

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

VALENT U.S.A. CORPORATION,)
)
 Opposer,)
)
 v.)
)
 FLORIDA GARDEN SUPPLIES, INC.)
)
 Applicant.)

85236790

Opposition No. 91202421

**OPPOSER’S RESPONSE TO APPLICANT’S MOTIONS TO
REOPEN ITS TIME TO RESPOND OR WITHDRAW ITS ADMISSIONS**

I. INTRODUCTION

Applicant, Florida Garden Supplies, Inc. (“FGS”) has moved to reopen its time to respond to Opposer’s admission requests under Fed. R. Civ. P. 6(b)(2), or alternatively, to withdraw and amend its admissions under Fed. R. Civ. P. 36(b). As discussed below, the Board should deny FGS’s motion to reopen its time to respond, but Opposer does not object to allowing FGS to withdraw and amend its admissions.

II. STATEMENT OF FACTS

Opposer served its First Set of Requests for Admission on Applicant on February 13, 2012. *See* Declaration of Teresa D. Tambolas (“Tambolas Decl.”), attached hereto as Exhibit 1, at ¶ 2. Applicant’s responses to these discovery requests were due on March 19, 2012. *Id.*

The response deadline passed without any communication from Applicant’s counsel. Tambolas Decl. ¶ 3. No extension was requested. *Id.* On March 28, 2012, Applicant attached responses to an e-mail sent to Opposer, and mailed a service copy the next day, March 29, 2012. Tambolas Decl. ¶ 4.



05-29-2012

On April 5, 2012, Opposer's counsel advised Applicant's counsel that he needed to move to withdraw and amend Applicant's admissions pursuant to Fed. R. Civ. P. 36(b). Tambolas Decl. ¶ 5. Opposer's counsel sent a reminder on April 26, 2012, and Applicant filed the motion at issue on May 14, 2012. *Id.*

III. ANALYSIS

A. Applicant's Motion to Reopen Its Time Should Be Denied.

Under Fed. R. Civ. P. 6(b)(2), a party may move to reopen its time to respond to requests for admission if its failure to timely respond was the result of excusable neglect. Opposer served its discovery requests nearly a month before Applicant's counsel's difficulties began. Opposer sympathizes with Applicant's counsel's circumstances, but believes that he should have been aware of the imminent response deadline. Indeed, counsel acknowledged that his responses were late in his March 28, 2012, e-mail to Opposer. *See* Tambolas Decl. ¶ 4.

Counsel could have contacted Opposer to seek an extension, or filed a motion to extend Applicant's time to serve responses, but did not. Because Applicant has not shown excusable neglect for failing to timely respond to Opposer's admission requests, the Board should deny Applicant's motion to reopen its time to respond.

B. Opposer Consents to Allowing Applicant to Withdraw and Amend Its Responses.

If the Board agrees that Applicant has not shown excusable neglect for failing to timely respond to Opposer's admission requests, the requests are deemed admitted under Fed. R. Civ. P. 36. Under Rule 36(b), however, the Board may permit Applicant to withdraw and amend its admissions where doing so would (a) promote the presentation of the action on its merits; and (b) not prejudice the other party. *Giersch v. Scripps Networks, Inc.*, 85 USPQ2d 1306 (TTAB 2007).

Here, both prongs are met. If withdrawal and amendment were not permitted, Applicant would be held to have admitted critical elements of Opposer's asserted claims. Moreover, Opposer will not be prejudiced by allowing the withdrawal and amendment – this opposition still is in the pre-trial stage, and any prejudice can be mitigated by extending the discovery period. Opposer faces no other special difficulties caused by allowing Applicant to withdraw and amend its responses. The Board thus should grant Applicant's motion to withdraw and amend its admission responses.


IV. CONCLUSION

For the foregoing reasons, Opposer respectfully requests that the Board deny Applicant's motion to reopen its time to respond, and consents to Applicant's motion to withdraw and amend its admission responses.

Respectfully Submitted,

VALENT U.S.A. CORPORATION

May 25, 2012

By 
Robin M. Demouth
Dugal S. Sickert
Teresa D. Tambolas
870 Technology Way
Libertyville, Illinois 60048
(847) 968-4729

Attorneys for Opposer, Valent U.S.A. Corporation

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **OPPOSER'S RESPONSE TO APPLICANT'S MOTIONS TO REOPEN ITS TIME TO RESPOND OR WITHDRAW ITS ADMISSIONS** was served upon Applicant's counsel on May 25, 2012, via first class mail at the following address:

Edmar M. Amaya
Edam Law PLLC
Latitude One Building
175 SW 7th Street, Suite 2416
Miami, FL 33130

Jesse D Jumbolas

Exhibit

1

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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)	
Opposer,)	
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v.)	Opposition No. 91202421
)	
FLORIDA GARDEN SUPPLIES, INC.)	
)	
Applicant.)	

DECLARATION OF TERESA D. TAMBOLAS

I, Teresa D. Tambolas, pursuant to 28 U.S.C. § 1746, hereby declare the following:

1. I am Senior Intellectual Property Counsel for Opposer, Valent U.S.A. Corporation. This Declaration is submitted in support of Opposer's Response to Applicant's Motions to Reopen Its Time to Respond or Withdraw Its Admissions.

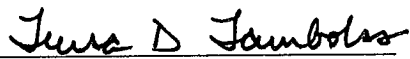
2. Opposer served its First Set of Requests for Admission on Applicant on February 13, 2012. Applicant's responses to these discovery requests were due on March 19, 2012.

3. The response deadline passed without any communication from Applicant's counsel. No extension was requested.

4. On March 28, 2012, Applicant attached responses to an e-mail sent to Opposer, and mailed a service copy the next day, March 29, 2012. A copy of Applicant's e-mail is attached as Exhibit A.

5. On April 5, 2012, Opposer's counsel advised Applicant's counsel during a telephone conversation that he needed to move to withdraw and amend Applicant's admissions pursuant to Fed. R. Civ. P. 36(b). Opposer's counsel sent a reminder e-mail on April 26, 2012. A copy of Opposer's e-mail is attached as Exhibit B. Applicant filed the motion at issue on May 14, 2012. I declare under penalty of perjury that the foregoing is true and correct.

Executed in Libertyville, Illinois, this 25th day of May, 2012



Teresa D. Tambolas

Exhibit A

Tambolas, Teresa

From: Edmar Amaya [edmar.amaya@edamlaw.com]
Sent: Wednesday, March 28, 2012 3:18 PM
To: Tambolas, Teresa
Cc: 9b29752f7+matter1014059659@maildrop.goclio.com
Subject: Re: Oppsition No. 91202421 - Valent U.S.A. Corporation v. Florida Garden Supplies, Inc.

Follow Up Flag: Follow up
Flag Status: Red

Attachments: FGS first set of interrogatories to Valent.pdf; FGS first set requests for admissions to Valent.pdf; FGS first set requests for production to Valent.pdf; FGS response to admissions.pdf; FGS response to document request.pdf; FGS response to first set of interrogatories.pdf



FGS first set of
interrogatori...



FGS first set
requests for adm...



FGS first set
requests for pro...



FGS response to
admissions.pdf...



FGS response to
document reque...



FGS response to
first set of i...

Counsel,

My sincere apologies for the belated responses. I am going through a divorce and at the same time moving offices. Not good timing. The new address is below. I will take into consideration any delay by your part. I am organizing the documents to be sent to you shortly. A paper copy of all the documents are in the mail.

Best regards,

Edmar M. Amaya LL.M.
Attorney Director

EDAM LAW PLLC
Attorneys at Law
Latitude One Building
175 SW 7th Street, Suite 2416,
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On Fri, Feb 17, 2012 at 1:52 PM, Edmar Amaya <edmar.amaya@edamlaw.com> wrote:
> Counsel, please see attached initial disclosures.
>
> Regards,
>
> Edmar

>
> -----
> Edmar M. Amaya LL.M.
> Attorney Director
>
> EDAM LAW PLLC
> Attorneys at Law
> Interamerican Plaza
> 701SW 27TH AV Suite 707
> Miami, Florida 33135
> Office + 1 (305) 643-0740
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Exhibit B

Tambolas, Teresa

From: Tambolas, Teresa
Sent: Thursday, April 26, 2012 6:07 PM
To: Edmar Amaya
Cc: trademarks
Subject: Valent USA Corp. v. Florida Garden Supplies, Inc. - Opp. No. 91202421

Dear Mr. Amaya:

I write further to our telephone conversation of April 5, 2012. We have not heard from you since, and have several outstanding issues:

1. The "Certificates of Transmission" that accompany your Requests for Admissions and Documents to us bear a March 27, 2012, date, while the Interrogatories bear a March 28, 2012, date. You sent us these discovery sets via e-mail on March 28, 2012, but the envelope in which the service copies arrived bears postage and a postmark dated March 29, 2012. We have not agreed to electronic service, so the date from which our deadline to respond is calculated from is March 29, 2012. Please let us know if you disagree, and explain why.
2. Your answers to our interrogatories have not been verified by your client. Please advise whether that means that you purport to have verified the answers on your client's behalf.
3. Your objections to our discovery requests are cursory and lack sufficient detail. Moreover, several interrogatory answers are non-responsive, stating merely "Some documents will be provided from which Opposer may derive or ascertain the answer." Although you may answer by referring to documents, (a) you must be able to demonstrate that the burden of deriving the answer from the documents will be the same for us as it would for you, and (b) you must specify the records from which the information may be derived. The specification must be made in sufficient detail to allow us to readily identify the relevant documents. See TBMP 405.04(b) and Fed. R. Civ. P. 33(d). Merely stating that the answers are in the documents is not sufficient. We demand that you supplement your interrogatory answers to either (a) provide answers, or (b) identify responsive documents, by Bates number, no later than **May 14, 2012**.
4. During our April 5 call, you represented that you would produce documents soon, but we have yet to receive a single document from you. We demand that you produce all relevant documents in your possession no later than **May 14, 2012**.
5. During our call, we also discussed your need to move to amend/withdraw your admissions pursuant to Fed. R. Civ. P. 36(b). We have not seen a motion yet, and you do not appear to have filed it with the TTAB. Unless you file your motion by **May 14, 2012**, we will move for summary judgment based on the admissions as they stand.
6. We have not heard from you regarding the renewed settlement proposal we discussed on April 5. We remind you that you are ethically obligated to share our proposal with your client, and look forward to receiving your response.

Sincerely,
Teresa

Teresa D. Tambolas
Senior Intellectual Property Counsel

Valent U.S.A. Corporation
Valent BioSciences Corporation
870 Technology Way
Libertyville, IL 60048
Direct 847-968-4729 **Fax** 925-948-3495

5/25/2012