

ESTTA Tracking number: **ESTTA580727**

Filing date: **01/08/2014**

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

Proceeding	91213225
Party	Defendant Ability Dynamics, LLC
Correspondence Address	DAVID WADE SCHNELL THE NOBLITT GROUP PLLC 8800 N GAINES CENTER DR , STE 279 SCOTTSDALE, AZ 85258-2123 UNITED STATES
Submission	Motion to Reopen
Filer's Name	David Wade Schnell
Filer's e-mail	dwschnell@ngtechlaw.com
Signature	/David Wade Schnell/
Date	01/08/2014
Attachments	103320700OPP_2013_01_08_Motion_to_Reopen.pdf(3356514 bytes) 10332.0700OP_2014-01-08_2013-12-09_Exhibit A_Stipulated Consent to Extend.pdf(51925 bytes) 10332.0700OP_2014-01-08_2013-12-09_Exhibit B_Stipulated Consent to Reopen_File Late Answer.pdf(54471 bytes)

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

_____)	
RUSH UNIVERSITY MEDICAL)	
CENTER,)	
)	Trademark Application
)	Serial No. 85/850,466
)	
)	Mark: RUSH
Opposer/Plaintiff,)	
)	
v.)	Filed: February 14, 2013
)	Published on: August 27, 2013
ABILITY DYNAMICS, LLC)	Opposition No. 91/213,225
)	
)	
Applicant/Defendant.)	
_____)	

**MOTION FOR REOPENING OF TIME TO FILE AN ANSWER, FOR LEAVE
TO FILE A LATE ANSWER, AND TO REFRAIN FROM ENTERING A
JUDGMENT BY DEFAULT**

Ability Dynamics, LLC (“Defendant”), hereby moves to reopen the time to file an answer, for leave to file a late answer the opposition and for the Board to refrain from entering a judgment by default in the opposition proceeding against Application Serial Number 85/850,466 for the mark RUSH (the “Rush Mark”) filed by Rush University Medical Center (“Plaintiff”) (collectively, “the Parties”). Pursuant to Fed. R. Civ. P. 55(c), Defendant’s motion to reopen the time to file an answer, for leave to file a late answer to the opposition and for the Board to refrain from entering a judgment by default should be granted and its late-filed answer accepted because the failure to file an answer in a timely fashion was inadvertent, the delay is non-prejudicial to the Plaintiff, and Defendant has a meritorious defense to the opposition, as shown by the facts submitted below.

I. STATEMENT OF FACTS

1. On November 1, 2013, the Parties, through respective counsel, initiated settlement discussions, and as of this date, continue to engage in settlement discussions.
2. On October 28, 2013, Plaintiff filed a Notice of Opposition against Application Serial No. 85/850,466 for RUSH (“Opposition No. 91/213,225”).
3. Pursuant to 37 CFR § 2.105, the Trial and Trademark Appeal Board (“TTAB”) designated Defendant’s time to answer the Notice of Opposition as December 9, 2013.
4. On December 9, 2013, Defendant’s counsel secured the express written consent of Plaintiff, through Plaintiff’s counsel Jennifer Mikulina, to file a stipulated motion for an extension of time to answer the notice of opposition for thirty (30)

days, or until January 8, 2014, and to reset all subsequent discovery and trial periods in Opposition No. 91/213,225, for good cause under TBMP § 509.01(a), specifically, to continue to engage in settlement discussions. Exhibit A is attached hereto showing a copy of the email chain containing the Parties' express written consent.

5. On December 9, 2013, Defendant intended to file a stipulated motion for an extension of time to answer the notice of opposition for thirty (30) days in Opposition No. 91/213,225. However, the stipulated motion for an extension of time to answer the notice of opposition was inadvertently filed in Opposition No. 91/198,197.
6. On January 7, 2014 Defendant's counsel discerned the inadvertent filing mistake.
7. On January 7, 2014, Defendant's counsel notified the Plaintiff's counsel of the inadvertent filing mistake.
8. On January 7, 2014, Defendant's counsel secured the express oral consent of Plaintiff, through Plaintiff's counsel Jennifer Mikulina, to file this motion and a late answer.
9. On January 8, 2014, Defendant's counsel secured the express written consent of Plaintiff, through Plaintiff's counsel Jennifer Mikulina, to file this motion and a late answer. Exhibit B is attached hereto showing a copy of the email chain containing the Parties' express written consent.
10. As of January 8, 2014, no order of default judgment has been issued by the Trademark Trial and Appeal Board.

II. LEGAL ARGUMENT

11. Under 37 CFR § 2.105, when a notice of opposition is filed, the Board “shall designate a time . . . within which an answer must be filed.” If the opposition respondent fails to file an answer within the time set by the Board, “the opposition may be decided as in case of default.” 37 CFR § 2.106(a) and 37 CFR § 2.114(a). If an answer is already overdue, applicant’s motion will be treated in the same manner as a response to a notice of default. Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc., 21 USPQ2d 1556, 1557 (TTAB 1991).
12. In an opposition proceeding, the showing required to obtain a reopening of time for defendant to file an answer to the notice of opposition, to permit late filing of an answer in an opposition proceeding and for determining whether a default judgment should be entered against the defendant for its failure to timely answer the notice of opposition is the good cause standard under Fed. R. Civ. P. 55(c). *See* TMBP § 312.01; TMBP § 509(B)(1) and TMBP § 508; *id.* Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc. at 1557.
13. Good cause is “usually found when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action.” *See* TMBP § 312.02; *id.* Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc. at 1557.
14. In this case, the failure to file an answer in a timely fashion was not the result of willful conduct or gross neglect on the part of the Defendant, but was inadvertent. Defendant intended at all times to defend this opposition and to answer the notice

of opposition in a timely fashion. As shown in Exhibit A, Defendant received the express consent of Plaintiff to file a stipulated motion for an extension of time to answer the notice of opposition for thirty (30) days, or until January 8, 2014, to continue to engage in settlement discussions. Defendant timely filed a stipulated motion for an extension of time to answer the notice of opposition for thirty (30) days, but due to an inadvertent filing mistake, the motion for extension was filed in the unrelated TTAB opposition proceeding Opposition No. 91/198,197, one in which the Plaintiff is the opposing party.

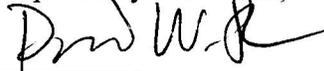
15. Plaintiff is not substantially prejudiced by the delay. The Parties continue to engage in settlement discussions and there is no delay in submitting the answer on the Parties' originally agreed to extension due date, that is, January 8, 2014. As shown in Exhibit B, Defendant received the express consent of Plaintiff to file this motion and a late answer.
16. Defendant's concurrently submitted answer adequately shows that Defendant has a meritorious defense to the opposition proceeding.

III. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Board grant this motion, and accepts its late-filed answer.

Dated: January 8, 2014

Respectfully submitted,

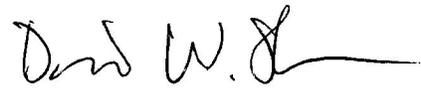


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Attorney for Defendant
Ability Dynamics, LLC

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that the attached MOTION FOR REOPENING TIME TO FILE AN ANSWER, FOR LEAVE TO FILE A LATE ANSWER, AND TO REFRAIN FROM ENTERING A JUDGMENT OF DEFAULT was filed electronically with the Trademark Trial and Appeal Board on January 8, 2014.



David Wade Schnell

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served by First Class mail on January 9, 2014 postage prepaid, to Plaintiff and counsel for Plaintiff:

Rush University Medical Center
1653 West Congress Parkway
Chicago, IL 60612
United States

Jennifer M. Mikulina
Ulrika E. Mattsson
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606
United States

Dated: January 8, 2014



David Wade Schnell

Exhibit A

Juna Summerton

Subject: FW: Draft of Proposed Settlement Terms RUSH

From: Mikulina, Jennifer [<mailto:jmikulina@mwe.com>]
Sent: Monday, December 09, 2013 9:02 AM
To: Wade Schnell
Subject: RE: Draft of Proposed Settlement Terms RUSH

Wade,

Thank you for your message and draft term sheet. I have forwarded it to my client and will provide our comments to the proposal as soon as possible.

We agree to the 30-day extension of time for Ability Dynamics to file its Answer.

Jennifer M. Mikulina
McDermott Will & Emery LLP | 227 West Monroe Street | Suite 4400 | Chicago, Illinois 60606
Telephone: 312.984.3620 | Facsimile: 312.984.7700 | Email: jmikulina@mwe.com

From: Wade Schnell [<mailto:dwschnell@ngtechlaw.com>]
Sent: Monday, December 09, 2013 9:36 AM
To: Mikulina, Jennifer
Subject: Draft of Proposed Settlement Terms RUSH

Jennifer,

Per our conversation last week, please see attached initial draft of proposed settlement terms. Also, please consent to extend the time to file our answer for 30 days.

Please let me know if you have any questions.

D. Wade Schnell

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Exhibit B

Juna Summerton

Subject: FW: Opposition No. 91/213,225 Rush University Medical Center vs. Ability Dynamics

From: Mikulina, Jennifer [<mailto:jmikulina@mwe.com>]
Sent: Wednesday, January 08, 2014 2:32 PM
To: Wade Schnell
Cc: Hawkins, Brent
Subject: RE: Opposition No. 91/213,225 Rush University Medical Center vs. Ability Dynamics

Thank you, Wade. As we discussed, we agree to the 30-day extension of time (from December 9, 2013 to January 9, 2014) for Ability Dynamics to file its Answer. We also agree to the proposed motion to reopen the case. We look forward to receiving your client's Answer later this week and the revised settlement proposal next week.

Jennifer M. Mikulina
McDermott Will & Emery LLP | 227 West Monroe Street | Suite 4400 | Chicago, Illinois 60606
Telephone: 312.984.3620 | Facsimile: 312.984.7700 | Email: jmikulina@mwe.com

From: Wade Schnell [<mailto:dwschnell@ngtechlaw.com>]
Sent: Wednesday, January 08, 2014 3:21 PM
To: Mikulina, Jennifer
Subject: Opposition No. 91/213,225 Rush University Medical Center vs. Ability Dynamics

Jennifer,

Per our conversation yesterday can you please confirm your agreement to the 30 day extension on December 9 for filing the answer and subsequently the late answer and the motion to reopen.

Thank you for your assistance with this matter.

Regards,

D. Wade Schnell

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