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

Proceeding	92056067
Party	Defendant Mother's Nutritional Center, Inc.
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Date	11/30/2015
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Case AVARU-009M/010M
Trademark Registration

IN THE UNITED STATES
PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Registration No. 3,675,027

Ava Ruha Corporation dba Mother's Market & Kitchen, Petitioner, Mother's Nutritional Center, Inc., Respondent.	Cancellation Nos. 92056067 for Registration No. 3675027 For the Mark MOTHER'S (stylized) And 92056080 for Registration No. 3675056 For the Mark MOTHER'S NUTRITIONAL CENTER

RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO EXTEND REMAINING DEADLINES IN THE CASE, INCLUDING DISCOVERY CUT-OFF

Under TBMP § 509.01(a), a party moving to extend time "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." Further,

the Board will "scrutinize carefully" any motion to extend time, to determine whether the requisite good cause has been shown.

Here, Petitioner seeks to extend time to take depositions of the opposing party. Yet the case has been pending for over three years -- and has even been the subject of a summary judgment motion. Petitioner has had plenty of time to take depositions, if depositions were really needed. Indeed, as Petitioner admits, Respondent provided deposition dates for its witnesses in May 2015 (*see* Vegh Decl., ¶ 12). It was ***Petitioner*** that elected not to take the depositions on the dates that were provided.

Three years of inaction on following up with depositions strongly compels the conclusion that the requested depositions -- noticed in March 2015, offered in May 2015, but never taken -- are more likely intended to increase costs for the Respondent, rather than obtain needed factual information for the Petitioner to prepare its case.

Further, as Petitioner admits, the last settlement proposal in this case came from Respondent in mid-September 2015. (*See* Vegh Decl., ¶ 25.) Over the next two months, there was no response to that proposal. Yet the only information provided in Petitioner's motion to explain the lack of responsiveness is the vague, unsupported statement

that "additional layers" of approval were needed to consider the settlement proposal. This is insufficient information to carry the moving party's burden on this motion.

Good cause has not been shown. Moreover, Petitioner's motion lacks any citation to case authority. This may be because very little case authority exists (if any) supporting Petitioner's request under these facts.

For example, in *National Football League v. DNH Management, LLC*, 85 USPQ2d 1852 (TTAB 2008), the Board denied a party's (first!) request to extend the discovery period. While it is said that the Board is usually liberal in granting such extensions, it nonetheless requires that the moving party be free from "negligence or bad faith"; the Board also mandates that "the privilege of extensions" not be abused. In the *National Football League* case, however, the moving party waited until twelve days before the close of the discovery period before filing a motion to extend. Under these facts, the Board found that the NFL failed to make "the minimum showing necessary to establish good cause to support an extension of the discovery period for any length of time." Here, of course, the Petitioner waited until the last possible day to file its unconsented-to motion.

As Petitioner claims in the present case, the NFL asserted that it delayed taking discovery because of settlement negotiations. But this rationale did not fly. The Board observed that the NFL should have "reasonably concluded" that it needed to move forward with discovery, and that the NFL's claimed need for an extension of discovery was "the product solely of [its own] unwarranted delay in initiating discovery." Significantly, the Board also quashed a deposition notice served by the NFL on the last day of discovery, since discovery depositions must be both noticed and taken during the discovery period.

Another case with a fact pattern similar to the present case is *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Manufacturing Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000). There, the moving party knew that a key witness would be unavailable due to maternity leave, but waited until the very last day to seek an agreement on an extension of time. Good cause to extend the deadline was lacking, under the circumstances. (*See also Chesebrough-Pond's Inc. v. Faberge, Inc.*, 618 F.2d 776, 205 USPQ 888, 891 (CCPA 1980) (attorneys have no right to assume that extensions of time will always be granted); *Fairline Boats PLC v. New Howmar Boats Corp.*, 59 USPQ2d 1479,

1480 (TTAB 2000) (mere existence of settlement negotiations or proposals, without more, would not justify delay in proceeding with testimony); *Instruments SA Inc. v. ASI Instruments, Inc.*, 53 USPQ2d 1925, 1927 (TTAB 1999) (plaintiff's claim of ongoing bilateral settlement negotiations was rebutted by defendant, and no other reason for plaintiff's failure to proceed with discovery was shown); *Luemme, Inc. v. D.B. Plus Inc.*, 53 USPQ2d 1758, 1760-61 (TTAB 1999) (plaintiff failed to set forth detailed facts concerning the circumstances -- plaintiff's allegedly busy travel schedule -- which necessitated the extension, and evidence showed that need for extension resulted from plaintiff's delay and lack of diligence during previously-set discovery period).)

This case has seen delay after delay for over three years. It is now time for the case to move forward. A settlement proposal has gone unresponded to for over two months now, without a sufficient explanation. The existence of undisclosed "additional layers" of approval does not constitute a cogent argument justifying further delay.

For the reasons set forth herein, Respondent respectfully urges that the motion to extend time be denied.

Dated: November 30, 2015.

By:

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Attorneys for Respondent Mother's Nutritional Center, Inc.

DECLARATION OF JEFFREY BERKOWITZ

1. I am outside general counsel for Respondent herein.

2. The chronological recitation of events in Mr. Vegh's Declaration is largely accurate, but there are two important aspects in which it is not correct, or potentially misleading.

3. First, Mr. Vegh states, at paragraph 24, that he "understood" that if the parties "could not reach a resolution of the issues [i.e., a settlement], Respondent's counsel would produce his client's representatives for deposition." As a general proposition, the statement is probably accurate: if cases do not settle, then discovery is anticipated. However, the implication of the statement appears to be that there existed an agreement not to conduct any discovery (or depositions) until the parties agreed that a settlement impasse had been reached. If that is the import of Mr. Vegh's statement, then it is inaccurate: no such agreement was ever made.

4. Second, Mr. Vegh states, at paragraph 31, that I told him that I "would allow Petitioner to prosecute its case by making available Respondent's representatives for deposition." As phrased, it appears I was committing the client to depositions, despite a fast-looming discovery cutoff. But what I actually said was that I couldn't agree to

anything without first talking to a litigator (Mr. Marks), because I wasn't a litigator; I also said at some point that ultimately any decisions were the client's to make. I did say that I saw no reason why depositions could not go forward, but what I did not understand during that phone call -- because I am not a litigator -- was that Mr. Vegh was speaking to me on the date discovery was set to close. At some point in the phone call he made a separate request to extend deadlines, but I again said that the decision would be up to the client. It wasn't until later in the day when I spoke with Mr. Marks -- who is a litigator -- that I understood the request for deposition dates was being made on the last day of discovery. When Mr. Marks and I later spoke with the client, the client declined the requested extension of time, and Mr. Marks indicated he would relay that response to Mr. Vegh. Mr. Marks's call to Mr. Vegh that day was the first time our position of "no extension" was relayed to Mr. Vegh.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I signed this declaration on November 30, 2015, in Beverly Hills, CA.

JEFFREY BERKOWITZ

DECLARATION OF PAUL S. MARKS

1. I am trial counsel for Respondent in this matter.

2. As Mr. Vegh stated in his declaration, he and I did speak on November 10, 2015. I called him in response to a voice mail he had left me that day. In our call, I informed Mr. Vegh that I had direct word from the client not to agree to further extensions. At no point in the call did Mr. Vegh state that Mr. Berkowitz had previously agreed to permit our client's depositions; indeed, his stern reaction to my statement that the client refused further extensions made it clear to me that this was the first time he had heard that we would not agree to a further stipulation.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I signed this declaration on November 30, 2015, in Los Angeles, CA.

PAUL S. MARKS

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 315 W. 9th Street, Suite 501, Los Angeles, CA 90015.

On November 30, 2015, I served true copies of the following document(s) described as **RESPONDENT'S OPPOSITION TO PETITIONER'S MOTION TO EXTEND REMAINING DEADLINES IN THE CASE, INCLUDING DISCOVERY CUT-OFF** on the interested parties in this action as follows:

Kit M. Stetina
Stephen Z. Vegh
75 Enterprise, Suite 250
Aliso Viejo, CA 92656

Counsel for Petitioner

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Neufeld Marks's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on November 30, 2015, at Los Angeles, California.

Gabriela Neufeld