

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

RK

Mailed: February 14, 2015

Opposition Nos.: **91207333 (parent)**
91207598

RxD Media, LLC

v.

IP Application Development LLC

Yong Oh (Richard) Kim, Interlocutory Attorney:

On February 6, 2015, the Board held a telephone conference to hear argument and rule on Opposer's motion (filed February 2, 2015) to extend discovery and trial periods. Applicant has contested the motion. Cecil E. Key, Esq., and Sara M. Sakagami, Esq. of DiMuro Ginsberg, PC appeared as counsel for Opposer and Daniel P. Hope, Esq., of Dechert LLP appeared as counsel for Applicant.

As last reset on December 15, 2014, discovery was set to close on February 9, 2015. As Opposer's motion was filed while discovery remained open, Opposer need only show good cause for the requested extension. *See* Fed. R. Civ. P. 6(b); TBMP § 509.01 (2014). To show good cause, the moving party must set forth with particularity the facts said to constitute good cause and must demonstrate that the requested extension is not necessitated by the moving party's own lack of diligence or unreasonable delay. *See National*

Football League v. DNH Management LLC, 85 USPQ2d 1852, 1854 (TTAB 2008) (“the Board is liberal in granting extensions of time before the period to act has elapsed so long as the moving party has not been guilty of negligence or bad faith and the privilege of extension is not abused”).

The cause for Opposer’s motion is its inability to complete three noticed depositions prior to the current discovery deadline as well as its need for additional time to confer with Applicant on perceived deficiencies in Applicant’s discovery responses including Applicant’s failure to produce any documents in response to Opposer’s document requests. *Motion to Extend*, p. 3. Applicant opposes the requested extension on grounds of unfairness, noting that discovery has been open for nearly twenty months, Opposer took eight¹ months to retain new counsel, and that an extension would only serve to further delay this proceeding “which [has] prevented Applicant from obtaining a registration of its IPAD Mark for more than two years.” *Opposition to Motion*, pp. 1-3.

As discussed during the conference, the Board does not find that Opposer lacked diligence or unreasonably delayed so as to preclude a finding of good cause. After the Board granted Opposer’s initial counsel’s request to withdraw, Opposer filed five separate motions to extend its time to search for and retain new counsel within the time allowed by the Board. All of these

¹ Although Applicant alleges eight months, the Board finds it closer to six months considering that the request for withdrawal was filed on March 7, 2014, and granted by the Board on April 3, 2014, and a new appearance was filed on September 29, 2014.

motions went uncontested by Applicant and were granted by the Board. Opposer's new counsel filed an appearance on September 29, 2014, and the Board resumed proceedings on December 15, 2014.

Three days later on December 18, 2014, Opposer wrote Applicant concerning depositions of Applicant's witnesses and on December 29, 2014, Opposer served additional written discovery. Based on dates provided by Applicant, Opposer noticed the three depositions for February 3 and 4, 2015. However, on January 29, 2015, Applicant informed Opposer that one of its witnesses would not be available on the dates as noticed due to an unexpected surgery.

In view of these circumstances, the Board does not find that Opposer lacked diligence or unduly delayed in completing its discovery. Opposer, under new counsel, initiated discovery within three days of resumption, served written discovery early enough such that responses would be due prior to the close of discovery and would have completed its noticed depositions prior to the close of discovery but for the unexpected unavailability of one of Applicant's witnesses. Further, Applicant will not be heard to complain that it has been prejudiced by the length of discovery and the overall length of this proceeding when Applicant consented to all of the extension requests from May 13, 2013, to January 31, 2014, and chose not to oppose five additional extension requests filed between May 1, 2014, and September 3, 2014. Indeed, it appears that Applicant would benefit from an extension considering that Applicant has also stated that it anticipates taking further

discovery, albeit pursuant to a proposed agreement to allow the taking of prior-noticed depositions after the close of discovery.

In view thereof, Opposer's motion for an extension of the close of discovery and trial dates is hereby **GRANTED**. Dates are **RESET** in accordance with the schedule set out in Opposer's motion. That schedule is reproduced below (subject to the correction to Opposer's rebuttal disclosure date)²:

Discovery Closes	3/31/2015
Plaintiff's Pretrial Disclosures Due	5/15/2015
Plaintiff's 30-day Trial Period Ends	6/29/2015
Defendant's Pretrial Disclosures Due	7/14/2015
Defendant's 30-day Trial Period Ends	8/28/2015
Plaintiff's Rebuttal Disclosures Due	9/12/2015
Plaintiff's 15-day Rebuttal Period Ends	10/12/2015

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 taking of testimony. Trademark Rule 2.125.

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

* * *

² While the Board appreciates that September 12, 2015, falls on a Saturday, that Opposer's rebuttal disclosures will effectively be due on September 14, 2015, is by operation of Trademark Rule 2.196 rather than a schedule unilaterally set by Opposer.