

**UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451**

Lykos

Mailed: December 16, 2009

Opposition No. 91185527

Beniko, Inc.

v.

VanPro Company LLC

Angela Lykos, Interlocutory Attorney

This case now comes before the Board for consideration of opposer's motion (filed June 26, 2009) to extend the close of its first testimony period and remaining dates in this case. The motion is fully briefed.

By way of background, pursuant to the Board's institution order, pretrial disclosures were due May 21, 2009 and opposer's first testimony period was set to close July 5, 2009. Opposer failed to submit its pretrial disclosures by this deadline. On June 18, 2009, opposer filed a consented motion to reopen the due date for pre-trial disclosures to June 20, 2009 and extend the close of opposer's first testimony period to August 4, 2009. The Board approved the motion that same day. Shortly thereafter, on June 26, 2009, the parties filed a stipulation to vacate the Board order approving opposer's

June 18, 2009 consented motion to extend.<sup>1</sup> According to the stipulation, the parties apparently had a miscommunication as to whether they had agreed to suspension of proceedings or an extension of time. Applicant maintains that it only consented to suspension of proceedings, not an extension, because the parties have a dispute surrounding pretrial disclosures. Opposer then filed the instant motion to extend now pending before the Board.

In support of its motion to extend the close of its first testimony period, opposer argues that it needs additional time (1) to review the deposition transcript of applicant's Rule 30(b)(6) witness in light of the fact that the deposition took place one month after the close of discovery due to scheduling conflicts; (2) to allow the parties additional time to pursue settlement discussions; (3) to give the parties an opportunity to discuss the possibility to exchange discuss a stipulation of facts; (4) to allow opposer time to prepare for the taking of testimony depositions. Opposer contends that these circumstances constitute good cause to warrant an extension of time pursuant to Fed. R. Civ. P. 6(b).

In response thereto, applicant contends that in addition to moving to extend its first testimony period, opposer also seeks to reopen the time period to file its

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<sup>1</sup> That motion is hereby approved.

pretrial disclosures. Applicant argues that opposer has failed to meet the excusable neglect standard set forth in Fed. R. Civ. P. 6(b) to reopen both time periods. Applicant further notes that opposer failed to formally identify Mr. Khodari, opposer's president, as a witness because opposer failed to comply with the formal pretrial disclosure requirements set forth in Trademark Rule 2.121(e).

Applicant further states in its responsive brief:

"[a]pplicant never said that [o]pposer could not take the [Khodari] deposition. . . however . . . [a]pplicant would take action necessary to ensure that such testimony be excluded from the record as allowed by 37 CFR 2.123(e)(3). . .

"[a]pplicant intends to preserve its rights to object to any testimony taken, reexamine under protest, and move to strike."

In reply, opposer argues that excusable neglect is not the applicable standard insofar as opposer has moved only to extend the close of opposer's first testimony period. Opposer acknowledges that it has not formally served applicant with a pretrial disclosure statement but maintains that because Mr. Khodari was the only person identified as a person with knowledge of this case in its initial disclosures, and because opposer informally notified applicant by e-mail dated June 18, 2009 that Mr. Khodari would be testifying on opposer's behalf, opposer is entitled

to depose Mr. Khodari during its testimony period and not have the testimony stricken.

The appropriate standard for allowing an extension of a prescribed period prior to the expiration of the time period is "good cause." See Fed. R. Civ. P. 6(b) and TBMP § 509 (2d ed. rev. 2004) and the authorities cited therein. The Board generally is liberal in granting extensions of time before the period to act has elapsed so long as the moving party has not been guilty of negligence or bad faith and the privilege of extensions is not abused. See, e.g., *American Vitamin Products Inc., v. DowBrands Inc.*, 22 USPQ2d 1313 (TTAB 1992); and *Sunkist Growers, Inc. v. Benjamin Ansehl Company*, 229 USPQ 147 (TTAB 1985).

The Board finds that the circumstances presented herein do constitute the requisite good cause to warrant an extension of time of opposer's testimony period. The parties had a miscommunication regarding whether they had agreed to an extension or suspension of proceedings after the opening of opposer's first testimony period. In addition, based on the record before us, we find no evidence of bad faith on the part of opposer. Lastly, inasmuch as opposer has filed only a single request to extend the testimony periods in this case, we find that opposer has not abused its privilege of extensions.

As to opposer's failure to make pretrial disclosures, whether opposer may notice the deposition of Mr. Khodari, or whether if Mr. Khodari's testimony deposition is taken, it will be stricken from the record, the Board cannot make a determination on this issue insofar as no motion relating to the noticing or the taking of such a testimony deposition (i.e. a motion to quash for improper notice or motion to strike testimony from the record) is before the Board at this time.

In view thereof, opposer's motion to extend is granted to the extent that opposer is allowed the balance of its testimony period (18 days) to present evidence. Dates are reset as follows:

Plaintiff's <b>18-day</b> Trial Period Ends	<b>1/25/10</b>
Defendant's Pretrial Disclosures	<b>2/9/10</b>
Defendant's 30-day Trial Period Ends	<b>3/26/10</b>
Plaintiff's Rebuttal Disclosures	<b>4/10/10</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>5/10/10</b>

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 2.125.

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.