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

Proceeding no.	91266802
Party	Defendant Sezzle Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ITS, Inc.,

Opposer,

v.

Opposition No. 91266802
Serial No. 88891706

Sezzle, Inc.,

Applicant.

APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO QUASH APPLICANT'S 30(b)(6) NOTICE

Applicant Sezzle, Inc. ("Sezzle" or "Applicant") by and through its counsel, hereby opposes Opposer, ITS, Inc. ("ITS" or "Opposer")'s Motion to Quash Sezzle's 30(b)(6) Notice. Sezzle does not oppose ITS's Motion for an extension of the discovery period provided that the extension is mutual.

On December 3, 2021, ITS asked Sezzle for an extension of the discovery period to complete the 30(b)(6) deposition noticed by ITS in the last weeks of discovery. Sezzle was willing to agree to this provided that the extension would apply mutually, and informed ITS of its desire to also take a 30(b)(6) deposition. Opposer refused to agree to a mutual 45-day extension and insisted that any extension be unilateral for its own benefit. Because Opposer would not consent to Sezzle's request for an extension, Applicant timely served its notice for its 30(b)(6) deposition with 3 days remaining in the discovery period and brought a timely motion for a 45-day, mutual extension of the discovery period. (Doc. 10).

The appropriate standard for allowing an extension of a prescribed period prior to the expiration of the term is "good cause." *See* Fed. R. Civ. P. 6(b) and Trademark Trial and Appeal Board Manual of Procedure ("TBMP") § 509 (2d ed. rev. 2004) and cases cited therein. Generally, the Board 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. The moving party has the burden of persuading the Board that it was diligent in meeting its responsibilities and should therefore be awarded additional time. *See Sunkist Growers, Inc. v. Benjamin Ansehl Co.*, 229 U.S.P.Q. 147 (TTAB 1985).

1. Applicant has been Diligent During the Discovery Period

Applicant has been diligent in meeting its discovery responsibilities throughout the discovery period and has been open to settlement discussions. On September 17, 2021 Sezzle served its Interrogatories and Document Requests on ITS. *See* Declaration of Todd R. Fronek in Support of Applicant's Motion to Extend ("Fronek Dec. 6 Decl."), ¶ 3, (Doc. 10, p.8-9). On November 17, 2021, ITS requested a 30(b)(6) deposition of Sezzle's witness. *See Id.* Sezzle does not object to this deposition and has, and still is, willing to work with ITS to find a time and place that is convenient for both Parties. On November 22, 2021, Sezzle responded to written discovery requests (interrogatories, requests for production of documents and requests for admission) and has supplemented them. *See Id.* On December 3, Sezzle noticed ITS with a 30(b)(6) deposition to be taken December 6, 2021. Sezzle is open to schedule a time and place that is convenient for ITS. *See Id.* On December 7, 2021, Sezzle supplemented its document production.

2. Applicant's Delay in Noticing the Deposition Was Not Caused by Negligence

Applicant's counsel was overwhelmed with pressing litigation between late October and the beginning of December. *See Fronek Dec. 6 Decl.* ¶ 4. Applicant continued to respond to discovery requests and supplement its document production. Applicant in good faith asked ITS to consent to a mutual 45-day extension of before the close of discovery on December 6, 2021 for the limited purpose of allowing both Parties to take their respective 30(b)(6) depositions. *See Id.* ¶ 5. ITS refused to consent to this request leaving Applicant in a bind to notice and complete the 30(b)(6) deposition before the close of discovery and having to file an unconsented Motion to Extend. (Doc. 10).

> According to the Board, the determination of whether a party's neglect is excusable is
>
> > at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the [nonmovant], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Pumpkin Ltd. v. the Seed Corps, 43 U.S.P.Q.2d 1582 (TTAB 1997) (*citing Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. P'ship et al.*, 507 U.S. 380 (1993)). Given that Applicant was called to address other more pressing litigation matters which were outside of its control during the last couple months of the discovery period shows that Applicant's delay in noticing the deposition was not caused by neglect and Applicant's request for an extension should be granted.

3. Sezzle Acted in Good Faith and its 30(b)(6) Notice was not Untimely

ITS has moved to quash Sezzle's 30(b)(6) deposition as untimely. However, Sezzle's notice was before the close of Discovery and it gave ITS three days to prepare a witness.[1] Three-days' notice for a deposition has been found reasonable notice by the Board. *See Duke Univ. v. Haggar Clothing, Inc.* 54 U.S.P.Q.2d 1443 (TTAB 2000) (holding three-days' notice of deposition for the witness was reasonable.) Sezzle did not purposely delay in noticing the 30(b)(6) deposition to seek taking advantage of ITS or put ITS in a bad position. Rather, it should be noted that when ITS approached Sezzle for an extension of the Discovery period on December 3, 2021, solely for the purpose of completing its own 30(b)(6) deposition of Sezzle, Sezzle, in good faith, proposed that the Parties agree to extend the discovery deadline mutually by 45 days to allow each Party to take its own 30(b)(6) deposition. *See Id.* ¶ 5. Forty-five days was more than enough time for each party to take a Rule 30(b)(6) deposition, even with the scheduling difficulties caused by the holidays. Although ITS did not agree to this mutual extension, Sezzle is still willing to cooperate with ITS to ensure that both Parties are able to take a 30(b)(6) deposition within the discovery period. Because three days' notice can be considered timely, a 30(b)(6) deposition noticed with over 45 days remaining in the discovery period, as would be the case if Sezzle's motion for and extension of time is granted, is indisputably timely.

4. Opposer is not Prejudiced by Allowing Applicant a 30(b)(6) Deposition

ITS has not shown that its ability to present its case has been prejudiced by respondent's delay in serving the 30(b)(6) deposition particularly when Sezzle has also filed a motion for a 45-

[1] On Thursday December 2, 2021 there were email discussions between the Parties regarding extending the discovery deadline for the purpose of completing the 30(b)(6) depositions. ITS was aware of Sezzle's intent to take a deposition on December 2, 2021, and a formal notice was served on December 3, 2021.

day extension of time for both parties to complete their 30(b)(6) depositions.[2] *See Pumpkin, Ltd. v. The Seed Corps,* 43 U.S.P.Q.2d 1582 (TTAB 1997); *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997). Any prejudice that ITS may otherwise suffer will be alleviated by further extending the discovery period.

For the foregoing reasons, Sezzle respectfully requests that ITS' Motion to Quash be denied and that the discovery period be extended on a bilateral basis for 45 days.

Dated: January 5, 2022

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[2] Sezzle has offered to take the 30(b)(6) deposition noticed on December 3, 2021 at a convenient date provided the 45-day extension is granted.

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2022, I caused a true and correct copy of the foregoing Applicant's APPLICANT'S OPPOSITION TO OPPOSER'S MOTION TO QUASH APPLICANT'S 30(b)(6) NOTICE in PDF format, to be served by email upon the following attorneys of record for Opposer:

Clinton Newton, CNEWTON@shb.com, CGNTMDocket@shb.com.

/*John A. Kvinge*/
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