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

Proceeding	91215657
Party	Plaintiff Goya Foods, Inc.
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Date	07/13/2015
Attachments	REPLYM2Xtnd.pdf(105900 bytes)

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

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Goya Foods, Inc.,

Opposer,

v.

GOYOGO FROZEN YOGURT LLC,

Applicant,

----------X

Opposition No. 91215657

Mark:

Serial No. 86060111

Mark: GOYOGO FROZEN YOGURT OUR INGREDIENTS YOUR CREATION

Serial No. 86037364

OPPOSER'S REPLY IN SUPPORT OF
OPPOSER'S MOTION FOR EXTENSION OF TIME

Pending disposition of its outstanding motion to compel discovery from Applicant, the Opposer, Goya Foods, Inc., requested the Board suspend the proceeding and reset the deadlines accordingly. The request to suspend was previously made by the Opposer in its co-pending motion to compel discovery.[1] However, because a suspension order had not been entered and its pretrial deadlines were approaching, Opposer requested a timely extension.

Applicant has responded in opposition to the extension arguing that it should not be granted (i) because the request was untimely, (ii) there was no good cause or (iii) because Opposer it also delinquent with its discovery obligations.

Opposer files this reply to show how Applicant's arguments are fatally flawed because they lack support, are not recognizable, and most importantly fail to allege that Opposer abused the privilege of extensions otherwise.

[1] See docket No. 9, Opposer's motion to compel discovery (filed June 3, 2015).

STANDARD FOR GRANTING A MOTION FOR EXTENSION

The Board is generally liberal in granting extensions before the period to act has lapsed, so long as the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. See, e.g., *American Vitamin Products, Inc. v. DowBrands Inc.*, 22 USPQ2d 1313 (TTAB 1992). Inasmuch as Opposer filed this single extension request within the applicable time period, there is no suggestion or evidence that Opposer has ever abused its privilege of extensions. *And, Applicant does not argue any abuse otherwise*. Furthermore, Applicant will not suffer any prejudice – seeing as the motion is as a consequence of Applicant's failure to participate in discovery.

THE REQUEST TO EXTEND WAS TIMELY FILED BY THE OPPOSER

Applicant argues that the Opposer waited until the "very day it was required to make its pretrial disclosures" when it filed its motion to extend. This argument is misleading because while Opposer did make the request the day the disclosures were due, this does not make the request untimely. Furthermore, in the co-pending motion to compel, Opposer had already requested the Board suspend the proceedings pending disposition. In view of the fact that the proceeding had not yet been suspended, however, Opposer decided to timely file an additional request — out of precaution and to preserve Opposer's rights. As stated in the request, the Opposer waited on an entry of suspension. Because this could have come anytime leading up to the deadline, it could have rendered the additional extension request an avoidable filing as well as an avoidable expense.[2]

[2] As seen on the time stamp of the instant extension request, the filing was made on June 8, 2015 at 8:51PM – which suggests Opposer tried to avoid an expense if a filing was avoidable, i.e., had there been a suspension entered.

THERE IS GOOD CAUSE IN OPPOSER'S MOTION AS IT IS BASED ON APPLICANT'S FAILURE TO PROPERLY PARTICIPATE IN DISCOVERY

The argument by Applicant that the motion is a sham is rather concerning when the Opposer was forced to bring the co-pending motion to compel, in the first place, because Applicant completely refuses to answer interrogatories and respond to requests for admissions. Suffice it to say, good cause to is found in the referenced motion to compel (i.e., Applicant has not complied with discovery requirements). If anything, it is the Applicant who fails to show any good cause in its argument against good cause. *See Harris County v. Smoker*, 934 S.W.2d 714, 721 (Tex. App. 1996, writ denied)(Under the avoidable consequences doctrine, an injured party must exercise reasonable care to minimize damages).

OPPOSER HAS FULFILLED ITS OBLIGATIONS, HOWEVER THIS IS NOT SUBJECT OF THE INSTANT MOTION

Applicant argues the extension should be denied because it believes Opposer has not complied with its discovery obligations. This is without merit and should not be considered. Applicant has neither filed a motion to compel nor is this even a recognizable excuse. *See Miss America Pageant v. Petite Productions, Inc*., 17 USPQ2d 1067 (TTAB 1990) (citing Fed. R. Civ. P. 26(d) and *Giant Food, Inc. v. Standard Terry Mills, Inc*., 231 USPQ 626 (TTAB 1986); TBMP § 408.01. A party is not relieved of its discovery obligations, including its duty to cooperate, in spite of the fact that an adverse party wrongfully may have failed to fulfill its own obligations.

APPLICANT WILL NOT BE HARMED BY AN EXTENSION AS THE REQUEST SOUGHT IS SOLELY BASED ON APPLICANT'S MISCONDUCT

Nowhere in Applicant's response does it ever state it would be harmed if the calendar was suspended pending the Board's consideration of the outstanding motion to compel (if

anything, denying the request would result in Applicant being unjustly enriched). In fact, any unknown prejudice to Applicant would strictly be as a result of Applicant's own conduct that includes stringing Opposer along and ultimately not attending to its discovery obligations.[3] Furthermore, had Applicant exercised reasonable care to answer its discovery, it could have avoided the instant consequences. Even though Applicant argues it was the Opposer that allegedly "sat on its hands": any delay of time on Opposer's behalf can be seen as wholly justified in view of Applicant's own actions which included twice supplementing its answers, incompletely. At the time leading up to filing the pending motion to compel, Opposer was led to believe Applicant's supplemental responses could turn into an act of good-faith, however as discovery neared its deadline, it was clearer that the only act of Applicant was in futility.

Accordingly, because there is an outstanding motion to compel Applicant to answer discovery, Applicant has no justification to oppose an extension, nor does Applicant stand to suffer any harm. This is a single extension request that is filed within the allowed time period. Applicant does not argue Opposer abused its privilege of extensions, nor is this on the record otherwise. Because abuse of the privilege is a requirement in order to deny the instant request, the Board should liberally allow the motion. See, e.g., *American Vitamin Products, Inc. v. DowBrands Inc*., 22 USPQ2d 1313 (TTAB 1992).

CONCLUSION

Opposer, Goya Foods, Inc., respectfully requests the Board suspend the instant proceeding pending disposition of the co-pending motion to compel. And, in view of the foregoing, Opposer respectfully requests the Board enter an Order compelling Applicant to answer Interrogatory Nos. 6 and 19 and deem Request for Admission nos. 18-23 admitted.

[3] Applicant supplemented its responses two times (See for e.g., Exh. 10)(neither was completely responsive).

Furthermore, based on the responses provided by Applicant, Opposer may need to take additional / follow-up discovery and requests the Board allow it an additional 30-days to do so.

Dated: July 13, 2015

Respectfully submitted,

By: /Jason DeFrancesco/
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was forwarded by first class postage prepaid mail by depositing the same with the U.S. Postal Service on this 13th day of July, 2015 to counsel for Applicant at the following address:

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