

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Mailed: September 23, 2013

Cancellation No. 92053298

Tyler Perry Studios, LLC

v.

Kimberly Kearney

**Andrew P. Baxley, Interlocutory Attorney:**

Under the schedule set forth in the Board's June 27, 2013 order, respondent's testimony period was reset to close on August 20, 2013. On August 12, 2013, respondent filed a motion to extend her testimony period. The motion has been fully briefed.

As an initial matter, respondent's reply brief in support of the motion to extend is seven pages, but is single-spaced in contravention of Trademark Rule 2.126. Respondent may not circumvent the ten-page limit for a reply brief in support of a motion, Trademark Rule 2.127(a), by single-spacing that reply brief. *Cf. Consorzio del Prosciutto di Parma Sausage Products Inc.*, 23 USPQ2d 1894, 1896 n.3 (TTAB 1992) (single-spaced footnotes containing substantial discussion may be viewed as a subterfuge to avoid page limit). Had respondent's reply brief been double-spaced, as required by Rule 2.126, that reply brief

clearly would have exceeded the ten-page limit for reply briefs in support of motions in Board proceedings.<sup>1</sup> Accordingly, that reply brief has received no consideration. See *Saint-Gobain Corp. v. Minnesota Mining and Mfg. Co.*, 66 USPQ2d 1220 (TTAB 2003).

In support of the motion to extend, respondent contends that she has been representing herself in this proceeding; that it has become clear that she needs "someone who [h]as the legal authority to swear in witnesses ... to take testimony;" that petitioner's owner has failed to provide a date on which he is available for a testimony deposition; and that other witnesses named in her pretrial disclosures have "have mysteriously disappeared and/or refused contact with me now because they feel intimidated and at personal and/or professional risk, if they voluntarily ree to witness on my behalf, though they initially agreed to do so as late as 1 month ago." Accordingly, respondent asks that her testimony period be extended by ninety days.

In response, petitioner contends that respondent should not be rewarded for her lack of diligence; that respondent's motion "is bereft of any factual detail explaining why she

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<sup>1</sup> Respondent has submitted other single-spaced documents in this proceeding. See, e.g., respondent's brief (filed February 25, 2013) in response to petitioner's motion to strike, respondent's motion (filed January 30, 2013) to amend admissions, and respondent's motion (filed February 13, 2012) to extend time to answer. However, none of those documents would have exceeded applicable page limits had they been double-spaced.

has failed to follow procedure and issue subpoenas for the taking of testimony during the three weeks prior to the Testimony or the 30 days during same;" that petitioner's principal is not an appropriate witness because "he has no specific or other knowledge of any facts relevant to the registration at issue in this proceeding." Accordingly, petitioner asks that the Board deny the motion to extend and "sanction [respondent] for [her] inexcusable misconduct of failing to even put on a gossamer defense by granting default against her and canceling the registration forthwith."

The standard for allowing an extension of a prescribed period prior to the expiration of that period is "good cause." See Fed. R. Civ. P. 6(b)(1)(A); TBMP Section 509.01(a) (3d ed. rev. 2 2013). 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). However, a motion to extend should include a recitation of specific facts constituting good cause for the extension sought. See *Fairline Boats plc v. New Howmar Boats Corp.*, 59 USPQ2d 1479, 1480 (TTAB 2000); *Instruments SA Inc. v. ASI*

*Instruments Inc.*, 53 USPQ2d 1925, 1927 (TTAB 1999) *Luemme, Inc. v. D. B. Plus Inc.*, 53 USPQ2d 1758 (TTAB 1999).

The Board finds that respondent's difficulties in procuring its witnesses named in its pretrial disclosures for testimony depositions constitute good cause for an extension of respondent's testimony period, albeit for significantly less than the ninety day extension that respondent seeks.<sup>2</sup> Accordingly, respondent's motion to extend is granted to the extent that respondent's testimony period is reset to close on **October 19, 2013**.

Regarding respondent's stated wish to take a testimony deposition of petitioner's principal, and regarding obtaining the testimony of any adverse party or nonparty witness who is unwilling to appear voluntarily, respondent must secure the attendance of that witness by subpoena issued, pursuant to 35 U.S.C. § 24 and Fed. R. Civ. P. 45, from the United States district court in the federal judicial district where the witness resides or is regularly employed. See TBMP Section 703.01(f). The Board has no jurisdiction over depositions by subpoena. See TBMP Section 703.01(f)(2). If a person named in a subpoena compelling

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<sup>2</sup> Notwithstanding that respondent is representing herself and appears to have limited litigation experience, respondent should have been cognizant of what evidence she would need to defend this cancellation proceeding and how she would obtain that evidence long before trial. The Board expects all parties appearing before it, whether or not they are represented by counsel, to comply with applicable rules.

attendance at a testimony deposition fails to attend the deposition, or refuses to answer a question propounded at the deposition, the deposing party must seek enforcement from the United States district court that issued the subpoena. Similarly, any request to quash a subpoena must be directed to the United States district court that issued the subpoena. See TBMP Section 703.01(f)(2).

To the extent that petitioner requests that the Board enter default judgment as a sanction for respondent's failure to present evidence at trial, the Board notes that petitioner, as plaintiff, has the burden of proof herein and that respondent is not required to submit trial evidence or to file a brief on the case. Cf. Trademark Rules 2.128(a) and 2.132. Moreover, petitioner has cited to no rule upon which its request for entry of default judgment as a sanction is based. Accordingly, that request will receive no consideration.

Remaining dates herein are reset as follows:

Plaintiff's Rebuttal Disclosures Due	<b>11/3/2013</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>12/3/2013</b>

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 the taking of testimony. Trademark Rule 2.125.

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

If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.