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Filing date: **11/15/2005**

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

Proceeding	91166014
Party	Defendant Blue Frog Mobile, LLC Blue Frog Mobile, LLC 500 Union St., Suite 201 Seattle, WA 98101
Correspondence Address	Jessica V. Newman Newman & Newman, Attorneys at Law, LLP 505 Fifth Avenue South, Suite 610 Seattle, WA 98104
Submission	Motion to Extend
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Signature	/vb/
Date	11/15/2005
Attachments	Motion and Answer.pdf (12 pages)

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

In the Matter of Trademark Application Serial No. 78/395,861

For the Mark: **BLUE FROG**

Published in the Official Gazette (Trademarks) on May 3, 2005

BLUE FROG INTERNET, INC.,

Opposer,

v.

BLUE FROG MOBILE, INC.,

Applicant.

Opposition No. 91166014

Serial No. 78/395,861

Publication Date: May 03, 2005

Mark: BLUE FROG

CERTIFICATE UNDER 37 C.F.R. § 2.119:

The undersigned hereby certifies that this correspondence is being deposited with the United States Postal Service, First Class Mail in an envelope addressed to: P.O. Box 1451, Alexandria, VA 22213-1451 on November 4, 2005.

By: _____

Jeff Yates

APPLICANT'S MOTION TO EXTEND TIME TO ANSWER

Applicant Blue Frog Mobile, Inc. ("Blue Frog") hereby files this Motion to Extend Time to Answer the Opposition filed by Blue Frog Internet, Inc. ("Opposer") with the Trademark Trial and Appeal Board, and dated July 20, 2005. Blue Frog's Answer ("Answer") is attached as **Exhibit A** herewith.

"The time for filing an answer may be extended or reopened by stipulation of the parties, approved by the Board, or on motion granted by the Board, or by order of the Board."

OPPOSITION NO. 91166014
APPLICANT'S MOTION TO
EXTEND TIME TO ANSWER – PAGE 1 of 6

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TBMP 310.03(c). Blue Frog requests that the Board grant its requested extension of time for the following reasons:

Good cause exists for granting Blue Frog's motion to extend time. The test applied for determining whether good cause exists was set forth in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 395 (1993). This case holds that the following factors are relevant when determining whether to grant a motion to extend time: (1) the danger of prejudice to the nonmovant; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith. Id.

No Prejudice to Petitioners

The "prejudice to the nonmovant" contemplated in Pioneer "must be more than the mere inconvenience and delay caused by the movant's previous failure to take timely action..." Rather, such prejudice occurs "where the movant's delay has resulted in a loss or unavailability of evidence or witnesses which otherwise would have been available to the nonmovant." No such prejudice exists in this case.

No Impact on Judicial Proceedings

The extension of time for filing Blue Frog's Answer will have no impact on the judicial proceedings in this matter. Discovery in this case closes on February 11, 2006. Opposer's testimony period opens on April 12, 2006. Blue Frog anticipates that the parties can conduct the necessary discovery by February 11, 2006. To the extent necessary, Blue Frog will cooperate with Opposer in extending the discovery deadline and has no objection to such extension. Such

extension should not have any effect on the testimony periods of the parties.

Delay Not Within Blue Frog's Reasonable Control

Blue Frog attempted to file its Answer electronically with the TTAB on the due date, September 6, 2005. Due to a technical error, only a cover sheet to the Answer was filed with the TTAB¹ and Opposer was not served with a copy of the Answer.

Blue Frog Has Acted in Good Faith

Upon learning of the existence of deficiencies in the filing and service of its Answer, Blue Frog immediately contacted counsel for Opposer to discuss the matter. Blue Frog will cooperate with Opposer in setting the discovery schedule and in other matters.

RELIEF REQUESTED

Blue Frog respectfully requests that the Board extend the time for filing its Answer to November 4, 2005 and that the Board accept its Answer (attached as **Exhibit A**) for filing.

Dated this 4th day of November, 2005.

Respectfully Submitted
NEWMAN & NEWMAN
ATTORNEYS AT LAW, LLP

By: _____

Detek A. Newman, WSBA No. 26967
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Attorneys for Applicant

¹ Applicant is unaware as to whether the electronic filing was successfully accomplished. It is possible that the Answer was filed but has not been uploaded to the "TTABVUE" system. In such event Applicant only requests an extension of time to serve Opposer.

EXHIBIT A

BLUE FROG MOBILE, INC.'S ANSWER

OPPOSITION NO. 91166014
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Publication Date: May 03, 2005

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APPLICANT'S ANSWER TO THE NOTICE OF OPPOSITION

Applicant, Blue Frog Mobile, Inc., hereby files this Answer in response to the Notice of Opposition filed by Blue Frog Internet, Inc. with the Trademark Trial and Appeal Board on July 20, 2005. Blue Frog Mobile, Inc. ("Blue Frog Mobile")¹ answers

¹ Blue Frog Mobile incorrectly identified itself in its application as "Blue Frog Mobile, LLC." Blue Frog Mobile intends to correct its designation with the Patent and Trademark Office.

the Notice of Opposition (“Opposition”) as follows:

1. In answer to the averments of Paragraph 1 (each hereinafter referred to as a “Paragraph”) of the Opposition, Blue Frog Mobile is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 1, and based thereon Blue Frog Mobile denies each and all of these averments.

2. In answer to the averments of Paragraph 2, Blue Frog Mobile is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 2, and based thereon Blue Frog Mobile denies each and all of these averments.

3. In answer to the averments of Paragraph 3, Blue Frog Mobile is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 3, and based thereon Blue Frog Mobile denies each and all of these averments.

4. In answer to the averments of Paragraph 4, Blue Frog Mobile is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 4, and based thereon Blue Frog Mobile denies each and all of these averments.

5. In answer to the averments of Paragraph 5, Blue Frog Mobile is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 5, and based thereon Blue Frog Mobile denies each and all of these averments.

6. In answer to the averments of Paragraph 6, Blue Frog Mobile is without knowledge or information sufficient to form a belief as to the truth of the averments in

Paragraph 6, and based thereon Blue Frog Mobile denies each and all of these averments.

7. In answer to the averments of Paragraph 7, Blue Frog Mobile is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 7, and based thereon Blue Frog Mobile denies each and all of these averments.

8. In answer to the averments of Paragraph 8, Blue Frog Mobile admits that it filed “the instant ‘intent to use’ application (serial no. 78395861) . . . for the word mark “Blue Frog,” and that “[t]here are actually three applications currently pending, the other two of which have not yet been published for opposition (“Intent to Use” application for Blue Frog logo, serial no. 78408362; and “Use in Commerce” application for Blue Frog Mobile, serial no. 78509154, with a date of first use of 1/31/04).” Blue Frog Mobile is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of Paragraph 8, and on this basis denies the remaining allegations of Paragraph 8.

9. In answer to the averments of Paragraph 9, Blue Frog Mobile is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 9, and based thereon Blue Frog Mobile denies each and all of these averments.

10. In answer to the averments of Paragraph 10, Blue Frog Mobile admits it received the letter attached to the Opposition as Exhibit D but denies the allegations in that letter.

11. In answer to the averments of Paragraph 11, Blue Frog Mobile denies all of the averments contained in Paragraph 11. Blue Frog Mobile specifically denies that Opposer is entitled to the relief it requests.

AFFIRMATIVE DEFENSES

In further answer to the Opposition, Blue Frog Mobile asserts the following affirmative defenses:

No Likelihood of Confusion

12. There is no likelihood of confusion between the origin of Opposer's products and services and the products and services of Blue Frog Mobile.

13. Opposer offers a service that is distinct from the products and services offered by Blue Frog Mobile.

14. The products and services of Opposer and those of Blue Frog Mobile are marketed through distinct channels.

15. The products and services of Opposer and those of Blue Frog Mobile are distributed through distinct channels.

16. The consumers of the products and services of Opposer and those of Blue Frog Mobile are distinct.

17. The consumers of the products and services of Opposer and those of Blue Frog Mobile are sophisticated and discriminating.

18. There is no overlap between these groups of consumers.

Opposer Only Has Common Law Rights (if at all) in The “Blue Frog” Mark

19. Opposer has not filed a registration with the USPTO for the “Blue Frog” mark.

20. Opposer can only rely on its common law rights to the Blue Frog (or any similar) mark.

21. Opposer only has common law rights (if at all) in the Blue Frog mark where there is actual market penetration. Blue Frog Mobile avers based on information and belief that (1) Opposer has no significant volume of sales sufficient to find actual market penetration in any markets; (2) there are no significant positive growth trends with respect to sales of Opposer’s services in any markets; (3) the proportion of actual purchasers as opposed to potential purchasers or Opposer’s services is low; and (4) Opposer has not effected significant advertising in any relevant markets.

Other Affirmative Defenses

22. Applicant also asserts other affirmative defenses of: laches, waiver, and estoppel.

23. Opposer’s Notice of Opposition fails to state a claim upon which relief may be granted.

24. Applicant reserves the right to add more defenses pending discovery.

RELIEF REQUESTED

25. Blue Frog Mobile respectfully requests that Opposer's Opposition be dismissed and that Blue Frog Mobile's registration be issued forthwith.

Respectfully Submitted

**NEWMAN & NEWMAN
ATTORNEYS AT LAW, LLP**

By:

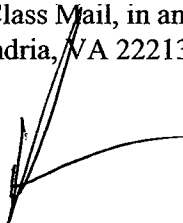


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CERTIFICATE OF MAILING

I hereby certify that on this 4th day of November, 2005 a copy of the foregoing **APPLICANT'S MOTION TO EXTEND TIME TO ANSWER** (the attached document) is being deposited with the U.S. Postal Service by First Class Mail, in an envelope addressed to the Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22213-1451.



Venkat Balasubramani

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2005 a copy of the foregoing **APPLICANT'S MOTION TO EXTEND TIME TO ANSWER** (the attached document) has been served upon Opposer's counsel by first class mail, postage prepaid at the following address:

Carol S. Maue, Esq.
Chamberlain D'Amada
1600 Crossroads Building, Two State Street
Rochester, NY 14604
csm@cdlawyers.com



Venkat Balasubramani