 2015. (Ex. 2.)

In January 2015 counsel for the parties discussed the scheduling of depositions in these proceedings. During those discussions, counsel for both parties acknowledged that Applicant's responses to Opposer's most recent discovery requests were not due until January 28, 2015 and, accordingly, indicated the willingness to conduct depositions after the February 9, 2015 discovery deadline. On January 20, 2015, Opposer served notice to depose Applicant's 30(b)(6)

witness on February 3, 2015. Applicant also served notices to depose Opposer's witnesses, setting February 9, 2015 as a placeholder date. (Ex. 3.)

On Thursday, January 29, 2015, Applicant's 30(b)(6) designee unexpectedly had to undergo surgery, and thus he was no longer available for deposition on Tuesday, February 3, 2015. On the same day, as soon as becoming aware of the surgery, Applicant's counsel immediately called Opposer's counsel regarding the witness's unforeseeable scheduling conflict. (See Ex. 4.) The next day, Applicant's counsel confirmed that replacement deposition dates would be provided as soon as possible. (Ex. 5.)

On January 29, 2015, Opposer sought Applicant's consent to a fifth general extension of the deadlines in these proceedings on grounds that it is necessary to provide Opposer with time to address "discovery issues." (*Id.* at 2.) However, despite stating that there are "deficiencies in Applicant's discovery responses" (Opposer's Moving Brief at 4), Opposer has failed to specify a single deficiency. Accordingly, Applicant advised that while it remains open to reasonable extensions of time beyond February 9, 2015 for the purpose of conducting necessary depositions, it would not agree to yet another general extension of this already long-delayed proceeding. (Ex. 5 at 1.)

In short, Applicant has already proposed to conduct depositions of Opposer's witnesses after discovery has closed and make its own witness available after discovery has closed, and Opposer has failed to explain why that proposal would be insufficient to address Opposer's concerns.

If the Board grants Opposer's motion for an extension of all deadlines in these proceedings, it would result in the discovery period being open for nearly two years – three quarters of which were the result of Opposer's unilateral requests for extensions of time.

ARGUMENT

Pursuant to Federal Rule of Civil Procedure 6(b)(1)(B), the Board may extend the schedule in these proceedings “for good cause.” However, TBMP § 509.01(a) requires that a motion to extend must state with particularity the facts constituting “good cause” and that “mere conclusory allegations lacking in factual detail are not sufficient.” “The Board will ‘scrutinize carefully’ any motion to extend time, to determine whether the requisite good cause has been shown.” *Id.*; see also *Fairline Boats plc v. New Howmar Boats Corp.*, 59 USPQ2d 1479, 1480 (TTAB 2000) (denying petitioner’s “sparse motion contain[ing] very little information upon which the Board could find good cause”); *Luemme, Inc. v. D. B. Plus Inc.*, 53 USPQ2d 1758, 1760-61 (TTAB 1999) (denying motion containing insufficient facts on which to find good cause); *Instruments SA Inc. v. ASI Instruments Inc.*, 53 USPQ2d 1925, 1927 (TTAB 1999) (cursory or conclusory allegations did not constitute a showing of good cause). Furthermore, “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.” TBMP § 509.01(a). While the Board is ordinarily liberal in granting extensions of time before a deadline has elapsed, it will examine the facts to ensure that “the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused.” *American Vitamin Products Inc. v. DowBrands Inc.*, 22 USPQ2d 1312, 1314 (TTAB 1992); see also *National Football League v. DNH Management LLC*, 85 USPQ2d 1852 (TTAB 2008) (denying motion to extend where movant failed to “persuade the Board that it was diligent in meeting its responsibilities and should therefore be awarded additional time”); *SFW Licensing Corp. v. Di Pardo Packing Ltd.*, 60 USPQ2d 1372,

1373 (TTAB 2001) (opposers had not come forward with “detailed facts” required to carry their burden explaining their inaction).

Here, Opposer attempts to show good cause for an extension by suggesting that non-specific “discovery issues” exist and that Applicant has not produced documents responsive to Opposer’s most recent discovery requests. However, Opposer has failed to specify a single “discovery issue” and Applicant made a substantial production of documents responsive to Opposer’s most recent discovery requests on the same day that Opposer filed this motion. (*See* Ex. 2.) Furthermore, as Opposer well knows, the parties are continuing to discuss scheduling depositions after the February 9, 2015 discovery deadline. As to Opposer’s apparent concerns about traveling to depose Applicant’s witness in the place where he resides – as counsel is required to do – and additional discovery that *Applicant* may or may not wish to obtain, such concerns do not justify a wholesale extension of the discovery period for Opposer’s sole benefit.

As to Opposer’s claim that, absent another extension, it “could be prejudiced in meeting its subsequent deadlines” (Opposer’s Moving Brief at 5), Opposer fails to explain how it would be more prejudiced than any other plaintiff in any other opposition proceeding with respect to its ability to meet trial-related deadlines following the close of the discovery period. There is nothing preventing Opposer from continuing to work with Applicant’s counsel to reasonably address perceived discovery deficiencies between the close of the discovery period and the time that Opposer must submit its pretrial disclosures; Applicant expects that Opposer will do so irrespective of whether the Board grants the instant motion. Nor has Opposer explained why it has not been able to complete discovery within the 20 months that have already passed.

In short, Opposer wrongly believes that its desire for more discovery in these proceedings should outweigh Applicant's right to a fair and expeditious resolution of this dispute, which will enable it to obtain registrations of its IPAD Mark.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests that Opposer's motion to further extend the discovery deadline in these proceedings be denied.

Respectfully submitted,

Date: February 5, 2015

/Daniel P. Hope/

Glenn A. Gundersen
Daniel P. Hope
Dechert LLP
Cira Centre, 2929 Arch Street
Philadelphia, PA 19104-2808
Telephone: 215-994-2183

Attorneys for Applicant
IP Application Development LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Applicant's Opposition to Opposer's Request for Extension of Discovery and Trial Schedule has been duly served by electronic mail to Cecil E. Key, DiMuroGinsberg, PC, 1101 King Street, Suite 610, Alexandria, VA 22314, ckey@dimuro.com, on February 5, 2015.

/Daniel P. Hope/

Daniel P. Hope

EXHIBIT 1

Hope, Daniel

From: Hope, Daniel
Sent: Wednesday, January 28, 2015 11:03 PM
To: Cecil E. Key (ckey@dimuro.com)
Cc: Sara Sakagami; Gundersen, Glenn
Subject: RxD Media, LLC v. IP Application Development LLC, Opp. Nos. 91207333 and 91207598
Attachments: 2015.01.28 - Applicant's Responses to RxD's 3rd Set of Interrogatories.pdf; 2015.01.28 - Applicant's Responses to RxD's 3rd Set of RFPs.pdf

Dear Cecil,

Please find attached Applicant's responses to Opposer's third sets of interrogatories and requests for production.

Sincerely,
Dan

Daniel P. Hope

Dechert LLP

1095 Avenue of the Americas
New York, New York 10036
Daniel.Hope@dechert.com
Direct: +1 212 698-3657

EXHIBIT 2

Hope, Daniel

From: Hope, Daniel
Sent: Monday, February 02, 2015 9:06 PM
To: 'Cecil Key'; Sara Sakagami
Cc: Gundersen, Glenn
Subject: RxD Media, LLC v. IP Application Development LLC, Opp. Nos. 91207333 and 91207598

Cecil and Sara,

As mentioned in my January 30, 2015 email, Applicant hereby produces documents responsive to Opposer's third set of requests for production of documents, pursuant to Applicant's January 28, 2015 responses and objections thereto. The documents are now available for download at <https://www.dechertfileshare.com:4430/> using the following login credentials:

Group User ID: **appleuser**
Password: **ShareAP02022015cx**

These documents are identified by the Bates range IPADLLC_000250-001078. Please let me know if you have any problems accessing them.

Regards,
Dan

Daniel P. Hope

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New York, New York 10036
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Direct: +1 212 698-3657

EXHIBIT 3

Hope, Daniel

From: Hope, Daniel
Sent: Friday, January 30, 2015 5:25 PM
To: Cecil E. Key (ckey@dimuro.com)
Cc: Sara Sakagami; Gundersen, Glenn
Subject: RxD Media, LLC v. IP Application Development, Opp. Nos. 91207333 and 91207598 - deposition notice
Attachments: 2015.01.30 Deposition Notice - Keith Clements.pdf

Dear Cecil,

Please see the attached deposition notice of Keith Clements, which identifies February 9th as a placeholder date for the deposition.

On January 26, 2015 you advised that you were working to identify potential dates for Mr. Clement's deposition, but we have not yet received that information. Nor have we received potential dates for the 30(b)(6) deposition of RxD Media, LLC, which was noticed on January 22, 2015. Please advise.

Regards,
Dan

Daniel P. Hope

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Direct: +1 212 698-3657

EXHIBIT 4

Hope, Daniel

From: Hope, Daniel
Sent: Thursday, January 29, 2015 12:04 PM
To: Cecil E. Key (ckey@dimuro.com)
Subject: RxD Media, LLC v. IP Application Development LLC - deposition scheduling

Cecil -

Following up our call, I can now confirm that Tom La Perle is not available to be deposed on February 3rd, on account of unforeseeable circumstances. I understand that you will be getting in touch with me to discuss rescheduling the deposition after you have reviewed Applicant's discovery responses.

Thanks,
Dan

Daniel P. Hope

Dechert LLP
1095 Avenue of the Americas
New York, New York 10036
Daniel.Hope@dechert.com
Direct: +1 212 698-3657

EXHIBIT 5

Hope, Daniel

From: Hope, Daniel
Sent: Friday, January 30, 2015 5:37 PM
To: 'Cecil Key'
Cc: Gundersen, Glenn; Sara Sakagami
Subject: RE: RxD v. IP Application: Deposition and Discovery Issues

Dear Cecil,

We respond to your January 29, 2015 email.

With respect to deposition scheduling, we will propose replacement deposition dates when Mr. La Perle returns to the office next week. As you know, his unavailability on February 3rd was unforeseeable. We plan to produce documents pursuant to Applicant's January 28, 2015 responses and objections to RxD's third set of requests for production as early as this coming Monday.

While we remain open to reasonable extensions of time beyond February 9, 2015 for the purpose of conducting necessary depositions – and we understand and expect that RxD will also agree to such purposeful extensions – we do not agree to and intend to oppose RxD's request for an extension of the discovery deadline. As you know, your client commenced these proceedings on October 5, 2012 and the discovery period has already been open for a total of approximately 20 months. Applicant has already agreed to RxD's requests to extend the discovery deadline four times, totaling almost a full year of additional time for RxD to complete its pursuit of discovery. Furthermore, Applicant waited eight months for RxD to locate and appoint new counsel. Accordingly, there is no reason for yet another general extension of this already long-delayed proceeding.

As to your allegation of “deficiencies that will need to be addressed” and request for a privilege log, we look forward to receiving your written explanation of RxD's concerns, which will enable Applicant to properly evaluate and respond.

Sincerely,
Dan

Daniel P. Hope

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Direct: +1 212 698-3657

From: Cecil Key [<mailto:CKey@dimuro.com>]
Sent: Thursday, January 29, 2015 5:05 PM
To: Hope, Daniel
Cc: Gundersen, Glenn; Sara Sakagami
Subject: RxD v. IP Application: Deposition and Discovery Issues

Dan:

As discussed, I am following up regarding the rescheduling of the depositions of Mr. LaPerle and Mr. Vetter, which we noticed for February 3-4, in light of the fact that Mr. LaPerle is now not available on February 3 as we had originally understood. At the same time, we have begun reviewing IP Application/Apple's written discovery responses and while

that review is not complete, it is clear that there a number of deficiencies that will need to be addressed, and those issues seem likely to have a direct and negative impact on RxD's ability to conduct the noticed depositions. We also have not received any documents in response to our document requests, nor have we been given any indication of when we might expect to receive documents or how many documents we might expect, despite our request for that information. As with the written responses, the lack of documents has the strong potential to impede efficient and meaningful examination of the witnesses. These issues are exacerbated by the current schedule and what appears to be limited availability of IP Application's witnesses.

Accordingly, to best assure that RxD is given the opportunity to meaningfully exam the witnesses, and that the noticed depositions can proceed efficiently and in a cost-effective manner, please provide us with dates when Mr. LaPerle and Mr. Vetter can be available for deposition at least two weeks after IP Application has produced responsive documents. In addition, IP Application has never produced a privilege log, including for documents previously produced. Please promptly provide us with the privilege log, and update it with the upcoming production. In the meantime, we will expedite the process of meeting and conferring regarding the deficiencies in IP Application's responses, about which we will write to you separately, so that some if not all of those issues can be resolved before the depositions.

We will need to request an extension of the discovery schedule in light of the discovery issues outlined above. If IP Application is willing to agree to an extension under these circumstances, please let me know and we will then discuss the amount of time to be requested in a stipulated motion. Likewise, please let me know if IP Application will oppose an extension, and we will file a motion unilaterally.

Thank you, and we look forward to receiving your response.

Cecil E. Key
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