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

Proceeding no.	91266802
Party	Plaintiff ITS, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of: Trademark Application Serial No. 88/891,706

For the Mark: 
Published in the Official Gazette: September 1, 2020

ITS, Inc.,

Opposer,

v.

Opposition No. 91266802
Serial No. 88/891,706

Sezzle Inc.,

Applicant.

ITS'S REPLY IN SUPPORT OF ITS MOTION TO EXTEND FACT DISCOVERY, SUSPEND DEADLINES, AND QUASH SEZZLE'S 30(B)(6) NOTICE

Pursuant to Trademark Rule 2.127(a) and the Board's December 20, 2021, Order (Doc. 11), Opposer ITS, Inc. ("ITS") submits the following reply in support of its Motion to extend fact discovery, suspend deadlines, and quash Sezzle's 30(b)(6) notice (Doc. 9).

I. INTRODUCTION

Sezzle asks the Board to find it reasonable to expect ITS, over one weekend, to: (1) draft formal objections and responses to Sezzle's thirteen deposition topics; (2) meet and confer with Sezzle to resolve ITS's objections to these topics; (3) internally coordinate with its client to identify the company employees with relevant knowledge regarding each of the thirteen deposition topics for purposes of identifying one or more designees on each topic; (4) identify relevant documents to prepare ITS's 30(b)(6) designees; and (5) prepare ITS's 30(b)(6) designees for deposition at 9:00 a.m. Monday morning. Not a single Board decision or federal court decision has held that a weekend's notice constitutes sufficient notice for a 30(b)(6) deposition. Moreover, while Sezzle

concedes that good cause exists to extend the fact discovery deadline to allow ITS to depose Sezzle based on ITS's timely served 30(b)(6) notice[1], the same cannot be said for Sezzle's untimely 30(b)(6) notice of ITS. As set forth below, Sezzle is unable to provide any legitimate reason why it could not have timely served its notice. Accordingly, the Board should quash Sezzle's deposition notice and extend the fact discovery period for the limited purpose of allowing ITS to depose Sezzle on ITS's timely-served 30(b)(6) deposition notice.

II. SEZZLE CONCEDES THAT GOOD CAUSE SUPPORTS ITS'S MOTION

In its opening brief, ITS argued that the Board should extend the fact discovery deadline in this case for the limited purpose of allowing ITS to depose Sezzle on ITS's timely-served 30(b)(6) notice. Doc. 9 at 3-4. In support, ITS maintained that it served its 30(b)(6) notice on Sezzle well in advance of the December 6, 2021, fact discovery deadline yet Sezzle had still failed to provide formal objections and responses to this notice or make one or more witnesses available for deposition. *Id.* at 3. In its opposition, Sezzle does not contest or address the case law supporting ITS's argument that good cause exists to extend the fact discovery deadline for allowing ITS to depose Sezzle. *See* Doc. 12 at 1-4. Accordingly, the Board should grant ITS' Motion to extend the fact discovery deadline in this case for the limited purposes of allowing ITS to depose Sezzle on ITS's timely-served 30(b)(6) notice.[2]

III. THE BOARD SHOULD QUASH SEZZLE'S 30(B)(6) NOTICE AS UNTIMELY

The Board should grant ITS's Motion to Quash Sezzle's 30(b)(6) deposition notice. Sezzle provided a weekend's notice for this deposition, which does not constitute reasonable notice. Furthermore, contrary to Sezzle's assertion, good cause does not exist to extend the fact discovery

[1] ITS served its 30(b)(6) notice on Sezzle on November 17th, almost three weeks before the close of discovery.
[2] It should be noted that ITS's requested extension is not solely for ITS's benefit and was necessitated by Sezzle's lack of diligence. If Sezzle had produced its 30(b)(6) witness or any documents during the discovery period, ITS would not have had to seek any extension. ITS's requested extension was solely to permit Sezzle to have more time to comply with its obligations.

deadline, which would convert this untimely notice into a timely one, because Sezzle has not been diligent in meeting its responsibilities in this proceeding.

A. A WEEKEND'S NOTICE IS INSUFFICIENT NOTICE

Sezzle asserts that it gave ITS three days' notice of its intent to conduct a 30(b)(6) deposition of ITS. Opp'n at 4. In reality, Sezzle gave ITS just a weekend's notice, serving its thirteen-topic 30(b)(6) deposition notice after the close of business on Friday, December 3, for Monday, December 6 at 9:00 a.m., a date and time Sezzle already told ITS was not available for ITS's prior served 30(b)(6) notice. *Duke University v. Hagar Clothing Co.*, No. 108,304, 2000 WL 390037 (T.T.A.B. Mar. 16, 2000) – the only case Sezzle relies on – does not support its assertion that it provided ITS with reasonable notice of its intent to conduct its 30(b)(6) deposition of ITS. In that case, the Board quashed multiple deposition notices as unreasonable where they were served just two business days in advance. *Duke Univ.*, 2000 WL 390037 at *2-3. Other Board decisions, too, have similarly found two-days' notice insufficient. *See, e.g.*, *Gaudreau v. Am. Promotional Events Inc.*, No. 91125329, 2007 WL 499920, at *4 (T.T.A.B. Feb. 15, 2007) (two days' notice for deposition found unreasonable); *Elec. Indust. Assoc. v. Patrick H. Potega DBA Lifestyle Techs.*, No. 107,146, 1999 WL 375908, at *1 (T.T.A.B. Feb. 17, 1999) (same). ITS, essentially, only had Saturday and Sunday, to prepare and to complete all of the tasks enumerated above.

Moreover, contrary to Sezzle's assertion, the Board in *Duke University* did not hold that three days' notice was presumptively reasonable notice for a 30(b)(6) deposition. Instead, the Board held that applicant's deposition notice for its own witness provided three *business* days in advance was reasonable where applicant had orally notified opposer seven business days in advance of the deposition. *Duke Univ.*, 2000 WL 390037, at *1-3. And critically, opposer had previously conducted a 30(b)(6) deposition of the witness, such that opposer was familiar with the

deponent's likely testimony for purposes of cross examining the witness during the deposition. *Id.* at *1, 2.

As the Board has acknowledged, "[w]hether notice [of a deposition] is reasonable depends upon the individual circumstances of each case." *Gaudreau v. Am. Promotional Events Inc.*, 2007 WL 499920, at *4 (T.T.A.B. Feb. 15, 2007). Here, Sezzle asks the Board to deem it reasonable to expect ITS over a weekend to: (1) draft formal objections and responses to Sezzle's thirteen deposition topics; (2) meet and confer with Sezzle to resolve ITS's objections to these topics; (3) internally coordinate with ITS to identify the company employees with relevant knowledge regarding each of the thirteen deposition topics for purposes of identifying one or more designees on each topic; (4) identify relevant documents to prepare ITS's 30(b)(6) designees; and (5) prepare ITS's 30(b)(6) designees for deposition at 9:00 a.m. on Monday morning. ITS cannot identify a single Board decision or federal district court case, finding that a weekend constitutes sufficient time to accomplish this amount of work. *See* Sezzle's Resp. at 1-5. Indeed, the deposition forming the basis of ITS's motion to quash is not like the one in *Duke University* where opposer had already conducted a 30(b)(6) deposition of the witness, such that it was likely opposer would need little preparation time to effectively cross-examine the witness. Instead, ITS will need to conduct a significant amount of preparation in order to put up its corporate witnesses on Sezzle's 30(b)(6) deposition notice, such that a weekends' notice is unreasonable.

As one federal district court recently highlighted, "[w]hile the [Federal] rules do not expound on what exactly constitutes reasonable notice, case law is both instructive and consistent that less than a week's notice cannot constitute reasonable notice." *In re Tara Crosby, LLC*, No. CV 17-5391, 2019 WL 5634182, at *3 (E.D. La. Oct. 31, 2019); *see also In re Teon Maria, LLC*, No. CIV.A. 12-2272, 2013 WL 5507286, at *2 (E.D. La. Sept. 30, 2013) (finding "a week or less

is not sufficient notice pursuant to the rules"); *Gulf Prod. Co. v. Hoover Oilfield Supply, Inc.*, Civil Action Nos. 08–5016, 09–0104, 09–2779, 2011 WL 891027, at *3 (E.D. La. Mar. 11, 2011) (four days' notice for a Rule 30(b)(6) deposition was not reasonable); *Mem'l Hospice, Inc. v. Norris*, Civil Action No. 2:08–CV–048–B–A, 2008 WL 4844758 (N.D. Miss. Nov. 5, 2008) (finding that three days' notice for deposition clearly unreasonable); *Sullivan v. Dollar Tree Stores, Inc.*, No. CV-07-5020-EFS, 2008 WL 706698, at *1-2 (E.D. Wash. Mar. 14, 2008) (four days' notice for a Rule 30(b)(6) deposition was unreasonable).

It should be noted that Sezzle's 30(b)(6) notice, which was served after the close of regular business hours on a Friday evening for a deposition to occur Monday morning at 9:00 a.m. (the last day of discovery), provided zero minutes of regular business hours to prepare.

Here, no facts exist supporting a finding that Sezzle's 30(b)(6) notice was reasonable. Accordingly, the Board should grant ITS's motion to quash this notice.

B. SEZZLE WAS NOT DILIGENT IN MEETING ITS RESPONSIBILITIES

Sezzle asserts that the Board should not quash its untimely-served 30(b)(6) notice because good cause exists to extend the fact discovery deadline, which would convert Sezzle's untimely notice into a timely one. In particular, Sezzle maintains that two of its four counsel of record were "overwhelmed with pressing litigation between late October and the beginning of December." Doc. 12 at 2-3. But, the record establishes that Sezzle merely delayed in serving its 30(b)(6) notice. Critically, Sezzle concedes that its other counsel of record from September through November was able to draft and serve interrogatories and document requests and provide formal objections and responses to ITS's interrogatories, document requests, and requests for admission. Doc. 10 at 3. There was simply nothing preventing Sezzle's counsel from also drafting a 30(b)(6) notice anytime between September through November. Indeed, this notice would have only taken a handful of hours to draft as evidenced by the fact that when ITS told Sezzle it was unwilling to agree to an

extension of the fact discovery deadline, Sezzle was able to prepare and serve a 30(b)(6) notice in less than two hours. Doc. 13 at 5. Further, the busy schedules of two of Sezzle's four counsel of record would not have prevented Sezzle from preparing and serving a 30(b)(6) notice earlier in the discovery period when presumably none of its four counsel were busy with other matters.

The Board has consistently found that mere delay in serving discovery cannot constitute the good cause necessary to extend the fact discovery deadline. *See, e.g.*, *Nomi Network, Inc. v. Nomi Beauty*, No. 91234184, 2020 WL 1809218, at *3 (T.T.A.B. Apr. 2, 2020) (finding good cause did not exist to extend the discovery deadline and noting that "[i]f Opposer desired to take discovery depositions in this proceeding, it should have commenced the process for coordinating and scheduling such depositions prior to the waning days of the already-extended discovery period"); *Amazon Techs., Inc. v. Foxconn Interconnect Tech.*, No. 91236517, 2019 WL 259580, at *3 (T.T.A.B. Jan. 16, 2019) (denying motion to extend discovery deadline for lack of good cause where movant did "not adequately explain why it did not seek discovery earlier in the proceeding"); *Nat'l Football League*, 2008 WL 258323, at *2 (finding good cause did not exist to extend the fact discovery deadline where opposers failed to identify any exigent circumstances that prevented them from timely serving discovery and noting that "[c]learly, [] opposers' claimed need for an extension of discovery is the product solely of opposers' unwarranted delay in initiating discovery.")

Sezzle further asserts that the Board should not quash its untimely-served 30(b)(6) notice because ITS has shown no prejudice. Doc. 12 at 4-5. But contrary to Sezzle's assertion, ITS will suffer prejudice. If the Board grants Sezzle a free pass here, ITS will have to expend significant resources that it would not otherwise have to expend, and Sezzle will get an additional opportunity to strengthen its defense of this case solely as a result of its delay and lack of diligence. And, in

any event, lack of prejudice cannot serve as the good cause needed to extend a Board deadline. *See, e.g.*, *Shemendera v. First Niagara Bank N.A.*, 288 F.R.D. 251, 253 (W.D.N.Y. 2012) ("[t]he existence or degree of prejudice to the party opposing modification . . . is irrelevant to the moving party's exercise of diligence and does not show good cause."); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Pracs. & Antitrust Litig.*, No. 17-MD-2785-DDC-TJJ, 2020 WL 1942188, at *3 (D. Kan. Apr. 22, 2020) ("The absence of prejudice to the opposing party does not constitute an affirmative showing of 'good cause' to alter the schedule ordered by the court."); *Tesone v. Empire Mktg. Strategies*, No. 17-CV-02101-MEH, 2019 WL 8223285, at *2 (D. Colo. Jan. 17, 2019), *aff'd*, 942 F.3d 979 (10th Cir. 2019) ("prejudice to the defendant is irrelevant to a 'good cause' analysis"); 3 Moore's Federal Practice § 16.14[1][b] (Matthew Bender 3d ed. 2018) ("The existence or degree of prejudice . . . is irrelevant to the moving party's exercise of diligence and does not show good cause").

Sezzle has not been diligent. Had Sezzle been diligent, ITS would not have needed to request more time for the sole purposes of allowing Sezzle to produce its 30(b)(6) witness and produce documents. Had Sezzle been diligent, ITS would not have had to file a Motion to Quash or had grounds on which to do so. Had Sezzle been diligent, Sezzle would not have needed to request more time and reopen discovery far enough that it could propound additional written discovery and notice an untold number of depositions that were not previously requested or timely noticed.

ITS, on several occasions, including the closing days of discovery, repeatedly offered and requested a suspension of the matter to provide the parties with additional time and opportunities for settlement discussions. Sezzle refused each one of those requests.

IV. CONCLUSION

For the foregoing reasons and the reasons set forth in ITS's Motion, the Board should grant ITS's request to extend the fact-discovery deadline in this matter for the limited purpose of allowing ITS to depose Sezzle on the topics set forth in its timely 30(b)(6) notice and to suspend all other deadlines until this deposition occurs. In addition, the Board should quash Sezzle's 30(b)(6) notice as untimely and determine that Sezzle has not met its burden of establishing that good cause exists to bilaterally extend the discovery period in this proceeding.

DATED: January 24, 2022

/Clinton G. Newton/

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been filed through the TTAB's online filing system (ESTTA) and served by forwarding said copy on January 24, 2022, via email to the following email address of record:

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