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

Proceeding	92053911
Party	Plaintiff Ovation LLC
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Attachments	Petitioner's Motion.pdf (13 pages)(501288 bytes)

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

In the matter of Reg. Nos. 3,670,163, 3,755,678 and 3,755,679
For the Marks: OVATION, OVATION & Design and OVATION & Design
Registered August 18, 2009, March 2, 2010 and March 2, 2010

OVATION LLC, a Delaware limited liability company,)	
)	
Petitioner,)	
)	
v.)	Cancellation No.: 92-053,911
)	
OVATION, INC., a Tennessee corporation,)	
)	
Registrant.)	
)	

**PETITIONER’S OPPOSITION TO
REGISTRANT’S MOTION FOR EXTENSION OF DEADLINES**

Petitioner Ovation LLC (“Petitioner”), by and through its undersigned counsel, hereby submits its opposition to Registrant Ovation, Inc.’s (“Registrant”) Motion for Extension of Deadlines, filed with the Trademark Trial and Appeal Board (the “Board”) on March 27, 2012 (the “Motion”). Registrant has not demonstrated excusable neglect sufficient to demonstrate why it could not conform with the requirements set forth in 37 C.F.R. § 2.120(a)(2) and make its Expert Disclosures. Moreover, Registrant has not set forth, with particularity, facts said to constitute good cause to support an extension of the remaining deadlines in this proceeding.

Accordingly, Petitioner opposes Registrant’s Motion and respectfully requests that the Board deny Registrant’s Motion and allow this proceeding to continue as scheduled in the Board’s most recent scheduling order, dated September 23, 2011.

BACKGROUND

The deadline for Expert Disclosures in this case was March 26, 2012.¹ On March 26, 2012, Petitioner served its Expert Disclosures on Registrant via First Class Mail and also sent Registrant a courtesy copy via electronic mail. *See* Declaration of Wendy M. Mantell (“Mantell Decl.”) at ¶ 3, attached hereto as Exhibit A. Registrant did not serve any Expert Disclosures on Petitioner. *Id.* On March 27, 2012, the day after the deadline for the Expert Disclosures, Registrant filed its Motion requesting, essentially, a re-opening of the Expert Disclosures period and an extension of the remaining deadlines in this case.²

Registrant did not at any time, prior to filing its Motion, confer with Petitioner regarding its need for an extension of deadlines, rather, hours after it received Petitioner’s courtesy copy by email, Registrant informed Petitioner that it would be filing its motion to re-open the Expert Disclosures period and extend all other deadlines in this case. Mantell Decl. at ¶ 4. Petitioner promptly notified Registrant that it would oppose any such motion. *Id.*

For the reasons set forth more fully below, Petitioner opposes Registrant’s Motion and respectfully requests that the Board deny Registrant’s Motion and allow this proceeding to continue as scheduled in the Board’s scheduling order, dated September 23, 2011.

ARGUMENT

I. Registrant Has Not Demonstrated Excusable Neglect, Therefore Its Motion to Re-Open the Expert Disclosures Period Should be Denied.

Where the time for taking required action has expired, a party desiring to take the required action must file a motion to reopen the time for taking that action. *See* Fed. R. Civ .P.

¹ The deadline for Expert Disclosures was actually March 25, 2012. However, as March 25th fell on a Sunday, pursuant to 37 C.F.R. § 2.196, the Expert Disclosures became due on Monday, March 26, 2012.

6(b)(1)(B); T.B.M.P. 509.01(b)(1). The movant must show that its failure to act during the time previously allotted therefore was the result of excusable neglect. *Id.* Registrant filed its Motion *after* the expiration of the deadline for making Expert Disclosures, and accordingly, is subject to the standard of excusable neglect.

Excusable neglect determinations must take into account all relevant circumstances surrounding the party's omission or delay, including: 1) the danger of prejudice to the nonmovant, 2) the length of the delay and its potential impact on judicial proceedings, 3) the reason for the delay, including whether it was within the reasonable control of the movant, and 4) whether the movant acted in good faith. *See Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993), adopted by the Board in *Pumpkin Ltd. v. The Seed Corps.*, 43 U.S.P.Q.2d 1582 (T.T.A.B. 1997).

A. The Reason for Registrant's Delay.

It has been held that the third factor, *i.e.*, "the reason for the delay, including whether it was within the reasonable control of the movant," may be deemed to be the most important of the *Pioneer* factors in a particular case. *See Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 U.S.Q.P.2d 1701, 1702 (T.T.A.B. 2002); *Pumpkin Ltd. v. The Seed Corps.*, 43 U.S.P.Q.2d 1582 (T.T.A.B. 1997). *See also, Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848, 1851 (T.T.A.B. 2000) (where movant's delay was due to matters wholly within its control - counsel's press for other business, docketing errors and misreading of relevant rule - no good cause for reopening period); *Dating DNA LLC v. Imagini Holding Ltd.*, 94 U.S.P.Q.2d 1889, 1892-3 (T.T.A.B. 2010)(motion to reopen discovery denied;

² Registrant's Motion is framed as a request for an "extension" of the remaining deadlines. However, as the Expert Disclosures deadline already passed at the time of Registrant's filing, Registrant's Motion is actually a request for a "re-opening" of the Expert Disclosures period and an extension of all other remaining deadlines.

opposer's "oversight" in failing to timely serve initial disclosures and seek an extension of the discovery period does not constitute excusable neglect).

Here the basis for Registrant's request is that its counsel needs additional time to "prepare" this matter for trial because its associate attorney left for another position less than two weeks ago. Registrant also claims that it would like the benefit of Petitioner's responses to discovery, which are due mid-April. As these reasons were all wholly and reasonably within Registrant's control, this factor, generally deemed the most important factor, should weigh heavily in Petitioner's favor.

First, despite the departure of its associate attorney, Registrant's "Attorney of Record" in this case is still the same and has not changed. As the Attorney of Record, Registrant's counsel is charged with the main responsibilities of handling this case and should not be excused from those responsibilities because an associate has left the firm. Additionally, there is absolutely no basis for requiring an extension of sixty (60) days to either bring Registrant's counsel up to speed and/or "prepare" for trial. Registrant had plenty of time, well before the departure of its associate attorney to prepare and serve its Expert Disclosures. The fact that it did not do so cannot now be the basis for its request to re-open this period. Of note, counsel for Petitioner also recently changed as its previous counsel left this firm in March 2012. *See*, Mantell Decl. at ¶ 2. However, no deadlines were missed and other members of the firm have assumed responsibility for this case without any interruption.

Second, Registrant also claims that it would like the benefit of Petitioner's responses to discovery that are due mid-April, five days before the close of discovery. If Registrant wanted the benefit of Petitioner's responses to discovery, it should have served its discovery earlier during the discovery period. Instead, Registrant waited until the waning weeks of the discovery

period to serve its interrogatories and requests for production of documents and things, and now requests a re-opening of Expert Disclosures and an extension of the discovery period. The Board has previously held that such complaints will not be heard. *See American Vitamin Products Inc. v. Dow Brands Inc.*, 22 U.S.P.Q.2d 1313, 1316 n. 4 (T.T.A.B. 1992)(respondent's argument regarding its inability to take follow-up discovery is unconvincing particularly since respondent did not initiate discovery until the last days of the original discovery period).

As the reasons proffered by Registrant as the basis for re-opening the Expert Disclosures period were all completely and reasonably within Registrant's control, this factor weighs heavily in Petitioner's favor.

B. Danger of Prejudice to Petitioner.

Registrant's Motion, if granted, would severely prejudice Petitioner. Further delay of this proceeding will severely prejudice Petitioner's right to a speedy determination of the proceeding, which has already lasted a period of one year, and it would incur additional expenses that would be deemed both significant and unnecessary. Allowing Registrant to re-open the Expert Disclosures period would unfairly require Petitioner to prepare and present a new set of rebuttal evidence and would prejudice Petitioner in having but a fraction of the time allotted to Registrant in preparing its Expert Disclosures. As the granting of Registrant's Motion would impose a severe prejudice to Petitioner, this factor also weighs in favor of Petitioner.

C. Length of Delay and Its Potential Impact on Proceeding.

Registrant seeks to delay this proceeding for another sixty (60) days so that it may get up to speed in the wake of its associate attorney's departure. Sixty days is a significant delay for Petitioner who is entitled to a speedy determination of this proceeding and should be allowed to conduct business with certain assurances concerning its trademarks and the goodwill associated

therewith. Granting Registrant's Motion would cause a significant delay as well as award Registrant with a substantial advantage over Petitioner in that Registrant would have two more months than Petitioner had to prepare and serve its Expert Disclosures. Accordingly, this factor also weighs in favor of Petitioner.

D. Whether Registrant Acted in Good Faith.

Registrant did not confer with Petitioner at all prior to its filing of the Motion. *See*, Mantell Decl. at ¶ 4. While Registrant's failure to confer does not necessarily constitute a lack of good faith *per se*, Petitioner is left to wonder why Registrant waited until just after the close of the deadline for Expert Disclosures, and until after Petitioner served its own Expert Disclosures *by email*, to assert that it needed to re-open the Expert Disclosures period and extend all other remaining dates. In other words, Registrant had the benefit of receiving Petitioner's Expert Disclosures before filing its Motion.

Weighing all of the four *Pioneer* factors together, it is abundantly clear that Registrant has not demonstrated the requisite excusable neglect necessary for a re-opening of the Expert Disclosures period. Accordingly, Registrant's Motion should be denied as to the re-opening of the Expert Disclosures period.

II. Registrant Has Not Provided Facts with Particularity to Constitute Good Cause, Therefore Its Motion to Extend Remaining Deadlines Should be Denied.

A motion to extend time must set forth with particularity the facts said to constitute good cause for the requested extension; mere conclusory allegations lacking in factual detail are not sufficient. *See Instruments SA Inc. v. ASI Instruments Inc.*, 53 U.S.P.Q.2d 1925, 1927 (T.T.A.B. 1999)(cursory or conclusory allegations that were denied unequivocally by the nonmovant and were not otherwise supported by the record did not constitute a showing of good cause);

Luemme, Inc. v. D.B. Plus Inc., 53 U.S.P.Q.2d 1758 (T.T.A.B. 1999)(sparse motion contained insufficient facts on which to find good cause).

Registrant has not provided any detailed evidence or facts with particularity to constitute good cause. Registrant's Motion is wholly based on conclusory statements, specifically: 1) its need for extra time to "prepare" due to the departure of its associate attorney; and 2) its want of the benefit of receiving Petitioner's responses to discovery, which were served by Registrant during the last weeks left in the discovery period. As the Board has previously held, these types of conclusory allegations lack factual detail and are insufficient to constitute good cause.

A. Registrant Has Not Explained the Reasons for Its Inaction.

Registrant only made mere conclusory statements that it needed extra time because its associate attorney had left the firm. Registrant provides no explanation as to, *e.g.*, why it did not or could not prepare and serve its Expert Disclosures prior to its associate's departure, why it did not confer with Petitioner's counsel concerning the need for an extension earlier (but instead, on the eve of the close of the Expert Disclosures period, suddenly concluded that it needed an extension), why other members of the firm cannot assist or assume responsibility, why it did not or could not serve its discovery on Petitioner earlier if it wanted the benefit of the responses earlier, why it now needs an extension of all remaining deadlines and why it needs sixty (60) days to "prepare" this matter for trial. Good cause cannot be supported if there is a failure to provide detailed evidence and factual information. *See SFW Licensing Corp. v. Di Pardo Packing Ltd.*, 60 U.S.P.Q.2d 1372, 1373 (T.T.A.B. 2001) (opposers had not come forward with "detailed facts" required to carry their burden explaining their inaction); *Luehrmann v. Kwik Kopy Corp.*, 2 U.S.P.Q.2d 1303, 1305 (T.T.A.B. 1987)(no reason given why discovery was not taken during the time allowed). *See also Gaylord Entertainment Co. v. Calvin Gilmore*

Productions, Inc., 59 U.S.P.Q.2d 1369 (T.T.A.B. 2000)(no specific reasons for former counsel's inaction); *HKG Indus., Inc. v. Perma-Pipe, Inc.*, 49 U.S.P.Q.2d 1156 (T.T.A.B. 1998)(motion denied because movant failed to provide detailed evidence and factual information in support of requested relief).

B. Registrant's Extension is Necessitated by Its Own Lack of Diligence.

Registrant's current "need" for an extension is necessitated by its own lack of diligence, specifically, failure to make any Expert Disclosures within the prescribed time and its decision to serve discovery in the later days of the discovery period, and does not constitute good cause. Petitioner should not be punished for Registrant's failure to serve its discovery earlier in the discovery period. Indeed, the Board has held that the mere *delay in initiating discovery does not constitute good cause* for an extension of the discovery period. *See National Football League v. DNH Management LLC*, 85 U.S.P.Q.2d 1852 (T.T.A.B. 2008)(moving party has the burden of persuading the Board that it was diligent in meeting its responsibilities; motion denied because opposer failed to make the minimum showing necessary to establish good cause to extend discovery); *see American Vitamin Products Inc. v. Dow Brands Inc.*, 22 U.S.P.Q.2d 1313, 1316 n. 4 (T.T.A.B. 1992)(respondent's argument regarding its inability to take follow-up discovery is unconvincing particularly since respondent did not initiate discovery until the last days of the original discovery period).

Registrant failed to make its Expert Disclosures and on the eve of the close of the Expert Disclosures period, only moments after Petitioner emailed a courtesy copy of its Expert Disclosures, Registrant informed Petitioner that it would file this unconsented Motion the day *after* the close of this period. Moreover, Registrant served its discovery late in the discovery period and now seeks to not only re-open the Expert Disclosures period but also extend all

remaining dates based on the conclusory statements that extra time is needed in order to “prepare” and give Registrant the benefit of Petitioner’s discovery responses. As Registrant has failed to provide detailed evidence and factual information to constitute good cause, Registrant’s Motion to extend the remaining deadlines in this proceeding should be denied.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Board deny Registrant’s Motion and continue this proceeding as scheduled in the Board’s most recent scheduling order, dated September 23, 2011. In the alternative, if the Board must allow an extension of deadlines, Petitioner respectfully requests that the Board limit its allowance to a brief extension of the remaining deadlines only and does not allow for the re-opening of the Expert Disclosures period.

Respectfully submitted,

Dated: April 10, 2012

OVATION LLC

By:



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Fax: (310) 586-7800

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2012, a true and correct copy of the foregoing Petitioner's Opposition to Registrant's Motion to Extend Deadlines was served by First Class Mail, postage prepaid, to counsel for Registrant:

Paige W. Mills
BASS BERRY & SIMS PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201

A handwritten signature in black ink, appearing to read 'Paige W. Mills', is written over a horizontal line.

Exhibit A

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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In the matter of Reg. Nos. 3,670,163, 3,755,678 and 3,755,679
For the Marks: OVATION, OVATION & Design and OVATION & Design
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OVATION LLC, a Delaware limited liability company,)	
)	
Petitioner,)	
)	
v.)	Cancellation No.: 92-053,911
)	
OVATION, INC., a Tennessee corporation,)	
)	
Registrant.)	
)	

**DECLARATION OF WENDY M. MANTELL
IN SUPPORT OF PETITIONER'S OPPOSITION TO EXTENSION OF DEADLINES**

I, Wendy M. Mantell, hereby declare, under penalty of perjury, as follows:

1. I am a shareholder at Greenberg Traurig, LLP, representing Petitioner Ovation LLC ("Petitioner"). I submit this declaration in support of Petitioner's Opposition to Registrant's Motion for Extension of Deadlines (the "Motion"), filed on March 27, 2012, in the above-captioned proceeding. The following facts are known to me, and if asked I could and would testify to their truth.

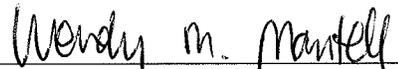
2. In March 2012, counsel for Petitioner, Elise Tenen-Aoki, left Greenberg Traurig and joined another firm. Since that time, I have assumed primary responsibility for this matter, along with my associate, Candice E. Kim, and have entered an appearance as the Attorney of Record in this proceeding.

3. On March 26, 2012, we sent Registrant a courtesy copy of Petitioner's Expert Disclosures by email. We did not receive Expert Disclosures from Registrant.

4. On the evening of March 26, 2012, Counsel for Registrant informed me that it would be filing a motion to re-open the Expert Disclosures period and extend all other deadlines in this case. Registrant's counsel had not previously discussed the possibility of needing to extend the discovery period. I promptly responded that we would oppose such a motion. I also clarified that while we would not be opposed to stipulating to certain depositions occurring after the cut off date, due to the length of time this matter has been pending, we are opposed to a general extension of all deadlines for 60 days.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of April 2012 in Santa Monica, California


Wendy M. Mantell