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

Proceeding	91164500
Party	Defendant Lynette M. Thorlakson Thorlakson, Lynette M. 2515 109th Avenue SE Bellevue, WA 98004
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Date	09/19/2006
Attachments	LYTH-6-1002P0x MTN to DISMISS.pdf (5 pages)(98980 bytes)

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

Puppuccino, Inc. Opposer, v. Thorlakson, Lynette M. Applicant.	Opposition No. 91164500 Opposition No. 91164705 Serial Nos. 78/324,909 & 78/324,924 Marks: CATPUCCINO and CHIRPPUCCINO Serial No. 78/315,477 Mark: PUPPUCCINO

MOTION FOR INVOLUNTARY DISMISSAL

Applicant Lynette M. Thorlakson, applicant herein, moves pursuant to 37 CFR §2.132(a), for Involuntary Dismissal for Failure to Take Testimony. Appellant Puppuccino, Inc., has not taken any testimony. The 30 day testimony period for plaintiff Opposer has expired for a second time without any testimony being taken. Opposer's attention was directed to its inaction with the Board's Order to Show Cause Why Default Judgment Should Not Be Entered. After deadlines had passed, Opposer was granted an Extension Order, but told:

> Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.

Still no testimony was taken, and discovery was not responded to. Judgment of Involuntary Dismissal should be entered.

BACKGROUND

Applicant Lynette M. Thorlakson runs a very small business making pet treats. She timely and properly filed the applications for "Puppuccino," "Catpuccino," and "Chirppuccino," for dog, cat and bird pet treats. Despite the stress this action has caused her small business, Ms.

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Thorlakson has answered appellant, properly responded to all discovery, and has prepared to sustain her applications. Ms. Thorlakson's business plans have been delayed now for over a year by non-filings in this matter.

In response to discovery requests, appellant Opposer did not produce any documentation supporting its appeals. Now, even with extensions, appellant Opposer has not adduced any testimony in this matter.

The original schedules in these matters provided for the testimony period for Opposer to close January 13, 2006. No testimony was presented by Opposer by that date, nor was any request for extension made.

Counsel for Opposer withdrew. On April 11, 2006, the Board issued an Order for the Opposer to show cause why default judgment should not be entered. Opposer, *pro se,* responded and stated Opposer wanted to oppose and would prepare submittals.

A detailed Extension Order was issued June 30, 2006. That Extension Order told the parties to serve responses to any outstanding discovery requests within 30 days. Otherwise, discovery was closed. The 30 day testimony period for Opposer was reset to close September 15, 2006.

Appellant Opposer did not respond to the pending requests in 30 days, and has submitted no such discovery responses to date. During the course of this matter, Ms. Thorlakson has never received any business or transaction documents supporting appellant Opposer's claims in this matter.

As noted above, the Extension Order of June 30, 2006, stated that strict compliance with the rules was expected of all parties.

As of September 15, 2006, appellant Opposer noted no witnesses for testimony, conducted no testimony sessions, has not asked for an extension, and has not communicated with Ms. Thorlakson's counsel in any way. The 30 day testimony period for Opposer closed September 15, 2006.

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Undersigned counsel for Ms. Thorlakson, as of the date of the filing of this motion, September 19, 2006, has received no post testimony period requests or communications from appellant Opposer.

LEGAL ANALYSIS

37 CFR §2.132(a), Involuntary dismissal for failure to take testimony, provides:

> (a) if the time for taking testimony by any party in the position of plaintiff has expired and that party has not taken testimony or offered any other evidence, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute. The party in the position of plaintiff shall have 15 days from the date of service and the motion to show cause why judgment should not be entered 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 party in the position of defendant and for rebuttal.

Appellant Opposer Puppuccino, Inc., has not taken testimony, and §2.132(a) applies. These appeals should be involuntarily dismissed.

With dual and explicit warnings having been issued to appellant Opposer concerning the schedule, good and sufficient cause is not present, and dismissal should proceed. The Board is justified in enforcing its procedural deadlines. TBMP §534.02, at Note 477. Good and sufficient cause requires proof of "excusable neglect," because it requires reopening of the testimony period to introduce evidence. TBMP §534.02, at Note 478. Where due diligence is not present, the Board dismisses appeals for failure to introduce testimony. TBMP §534.02, at Note 479.

Here, (a) the appellant Opposer's failure to act has unnecessarily delayed Ms. Thorlakson; (b) the delay has now been nearly a year; (c) there is no reason for the delay other than inaction of appellant Opposer, (d) timing has always been in the reasonable control of appellant Opposer; and (e) good faith is absent with warnings already having been given. TBMP §509.01(b), at Note 147, incorporated by TBMP §534.02, at Note 479.

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"Due diligence", even were it here, is not enough:

> However, even if a sufficient showing of due diligence has been made, the Board will not automatically open the party's testimony period for introduction of the new evidence. The Board must also consider such factors as the nature and purpose of the evidence sought to be brought in, the state to the proceeding, and prejudice to the nonmoving party.

TBMP §509.01, at Note 154.

With no testimony presented, Opposer's burden as plaintiff has not been met. These appeals should be dismissed.

RESPECTFULLY SUBMITTED this 19th day of September, 2006.

/Richard R. Alaniz/
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of September, 2006, a true copy of the foregoing MOTION FOR INVOLUNTARY DISMISSAL was served via First Class U.S Mail, addressed as follows:

Tanya Shipman
3 SW Flagler Avenue
Stuart, CL 34994

EXECUTED on September 19, 2006.

/Richard R. Alaniz/
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