UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

Mailed: November 26, 2002

Opposition No. 91150075

REIMAN PUBLICATIONS, LLC.

v.

FARM LIVING, INC.

David Mermelstein, Attorney:

On July 2 and July 12, 2002, opposer filed consent motions to extend its testimony period. On July 26, 2002, a Board paralegal, incorrectly assuming that the extensions were requested on the basis of settlement negotiations,[1] suspended proceedings for six months, subject to the right of either party to request resumption at any time.

Neither party promptly pointed out the apparent error in the Board's order or otherwise requested resumption of proceedings. Instead, it appears that notwithstanding the suspension, the parties agreed to proceed with a testimonial deposition. The current dispute began when, during the

[1] Indeed, the parties stated no grounds at all for their motion. The parties are advised that all motions, even those filed with the consent or stipulation of the opposing party, must state good cause therefor. *See* Trademark Rule 2.127(a)("Every motion shall be made in writing, shall contain a full statement of the grounds…."). While consent motions and stipulations usually need not be supported by lengthy briefs, a simple statement of the facts is required (e.g., "the parties request this extension to accommodate difficulties in scheduling opposer's testimony

deposition, a dispute arose when applicant alleged that a financial summary offered in evidence by opposer was inadmissible.[2]

Now before the Board is applicant's motion, filed September 26, 2002, requesting that the Board resume proceedings *nunc pro tunc* "under Rule 510."[3] The motion has been fully briefed.[4]

Specifically, it appears that applicant wishes the Board to enforce the stipulation of the parties mailed to the Board on July 25, 2002, the day before the issuance of the Board's suspension order, under which opposer's main testimony period would be closed. Applicant's purpose, it would appear, is to deny opposer the opportunity to take an

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depositions…."). Mere consent, however, is not the equivalent of good cause.

[2] Applicant's objection – on the ground that there was not a proper foundation for the evidence – goes to the substance of the testimony and the contents of the disputed financial report. As such, the objection will not be considered until final disposition of the case by a panel of the Board. *See generally* TBMP § 716.02(c).

[3] By "Rule 510," we presume applicant is referring to Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 510. The TBMP is not a set of rules, but a collection and explanation of Board practices under the Trademark Act, 15 U.S.C. § 1051, *et seq.*, the applicable rules, 37 C.F.R. Parts 1, 2, 10, other statutory provisions and cases interpreting such authorities. The rule generally governing suspension of Board proceedings is Trademark Rule 2.117, 37 C.F.R. § 2.117.

[4] Applicant's reply brief requests that it be considered timely filed. Applicant's request was unnecessary. Opposer's brief was served on October 8, 2002, making a reply brief due no later than October 28, 2002. Trademark Rule 2.127(a); 2.119(c). The brief was filed under a certificate of mailing dated October 25, 2002, and in any event, was received by the USPTO on October 28, 2002.

additional discovery deposition which might support the admissibility of its financial summary.

Applicant's motion makes much of the fact that the Board's suspension order was "erroneous." However, applicant's concern apparently did not motivate it to point out the Board's error until it was tactically advantageous to do so. The Board's suspension order clearly should not have been issued as the parties did not state that they were negotiating for a settlement of the case (nor were they in fact doing so). However, once issued, the order was valid until vacated or reversed. It is the Board, and not the parties, which determines the scheduling of a proceeding.

Apparently applicant wants to have it both ways. It wants the Board to rule that opposer's testimony period has concluded pursuant to the parties' July 25 consent motion. The difficulty with applicant's position is that if we did so, applicant's own testimony period would also have closed. So applicant urges that we enforce the stipulation against opposer, but merely resume proceedings "so that Applicant can begin its testimony period without delay." (emphasis added.)

The parties apparently agreed to take a testimonial deposition by agreement while the proceeding was suspended. While applicant could have objected to the notice of

deposition on the basis of the suspension, it did not do so, and we consider any such objection to have been waived.

Notwithstanding the agreed-upon testimonial deposition, however, the case was still suspended. We will not now resume proceedings "*nunc pro tunc*," as applicant suggests, when doing so would so clearly disadvantage one party. Accordingly, proceedings herein are RESUMED. Trial dates are reset as follows:

DISCOVERY PERIOD TO CLOSE:	**CLOSED**
Thirty day testimony period for party in position of plaintiff to close:	**January 20, 2003**
Thirty day testimony period for party in position of defendant to close:	**March 21, 2003**
Fifteen day rebuttal testimony period to close:	**May 5, 2003**

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 the taking of testimony. Trademark Rule 2.l25.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.

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