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

Proceeding	92053911
Party	Defendant Ovation, Inc.
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Date	04/17/2012
Attachments	10728249_1.DOC.pdf (8 pages)(112756 bytes) exhibitA.pdf (1 page)(343398 bytes) exhibit_B.pdf (1 page)(170631 bytes) exhibitC.pdf (1 page)(158482 bytes)

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

**In the matter of Trademark Registration Nos. 3,755,679, 3,755,678 and 3,670,163 Ovation
LLC, a Delaware Limited Liability)**

Company,)

Petitioner,)

**REGISTRANT’S MOTION FOR
EXTENSION OF DEADLINES**

v.)

Ovation, Inc., a Tennessee Corporation,)

Cancellation No. 92053911

Registrant.)

**REGISTRANT’S REPLY REGARDING ITS MOTION
TO EXTEND REMAINING DEADLINES**

The Registrant, Ovation, Inc. respectfully offers the following Reply to Petitioner’s Response to Registrant’s Motion to Extend Remaining Deadlines. In support of its Motion, Registrant would show as follows:

1. As a threshold matter, Petitioner did not serve Registrant with its Response to Registrant’s Motion. Registrant only learned of Petitioner’s Response upon checking the TTAB’s website. Despite the fact that Petitioner is sending Registrant frequent emails on other subjects, it did not serve a copy of its Response Brief by email, instead asserting that it sent its service copy by mail. When undersigned counsel learned of the existence of the Response, it asked Petitioner’s counsel why they did not serve it on Registrant. Registrant was provided with a purported receipt from the USPS, which stated that service was attempted (but not made) at some unknown address but a “notice” was left. *See Exhibit A.* Registrant’s counsel’s law firm is a large, busy enterprise with in excess of 450 employees. There is never an occasion on any business day in which numerous

people are not present to accept mail. Further, it is not the usual procedure of the USPS to “attempt service” of first class mail, it is normally left in one’s mailbox. At any rate, because no courtesy copy of the Response was provided, Registrant did not know that it existed until this afternoon.

2. Much of Petitioner’s Motion is premised on the fact that Registrant filed its motion after the expiration of the deadline for expert disclosures, which, according to Petitioner, subjects Registrant’s request to the “excusable neglect” standard. Yet, Registrant served its motion on Petitioner on March 26, 2012, before the deadline ran for expert disclosures. While the Motion was actually filed with the TTAB the next morning, on March 27, 2012, this was only because the TTAB website was down on the night of March 26th. *See Exhibit B.* At any rate, Registrant is merely seeking an extension of the discovery deadlines so that it can determine whether a rebuttal expert is necessary upon review of Petitioner’s discovery responses and the discovery deadline had not run as of the filing of Respondent’s Motion and it had not run as of the filing of this Reply.
3. Petitioner makes much of the fact that it will be “severely prejudiced” by the extension of the deadlines in this case by 60 days. According to Petitioner, such an extension will “severely prejudice Petitioner’s right to a speedy determination of the proceeding.” This argument is without merit in light of several factors:
 - a. There have been three extensions of the deadlines in this case, all at Petitioner’s counsel’s request. While Registrant agreed so that the Motions were filed as “stipulated” ones, Petitioner’s counsel requested and initiated the extension and filed the Motion each of these previous three times. It is hard to see how Petitioner can now claim that it is “severely prejudiced” by Registrant’s first

request of an extension of 60 days. . In fact, when added together, Petitioner has requested that the schedule be extended by a total of 120 days so far, only half of the amount of the extension currently requested by Registrant. If a “speedy determination” were so critical to Petitioner’s client, it is hard to explain why its counsel has previously requested extensions which double the amount requested by the Registrant. Petitioner’s argument that it will be “severely prejudiced” is hard to take seriously in light of its conduct. It also clearly suggests a lack of collegiality in reciprocating professional courtesy.

- b. Petitioner has not yet completed its own factual discovery. It only requested dates for four fact depositions on April 4, 2012, *after* Registrant had requested dates for Petitioner’s witnesses’ depositions on April 2, 2012. When dates were not available within the discovery period for the Registrant’s witnesses, Petitioner asked Registrant to agree to allow it to depose Registrant’s witnesses outside the deadline for factual discovery. *See Exhibit C*. Further, Petitioner has indicated that it wants to take discovery depositions by written questions of three third party witnesses that reside *outside the United States*. If these witnesses do not agree to this procedure voluntarily, it can take many months or even years to accomplish such depositions. See 28 U.S.C. § 1781(b)(2)¹. Obviously, there is not enough time for Petitioner to accomplish this under the letters rogatory procedure, prior to the close of the current factual discovery period on April 25, 2012. Accordingly,

¹ See 28 U.S.C. § 1781(b)(2) stating “[a] party considering the filing of a request for issuance of a letter rogatory should bear in mind not only the complexity and uncertain outcome of the procedure, but also its time-consuming nature. The entire process, from the filing of the initial request for issuance of a letter rogatory, to receipt by the Board either of the completed deposition, or of notification that the letter rogatory will not be honored; will consume months, if not years. During the interim, proceedings in the case before the Board most likely will be suspended pending the execution and return to the Board of the letter rogatory.”

Petitioner's self-serving assertions that Registrant's request for an extension is caused by its "own lack of diligence," fails to take into consideration the fact that it is physically impossible for Petitioner to accomplish the discovery it says it needs within the current discovery deadline.

- c. While strenuously arguing that it will be "severely prejudiced" by this extension, Petitioner cites a host of cases that do not address the question that is squarely before the Board on Registrant's Motion: is Registrant entitled to an extension of the discovery deadline when the request is made nearly one month before the deadline expires and there has been no showing that Registrant has been guilty of negligence or bad faith or that it has abused the privilege of extensions? Despite Petitioner's representations to the contrary, the cases indicate that the answer to this question is "yes." See *American Vitamin Products Inc. v. Dowbrands Inc.*, 22 U.S.P.Q.2d 1313, 1315 (P.T.O. T.T.A.B.1992)("[o]rdinarily, the Board is liberal in granting extensions of time before the period to act has elapsed, so long as the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused."). Instead, Petitioner cites numerous cases that do not address the request made in Registrant's Motion, but instead deal with requests to reopen discovery long after discovery has closed, reopen cases where trial briefs were never submitted, requests to withdraw after failing to communicate with clients for nearly two years, or no attempt to work the case during the discovery deadlines was made:

- i. *SFW Licensing Corp. V Di Pardo Packing Ltd.*, 60 U.S.P.Q. 1372 (T.T.A.B. 2001) dealt with counsel's request to withdraw from its

representation at the 11th hour due to “communication difficulties with his client” after 2 and ½ years of inaction and after not speaking to his client in over two years.

- ii. *Luehrmann v. Kwik Kopy Corp.*, 2 U.S.P.Q.2d 1303 (T.T.A.B. 1987) dealt with a request to reopen the discovery period when the requesting party did absolutely nothing until the last day of the discovery period.
- iii. *Gaylord Entertainment Co. v. Calvin Gilmore Productions, Inc.*, 59 U.S.P.Q.2d 1369 (T.T.A.B. 2000) dealt with a situation where the Petitioner wanted to reopen discovery after the testimony period had closed and the Petitioner had offered no evidence in support of its case.
- iv. *HKG Indus., Inc. v. Perma-Pipe, Inc.*, 49 U.S.P.Q.2d 1156 (T.T.A.B. 1998) involved a motion to reopen a discovery period that had long passed. In fact, in that case, the Petitioner had failed to file a trial brief and a show cause order had issued 6 months past the time the brief should have been filed.
- v. *National Football League v. DNH Management LLC*, 85 U.S.P.Q.2d 1852 (T.T.A.B. 2008) dealt with a party requesting to reopen the discovery deadlines when that party had served its discovery on the last day and had made no attempt to depose witnesses within the discovery deadline.
- vi. *American Vitamin Products, Inc. v. Dow Brands Inc.*, 22 U.S.P.Q.2d 1313 (TTAB 1992) involved a request to reopen the discovery period and the requesting party did not submit any discovery during the discovery period.

- d. Registrant has provided sufficient detail in its Motion as to why additional time is needed. As stated, the associate responsible for this matter left for a job with a client of Registrant's attorneys' law firm two weeks prior to the expert disclosure date. Due to the press of other matters, the lack of time available to get another associate up to speed on the matter, the remaining discovery that both sides need to conduct, the need to evaluate Petitioner's discovery responses in order to determine whether a rebuttal expert is necessary given Petitioner's expert report, there are many reasonable, good faith reasons for Registrant's first request for an extension that was made well within the discovery period.
- e. Registrant has diligently worked this matter. Petitioner served its first set of discovery in December. Registrant timely responded to these discovery requests in mid-January with hundreds of pages of documents and Interrogatory responses. Registrant served Petitioner with written discovery in mid-March, nearly six weeks before the close of discovery. This is not a case of waiting until the last day of the discovery period to serve written discovery. Registrant served its requests within sufficient time to have responses back before the close of the factual discovery period. Similarly, Registrant made requests to schedule factual depositions nearly four weeks before the close of discovery. Petitioner's assertions that Registrant's lack of diligence should mandate the denial of its motion is unprofessional and disingenuous, particularly given the fact that it has

CERTIFICATE OF SERVICE

I hereby certify that on the 16h day of April, 2012, I caused to be served a true and correct copy of the foregoing by the method by regular mail and email, addressed as follows:

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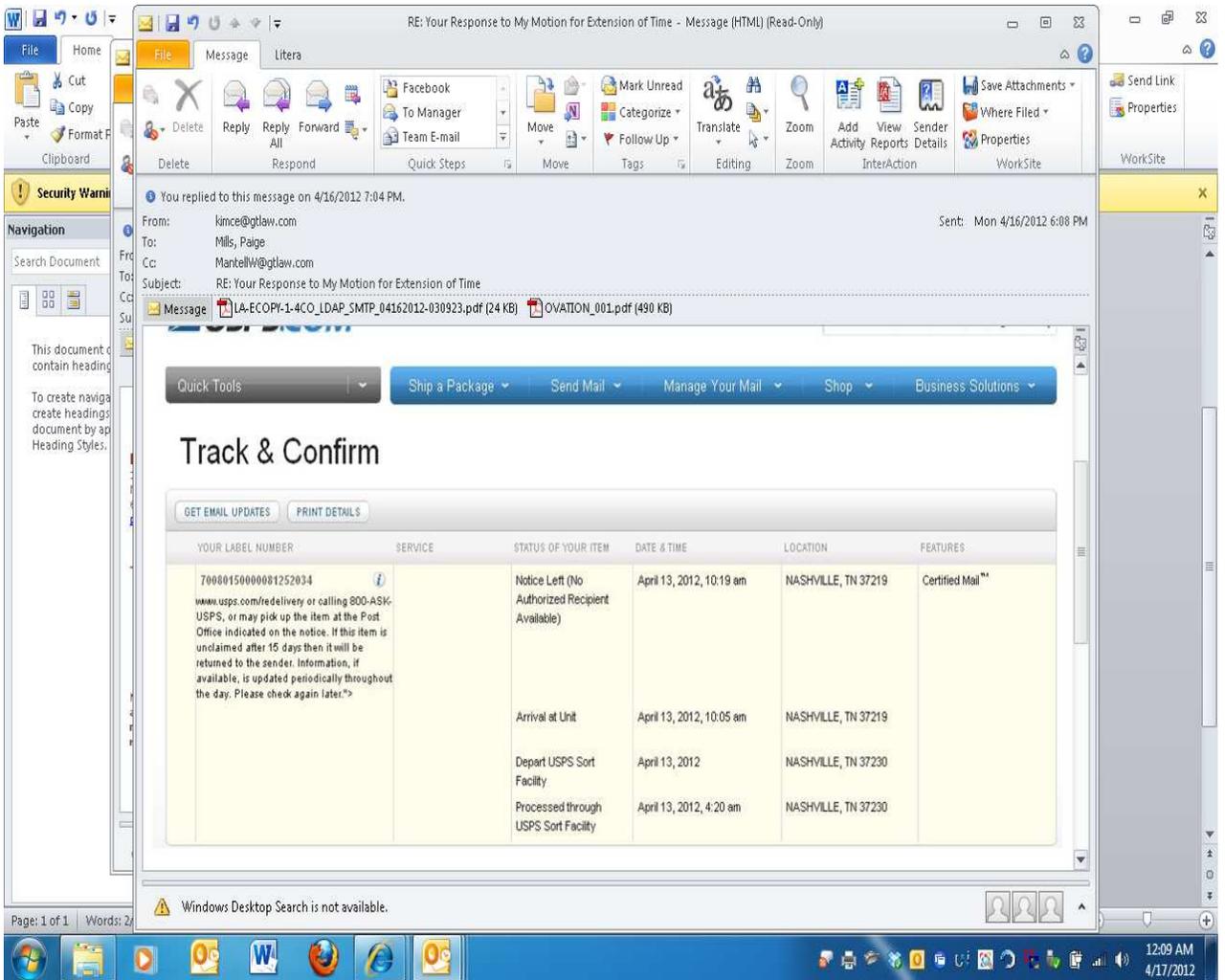


Exhibit A

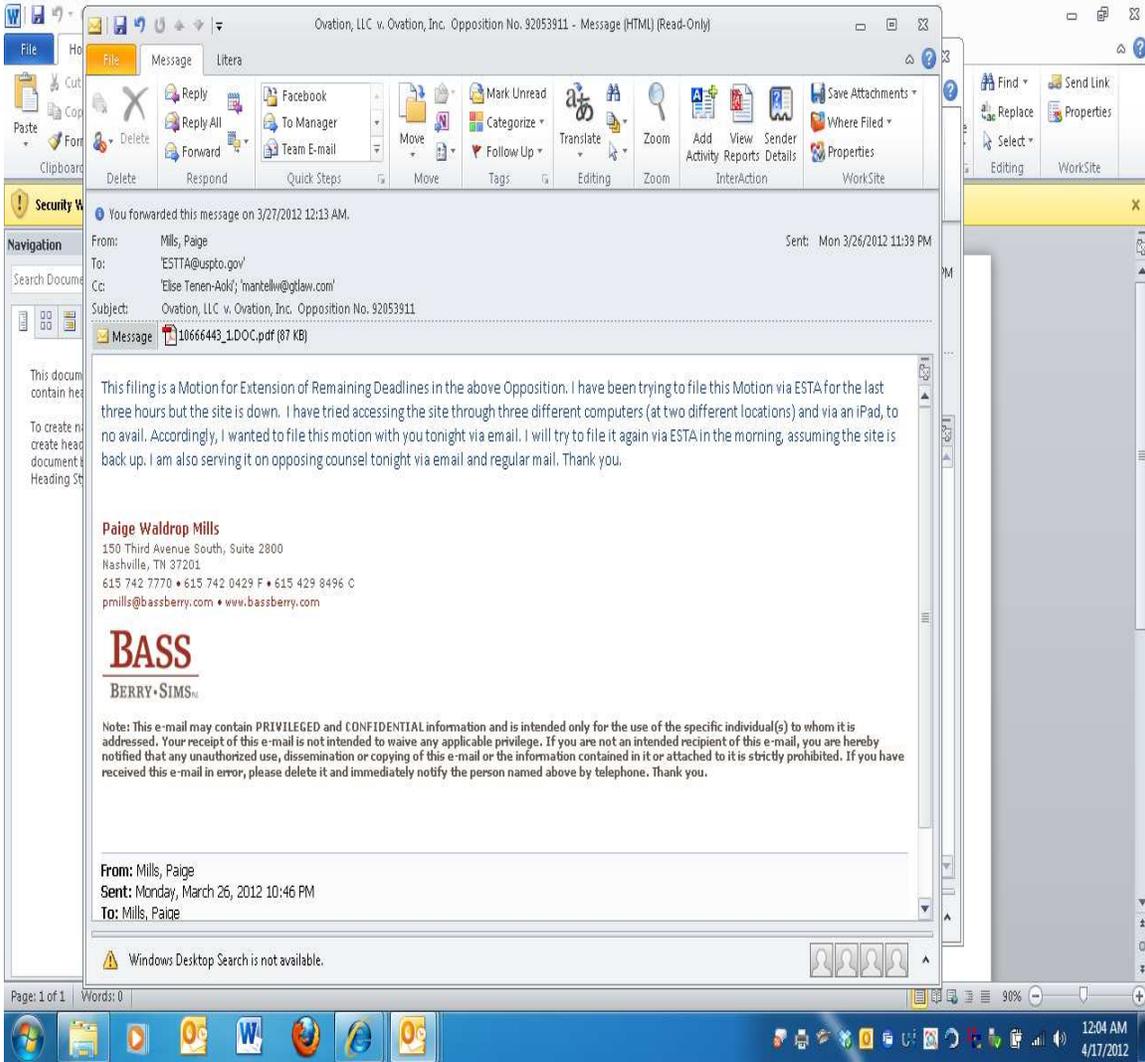


Exhibit B

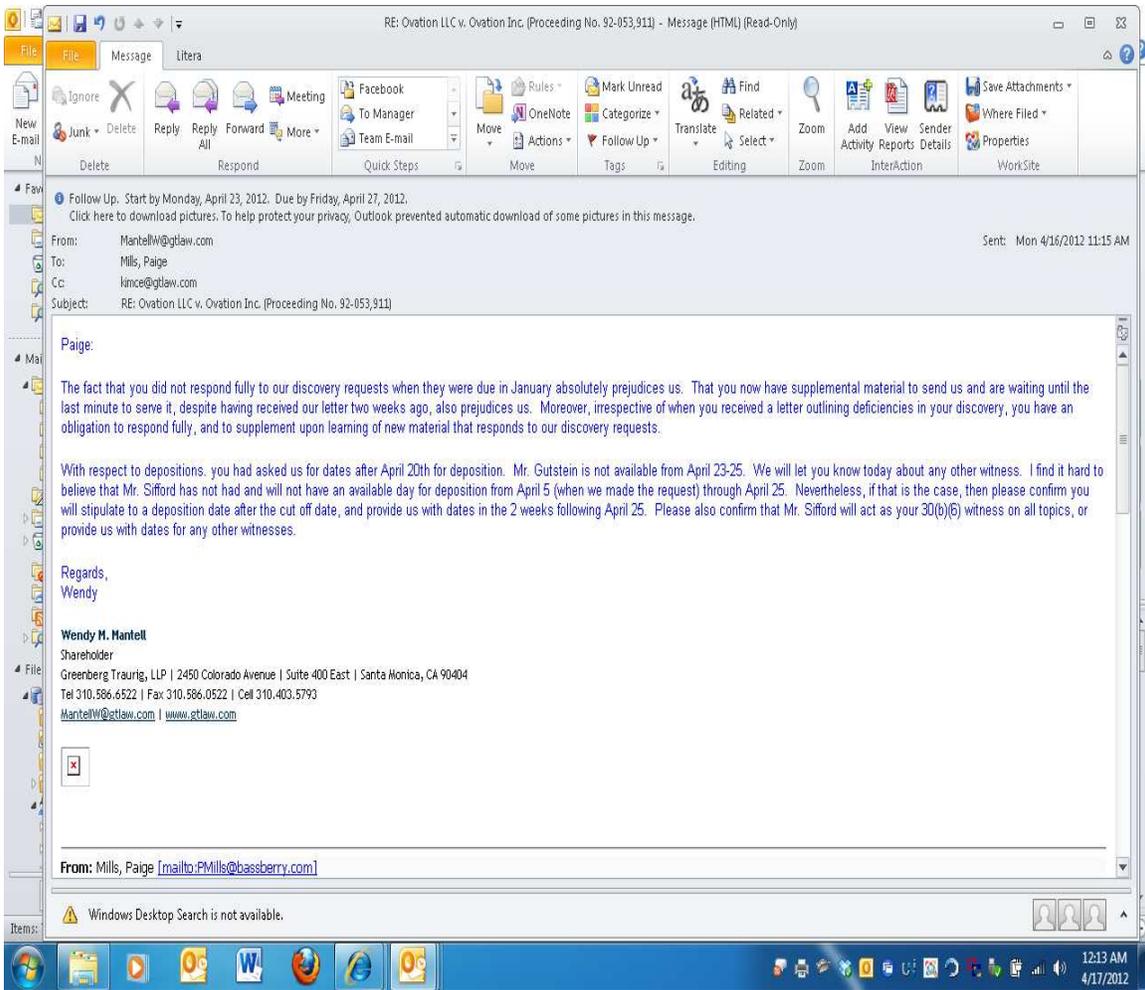


Exhibit C