

HAB

6872772 90021173

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

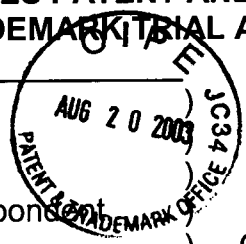
X/OPEN COMPANY LIMITED,

Opposer/Respondent

v.

WAYNE R. GRAY,

Applicant/Petitioner.



) Opposition No. 122,254  
) Application Serial No. 75/680,034  
) Mark: INUX

03 AUG 22 09 09 03

**OPPOSITION TO APPLICANT'S REQUEST FOR  
EXTENSION OF DISCOVERY AND TESTIMONY PERIODS**

Opposer X/Open Company Limited submits this opposition to the Request for Extension of Discovery and Testimony Periods filed by Applicant Wayne R. Gray on August 7, 2003 (the last day of the discovery period).

**I. Facts**

X/Open filed this Opposition on April 11, 2001.

From June 4, 2001 through October 2, 2001, Mr. Gray requested and was granted extensions of time to answer the opposition.

On October 1, 2001, Mr. Gray requested a suspension of the opposition for six months on the basis that he wished to reach a settlement agreement (settlement negotiations were unsuccessful). On April 19, 2002, Mr. Gray filed a motion for a 90-day extension of time for the purpose of securing new counsel and answering the opposition, which the Board granted.

A year and a half after the opposition was filed, Mr. Gray filed his answer and a counterclaim on August 5, 2002, which, after obtaining two extensions of time, X/Open answered on December 20, 2002.

After resetting the discovery and testimony periods various times, as requested by the parties, the Board set the close of discovery for August 7, 2003.

On August 7, 2003, X/Open served requests for documents, requests for admissions, and interrogatories on Mr. Gray.

The day after the close of discovery on August 8, 2003, Mr. Gray's counsel faxed X/Open's counsel the pending request for extension of discovery and testimony periods. (See Exhibit A.) The request contains a Certificate of Service dated the last day of discovery.

The fax cover sheet for Mr. Gray's motion states that "I tried to reach you several times by telephone and finally left a message on your voice mail, regarding and extension of discovery. I was ultimately unable to reach you; consequently I filed the attached [] motion for an extension."

The voice mail referred to in the fax cover sheet for Mr. Gray's motion was left late in the day on August 7, 2003, and did not mention an extension of the discovery deadline, but merely indicated that Mr. Gray's counsel wished to discuss the opposition.

Mr. Gray's motion states that "Applicant still has additional investigation and discovery to complete, and it is believed that opposer would like to submit discovery as well, although the undersigned counsel for applicant has not been able to reach opposer's counsel to confirm that or to discuss this extension request." This is the only sentence setting forth any facts in support of Mr. Gray's motion.

## **II. Argument**

Mr. Gray's motion admits that Mr. Gray's counsel did not reach opposer's counsel "to confirm [that X/Open would like to conduct additional investigation and discovery] or to discuss this extension request." As Mr. Gray's motion is unconsented,

he must establish good cause for the requested extension. Fed. R. Civ. P. 6(b)(1); TBMP §509.01.

The Board has held that a motion to extend time must state with particularity the grounds for the extension, including "detailed facts" constituting good cause. SFW Licensing Corp. v. Di Pardo Packing Ltd., 60 USPQ2d 1372 (TTAB 2001); Luemme Inc. v. D.B. Plus Inc., 53 USPQ2d 1758 (TTAB 1999). Further, the Board will carefully scrutinize motions to extend in determining whether good cause has been shown, including the diligence of the moving party during the discovery period. Luemme, 53 USPQ2d at 1760, citing Miscellaneous Changes to Trademark Trial and Appeal Board Rules, 63 Fed. Reg. 48081, 48087-88, and 48091 (1998) (effective October 9, 1998, to be codified at 37 C.F.R. Sections 2.120(a) and 2.121(a)(1)), reprinted in 1214 TMOG 145, 147-50 and 153-54 (September 29, 1998). In addition, the Board has held that good cause will not be found where the movant waits until the waning days of a time period to take action. Luehrmann v. Kwik Copy Corp., 2 USPQ2d 1303 (TTAB 1987).

Furthermore, Trademark Rule 2.127(a) specifically states that if a motion to extend is denied, dates may remain as originally set or as reset. This rule clearly identifies the potential consequences if a motion to extend does not show good cause. Opticians Ass'n of America v. Independent Opticians of America Inc., 734 F.Supp. 1171, 14 USPQ2d 2021 (D.N.J. 1990) (the Board has inherent authority to schedule the disposition of the cases on its docket).

**1. Mr. Gray's Motion Does Not Demonstrate Good Cause**

Far from setting forth detailed facts constituting good cause, Mr. Gray's motion merely states that he has "additional investigation and discovery" to complete and assumes X/Open would also like to submit additional discovery.

09/27/2003 11:00 AM

Mr. Gray's statement that he has additional investigation and discovery to complete does not constitute a detailed "fact" in support of his motion. It is merely an expression of a desire and, contrary to supporting a well-grounded basis for an extension, essentially amounts to an admission that he should have conducted discovery earlier. If Mr. Gray wished to conduct discovery, he could have done so before the last day of discovery. Indeed, rather than serving discovery on the last day of discovery, Mr. Gray instead spent his energies preparing and filing an unconsented motion for an extension of time.

Moreover, Mr. Gray's assumption that X/Open also wishes to conduct discovery is not a detailed "fact." An assumption is not a fact. Mr. Gray must show why his motion, filed at literally the last possible moment, should be granted based on facts and not mere assumptions.

The single sentence supporting Mr. Gray's motion regarding his desires and assumptions falls well-short of establishing detailed facts constituting good cause. The mere desire to conduct additional investigations and discovery in the future is not a justifiable basis to extend this proceeding yet again.

## **2. Mr. Gray's Motion Was Not Filed with Diligence**

Mr. Gray waited until the last day of discovery to move for an extension of the discovery period, i.e., August 7, 2003. Having failed to reach X/Open's counsel by telephone on the last day of discovery, he did not contact X/Open's counsel in writing until after the close of discovery, i.e., August 8, 2003 (even though he claims to have taken the time to attempt to contact X/Open's counsel "several times" by telephone). Not filing the motion until the last possible minute, or contacting opposing counsel in

writing after a deadline has passed, hardly constitutes diligence, and Mr. Gray should not be rewarded for his delay.


**III. Conclusion**

Mr. Gray fails to provide any goods reasons, let alone any detailed factual information, that (1) supports the grant of his motion, (2) excuses his delay in moving for an extension on the last day of discovery, or (3) explains his contacting X /Open's counsel in writing only after the close of discovery. Mr. Gray's delay in prosecuting his case, coupled with his mere future desires to do what should have been done months (if not years) before, do not constitute good cause. Under the circumstances, it would be unfair to grant Mr. Gray's motion, and the case should be allowed to proceed.

For the foregoing reasons, X/Open respectfully requests that Mr. Gray's motion to extend the discovery and testimony periods be denied, and that the testimony dates be reset to accommodate any delay caused by this motion. X/Open further requests that the Board order Mr. Gray to respond to X/Open's outstanding discovery requests by the dates set forth in those requests.

Respectfully submitted,

Date: August 20, 2003

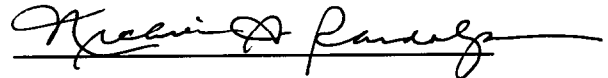
By:   
Mark Sommers  
Evan A. Raynes  
FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.  
1300 I Street, N.W.  
Washington, D.C. 20005-3315

Attorneys for Opposer

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing **OPPOSITION TO APPLICANT'S REQUEST FOR EXTENSION OF DISCOVERY AND TESTIMONY PERIODS** was served via first-class mail, postage prepaid and faxed on August 20, 2003, upon counsel for Applicant/Petitioner at the following address:

David L. Partlow, Esq.  
David L. Partlow, P.A.  
4100 W. Kennedy Blvd., Suite 201  
Tampa, Florida  
Telephone: 813-287-8337  
Facsimile: 813-287-8234



09/27/2009TTAB

# **EXHIBIT A**

08/08/2003 13:20 FAX 8132878234

**DAVID L. PARTLOW, P.A.**  
**ATTORNEYS AT LAW**

**TRANSWORLD CENTER, SUITE 210**  
**4100 WEST KENNEDY BOULEVARD**  
**TAMPA, FLORIDA 33609-2244**

**(813) 287-8337 • FAX (813) 287-8234**

**FACSIMILE MESSAGE**

**DATE: August 8, 2003**

**TO: EVAN RAYNES, ESQUIRE OF FINNEGAN, HENDERSON, ET AL.**  
**FAX NO.: 202-408-4400 # OF PAGES, INCLUDING COVER: 4**  
**RE: X/OPEN COMPANY LIMITED V. WAYNE R. GRAY**  
**FROM: DAVID L. PARTLOW, ESQUIRE FILE NO.: 2183**

THE FOLLOWING MAY BE PRIVILEGED ATTORNEY INFORMATION, AND IS INTENDED FOR THE ADDRESSEE ONLY. IF YOU ARE NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT USE OR DISSEMINATION OF THIS INFORMATION IS NOT PERMITTED. IF THIS COMMUNICATION HAS BEEN MISDIRECTED, PLEASE CALL THE ABOVE NUMBER IMMEDIATELY.

**MESSAGE:**

I tried to reach you several times by telephone and finally left a message on your voice mail, regarding an extension for discovery. I was ultimately unable to reach you; consequently I filed the attached of motion for an extension. Please call me about this at your earliest convenience.



08/08/2003 13:20 FAX 8132878234

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

08/08/2003 FAX 8132878234  
XOPEN COMPANY LIMITED,

Opposer,

Opposition No.: 122,254

vs.

Application Serial No.: 75/680,034

WAYNE R. GRAY,

Mark: INUX

Applicant.

---

**APPLICANT'S REQUEST FOR EXTENSION  
OF DISCOVERY AND TESTIMONY PERIODS**

Applicant Wayne R. Gray, by and through his undersigned counsel, requests that the schedule in this matter be extended sixty (60) days as follows:

Period for discovery to close	October 7, 2003
Testimony period for party in position of plaintiff to close (opening 30 days prior thereto)	January 6, 2004
Testimony period for party in position of defendant in opposition and plaintiff in the counterclaim to close (opening 30 days prior thereto)	March 8, 2004
Rebuttal testimony period for defendant in the counterclaim and plaintiff in the opposition to close (opening 30 days prior thereto)	May 11, 2004
Rebuttal testimony period for defendant in the opposition to close (opening 15 days prior thereto)	June 8, 2004

In accordance with the above schedule, briefs shall be due as follows:

Brief for plaintiff in the opposition	August 10, 2004
---------------------------------------	-----------------

Brief for defendant in the opposition and plaintiff in the counterclaim

September 15, 2004

Brief for defendant in the counterclaim and reply brief, if any, for plaintiff in the opposition

October 19, 2004

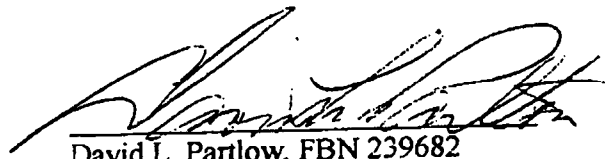
Reply brief, if any, for plaintiff in the counterclaim

November 9, 2004

Applicant still has additional investigation and discovery to complete, and it is believed that opposer would like to submit discovery as well, although the undersigned counsel for applicant has not been able to reach opposer's counsel to confirm that or to discuss this extension request.

WHEREFORE it is respectfully requested that the schedule in this matter be reset as shown above.

Respectfully submitted,



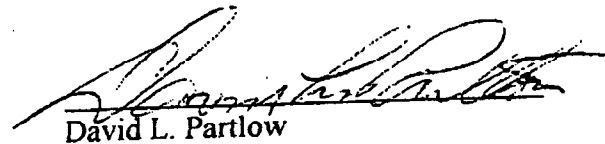
David L. Partlow, FBN 239682  
Josiah E. Hutton, FBN 793851  
David L. Partlow, P.A.  
4100 W. Kennedy Blvd., Suite 210  
Tampa, FL 33609-2244  
(813) 287-8337; FAX (813) 287-8234  
Counsel for Applicant

**CERTIFICATE OF EXPRESS MAILING**

"Express Mail" mailing label number: ET914493628US

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to the Assistant Commissioner for Trademarks, BOX NO FEE, 2900 Crystal Drive, Arlington, Virginia 22202-3513 on

Aug. 7, 2003.

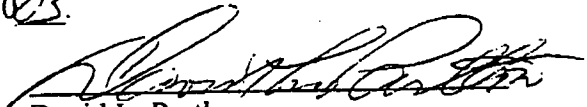


David L. Partlow

09/27/03 06:03:19

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by U.S. Mail to Evan A. Raynes, Esquire, at Finnegan, Henderson, Farabow, Garrett, & Dunner, L.L.P., 1300 I Street, N.W., Washington, D.C. 20005, this 7<sup>th</sup> day of August, 2003.

  
David L. Partlow