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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
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Attachments	Motion for Involuntary Dismissal.pdf (4 pages)(13466 bytes) Motion for Involuntary Dismissal_Brief.pdf (5 pages)(19186 bytes)

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

<p>GAS PUMP HEAVEN, INC.,</p> <p>Opposer,</p> <p>v.</p> <p>ANDERSON, SCOTT d/b/a TIME PASSAGES, LTD.,</p> <p>Applicant.</p>	<p>Opposition No. 91176701</p> <p>Serial no. 78849739</p> <p>Filing Date: March 30, 2006</p> <p>Publication Date: March 14, 2007</p> <p>MOTION FOR INVOLUNTARY DISMISSAL</p>
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Applicant Scott Anderson d/b/a Time Passages, Ltd. requests that Opposer Gas Pump Heaven, Inc.'s Opposition be involuntarily dismissed pursuant to 37 C.F. R. § 2.132(a) and in support of such request states as follows:

1. Applicant filed his Application for registration of the mark "CAPCOLITE NO. 216 THE CINN. ADV. PRODUCTS CO" ("the Mark") on March 30, 2006.
2. Opposer filed its Opposition on April 11, 2007.
3. The Trademark Trial and Appeal Board ("TTAB") issued a scheduling order on April 11, 2007 with discovery set to close on October 28, 2007, the period for Opposer's testimony to end on January 26, 2008, and the period for Applicant's testimony to close on March 26, 2008.
4. Applicant filed his Answer to Opposer's Opposition on May 18, 2007, denying Opposer's claims.
5. Opposer has filed no other pleadings in this matter.

6. The Opposer has the burden of coming forward with evidence to support its case, but has not done so in this matter. *Old Nutfield Brewing Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1704 (T.T.A.B. 2002).

7. During Opposer's testimony period, Opposer took no testimony and offered no other evidence.

8. Opposer did not request any extension of its testimony period.

9. TTAB Manual of Procedure Rule 534 provides that, pursuant to 37 C.F.R. § 2.132(a), Applicant may move for involuntary dismissal of Opposer's Opposition for failure to prosecute if Opposer took no testimony and offered no evidence before the close of its testimony period.

10. Opposer can show no "good and sufficient" cause as to why judgment should not be rendered against it at this time, as required by Rule 2.132(a).

11. Because Opposer's testimony period has closed and Opposer failed to take any testimony or offer any other evidence it cannot meet its burden of proof as plaintiff in this case; thus dismissal is appropriate. *Gaudreau v. American Promotional Events, Inc.*, 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) (finding no reason to go forward with the rest of the case because petitioner failed to offer any testimony or trial evidence and thus could not meet its burden of proof); *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1588 (T.T.A.B. 1997) (concluding that opposer did not carry its burden of proof because it failed to offer any evidence in support of its claims during the assigned testimony period; thus, it could not prevail); *Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 USPQ2d 1858, 1860 (T.T.A.B. 1998) (stating dismissal is appropriate

where plaintiff's testimony period has expired and plaintiff neither took any testimony nor offered any evidence).

THEREFORE, Applicant requests its Motion for Involuntary Dismissal be granted and that Opposer's Opposition be dismissed with prejudice.

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The undersigned hereby certifies that this correspondence is being transmitted via ESTTA to the United States Patent and Trademark Office on March 10, 2008, which will send notification to the following ESTTA system participant:

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I. INTRODUCTION

Applicant filed his request for registration of the mark “CAPCOLITE NO. 216 THE CINN. ADV. PRODUCTS CO” (“the Mark”) with the Trademark Trial and Appeal Board (“TTAB”) on March 30, 2006. In opposing this Application on April 11, 2007, Opposer claimed that (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 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) Opposer is entitled fair use of the Mark for its gas replica business. In his Answer to this Opposition, Applicant denied Opposer’s claims. Opposer has submitted no evidence in support of its claims.

II. STANDARD FOR INVOLUNTARY DISMISSAL

TTAB Manual of Procedure Rule 534 provides that if any party in the position of plaintiff (Opposer) fails to present any testimony or other evidence during its assigned testimony period, the party in the position of the defendant (Applicant) may move for dismissal for failure of the plaintiff to prosecute. TTAB Rule 534.01(a) (relying on 37 C.F.R. § 2.132(a)). The Opposition may be dismissed if Opposer cannot then show “good and sufficient cause” regarding why it did not present any testimony or other evidence during the time allotted. *Id.*

In the context of 37 C.F.R. § 2.132(a), the “good and sufficient cause” standard is equivalent to the standard for “excusable neglect” which must be met by any motion filed under Federal Rule of Civil Procedure 6(b) requesting reopening of a plaintiff’s testimony period. *Mattel, Inc. v. Henson*, 88 Fed. Appx. 401, 402-03 (Fed. Cir. 2004) (citing *HKG Indus., Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156, 1157 (T.T.A.B. 1998)). An inquiry into “excusable neglect” has been defined by the United States Supreme Court and adopted by the TTAB as an “equitable one,” which takes account of the full scope of relevant circumstances pertaining to the party’s omission. *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1584-88 (T.T.A.B. 1997) (citing *Pioneer Investment Servs. Co. v. Burnswick Assocs. Ltd. P’ship*, 507 U.S. 380 (1993)).

Under this “excusable neglect” standard, the factors which may be taken into account in this analysis include (1) the danger of prejudice to the nonmoving party; (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay (including whether it was within the reasonable control of the movant), and (4) whether the movant acted in

good faith. *Mattel*, 88 Fed. Appx. at 403; *Pumpkin*, 43 USPQ2d at 1586 (citation omitted). The TTAB has determined that the third factor is the most important of all the factors in the “excusable neglect” analysis. *Old Nutfield Brewing, Co. v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1702 (T.T.A.B. 2002) (citing *Pumpkin Ltd.*, 43 USPQ2d at 1586, n.7); *see, e.g.*, *PolyJohn Enters. Corp. v. 1-800-Toilets, Inc.*, 61 USPQ2d 1860, 1861 (T.T.A.B. 2002); *Gaylord Entertainment Co. v. Calvin Gilmore Productions, Inc.*, 59 USPQ2d 1369, 1371 (T.T.A.B. 2001); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 USPQ2d 1848, 1852 (T.T.A.B. 2000); *HKG Indus., Inc.*, 49 USPQ2d at 1157; *Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 USPQ2d 1858, 1859 (T.T.A.B. 1998). Further, with regard to the second factor (regarding the length of the delay if Opposer’s testimony period were reset) the TTAB has found that it is appropriate to consider not only the delay between the close of Opposer’s testimony period and the filing of its motion to reopen, but the total delay caused by Opposer’s failure to submit testimony during its prescribed time—including the “additional delay required to brief and decide the motion to reopen.” *Old Nutfield Brewing, Co.*, 65 USPQ2d at 1703 (citation omitted) (“Both the Board and the applicant clearly have an interest in seeing the expeditious resolution of this proceeding. Furthermore, the Board’s workload is unnecessarily increased when it must devote time and resources to ruling on motions resulting from avoidable delays.”); *see Pumpkin Ltd.*, 43 USPQ2d at 1588 (“The Board, and parties to Board proceedings generally, clearly have an interest in minimizing the amount of the Board’s time and resources that must be expended on matters, such as most contested motions to reopen time, which come before the Board solely as a result of a sloppy practice or inattention to deadlines on the part of litigants or their counsel. The Board’s interest in deterring such sloppy practice weighs heavily against a finding of excusable neglect, under the second [] factor.”).

III. ARGUMENT

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.*, 61 USPQ2d at 1862; *Procyon Pharmaceuticals, Inc. v. Procyon Biopharma, Inc.*, 61 USPQ2d 1542, 1544 (T.T.A.B. 2001). Because Opposer failed to take any testimony or offer any other evidence during its prescribed testimony period, it cannot meet its burden of proof as plaintiff in this case; thus dismissal is appropriate. *Gaudreau v. American Promotional Events, Inc.*, 82 USPQ2d 1692 (T.T.A.B. 2007); *see HKG Indus., Inc.*, 49 USPQ2d at 1158 (finding no reason to go forward with the rest of the case because petitioner failed to offer any testimony or trial evidence and thus could not meet its burden of proof); *Pumpkin*, 43 USPQ2d at 1588 (concluding that opposer did not carry its burden of proof because it failed to offer any evidence in support of its claims during the assigned testimony period; thus, it could not prevail); *Atlanta-Fulton County Zoo, Inc.*, 45 USPQ2d 1858, 1860 (T.T.A.B. 1998) (stating dismissal is appropriate where plaintiff's testimony period has expired and plaintiff neither took any testimony nor offered any evidence).

IV. CONCLUSION

Opposer had presented no evidence in support of its claims and has no good cause for its failure to do so. Therefore, Applicant requests its Motion for Involuntary Dismissal be granted and that Opposer's Opposition be dismissed with prejudice.

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