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

Proceeding	91215471
Party	Defendant Adrian E. Fratantoni
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Signature	/Nicholas D. Myers/
Date	08/28/2015
Attachments	2015-08-28 Opposition to Motion to Extend Trial Dates.pdf(39371 bytes)

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

In the Matter of Application Serial No. 85/948,300
Mark: PA KUA
Date of Publication: February 4, 2014
Filed: June 1, 2013

Nicolas Dario Moyano,)	Opposition No. 91215471
)	
Opposer,)	
)	
v.)	
)	
Adrian E. Fratantoni,)	
)	
Applicant.)	
)	
_____)	

APPLICANT’S OPPOSITION TO MOTION TO EXTEND TRIAL DATES

On August 13, 2015 Opposer Nicholas Dario Moyano (“Opposer”) filed and served his Motion to Extend All Dates three (3) days before discovery closed on August 16, 2015. Applicant Adrian E. Fratantoni (“Applicant”) by and through his counsel of record, hereby respectfully requests that the Board deny Opposer’s Motion to Extend All Dates and prohibit Opposer from conducting discovery in this proceeding as Opposer has failed to demonstrate good cause.

**I. OPPOSER HAS FAILED TO STATE WITH PARTICULAR FACTS
OR EXERCISE DILIGENCE TO DEMONSTRATE GOOD CAUSE
FOR EXTENDING THE TRIAL DATES**

“A motion to extend must set forth with particularity the facts said to constitute good cause for the requested extension.” TBMP § 509.01(a). “Moreover, a party moving to extend time must demonstrate that the requested extension of time is not necessitated

by the party's own lack of diligence or unreasonable delay." *Id.* Applicant contends that Opposer has failed to meet the showing of good cause as required by TBMP § 509.01(a) and, thus, the Motion to Extend All Date should be denied.

The party moving for an extension bears the burden of proof and must "state with particular grounds therefor, including detailed facts constituting goods cause." *Luemme, Inc. v. D.B. Plus, Inc.*, 53 USPQ2d 1758, 1760 (TTAB 1999); *see also* Trademark Rule 2.127(a); 4A C.A. Wright and A.R. Miller, *FEDERAL PRACTICE AND PROCEDURE*, §1165 (1987); *HKG Industries, Inc. v. Perma-Pipe, Inc.*, 49 USPQ2d 1156, 1158 (TTAB 1998); and *Johnston Pump/General Valve Inc. v. Chromally American Corp.*, 13 USPQ2d 1719, 1720 n.3 (TTAB 1989). Further, the Board in *Luemme*, 53 USPQ2d at 1760, expressed the position that the Board "will scrutinize carefully any such motions" in determining whether good cause has been shown, including the diligence of the moving party during the discovery period. *See* *Miscellaneous Changes to Trademark Trial and Appeal Board Rules*, 63 Fed. Reg. at 48086, 1214 TMOG at 149. The Board in *SFW Licensing Corp. and Shopper Foods Warehouse Corp. v. Di Pardo Packing Limited*, 60 USPQ2d 1372 (TTAB 2001) found that opposer failed to meet its burden of showing good cause because the motion did not state detailed facts, rather the motion simply stated that opposer's attorney could not get in contact with opposer.

Here, Opposer simply states¹ that his prior attorney "failed to respond to numerous communications" and, "[a]ccordingly, Opposer was unaware of the status of this Opposition proceeding and key discovery deadlines." *See* Opposer's Motion Page 2 Paragraph 2. Simply stating that your attorney failed to respond to numerous

¹ Opposer's motion was submitted without a declaration and, thus, we have no guarantees as to the limited amount of facts stated therein.

communications for several months clearly does not state detailed facts supporting good cause. To wit, Opposer's motion is devoid of any specificity as to: 1) how many months Opposer means by the alleged "several months"; 2) how many communications Opposer means by "numerous communications"; 3) specific dates and means of allegedly attempted communications by Opposer with his former counsel; and 4) what exactly Opposer means by "only recently . . . an administrative assistant at [Opposer's former counsel's office] informed Opposer of the . . . discovery cut-off." Further, Opposer has failed to act diligently in pursuing this matter for a period in excess of six (6) months.

Coexistent with Opposer's burden of showing good cause is Opposer's burden of persuading the Board that it was diligent in meeting its responsibilities and is not guilty of negligence. *National Football League v. DNH Management LLC*, 85 USPQ2d 1852, 1854 (TTAB 2008). The arguments stated above and hereinafter make clear that Opposer was aware of the Opposition and has failed to state in its motion any reasonable steps taken to ensure that discovery was being handled in a timely manner.

This Opposition was initiated on March 17, 2014 and was initially set to conclude more than two (2) months prior to the date of this Opposition to Opposer's Motion to Reset All Dates. Following the filing of Applicant's answer on April 14, 2014 the parties entered into settlement negotiations. As it was the intention of both parties to settle this matter, a motion to suspend the proceedings was filed and granted on September 17, 2014. The parties continued settlement negotiations heavily in January of 2015. *See* Declaration of Nicholas D. Myers. On January 19, 2015 (two (2) days prior to the date set by the Board for discovery to close), the parties submitted a stipulated motion to suspend the proceeding and reset the trial dates to pursue settlement. At this stage in the

proceedings, no discovery had been propounded by either party. The parties continued negotiating settlement following the filing of the stipulation with Opposer's former counsel. *See* Declaration of Nicholas D. Myers. On February 19, 2015, the Board issued an order denying the parties stipulation; however, the Board did reset the trial dates stating that "because the parties may not, under the applicable rules, engage in discovery activities without first making the required initial disclosures, the deadline for making such disclosures and all subsequent dates are hereby reset." *See* February 19, 2015 Board's Order. Of particular importance, Opposer's former counsel corresponded with Applicant's counsel regarding substantive settlement terms on February 24, 2015. *See* Declaration of Nicholas D. Myers. It seems likely, therefore, that Opposer corresponded with his former counsel following denial of the stipulation and that Opposer's former counsel informed Opposer of the denial and the impending deadlines. At a minimum, Opposer has an ongoing obligation to inquire at that time. It is clear that Opposer was aware of this Opposition or at least had a duty to make himself aware during the aforementioned interactions with his former counsel and did not take diligent steps to ensure that discovery was being handled in a timely manner either before the discovery deadline was extended or after.

II. AN EXTENSION OF TIME IS NOT NECESSARY FOR OPPOSER TO REVIEW DISCOVERY AS NO DISCOVERY HAS BEEN UNDERTAKEN BY EITHER PARTY

Opposer further states that "an extension of time of all deadlines is required to permit new counsel an opportunity to review the pleadings, review initial and expert disclosures to the extent such were served, reviewing outstanding discovery demands

and/or propound same and to communicate with Applicant's counsel." See Opposers Motion Page 2 Paragraph 3. Applicant hereby submits and contends that it is not necessary to grant Opposer time for the requested actions because no discovery has been undertaken. Neither party has issued expert disclosures or propounded discovery. The only items that were exchanged between the parties were initial disclosures. Thus, Opposer does not need any extension of time to respond to discovery as there are no outstanding requests.

III. CONCLUSION

Opposer has failed to state with detailed facts good cause sufficient to extend all dates in this Opposition. Further, Opposer's own negligence and lack of attentiveness to this Opposition proceeding, which he was clearly aware of negates any right he has to extend all dates herein. Finally, Opposer does not need any additional time to review discovery as neither party has issued or propounded any discovery whatsoever. As such, Opposer has failed to meet the burdens required of him to extend all dates of this Opposition and Applicant respectfully requests that Opposer's motion be denied.

Respectfully submitted,

Dated: August 28, 2015

MYERS BERSTEIN LLP

/Nicholas D. Myers/

Nicholas D. Myers

Attorneys for Applicant Adrian E. Fratantoni

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DECLARATION OF NICHOLAS D. MYERS, ESQ.

I, Nicholas D. Myers, Esq., declare as follows:

1. I am a Partner/Founder of MYERS BERSTEIN LLP, counsel of record for Applicant ADRIAN E. FRATANTONI (“Applicant”) in the aforementioned proceeding.
2. I make this Declaration on my own personal knowledge except those statements made on information and belief. As to those statements, I believe them to be true. I make this Declaration in support of Applicant’s Opposition to Motion to Extend Trial Dates.
3. On or about January and February of 2015, Opposer’s former counsel, Mitesh Patel, Esq., of the firm Raj Abhyanker P.C. contacted myself and/or other individuals at MYERS BERSTEIN LLP with respect to settlement of this Opposition, including discussion of substantive terms.

4. On or about February 24, 2015, Opposer's former counsel corresponded with my office regarding substantive settlement terms.

I declare that the foregoing is true and correct. Executed on August 28, 2015, at 2 Executive Circle, Suite 205, Irvine, California 92614.

Respectfully submitted,

Dated: August 28, 2015

MYERS BERSTEIN LLP

/Nicholas D. Myers/

Nicholas D. Myers

Attorneys for Applicant Adrian E. Fratantoni

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that the attached OPPOSITION TO MOTION TO EXTEND ALL DATES was filed electronically with the Trademark Trial and Appeal Board on August 28, 2015.

By: /Nicholas D. Myers/
Nicholas D. Myers
Attorney for Applicant

CERTIFICATE OF SERVICE

I certify that a true and complete copy of the attached OPPOSITION TO MOTION TO EXTEND ALL DATES has been served on Opposer Nicolas Dario Moyano by mailing said copy on August 28, 2015, via Electronic Mail to: mz@dhclegal.com and jet@dhclegal.com, such being the Opposer's attorney in this proceeding on this date.

By: /Nicholas D. Myers/
Nicholas D. Myers
Attorney for Applicant