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

Proceeding	91176701
Party	Defendant Scott Anderson dba Time Passages, Ltd.
Correspondence Address	THOMAS W. FOLEY NYEMASTER, GOODE, WEST, HANSELL & O'BRIEN P.C., 700 WALNUT STREET DES MOINES, IA 50309-3899 UNITED STATES tfoley@nyemaster.com, hmrogers@nyemaster.com
Submission	Reply in Support of Motion
Filer's Name	Thomas W. Foley
Filer's e-mail	tfoley@nyemaster.com
Signature	/Thomas W. Foley/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK AND APPEAL BOARD

GAS PUMP HEAVEN, INC., Opposer, v. ANDERSON, SCOTT d/b/a TIME PASSAGES, LTD., Applicant.	Opposition No. 91176701 Serial no. 78849739 Filing Date: March 30, 2006 Publication Date: March 14, 2007 **REPLY TO OPPOSER'S BRIEF IN OPPOSITION TO APPLICANT'S MOTION FOR INVOLUNTARY DISMISSAL**

Applicant Scott Anderson d/b/a Time Passages, Ltd. submits the following in reply to Opposer's brief filed in opposition to Applicant's Motion for Involuntary dismissal.

ARGUMENT

I. THE DESIGNATED TIME PERIOD FOR FILING INVOLUNTARY DISMISSAL MOTIONS IS PERMISSIVE

The rule governing motions for involuntary dismissal states that such motions "must be filed before the opening of the testimony period of the moving party, except that the Trademark Trial and Appeal Board may in its discretion grant [the] motion . . . even if the motion was filed after the opening of the testimony period of the moving party." 37 C.F.R. § 2.1329(c). Because the TTAB has discretion to grant a motion for involuntary dismissal filed after the opening of the movant's testimony period, this is a permissive rather than a mandatory rule.

The TTAB has considered and granted such motions on numerous occasions, even when filed after the moving party's testimony period had opened.[1] Further, the TTAB has, on its own

[1] *See, e.g.*, *Mattel, Inc. v. Henson*, 88 Fed. Appx. 401 (Fed. Cir. 2004) (affirming TTAB decision dismissing case in response to applicant's motion filed more than two months after applicant's testimony period opened); *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551 (Fed Cir. 1991) (affirming TTAB's grant of dismissal based on

initiative, dismissed proceedings based on an opposer's failure to present evidence during the appropriate testimony period, even when the applicant did not request such dismissal.[2] Ultimately, consideration of Applicant's Motion for Involuntary Dismissal is warranted at this stage to determine whether there is any need for the TTAB to continue committing its time to overseeing this proceeding. Based on the foregoing, Applicant's Motion for Involuntary Dismissal should not be denied as untimely.

II. OPPOSER'S RELIANCE UPON ITS OPPOSITION AND APPLICANT'S ANSWER IS INSUFFICIENT TO MEET ITS EVIDENTIARY BURDEN

Rather than putting forward "good cause" as to why it did not take any testimony or submit any evidence during its testimony period, Opposer instead contends that Applicant's admissions in his Answer are sufficient to meet Opposer's evidentiary burden. Opposer, however, takes inaccurate liberties with, and misapprehends the scope of, the statements Applicant included in its Answer.

First, Opposer asserts that Applicant admitted that Opposer and it "have both used the trademark aesthetically on their gas pump replicas for years." That assertion is misleading. Applicant admitted only that "Opposer has been using the Applicant's 'CAPCOLITE NO. 216 THE CINN. ADV. PRODUCTS CO." trademark on the gasoline pump globe frames it

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applicant's motion for dismissal filed nearly two months after applicant's testimony period opened); *Old Nutfield Brewing, Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701 (T.T.A.B. 2002) (granting dismissal to applicant based on motion filed more than six months after the opening of applicant's testimony period); *Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 USPQ2d 1858 (T.T.A.B. 1998) (concluding that dismissal was appropriate pursuant to applicant's motion filed approximately one week after applicant's testimony period opened); *Grobet File Co. of Am., Inc. v. Assoc. Distrib., Inc.*, 12 USPQ2d 1649 (T.T.A.B. 1989) (dismissing proceeding pursuant to applicant's motion filed almost five months after applicant's testimony period opened).

[2] *See, e.g.*, *Gaudreau v. Am. Promotional Events, Inc.*, 82 USPQ2d 1692 (T.T.A.B. 2007) (concluding that dismissal was appropriate because opposers' failure to present evidence during their testimony period meant that they could not meet their burden of proof in the case); *Gaylord Entm't Co. v. Calvin Gilmore Prods., Inc.*, 59 USPQ2d 1369 (T.T.A.B. 2001) (dismissing proceedings because opposer took no testimony and submitted no evidence during its testimony period); *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (T.T.A.B. 1997) (finding further proceedings unnecessary based on opposer's failure to carry its burden of proof by failing to submit testimony or evidence during its testimony period).

manufactures since at least 2005." (Answer, ¶ 3). The remainder of Opposer's allegations including this alleged "aesthetic" use of the Mark and the reference to "gas pump replicas" were denied. (Answer, ¶ 3; Notice of Opposition ¶ 3). In addition, Opposer fails to point out that it used the Mark over Applicant's objections, and that it was Opposer's continued unauthorized use of Applicant's trademark that caused Applicant to seek federal registration of the Mark.

Opposer next insists Applicant admitted that both Opposer and Applicant have placed the Mark "on their gas pump replicas at the same place the original antique gas pumps were marked with this designation." In reality, Applicant denied all allegations in paragraphs four and six of the Opposition while admitting only that both Opposer and Applicant place the Mark on "the gasoline pump globe frames [they] manufacture[] in the same place as the designation appeared on the gasoline pump globe frames Cincinnati Advertising Company previously manufactured." (Answer, ¶¶ 4, 6; Notice of Opposition ¶¶ 4, 6). Applicant did not admit either that it makes or places the Mark on "gas pump replicas," or that it places the Mark in the same place as the "original antique gas pumps." (Answer, ¶¶ 4, 6). This is important because Opposer has presented no evidence that the products at issue upon which the Mark is located are "replicas" of "original antique gas pumps," and it should not be allowed to couch these assertions as "evidence" by claiming Applicant admitted them.

Finally, Opposer states Applicant admitted the "Cincinnati Advertising Products Co. was dissolved before the Applicant purchased the <u>replica gasoline pump globe frames</u> upon which the company's previous Mark is applied." (Opposition, pp. 2-3) (emphasis added). This is incorrect. Applicant admitted only that the Cincinnati Advertising Products Co. dissolved before Applicant bought the <u>molds</u> previously owned by that company. (Answer, ¶ 7). Applicant did not purchase "replica gasoline pump globe frames" bearing the Cincinnati Company's "previous

Mark." This is an important distinction because Opposer is insinuating that Applicant purchased replica gas pump frames bearing the Cincinnati Company's "mark" in order to create its own "replica" gas pump globe frames. On the contrary, Applicant bought the Cincinnati Company's original molds to create its gas pump globe frames.

From the three very limited admissions discussed above, Opposer contends that the Mark "is merely attractive and ornamental, but is not functional and thus cannot be entitled to trademark protection" and, as such, not entitled to trademark protection. (Opposition, p. 3). Opposer adds, without providing any evidentiary support, that the Mark "does not identify the origin of the goods, guarantee the quality of the goods, or possess an inherent advertising appeal which serves to create a market for the goods involved." (Opposition, p. 3). None of these assertions are, however, supported by the record, and they are certainly not supported by the limited admissions Applicant made in its Answer. Further, and more importantly, the TTAB cannot conclude, as a matter of law, that the Mark does not constitute a legitimate trademark based on the limited record now before it, which is essentially what Opposer's resistance asks it to do.

As the party bringing this action, Opposer has the burden of putting forward evidence to support its case. *Old Nutfield Brewing, Co.*, 65 USPQ2d at 1704; *PolyJohn Enters. Corp. v. 1-800-Toilets, Inc.*, 61 USPQ2d 1860, 1862 (T.T.A.B. 2002); *Procyon Pharmaceuticals, Inc. v. Procyon Biopharma, Inc.*, 61 USPQ2d 1542, 1544 (T.T.A.B. 2001). Opposer has presented no evidence to support any of the claims it made in its Opposition to dismissal or the other claims it made in its Notice of Opposition.[3] Instead, it asserts legal arguments that assume facts not in evidence to support its contentions. This is simply not sufficient to meet Opposer's burden.

[3] In its resistance, Opposer states the following factual allegations: (1) Opposer uses the Mark as "an aesthetic feature of its gas pump replicas;" (2) Opposer uses the Mark "solely for the purpose of producing as accurate a

The statements and contentions generated by Opposer in its Opposition to Applicant's motion do not constitute evidence. (TBMP § 704.06(a)). Its claims require more support than these three statements by Applicant to move forward. *Yamaha Int'l Corp. v. Hoshino Gakki Co., Ltd.*, 840 F.2d 1572, 1579 (Fed. Cir. 1988) (finding it "beyond question" that an opposer "has the burden of proof to establish that applicant does not have the right to register its mark . . . which encompasses not only the ultimate burden of persuasion, but also the obligation of going forward with sufficient proof of the material allegations of the Notice of Opposition . . ."). Contrary to Opposer's contention, nothing in the record suggests that Applicant's request for registration does not meet the requisite qualifications. *See* 15 U.S.C.A. § 1127; *see also Au-Tomotive Gold, Inc. v. Volkswagen of Am.*, Inc., 457 F.3d 1062, 1067 (9th Cir. 2006); *Liberty Mut. Ins. Co. v. Liberty Ins. Co. of Texas*, 185 F. Supp. 895, 901 (E.D. Ark. 1960). Applicant contends that the Mark does just that and Opposer has submitted no evidence to the contrary. Because Opposer has failed to take any testimony or offer any other evidence during its prescribed testimony period, it cannot meet its required burden of proof as plaintiff in this case; thus dismissal is appropriate. *Gaudreau*, 82 USPQ2d 1692 (T.T.A.B. 2007); *see HKG Indus., Inc. v. Perma-Pipe, Inc.*, 49 USPQ2d 1156, 1158 (T.T.A.B. 1998); *Pumpkin*, 43 USPQ2d at 1588; *Atlanta-Fulton County Zoo, Inc*, 45 USPQ2d 1858, 1860 (T.T.A.B. 1998).

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replica as possible to the original antique gas pumps;" (3) Applicant uses the Mark "solely for the aesthetic purpose of producing as accurate a replica as possible to the original antique gas pumps;" (4) the Mark is a replication of the original patent notification for Reg. Pat. No. 1,933,866, that was placed on the glass globes of original antique gas pumps by The Cincinnati Advertising Products Company, an Ohio entity that has been dissolved since December of 1955"; (5) the Mark does not "identify and distinguish" Applicant's goods from other sources of goods; (6) Applicant uses the Mark "as an ornamental feature of the gas pump replicas, placed as it would have appeared on the original antique gas pumps, in order to produce an accurate replica;" (7) the Mark was "originally placed for identification and patent notification purposes by The Cincinnati Advertising Products Company;" and (8) "[b]ecause the Cincinnati Advertising Products Company has dissolved and consequently abandoned its intellectual property rights," Opposer is entitled fair use of the Mark for its "gas pump replica business to ensure accurate replication of original antique has pumps that had globes marked with [the Mark]." (Notice of Opposition, ¶¶ 1-10). Applicant never admitted these allegations and as is noted above, and Opposer failed to gather any evidence for any of them. The assertions remain bald allegations that should not be considered.

CONCLUSION

Opposer had presented no evidence in support of its claims and has no good cause for its failure to do so. Opposer's case has no merit, and should not be allowed to proceed. Therefore, Applicant requests its Motion for Involuntary Dismissal be granted and that Opposer's Opposition be dismissed with prejudice.

/s/Thomas W. Foley AT0002589
Hannah M. Rogers AT0006724
NYEMASTER, GOODE, WEST,
HANSELL & O'BRIEN, P.C.
700 Walnut Street, Suite 1600
Des Moines, IA 50309
Telephone: (515) 283-3109
Facsimile: (515) 283-8045
E-Mail: tfoley@nyemaster.com
hmrogers@nyemaster.com

ATTORNEYS FOR APPLICANT

CERTIFICATE OF TRANSMISSION AND SERVICE

The undersigned hereby certifies that this correspondence is being transmitted via ESTTA to the United States Patent and Trademark Office on April 4, 2008, which will send notification to the following ESTTA system participant:

Nora M. Kane
STINSON MORRISON HECKER LLP
1299 Farnam Street, 15th Floor
Omaha, NE 68102
Telephone: (402) 930-1740
Facsimile: (402) 829-8733
E-mail: nkane@stinson.com

ATTORNEYS FOR OPPOSER

/s/Thomas W. Foley AT0002589
NYEMASTER, GOODE, WEST,
HANSELL & O'BRIEN, P.C.
700 Walnut Street, Suite 1600
Des Moines, IA 50309
Telephone: (515) 283-3109
Facsimile: (515) 283-8045
E-Mail: tfoley@nyemaster.com

ATTORNEYS FOR APPLICANT