

Defendant is the applicant in U.S. trademark application no. 75/813380 seeking registration for the Trademark "LABCAST".

Plaintiff filed opposition no. 911550161 in opposition to Plaintiff's request for registration of the Trademark "LABCAST".

Plaintiff's testimony period in Opposition no. 911550161 ended on August 2, 2002.

Plaintiff failed to take testimony in the allotted time period.

Defendant has filed a Motion for Involuntary Dismissal for Failure to Take Testimony.

Plaintiff now files this opposition to Defendant's Motion for Involuntary Dismissal for Failure to Take Testimony and Countermotion to Reopen Plaintiff's Testimony Period.

**Argument in Opposition to
Defendant's Motion to Dismiss for Failure to Take Testimony.**

Defendant has filed a Motion to Dismiss for Failure to Take Testimony in accordance with 37 CFR 2.132(a). 2.132(a) also states "The party in the position of plaintiff shall have fifteen days from the date of service of the motion to show cause why judgment should not be rendered against him. In the absence of a showing of good and sufficient cause, judgment may be rendered against the party in the position of plaintiff. If the motion is denied, testimony periods will be reset for the part in the position of defendant and for rebuttal."

The Court of Appeals for the Federal Circuit found that the TTAB properly annunciated the standard for excusable neglect as:

"Failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention or the willful disregard of the process of the court, but in consequence of some unexpected, or unavoidable hindrance of accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party." *Hewlett Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710 (Fed. Cir. 1991)

Discussion: First, Plaintiff believes his case has merit and wishes to continue prosecution on the merits. As evidence of this belief, Plaintiff attended a discovery deposition in March of 2002 which was noticed by Defendant. Further, Plaintiff has complied with all discovery requests and has made a good faith effort to accommodate defense counsel's requests.

Plaintiff offers the following reasons for not taking testimony during the prescribed time:

1. Plaintiff's father is very ill and this has necessitated frequent visits to first Florida and then Maryland to check on his condition.
2. Plaintiff has diabetes, which requires plaintiff to monitor his health.
3. Plaintiff was confused as to the nature of the testimony and what it was to be used for.
4. Plaintiff and Plaintiff's counsel were involved with settlement negotiations first, between plaintiff's counsel and defense counsel and then directly between Plaintiff and Defendant. These negotiations led plaintiff to believe that there was a possibility that this case would settle and therefore there was no need to take testimony.
5. Plaintiff owns and operates a small business. As such, he is the only person in the company familiar enough the conception and use of the trademark since its inception and it is very difficult to rearrange his schedule to accommodate depositions.

Plaintiff believes that the combination of reasons set forth above rise to the level of excusable neglect and plaintiff respectfully requests that the TTAB deny Defendants Motion to Dismiss for Failure to Take Testimony. Further, Plaintiff can see no reason why Defendant would be prejudiced by denial of this motion. There has been no significant lapse in time, there has been no destruction of evidence, to the best of Plaintiff's knowledge, all witnesses who would have been called prior to August 2, 2002 should still be available, and all defenses available to Defendant prior to August 2 are still available now.

Cross motion for reopening Plaintiff's period for taking testimony.

Regarding motions to reopen, TMBP Section 509.01 states: "If, however, the motion [for enlargement of time] is not filed until after the expiration of the period as originally set or previously extended, the motion is a motion to reopen, and the moving party must show that its failure to act during the time allowed therefore was the result of excusable neglect." In *Hewlett-Packard Co. v. Olympus Corp.* The Court of Appeals for the Federal Circuit found that the TTAB properly annunciated the standard for excusable neglect as:

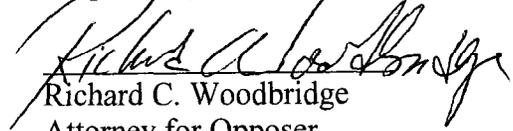
"Failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention or the willful disregard of the process of the court, but in consequence of some unexpected, or unavoidable hindrance of accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party." *Hewlett Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710 (Fed. Cir. 1991)

TMBP Section 509.02 says: ". . . it is preferable, at least where an unconsented motion seeks an extension or a reopening of a testimony period or period, or of the discovery period and testimony periods, that the motion request that the new period or periods be set to run from the date of the Board's decision on the motion."

Discussion: As stated above, Plaintiff continues to believe that his case has merit and wishes to have the case decided on the merits. Toward that end, Plaintiff has, attended a discovery deposition in March of 2002 which was noticed by Defendant. Further, Plaintiff has complied with all discovery requests and has made a good faith effort to accommodate defense counsel's requests.

Plaintiff believes he has demonstrated excusable neglect in failing to take testimony at the appointed time as detailed in the argument in opposition to Defendant's Motion to Dismiss for Failure to Take Testimony and therefore requests that the TTAB reopen the time period for taking testimony. Defendant has made no claim of prejudice in his moving papers with respect to Plaintiff's failure to take testimony. Further, Plaintiff can see no reason why Defendant would be prejudiced by reopening the testimony period. There has been no significant lapse in time, there has been no destruction of evidence, to the best of Plaintiff's knowledge, all witnesses who would have been called prior to August 2, 2002 should still be available, and all defenses available to Defendant prior to August 2 are still available now. Therefore Plaintiff respectfully requests that the TTAB reopen Plaintiff's testimony period to run from the date of the Board's decision.

Respectfully Submitted,


Richard C. Woodbridge
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Innovative Programming
Associates, Inc.

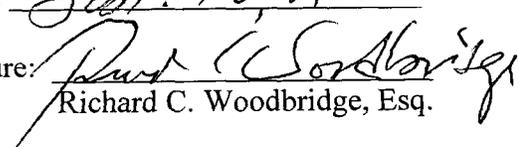
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I certify that this document is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 C.F.R. §1.10 on September 10, 2002 and is addressed to Commissioner of Trademarks, Attn: TTAB - NO FEE, 2900 Crystal Drive, Arlington, VA 22201-3513.

Dated: Sept. 10, 2002

Signature: 
Richard C. Woodbridge, Esq.

CERTIFICATE OF SERVICE

I certify that a copy of this document has been sent to counsel for Varian Inc.
via United States Postal Service, First Class postage pre-paid, addressed as follows:
Roy S. Gordet Esq., 530 Bush Street, Suite 601, San Francisco, CA 94108

Dated:

Sept. 10, 2007

Richard A. Gordon