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

Proceeding	91213487
Party	Plaintiff Blackbird Technologies, Inc.
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Date	01/10/2014
Attachments	Blackbird's Reply Brief Opposing AV's Motion to Extend Final.pdf(1327884 bytes)

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

Blackbird Technologies, Inc.
Opposer

v.

Allen-Vanguard Corporation
Applicant

Opposition No. 91213487
Serial No. 85/358,651
Trademark: BLACKBIRD

**MOTION TO OPPOSE APPLICANT'S MOTION FOR 30 DAY EXTENSION OF TIME
TO ANSWER AND ALL SUBSEQUENT DATES WITHOUT CONSENT**

Opposer respectfully moves the Trademark Trial and Appeal Board (the "Board") to deny Applicant's Motion for 30 Day Extension of Time to Answer and all Subsequent Dates due to Applicant's failure to demonstrate that it had good cause to make such a request.

On November 13, 2013, Opposer timely filed a Notice of Opposition to Applicant's application for the mark BLACKBIRD shown in Trademark Application Serial No. 85/358651. No later than November 14, 2013, the Board issued the schedule of dates for this case, allowing Applicant's 40 days to file its Answer to Opposer's Notice of Opposition, setting a deadline for Applicant's Answer of December 24, 2013.

On December 18, 2013, Applicant's attorney contacted Opposer to request Opposer's consent to an extension. Over the course of multiple phone calls between Mrs. Oren Gelber (as attorney for Applicant) and Mr. Taylor Johnson (as attorney for Opposer), Mrs. Gelber indicated that despite the passage of 34 days since Opposer filed its Notice of Opposition, Applicant's attorneys' had failed to receive any guidance from Applicant about how to proceed, or whether

or not to proceed at all. Based primarily on this assertion, Opposer decided to withhold its consent.

On December 23, 2013, one day before the deadline for Applicant to file its Answer, Applicant filed the Motion for 30 Day Extension of Time to Answer and all Subsequent Dates. Rather than expanding on the original justification offered to Opposer, however, Applicant offered a different justification, alleging that Applicant's counsel had "*been in touch with Applicant for the purpose of preparing answers and has initiated the process* [emphasis added]", but that the resources and personnel required by Applicant to comply with the deadline were unavailable until after the Christmas and New Year's holidays. Applicant's motion included no other details or references to authority indicating such circumstances constituted "good cause".

The standard for allowing an extension of a prescribed period prior to the expiration of the term is "good cause" pursuant to Fed. R. Civ. P. 6(b) and TBMP § 509 (3d ed. rev. 2013). *American Vitamin Products, Inc. v. DowBrands, Inc.*, 22 USPQ2d 1312 (TTAB 1992). The party moving for an extension bears the burden of proof, and must "state with particularity the grounds therefor, including detailed facts constituting good cause." *Luemme Inc. v. D.B. Plus Inc.*, 53 USPQ2d 1758, 1760. *See also HKG Industries, Inc. v. Perma-Pipe, Inc.* 49 USPQ2d 1156, 1158 (TTAB 1998). Although the Board is liberal in granting extensions of time before the period to act has elapsed, the Board will not grant extensions of time if the moving party is guilty of negligence or bad faith or fails to persuade the Board that it was diligent in meeting its responsibilities. *National Football League, NFL Properties LLC v. DNH Management, LLC*, 85

USPQ2d 1852 (TTAB 2008); *See American Vitamin Products, Inc.* at 1314. Applicant failed to state with particularity the grounds for its request or include detailed facts that constitute good cause. To the extent, however, that the Board is willing to grant Applicant the benefit of the doubt and examine the vague and unspecific explanation provided by Applicant, that examination will show it amounts to no more than Applicant's admission that it was negligent and that it was not diligent in meeting its responsibilities.

In *National Football League*, the NFL moved the Board for an extension of time. Although it was the NFL's first request for an extension, and the court noted that the NFL had not otherwise abused its right to request extensions, the Board ultimately denied the NFL's request because the NFL failed to make the minimum showing necessary to establish good cause. *Id.* The NFL's primary argument was that it delayed taking discovery because the parties were involved in settlement discussions. *Id.* Despite the NFL's assertions, the Board determined that the NFL's claimed need for an extension was due to the NFL's unwarranted delay in initiating discovery. *Id.* In the present case, Applicant's request for an extension relies entirely on a vague and unspecific reference to the *present* unavailability of Applicant personnel and attempts to justify this unavailability due to the proximity of the Christmas and New Year's holidays. The dates of these holidays, however, are not only available to anyone with a calendar and known well in advance of the deadline; both also occur after the scheduled deadline of December 24. Applicant's motion is silent on the availability of Applicant personnel for the first thirty-eight (38) days of the period granted to Applicant to prepare its answer. The only conceivable explanation is, just like the NFL in *National Football League*, Applicant's claimed need for an extension is based on nothing more than Applicant's unwarranted delay in preparing

its answer. As the Board agreed in *National Football League*, Applicant is not entitled to an extension required because of its unwarranted delay.

In *Luemme*, the Board initially noted its concern regarding petitioner's request for an extension, noting "petitioner's sparse motion contains very little information upon which the Board could find good cause." *Id.* Continuing, the Board noted that there was no evidence in the record to establish that petitioner had been diligent in meeting its responsibilities. *Id.* The Board completed its trifecta of objections to petitioner's request by indicating that it was troubled by petitioner's vague assertion that extensive travel had made it difficult for petitioner to coordinate with its counsel while it failed to provide "detailed information concerning the nature and dates of petitioner's travels [and] what efforts counsel made to contact petitioner". *Id.* For these reasons, the Board rejected petitioner's request for an extension. *Id.* The Board should be similarly concerned with Applicant's request. Applicant's request for an extension, except for stating that Applicant personnel are "presently" unavailable (i.e., they are unavailable on the last and penultimate day of the forty (40) day period granted to Applicant to prepare its answer) and making reference to two holidays which occur subsequent to the original deadline, contains no information at all. It certainly contains no detailed information upon which the Board could find good cause. Like the petitioner's motion in *Luemme*, Applicant's motion introduces no evidence into the record that it has been diligent in meeting its responsibilities, except for the purposely vague statement that Applicant's counsel has "*been in touch with* Applicant for the *purpose of preparing answers* and has *initiated the process* [emphasis added]". Interpreted charitably, this statement still falls well short of establishing diligence on the part of the Applicant. A single phone call from counsel to Applicant would suffice to make that statement true. And like the

petitioner in *Luemme*, Applicant failed to provide any information at all, let alone detailed information, concerning the specific nature and dates of Applicant's unavailability or the efforts of counsel to coordinate with Applicant. As the Board determined in *Luemme*, Petitioner's request contains no information upon which the Board can find good cause and should therefore be denied.

Applicant, as the moving party, failed to meet its burden of proof and failed to state with particularity the grounds for the request or the detailed facts constituting good cause. Applicant's need for an extension is based on its negligence in the performance of its responsibilities, and its one vague assertion fails to demonstrate otherwise. Furthermore, Applicant failed to identify a single authority indicating their motion should be granted. Granting a request under these circumstances is akin to granting a request for extension as a matter of right. The Board has previously made it clear that requests for extension are not granted as a matter of right.

[INTENTIONALLY LEFT BLANK]

WHEREFORE, Opposer respectfully requests the Board to deny Applicant's Motion for 30 Day Extension of Time to Answer and all Subsequent Dates.

This Motion is being filed electronically pursuant to the Electronic System for Trial and Appeals (ESSTA).

Dated: January 10, 2014

Respectfully Submitted,



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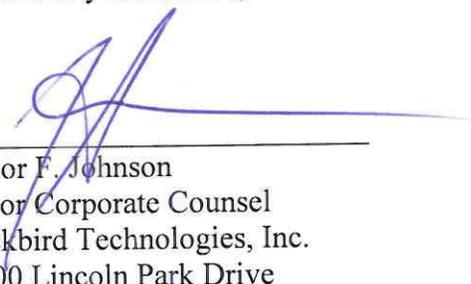
CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Motion to Oppose Applicant's Motion for 30 Day Extension of Time to Answer and All Subsequent Dates Without Consent has been served on Applicant, Allen-Vanguard Corporation, by mailing said copy on January 10, 2014, via FedEx Express courier, to the following counsel of record for Applicant:

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