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

Proceeding	92055094
Party	Defendant Temperance Distilling Company, Inc.
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Date	11/04/2013
Attachments	53928--Brief in Opposition.pdf(1289850 bytes)

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

In the Matter of Trademark Registration 3,885,993
Mark: SWIG
Registration Date: December 7, 2010

SWIG, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Cancellation No. 92055094
	)	
TEMPERANCE DISTILLING COMPANY, INC.,	)	
	)	
Registrant.	)	
	)	

REGISTRANT'S OPPOSITION TO PETITIONER'S CONTESTED MOTION FOR EXTENSION OF TIME

Registrant Temperance Distilling Company, Inc., hereby opposes Petitioner's Contested Motion for Extension of Time, for the reasons set forth below.

Pursuant to the current Scheduling Order, Petitioner's 30-day trial period closed on October 21, 2013. Petitioner issued subpoenas to Molly and Brian Pearson on October 9, 2013. Registrant moved to quash these subpoenas in the United States District Court for the Northern District of Ohio on October 11, 2013, on the basis that the subpoenas required the disclosure of privileged or other protected matter by Molly and/or Brian Pearson. The Court then contacted Petitioner's counsel to inquire if Petitioner intended on filing an opposition to Registrant's motion to quash, and Petitioner's counsel informed the Court that Petitioner would not be filing a formal opposition. The Court then granted Registrant's motion on October 16, 2013.

On October 18, 2013, Petitioner conducted a testimonial deposition of Christopher Erck,

Petitioner's owner and President. During the deposition, Mr. Erck attempted to testify about the contents of discussions he had with Molly Pearson. Registrant's counsel objected consistently on the basis of privilege and hearsay. Later the same day, after hours on a Friday and a mere 3 days before the close of Petitioner's trial period, Petitioner issued new subpoenas to Molly and Brian Pearson to answer written deposition questions. Registrant filed a second motion to quash these subpoenas in the United States District Court for the Northern District of Ohio on Monday, October 21, 2013, which Petitioner opposed. After the Court stayed the subpoenas pending further order, Petitioner promptly filed its Contested Motion.

Under TBMP § 509.01(a), Petitioner must show "good cause" for the requested extension and "must demonstrate that the requested extension of time is not necessitated by the party's own lack of diligence or unreasonable delay in taking the required action during the time previously allotted therefor." In this case, Petitioner cannot show either of these things.

First, with respect to good cause, the current proceedings in the District Court cannot constitute good cause for this extension because the underlying subpoenas -- even if complied with by the Pearsons -- cannot result in admissible evidence in this case. Petitioner failed to comply with TBMP § 703.02(c), and this fact is apparent from the face of Petitioner's Contested Motion, where Petitioner asserts it served subpoenas for deposition by written question on October 18, 2013. TBMP § 703.02(c) states: "A party that desires to take a testimony deposition on written questions **must** serve notice thereof on each adverse party within 10 days from the opening date of the deposing party's trial period, as originally set or as reset." (Emphasis added.) Petitioner utterly failed to comply with this rule. Petitioner issued, for the first time, subpoenas for testimonial depositions by written questions on October 18, 2013, which is 27 days after the opening of its trial period (and a mere 3 days before the close of Petitioner's trial period). No

prior "notice" of Petitioner's intent to take testimonial depositions by written questions was given by Petitioner at any time.

TBMP § 703.02(c) exists for a reason. Adverse parties need adequate time to prepare for cross-examining witnesses who are being deposed via written questions. Petitioner's failure to provide notice of deposition by written questions within the required time frame prevents Registrant from having a full and fair opportunity to cross-examine the witnesses. And this is not a situation where Petitioner just barely missed the cut-off; Petitioner missed the cut-off by 17 days, with a mere 3 days remaining in its trial period. In addition, the rules provide adverse parties 15 days after the requisite notice to make a motion with the Board that the deponents be deposed by oral examination, which is clearly not possible when only 3 days remain in the trial period. TBMP § 531. In short, even if the Pearsons were to comply with the subpoenas, their answers would not be admissible in these proceedings. The answers to the written questions would be stricken from the record by the Board, on a motion by Registrant, because of Petitioner's failure to comply with TBMP § 703.02(c). Thus, any action in the current District Court proceedings cannot possibly serve as good cause that necessitates extending Petitioner's trial period.

Second, Petitioner's request for an extension was necessitated by Petitioner's own lack of diligence and unreasonable delay in conducting its trial period. Petitioner waited until more than halfway through its 30-day trial period to begin to attempt to obtain the testimony of the Pearsons (non-parties) by subpoenas. Petitioner then decided not to oppose Registrant's motion to quash in the District Court. After the District Court quashed the subpoenas, Petitioner waited another 2 days, until October 18, 2013 (27 days into its 30-day trial period, and a mere 3 days from the close of its trial period), to issue new subpoenas to the Pearsons. Notably, when the new

subpoenas were issued, Registrant was notified of them after business hours on a Friday, at a time when Registrant would be unable to immediately contact the District Court for recourse. In other words, the delay is entirely a result of Petitioner's actions in conducting its trial period.

Petitioner states in its Contested Motion that it "reached out to Registrant to request an extension" of its trial period, and that Registrant did not respond. Petitioner's "reaching out" was in the form of an email on the very last day of its trial period. The Board has previously denied motions for extensions where parties unjustifiably wait until the very end of an allotted time period to request the extension. *See, e.g., Procyon Pharmaceuticals Inc. v. Procyon Biopharma Inc.*, 61 USPQ2d 1542, 1543-44 (TTAB 2001); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000).

To summarize the present situation, Petitioner (1) waited until more than halfway through its trial period to begin to attempt to secure the Pearsons' testimony; (2) chose not to oppose Registrant's first motion to quash the subpoenas issued to the Pearsons; (3) waited until 2 days after the District Court quashed the subpoenas to the Pearsons, and a mere 3 days before the close of its 30-day trial period, to issue new subpoenas to the Pearsons; and (4) failed to comply with TBMP § 703.02(c), making any answers in compliance with the subpoenas inadmissible in these proceedings anyway. Now, Petitioner moves for an extension so that it may continue to attempt to secure the testimony of the Pearsons, which it should have done by (1) subpoenaing them promptly during its trial period; (2) opposing Registrant's first motion to quash; (3) not waiting for two more days after the subpoenas were quashed before issuing new subpoenas; and/or (4) giving proper and timely notice of depositions by written questions. Given the facts, Petitioner has not shown, and cannot show good cause for the requested extension, or that the requested extension is not necessitated by Petitioner's own lack of diligence or unreasonable

delay in putting on its case during its 30-day trial period.

For all the above reasons, Registrant respectfully requests that the Board deny Petitioner's Contested Motion for Extension of Time.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition was sent this 4th day of November, 2013, by prepaid first-class mail to Petitioner's attorney of record as follows:

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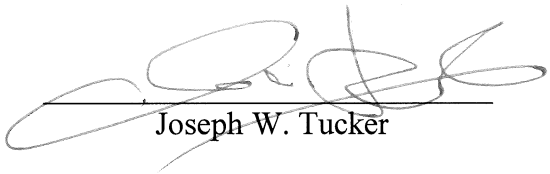

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