

**THIS ORDER IS NOT A
PRECEDENT OF THE TTAB**

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

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Mailed: July 12, 2016

Cancellation No. **92061236**

FWHG IP Holdings LLC

v.

BR Consulting, Inc.

**Before Quinn, Lykos and Gorowitz,
Administrative Trademark Judges**

By the Board:

This matter comes up on Petitioner's motion (filed December 17, 2015) to extend discovery and Respondent's motion (filed January 11, 2016) for summary judgment on Petitioner's claim of abandonment. The motion to extend is contested and the motion for summary judgment is fully briefed.¹

Petitioner's Motion to Extend

As last reset, discovery was scheduled to close on January 14, 2016. On December 17, 2015, Petitioner filed a motion to extend discovery and all remaining dates by ninety days on grounds that 1) additional time is necessary to review "roughly 3,300 pages of documents" produced by Respondent in November, 2) additional discovery may be required, 3)

¹ For purposes of this order, the Board presumes the parties' familiarity with the pleadings, and the arguments and evidence submitted with regard to the motions. Therefore, for the sake of efficiency, this order does not summarize or recount the parties' arguments or evidence, except as necessary.

Petitioner's principal has a busy travel schedule, 4) Petitioner's counsel faced a heavy work schedule, and 5) settlement is still being explored. *Petitioner's Motion to Extend*, 9 TTABVUE 3-4.

As Petitioner's motion was filed prior to the expiration of the time period for which Petitioner seeks an extension, Petitioner need only show good cause for the requested extension. *See* Fed. R. Civ. P. 6(b)(1)(A). *See also* TBMP § 509.01 (2016). To show good cause, the moving party must set forth with particularity the facts said to constitute good cause and must demonstrate that the requested extension is not necessitated by the moving party's own lack of diligence or unreasonable delay. *See* TBMP § 509.01(a) and cases cited therein. So long as the moving party has not been guilty of negligence or bad faith and the privilege of extensions has not been abused, the Board is liberal in granting extensions of time. *See National Football League v. DNH Management LLC*, 85 USPQ2d 1852, 1854 (TTAB 2008).

Here, there is nothing in the record to suggest that Petitioner lacked diligence or unreasonably delayed in seeking an extension. Furthermore, aside from a single thirty-day consented suspension for settlement early in this proceeding, this matter has progressed without delay. Respondent's contention that Petitioner has no outstanding discovery to Respondent fails to address any of the reasons for which Petitioner seeks an extension and Respondent's concern that extending discovery "would enable Petitioner to delay disposition of a summary judgment motion by asserting the right to

additional discovery” under Fed. R. Civ. P. 56(d), *see Respondent’s Opposition*, 10 TTABVUE 3, is not only speculative but unwarranted and misplaced to the extent that Respondent equates Petitioner’s motion for extension to a motion for discovery under Rule 56(d).

In view thereof, Petitioner’s motion for extension is hereby **GRANTED**.

Respondent’s Motion for Summary Judgment

Turning to Respondent’s motion, a decision on summary judgment necessarily requires a review of the operative pleading in the case. *See Asian and Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1478 (TTAB 2009). Here, we find the abandonment claim in the petition for cancellation insufficiently pleaded as Petitioner has failed to plead at least three consecutive years of nonuse or less than three years of nonuse coupled with an intent not to resume use. *See Otto Int’l Inc. v. Otto Kern GmbH*, 83 USPQ2d 1861, 1863 (TTAB 2007). Since a party may only obtain summary judgment on a properly pleaded claim, Respondent’s motion for summary judgment is **DENIED**.² *See Intermed Commc’ns, Inc. v. Chaney*, 197 USPQ 501, 503 n.2 (TTAB 1977) (“If a claim has not been properly pleaded, one cannot obtain summary judgment thereon”).

We note that even if the motion for summary judgment was considered on the merits, it would nevertheless be denied because genuine disputes of

² The parties are reminded that evidence submitted in support of or in opposition to a motion for summary judgment is of record only for consideration of that motion. Any such evidence to be considered at final hearing must be properly introduced during the appropriate trial period. *See, for example, Levi Strauss & Co. v. R. Joseph Sportswear Inc.*, 28 USPQ2d 1464 (TTAB 1993).

material fact remain. At a minimum, we would find genuine disputes of material fact on the period of Respondent's nonuse, the nature of the new or renewed use, and the question of Respondent's intent. *See Copelands' Enters. Inc. v. CNV Inc.*, 945 F.2d 1563, 20 USPQ2d 1295, 1299 (Fed. Cir. 1991) ("factual question of intent is particularly unsuited to disposition on summary judgment").

Petitioner is allowed until **AUGUST 1, 2016**, to serve and file an amended petition for cancellation that properly alleges a claim for abandonment, failing which this proceeding will be dismissed. Upon the service of an amended petition for cancellation, Respondent is allowed until **AUGUST 31, 2016**, to serve and file its answer.

Proceedings herein are **RESUMED** and dates are **RESET** as follows:

Amended Petition for Cancellation Due	8/1/2016
Answer to Amended Petition Due	8/31/2016
Discovery Closes	10/12/2016
Plaintiff's Pretrial Disclosures Due	11/26/2016
Plaintiff's 30-day Trial Period Ends	1/10/2017
Defendant's Pretrial Disclosures Due	1/25/2017
Defendant's 30-day Trial Period Ends	3/11/2017
Plaintiff's Rebuttal Disclosures Due	3/26/2017
Plaintiff's 15-day Rebuttal Period Ends	4/25/2017

IN EACH INSTANCE, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within **THIRTY DAYS** after completion of taking of testimony. Trademark Rule 2.125.

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Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b).
An oral hearing will be set only upon request filed as provided by Trademark
Rule 2.129.

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