

THIS ORDER IS A
PRECEDENT OF THE
TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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mbm

July 10, 2019

Cancellation No. 92066392

Covidien LP

v.

ERBE Elektromedizin GmbH

Mary Beth Myles, Interlocutory Attorney:

This proceeding now comes before the Board for consideration of (1) Petitioner's consented motion, filed January 16, 2019, to extend the remaining dates in the schedule for this case, and (2) Respondent's motion, filed January 28, 2019, to strike Petitioner's January 22, 2019 motion for summary judgment. 23, 28 TTABVUE. The motion to strike is fully briefed.¹

As last reset by the Board's December 21, 2018 order, the deadline for Petitioner's pretrial disclosures was January 18, 2019. On January 16, 2019, Petitioner filed a motion to extend all dates, with Respondent's consent, by one week. 23 TTABVUE. Inasmuch as the parties agreed to the extension, the motion is **granted**. The deadline for Petitioner's pretrial disclosures therefore became January 25, 2019.

¹ Petitioner's change of correspondence address, filed April 5, 2019, is noted. Board records have been updated accordingly.

On January 22, 2019, anticipating the Board's approval of the parties' consented motion to extend, Petitioner filed its motion for summary judgment. 24 TTABVUE. As the basis for its motion to strike the summary judgment motion, Respondent argues (1) that it only consented to an extension of time for Petitioner to serve its pretrial disclosures, not an extension of time to file a summary judgment motion, and (2) Petitioner's summary judgment motion is untimely because the Board did not grant the consented motion to extend prior to January 18, 2019, the expiration of the deadline for Petitioner's pretrial disclosures, as previously set.

Although Respondent contends that it would not have consented to the extension had it realized Petitioner intended to file a motion for summary judgment, the consented motion to extend contains no conditions or restrictions. Trademark Rule 2.127(e)(1), 37 C.F.R. § 2.127(e)(1), provides that a motion for summary judgment must be filed before the day of the deadline for the plaintiff's pretrial disclosures, as originally set or as reset. *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 528.02 (2019). At the time the consented motion to extend was filed (January 16), that deadline was due to expire on January 18, and Petitioner's deadline to file a summary judgment motion would have been January 17 absent any extension. Thus, Respondent must have known that a summary judgment motion not only was still possible at the time it consented to the extension, but also that, by agreeing to extend all deadlines, it was consenting as well to extend the time for filing a summary judgment motion. If Respondent's consent to an extension was conditioned upon a limitation, it was incumbent upon Respondent to

identify that limitation and to ensure that the limitation was conveyed in the motion when filed. Here, Respondent provided its consent to the extension without condition or limitation.

Respondent also argues that, even though it consented to extend the deadline for Petitioner's pretrial disclosures before Petitioner's summary judgment motion was due, the fact that the Board did not grant the consented motion to extend until after expiration of the previously-set January 18, 2019 deadline for Petitioner's pretrial disclosures means that Petitioner was required to file its summary judgment motion no later than January 17, 2019, or else lose the chance to do so.

Here, Respondent consented to Petitioner's motion for an extension of all deadlines two days prior to the deadline for Petitioner's pretrial disclosures, as last reset. Inasmuch as the unrestricted consented motion was filed prior to the deadline, once granted, the extension is effective before the deadline.² *But see* TBMP § 509.01(a) and cases cited therein ("If a motion to extend the time for taking action is denied, the time for taking such action may remain as previously set."). The extension of the pretrial disclosure deadline also generally resets the deadline for filing a motion for summary judgment, unless the parties agree to the contrary. *KID-Systeme GmbH v. Turk Hava Yollari Teknik Anonim Sirketi*, 125 USPQ2d 1415, 1416 (TTAB 2018) ("If the pretrial disclosure deadline is reset by order or stipulation effective before the

² Respondent states in its reply brief that it did not "stipulate" to the extension. 30 TTABVue 2. Irrespective of whether the motion to extend was filed as a stipulation or with consent, the parties voluntarily agreed to the requested extension. *Cf.* Black's Law Dictionary (10th ed. 2014) ("Stipulation" is defined as "[a] voluntary agreement between opposing parties concerning some relevant point," while "consent" is defined as "[a] voluntary yielding to what another proposes or desires...").

deadline, a motion for summary judgment filed before the reset pretrial disclosure deadline would be timely.”); *cf. Trans-High Corp. v. JFC Tobacco Corp.*, 127 USPQ2d 1175, 1177 (TTAB 2018) (finding that where the close of discovery has not yet passed, a motion to extend the close of discovery effectively resets the time for serving discovery requests under Trademark Rule 2.120(a)(3), 37 C.F.R. § 2.120(a)(3)). In view thereof, Petitioner’s motion for summary judgment is timely.

Accordingly, Respondent’s motion to strike Petitioner’s motion for summary judgment is **denied**.

However, the motion for summary judgment exceeds the page limit. Trademark Rule 2.127(a), 37 C.F.R. § 2.127(a), provides that no motion “shall exceed twenty-five pages in length in its entirety, including table of contents, index of cases, description of the record, statement of the issues, recitation of the facts, argument, and summary.” Petitioner’s motion for summary judgment, including the table of contents and index of cases, is twenty-eight pages.

The Board generally does not consider briefs that exceed the page limit. *See Saint-Gobain Corp. v. Minn. Mining and Mfg. Co.*, 66 USPQ2d 1220, 1221-22 (TTAB 2003) (refusing to give consideration to briefs in excess of page limit and finding that although briefs on motions do not require information such as an index of cases or table of contents, should a party choose to include them, they are counted towards the page limit). Accordingly, Petitioner’s motion for summary judgment is **therefore given no consideration**.

Proceedings herein are resumed.³ Remaining dates are reset as follows:

Plaintiff's Pretrial Disclosures Due	7/14/2019
Plaintiff's 30-day Trial Period Ends	8/26/2019
Defendant's Pretrial Disclosures Due	9/10/2019
Defendant's 30-day Trial Period Ends	10/25/2019
Plaintiff's Rebuttal Disclosures Due	11/9/2019
Plaintiff's 15-day Rebuttal Period Ends	12/9/2019
Plaintiff's Opening Brief Due	2/7/2020
Defendant's Brief Due	3/8/2020
Plaintiff's Reply Brief Due	3/23/2020
Request for Oral Hearing (optional) Due	4/2/2020

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

³ This case was effectively suspended as of the filing date of Petitioner's motion for summary judgment. See Trademark Rule 2.127(d), 37 C.F.R. § 2.127(d). Accordingly, any renewed motion for summary judgment must be filed no later than the day before the reset deadline for Petitioner's pretrial disclosures.