

ESTTA Tracking number: **ESTTA772717**

Filing date: **09/25/2016**

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

Proceeding	91221339
Party	Defendant David M. Reid
Correspondence Address	CLINTON J CUSICK CUSICK IP PLLC 623 N BROAD STREET LANSDALE, PA 19446-2316 UNITED STATES ccusick@cusickip.com
Submission	Other Motions/Papers
Filer's Name	Clinton J. Cusick
Filer's e-mail	ccusick@cusickip.com
Signature	/43573/
Date	09/25/2016
Attachments	Opposition to Motion to Extend.pdf(342958 bytes) Exhibits A-D.pdf(217446 bytes)

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

In re Application Serial No. : 86/438,474
For the Mark : HIGH IMPACT
Filed on : October 29, 2014
Published on : March 31, 2015

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:
Planned Furniture Promotions, Inc. :
:
Opposer, : Opposition No. 91221339
:
v. :
:
David M. Reid :
:
Applicant. :
----- X

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

**OPPOSITION TO OPPOSER’S MOTION
TO EXTEND TRIAL DATES**

Applicant David M. Reid hereby presents arguments in opposition to the request to extend the trial period of Opposer¹ Planned Furniture Promotions (“PFP”).

I. LEGAL STANDARD

The standard for granting or rejecting a request for an extension of time is set forth in TBMP 509.01(a). “A motion to extend must set forth with particularity the facts said to constitute good cause for the requested extension; mere conclusory allegations lacking in

¹ In its motion, PFP is listed as Petitioner in the caption and title. PFP is the Opposer in this proceeding.

factual detail are not sufficient.”

“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 in taking the required action during the time previously allotted therefor.”

“The Board will "scrutinize carefully" any motion to extend time, to determine whether the requisite good cause has been shown.’

Thus any successful motion must set forth with particularity the facts supporting a finding of good cause and must demonstrate that lack of diligence is not the cause for the need for more time. . In short, a party must have a good reason why the 30 day trial period is insufficient. **II. ANALYSIS**

As will be shown below, Opposer has not put forth any particular facts instead alluding to “limitations” and “schedules.” Further, Opposer does not correctly apprehend the rules for serving testimony. Opposer's brief delves into the merits of the case, or why a deposition might be desired, but does not provide a showing of good cause why an extension should be granted.²

A. No Particular facts warranting an extension are provided.

A motion to extend must set forth with particularity the facts said to constitute good cause for the requested extension. TBMP 509.01(a). Searching PFP’s brief for facts set forth with particularity, none are found. On page 2 of its brief, counsel presents the

² In its Motion, Opposer PFP requests a “60 day extension of the discovery period.” It is Opposer’s trial period that is currently open, and the trial period that PFP seeks to extend.

following statement: “However, due to limitations on availability to take the trial testimony of Applicant, Opposer is asking for more time to complete the trial time period.”³ No particular facts are presented. Counsel merely alludes to “limitations on availability.” Further on page 2, the brief states “the current request is necessary as a result of the limited time available to PFP’s counsel.” No reason is given as to why limited time is available to PFP’s counsel vis-a-vis any other attorney. For comparison, undersigned counsel is also a solo practitioner located outside Philadelphia and has to fly to Boston, attend a deposition in Salem, stay in a hotel overnight, and fly back to Philadelphia the next day. The fact that this takes time is a mundane observation common to all activities. No special circumstances are presented by PFP.

At the bottom of page 3 Opposer states: “Due to other scheduling conflicts, PFP’s counsel could not arrange a new date to take Mr. Reid’s’ trial testimony.” Again, scheduling conflicts are mentioned, but no details are set forth. PFP’s counsel did not even try to arrange a new date.

A review of the brief and supporting declaration reveals that no details whatsoever are provided. The rules require that the movant “set forth with particularity the facts said to constitute good cause for the requested extension.” No facts are provided. The Board’s rules further state that “mere conclusory allegations lacking in factual detail are not sufficient.” TBMP 509.01(a). *Johnston Pump/General Valve Inc. v. Chromalloy American Corp.*, 13 USPQ2d 1719, 1720 n.3 (TTAB 1989) (“The presentation of one’s arguments and authority should be presented thoroughly in the motion or the opposition

³ Further, this sentence is difficult to decipher as it is unclear how one could “complete the trial time period.”

brief thereto."). No facts or authority are presented in Opposer's motion.

As to the production of testimony transcripts, counsel is mistaken about the need to complete transcripts prior to the end of the trial period. PFP has thirty days from the taking of testimony to serve Applicant with the transcript. TBMP 703.01(k), 37 CFR 2.125(a). Misapprehending the rules cannot provide justification for a 60 day extension.

B. The moving party has not demonstrated that the extension is not necessitated by the party's own lack of diligence.

On page 2 of its brief, PFP states "Due to other scheduling conflicts, PFP's counsel could not arrange a new date to take Mr. Reid's trial testimony." Counsel did not even try. Counsel for Applicant had reached counsel for Opposer by phone on September 9th to determine why no Notice of Deposition had been served.⁴ Counsel for Opposer stated that the deposition would not be held on the 14th. At that point *19 days* remained in the trial period. Opposer made no attempt to schedule anything. Counsel for Opposer has presented *no evidence* to demonstrate that the extension is not necessitated by Opposer's own lack of diligence. The rules require that the motion for extension of the trial period be denied. Mere delay is the only conclusion for the need for extension. Opposer merely prefers to conduct trial related activities later, i.e. delay.

C. Communications of counsel.

Attached as Exhibits A through D are communications from counsel. It is known that a party can achieve an extension for good cause. Applicant's counsel therefore inquired as

⁴ As shown in Exhibit A, counsel for Applicant emailed counsel for Opposer on 8/31, 9/2, and 9/8, and received no response.

to what the reason for the delay would be. In an email dated September 15, 2016, counsel for Applicant stated:

“In order to get an extension of your trial period, you are going to have to explain why you missed the scheduled deposition date of yesterday, why you can't complete your trial activities by the 28th, and how an extension for, say 15 days, will solve all that.

Merely saying "I'm busy" is insufficient. I sent you several emails about the date you had selected, and these emails were not addressed. It gives me the impression that this is not a priority for you.

Making sure that this case does not slip into the winter, and thus next year, is a priority for us.”

See Exhibit B. Counsel for Opposer did not provide any reason, or give any assurances that an extension of 15 days would be sufficient to conduct the deposition. It was clear that the 19 days remaining in the trial period were not being utilized as of September 9, 2016. In response, Exhibit C was received. Rather than provide assurances that a 15 day extension of time would be sufficient, it was stated that October “is essentially a nullity as far as work is concerned.” Further, a nine month extension was posited. See Exhibit C. A “reasonable request” for a definite period of time was not received. Opposer made vague statements about an extension, but never proposed a length of time, prior to Opposer’s brief.

Counsel for Applicant responded by stating again, more formally in a letter to counsel that “you need a reason to extend trial dates.” Exhibit D. No reason was provided, and

Opposer's motion was filed. Opposer's motion does not set forth any reason to extend trial.

III CONCLUSION

The Board should scrutinize carefully the purported justification for an extension of the trial period and support Applicant's assertion that a "reason" is needed to extend the trial period. Opposer's request that a 30 day trial period to be extended to a 90 day trial period, while no activities have been conducted this far, is prejudicial to Applicant.

Applicant has shown that Opposer's brief fails to meet the standard of both 1) a showing of good cause and 2) demonstrating that the extension is not necessitated by Opposer's own lack of diligence. No showing of good cause has been provided through any particular facts, and no showing of any diligence (or any actions) have been provided.

Denial of the motion for extension of the trial period is requested.

Dated: September 25, 2016

Respectfully submitted,

David M. Reid

By His Attorneys



Clinton J. Cusick
Cusick IP, PLLC
623 N. Broad Street
Lansdale, PA 19446

Our Ref.: 2166-401

CERTIFICATE OF SERVICE

It is hereby certified that on September 25, 2016, a copy of the foregoing
OPPOSITION TO OPPOSER'S MOTION TO EXTEND TRIAL DATES has been sent
by first class mail, postage prepaid to the address of counsel for Opposer:

Leo L. Esses, Esq.
750 Third Avenue, 9th Floor
New York, NY 10017


Clinton J. Cusick

EXHIBIT A

Subject: Fwd: Trial Deposition
From: "Clinton J. Cusick, Esq. " <ccusick@cusickip.com>
Date: 9/8/2016 2:57 PM
To: Leo <leo@esseslaw.com>

Leo,
Please let me know if you are going to Notice the deposition for September 14th.

Thank you,

Clinton

Clinton J. Cusick, Esq.
Cusick IP, PLLC
Intellectual Property Counsel
623 N. Broad St. Lansdale, PA 19446
CCusick@CusickIP.com
215-853-8255
www.CusickIP.com

----- Forwarded Message -----

Subject: Trial Deposition
Date: Fri, 2 Sep 2016 15:22:51 -0400
From: Clinton J. Cusick, Esq. <ccusick@cusickip.com>
To: Leo <leo@esseslaw.com>

Leo,

I have not heard from you regarding the deposition.

I have made travel arrangements for the 14th at 4pm, but I would appreciate confirmation from you.

Thank you,

Clinton

Clinton J. Cusick, Esq.
Cusick IP, PLLC
Intellectual Property Counsel
623 N. Broad St. Lansdale, PA 19446
CCusick@CusickIP.com
215-853-8255
www.CusickIP.com

----- Forwarded Message -----

Subject:Re: Trial Testimony

Date:Wed, 31 Aug 2016 09:56:49 -0400

From:Clinton J. Cusick, Esq. <ccusick@cusickip.com>

To:Leo Esses <leo@esseslaw.com>

Leo,

I have shared that time with my client.

Will you Notice the Deposition?

I will make flight arrangements, etc. but I want to make sure about the date before I purchase tickets.

Thank you,

Clinton

Clinton J. Cusick, Esq.
Cusick IP, PLLC
Intellectual Property Counsel
623 N. Broad St. Lansdale, PA 19446
CCusick@CusickIP.com
215-853-8255
www.CusickIP.com

On 8/17/2016 2:07 PM, Leo Esses wrote:

I can do September 14th at 4pm, I have to be in court in NYC that morning.

Leo L. Esses
The Esses Law Group, LLC
750 Third Avenue, 9th Floor
New York, New York 10017
Phone: 212-673-3160
Cell: 917-846-2460
Fax: 212-845-9981
leo@esseslaw.com

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From: Clinton J. Cusick, Esq. [<mailto:ccusick@cusickip.com>]

Sent: Wednesday, August 17, 2016 2:02 PM

To: Leo Esses

Subject: Re: Trial Testimony

Leo,

David Reid and I are both available September 14, 15, and 16.

I will be out of the office, but have access to email, 8/18 to 8/27.

Best regards,

Clinton

Clinton J. Cusick, Esq.
Cusick IP, PLLC
Intellectual Property Counsel
623 N. Broad St. Lansdale, PA 19446
CCusick@CusickIP.com
215-853-8255
www.CusickIP.com

On 8/11/2016 12:17 PM, Leo Esses wrote:

Clinton:

Can you please advise dates in the first or second week of September that your client is available for his trial testimony.

Thanks,

Leo

Leo L. Esses
The Esses Law Group, LLC
750 Third Avenue, 9th Floor
New York, New York 10017
Phone: 212-673-3160
Cell: 917-846-2460
Fax: 212-845-9981
leo@esseslaw.com

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EXHIBIT B

Subject: Re: High Impact
From: "Clinton J. Cusick, Esq. " <ccusick@cusickip.com>
Date: 9/15/2016 12:37 PM
To: Leo Esses <leo@esseslaw.com>

Hi, Leo.

In order to get an extension of your trial period, you are going to have to explain why you missed the scheduled deposition date of yesterday, why you can't complete your trial activities by the 28th, and how an extension for, say 15 days, will solve all that.

Merely saying "I'm busy" is insufficient. I sent you several emails about the date you had selected, and these emails were not addressed. It gives me the impression that this is not a priority for you.

Making sure that this case does not slip into the winter, and thus next year, is a priority for us.

Best regards,

Clinton

Clinton J. Cusick, Esq.
Cusick IP, PLLC
Intellectual Property Counsel
623 N. Broad St. Lansdale, PA 19446
CCusick@CusickIP.com
215-853-8255
www.CusickIP.com

On 9/14/2016 9:10 AM, Leo Esses wrote:

Any word about adjourning the trial dates?

Leo L. Esses
The Esses Law Group, LLC
750 Third Avenue, 9th Floor
New York, New York 10017
Phone: 212-673-3160
Cell: 917-846-2460
Fax: 212-845-9981
leo@esseslaw.com

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EXHIBIT C

Subject: RE: High Impact
From: "Leo Esses" <leo@esseslaw.com>
Date: 9/20/2016 3:50 PM
To: "Clinton J. Cusick, Esq." <ccusick@cusickip.com>

Clinton:

I find it incredible that every time I have asked for a courtesy, I have been fought tooth and nail, and always denied. This is especially egregious in light of the fact that my client had to fight your client for over a year on a mark that your client did not even file under an existing company. I am asking for the courtesy of more time to prepare my client's case in light of the fact that I have to travel to MA to take your client's testimony and then have to put everything together, all on my own. Moreover, in light of the Jewish holidays coming up in October, the month is essentially a nullity as far as work is concerned. If your client can agree to this, I would appreciate it. If he can't, I will file my motion at the end of this week asking until June so that your client can go away and then come back and we can finish then. Please let me know by Thursday noon your client's decision.

Thanks,

Leo

Leo L. Esses
The Esses Law Group, LLC
750 Third Avenue, 9th Floor
New York, New York 10017
Phone: 212-673-3160
Cell: 917-846-2460
Fax: 212-845-9981
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From: Clinton J. Cusick, Esq. [mailto:ccusick@cusickip.com]
Sent: Thursday, September 15, 2016 12:37 PM
To: Leo Esses
Subject: Re: High Impact

Hi, Leo.

In order to get an extension of your trial period, you are going to have to explain why you missed the scheduled deposition date of yesterday, why you can't complete your trial activities by the 28th, and how an extension for, say 15 days, will solve all that.

Merely saying "I'm busy" is insufficient. I sent you several emails about the date you had selected, and these emails were not addressed. It gives me the impression that this is not a priority for you.

Making sure that this case does not slip into the winter, and thus next year, is a priority for us.

Best regards,

Clinton

Clinton J. Cusick, Esq.
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Intellectual Property Counsel
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215-853-8255
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On 9/14/2016 9:10 AM, Leo Esses wrote:

Any word about adjourning the trial dates?

Leo L. Esses
The Esses Law Group, LLC
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Phone: 212-673-3160
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EXHIBIT D

CUSICK IP, PLLC
INTELLECTUAL PROPERTY LAW

ADMITTED TO PRACTICE
- PENNSYLVANIA
- NEW YORK
- NEW JERSEY
- UNITED STATES PATENT AND
TRADEMARK OFFICE

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CCusick@CusickIP.COM

Leo Esses
750 Third Ave. 9th Floor
New York, NY 10017

September 22, 2016

Re: PFP v. David M. Reid, Opposition No. 91221339
Our ref. 2166-401

Dear Mr. Esses:

I received your email yesterday and have conferred with my client. I want to make clear a few items. Responsibility to move your case forward rests with you. You and your client have filed this Opposition and you have the burden of moving forward. It appears that you have done nothing in the trial period so far.

Extensions of the trial period are not available just because you want one. My client has a right to a speedy resolution of the case. You are opposing the registration of his trademark and hindering his ability to enforce his trademark. Further delay is prejudicial to my client.

On August 17, at your request, we scheduled a deposition for September 14th at 4pm. My client and I both made plans to attend. I purchased airfare and made hotel reservations. However, you never Noticed the Deposition. I emailed you on August 31 to inquire about that. You never responded. I emailed you on September 2 about the date, and you never responded. I emailed you on September 8, and you never responded. I called you on September 9 and you stated that you were busy and would follow up with me next week. The only follow up I received five days later was a query from you which stated in its entirety "Any word about adjourning the trial dates?"

This is not diligent prosecution of the case. I responded to your query by stating that you need a reason to extend trial dates. I have not received any reason. We do not agree to an extension of Opposer's trial period because you have not been diligent with the time you have been allotted.

Sincerely,



Clinton J. Cusick