

**In The United States Patent and Trademark Office  
Trademark Trial and Appeal Board**

Our Ref: 3017-001

In the Matter of:

Trademark FLORASOM  
Serial No. 75/571,522

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Nabisco Brands Company

Plaintiff/Opposer

v.

Opposition No. 116781

Floraceutical, Inc.

Applicant

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Trademark Trial and Appeal Board  
Assistant Commissioner of Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513



07-19-2002  
U.S. Patent & TMO/TM Mail Rcpt Dt. #61

**MOTION TO DISMISS**

Applicant, Floraceutical, Inc., through its counsel hereby Moves to Dismiss the above identified opposition on the grounds that the Plaintiff/Opposer has failed to prosecute this opposition. In support of this motion, applicant states as follows:

On September 19, 2001, the Trademark Trial and Appeal Board issued a revised discovery and trial schedule in the within case. Plaintiff's thirty (30) day testimony period expired on July 6, 2002. Plaintiff has not taken any discovery or testimony in the within case, nor has plaintiff served testimony upon applicant.

Pursuant to 37 C.F.R. § 2.132(a) ("Involuntary dismissal for failure to take testimony"), applicant's motion is timely filed. The time period for taking of discovery and for opposer to take testimony, have expired, and the time period for applicant to take testimony has not begun.

Opposer is in the position of plaintiff and has had since February 23, 2000 through July 6, 2002 to take discovery and testimony in this case. Opposer has not done so nor has opposer set forth any evidence to support any of the allegations in the Notice of Opposition. Opposer has not taken or noticed the taking of any testimony. Opposer has not served any discovery requests.

Opposer has failed to set forth any evidence to substantiate the allegations in the Notice of Opposition. Opposer bears the burden of proof, which encompasses not only the ultimate burden of persuasion, but also the obligation of going forward with sufficient proof of material allegations of the Notice of Opposition, which, if not countered, negates the Applicant's right to registration. *Sanyo Watch Co., Inc. v. Sanyo Electric Co., Ltd.*, 215 U.S.P.Q. 833 (Fed. Cir. 1982). Section 535.02 of the TBMP explains that "[t]he purpose of the motion under 37 CFR §2.132(a) is to save the defendant the expense and delay of continuing with the trial in those cases where plaintiff has failed to offer any evidence during its testimony period. See *Litton Business Systems, Inc. v. J. G. Furniture Co.*, 190 USPQ 431 (TTAB 1976). Here, as in *Litton*, "it is apparent that plaintiff has dropped the matter" and "has failed to present a prima facie case". *Id.*, at 434. Opposer has similarly failed to prosecute this opposition, and failed to offer any evidence in support of its Notice of Opposition. Opposer has apparently decided to do nothing.

37 C.F.R. § 2.132(a) provides that Opposer must, within fifteen (15) days demonstrate sufficient cause why judgment should not be entered against it. The rule requires a showing of "excusable neglect". In *Hewlett-Packard Co. v. Olympus Corp.*, 18 USPQ2d 1710 (Fed. Cir. 1991) the Federal Circuit affirmed the Trademark Trial and Appeal Boards definition of "excusable neglect" as being a "failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party." *Citing, Hewlett-Packard Co. v. Olympus Corp., Opposition No. 77,043, slip op. at 3 (TTAB April 10, 1990) (citing Black's Law Dictionary 508 (5th ed. 1979))*. Applicant is not aware of any reason

for Opposer's inaction in this case much less a reason constituting "excusable neglect". Further, Opposer has not made any attempts to communicate with Applicant's counsel in any manner since October 2000. Opposer has not offered any evidence to support its allegations in the Notice of Opposition, and has made no effort to attempt to establish a *prima facie* case against Applicant. *Id.*, at 1712.

For these reasons, Applicant respectfully requests that this opposition be dismissed with prejudice.

### EXPRESS MAILING CERTIFICATION

"Express Mail" mailing label number : EV098570327US  
Date of Deposit : July 18, 2002

I hereby certify that this **Motion to Dismiss** and any attachments are being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 C.F.R. §1.10 on the date indicated above and is addressed to the Assistant Commissioner of Trademarks 2900 Crystal Drive Arlington, VA 22202-3513.

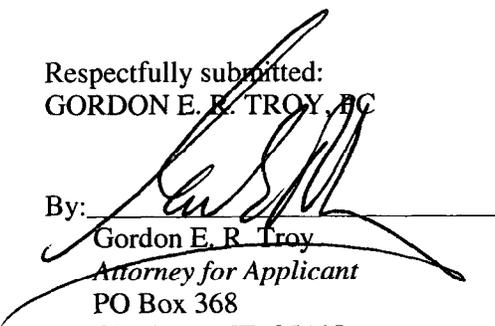
### Certificate of Service

The undersigned hereby certifies that a copy of the foregoing **Motion to Dismiss** has been served on counsel for by depositing same with the United States Postal Service with sufficient postage as first-class mail in an envelope addressed to:

Kathleen J. Gallagher, Esq.  
c/o Nabisco Brands Company  
100 Spear Street, Suite 1630  
San Francisco, CA 94105

on July 18, 2002.

Respectfully submitted:  
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July 18, 2002

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Dear Assistant Commissioner:

Kindly acknowledge and confirm receipt of the enclosed  
Motion to Dismiss  
by stamping and returning the self addressed stamped post card.

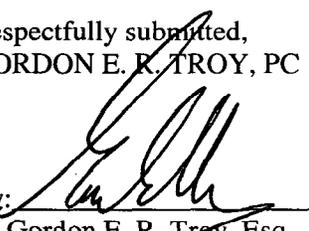
**EXPRESS MAILING CERTIFICATION**

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Date of Deposit : July 18, 2002

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Respectfully submitted,  
GORDON E. R. TROY, PC

By:   
Gordon E. R. Troy, Esq.  
*Attorney for Applicant*

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APPEAL BOARD  
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