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

Proceeding	92056067
Party	Plaintiff Ava Ruha Corporation dba Mother's Market & Kitchen
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Date	12/21/2015
Attachments	[12 21 2015]_Reply to Opposition to Motion to Extend.pdf(269669 bytes)

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,	) Cancellation Nos.:
	)
	) 92056067 for Registration No. 3675027
Petitioner,	) For the Mark MOTHER'S (stylized)
	)
vs.	) And
	)
Mother's Nutritional Center, Inc.,	) 92056080 for Registration No. 3675056
	) For the Mark MOTHER'S NUTRITIONAL
Respondent.	CENTER

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO MOTION TO EXTEND

Petitioner Ava Ruha Corporation dba Mother's Market & Kitchen (hereinafter "Mother's") hereby replies to Respondent Mother's Nutritional Center, Inc.'s (hereinafter "MNC") Opposition to Petitioner's Motion to Extend the Remaining Deadlines in the Case.

First, MNC curiously contends there has been three years of inaction in this case. MNC makes this statement knowing the Board stayed this matter while its motion for summary judgment on laches was pending for 15 months, from October 21, 2013 to January 29, 2015. Indeed, a month after the reopening of the case, Mother's counsel followed up with Respondent's counsel regarding the taking of MNC's deposition and the need for supplementation of MNC's prior responses to written discovery. See Vegh Dec., pars. 6-7. The subsequent record establishes that Petitioner was

diligent in its pursuit of discovery from the Respondent during the months prior to the stay of this matter and then after its reopening in the months leading up to the filing of this motion. See Vegh Dec., pars. 2-3, 8-9, 12, 14, 15, 19, 20, 21, 22, and 24. As such, there is no basis for MNC's suggestion that Mother's counsel was not diligent or unreasonably delayed the prosecution of this case.

MNC then cites to numerous cases whose factual and procedural history are readily distinguishable from those herein. In *National Football League v. DNH Management, LLC*, 85 USPQ2d 1852, 1854 (TTAB 2008), the opposer did not serve discovery until the *final day* of the discovery period, nor had they made any attempt to depose the applicant during the discovery period. Furthermore, there were no bilateral settlement discussions between the parties at the time the opposer sought their extension, as the applicant showed no interest in settling the case. Under these circumstances, the Board found the opposer could not have reasonably concluded that they need not move forward in discovery. *Id.* The Board further found that the need for an extension of discovery was solely the product of the opposer's unwarranted delay in initiating discovery. *Id.* at 1855. Likewise, the Board in *Luemme Inc. v. D.B. Plus, Inc.*, 53 USPQ2d 1758, 1760-61 (TTAB 1999), found that the petitioner had made no prior effort to depose the respondent, waiting until the last day to service discovery on the respondent.

Similarly, in *Baron Philippe de Rotschild S.A. v. Styl-Rite Optical Manufacturing Co.*, 55 USPQ2d 1848, 1851 (TTAB 2000) the Board had previously issued an Order compelling the applicant to respond to discovery by a date certain. Notwithstanding its awareness of the Board's deadline, the applicant's counsel had failed to notify opposing counsel or the Board that his client would be unavailable to comply with the Order because she would be giving birth and on maternity

leave. *Id.* Also, the parties had expressly agreed that because they had reached a settlement impasse, they would respond to each other's pending discovery requests. *Id.* at 1849-50.

In *Fairline Boats PLC v. New Howmar Boats Corp.*, 59 USPQ2d 1479, 1480 (TTAB 2000), the Petitioner failed to offer any factual detail supporting its claim that it was diligent in prosecuting its case and that good cause existed to grant its requested extension of the testimony period. The petitioner had not attempted to take *any* testimony or offer *any* evidence during its testimony period. Furthermore, it offered no explanation as to why it waited until the day before its testimony period closed to request an extension. Perhaps most importantly, the Board found that there were "no circumstances set forth to show any expectation [by the petitioner] that proceedings would not move forward during any [settlement] negotiations." The Board based this latter finding on the fact that there were no settlement discussions between the parties for over five (5) months leading up to the motion for extension. *Id.* at 1479. Likewise, in *Instruments SA Inc. v. ASI Instruments, Inc.*, 53 USPQ2d 1925, 1926-27 (TTAB 1999), there was no evidence of bilateral settlement discussions between the parties leading up to the motion to extend. Rather, the applicant had failed to respond to the opposer's settlement demand for quite some time. The Board found the opposer had not established by word or deed that the applicant would seriously consider its settlement offer.

Based on the record discussed above and in its original moving papers, Petitioner has been diligent in the prosecution of its discovery of the Respondent. This is in clear contrast to the movants in the *National Football League, Luemme, and Fairline Boats* cases. Furthermore, unlike in *National Football League*, *Baron Philippe de Rotschild*, *Fairline Boats*, and *Instruments SA*, there were continuous and ongoing bilateral settlement negotiations between Mother's counsel and MNC's former and current counsel for the seven (7) months leading up to the filing of the motion to extend.

See Vegh Dec., pars. 11-16, 21-32. Obviously, this isn't a situation where one party made a settlement proposal which the other party ignored for a lengthy period of time or rejected in its entirety, thereby leading to the cessation of negotiations. Without disclosing the contents of the parties' settlement discussions in this case, both Mother's and MNC had proposed over the course of seven (7) months specific terms during the negotiations, some of which the other side rejected or suggested modifications to, with no less than five different proposals exchanged by both parties. That is, there was a fairly typical back and forth, give and take, common to such negotiations. In view of his prior history with MNC's former counsel and the substance of his discussions with MNC's newly substituted counsel, Mother's counsel developed what he thought was the clear understanding between the parties that MNC's counsel would produce his clients for deposition *if and when* an impasse was reached in settlement discussions. Vegh Dec., par. 24. Needless to say, the record indicates that settlement discussions continued and never did reach an impasse when MNC's counsel, admittedly for the first time, indicated on November 10 that he would not agree to an extension. See Berkowitz Dec., par. 4, p. 8. Clearly, Mother's has demonstrated their reasonable expectation that discovery depositions would not proceed unless settlement discussions failed. See *Fairline Boats plc*, 59 USPQ2d at 1480.

The record further shows that Mother's counsel had attempted to reach out to MNC's counsel for at least five (5) days about an extension of the pretrial deadlines in this case before he was able to finally communicate with him. Importantly, during their November 10 conversation, MNC's counsel confirmed that he "saw no reason why depositions could not go forward..." See Berkowitz Dec., par. 4. MNC's counsel suggests that because he is not a litigator, he did not know that discovery was set to close that day. See Berkowitz Dec., par. 4, p. 8. But this is absolutely contradicted by

Mother's counsel, who explicitly responded to Mr. Berkowitz's suggestion to take depositions that "we would need his consent to our requested further extension of the discovery cut-off date to allow these depositions to go forward, in view of the fact that the discovery cut-off date was today." See Vegh Dec., par. 31, p. 6.

MNC contends "the existence of undisclosed 'additional layers' of approval does not constitute a cogent argument justifying further delay. See MNC's Brief, at p. 5. This is not only a partial misrepresentation of the record but also of the applicable standard regarding the adjudication of Mother's motion to extend. MNC's counsel clearly stated in his conversation with MNC's other counsel that the delay in being able to provide a response to Respondent's last settlement proposal "was due to an **ongoing change in control of ownership** of Petitioner which required additional layers of consideration by additional individuals..." See Vegh Dec., par. 32. (Emphasis added.) Obviously, Mother's counsel could not disclose at the time the details of this change in ownership and the various approval layers necessitated by such change because it would constitute a breach of the attorney-client privilege and other fiduciary duties owed to his client. However, that which was disclosed more than adequately explained why Mother's required an additional month at the time to consider MNC's most recent settlement proposal.

Finally with respect to the standard applicable to a motion to extend, TBMP Rule 509.01(a) states that "a motion to extend must set forth with particularity the facts said to constitute good cause for the requested extension." Mother's has done this. The Rule further states "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..." Mother's has satisfied this requirement as well.

For all of the foregoing reasons, and in applying the Board's liberal policy that favors the granting of extensions of time, Mother's has more than satisfied its burden of showing good cause to extend the remaining deadlines in this case, including discovery cut-off, so as to afford Mother's the opportunity to take its previously noticed depositions of MNC.

Respectfully submitted,

STETINA BRUNDA GARRED & BRUCKER

Dated: December 21, 2015

By: _____

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PROOF OF SERVICE

State of California)
) ss.
County of Orange)

I am over the age of 18 and not a party to the within action; my business address is 75 Enterprise, Suite 250, Aliso Viejo, California 92656. On **December 21, 2015**, the attached **PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO MOTION TO EXTEND** was served on all interested parties in this action by U.S. Mail, postage prepaid, at the address as follows:

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Executed on **December 21, 2015** at Aliso Viejo, California. I declare under penalty of perjury that the above is true and correct. I declare that I am employed in the office of STETINA BRUNDA GARRED & BRUCKER at whose direction service was made.

/Renee Lau/
Renee Lau