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

Proceeding	91212069
Party	Defendant Haze Tobacco, LLC
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Submission	Motion to Dismiss 2.132
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Application Serial No. 85/832429
Published in the *Official Gazette* June 18, 2013

THE CANDY WRAPPERS, LLC

Opposition No. 91202169

Opposer,

v.

HAZE TOBACCO, LLC,

Applicant.

APPLICANT HAZE TOBACCO, LLC'S MOTION FOR JUDGMENT

Pursuant to Rule 2.132(a) and (b) of the Trademark Rules of Practice, 37 C.F.R. §2.132(a) and (b), Applicant Haze Tobacco, LLC. ("Applicant"), through Counsel, moves for Judgment on the grounds that Opposer The Candy Wrappers, LLC ("Opposer") has failed to prosecute. Opposer has failed to take any testimony in this matter and has failed to introduce any evidence in support of its Opposition and the time to do so has expired.

FACTS

On August 8, 2013 Opposer filed its Notice of Opposition, No. 91212069, against Applicant's Application No. 85832429. The Board set a Case Schedule, which provided that Expert Disclosures were due March 26, 2014; Discovery Closed April 25, 2014; Plaintiffs pre-trial disclosures were due June 9, 2014; and Plaintiffs 30-day trial ended July 24, 2014. Applicant filed its answer on September 23, 2013, within the time set for Applicant to do so by the Board's Case Schedule. No further communication has been had between the parties or their

attorneys. Opposer has made no Expert Disclosures, nor has Opposer made any discovery or submitted any testimony. Moreover, Opposer has failed to introduce any testimony whatsoever which shows ownership and record title in the pleaded registration in its Notice of Opposition.

ARGUMENT

Rule 2.132(a) provides that a party may obtain an involuntary dismissal for failure of the party in position of Plaintiff to take any testimony or offer any other evidence. In this case, Opposer has not submitted a copy of any registration into evidence and has not obtained any discovery or taken any testimony. While Opposer references its purported trademark registration in its Notice of Opposition, that alone does not meet the requirements of 37 C.F.R. §2.122(d)(1) in order for the trademark registrations to be made of record as evidence. The Rule reads, in relevant part, as follows:

A registration of the Opposer or Petitioner pleaded in an opposition or petition to cancel will be received in evidence and made part of the record if the opposition or petition is accompanied by an original or photocopy of the registration prepared and issued by the United States Patent and Trademark Office showing both the current status of and title to the registration, or by a current printout of the information from the electronic database records of the USPTO showing the current status and title of the registration.

No original or photocopy of the registration prepared and issued by the United States Patent and Trademark Office showing both the current status of and title to the registration, or by a current printout of the information from the electronic database records of the USPTO showing the current status and title of the registration” was attached to the Notice of Opposition. As such, that purported registration is not in evidence. Therefore, it is appropriate that the Applicant now move for Judgment under Rule 2.132(a). *See Hewlett-Packard Co. v. Olympus Corp.*, 18 USPQ2d 1710 (Fed. Cir. 1991); *Hartwell Co. v. Shane*, 17 USPQ2d 1569, at fn4 (TTAB 1990);

Hester Industries, Inc. v. Tyson Foods, Inc., 2 USPQ2d 1646 (TTAB 1987).

Rule 2.132(a) relieves the Applicant from the burden of having to incur the expense and the time of a trial where the Opposer has wholly failed to prosecute its case. As Opposer has presented no record evidence or testimony establishing its case, it has shown no right to relief. Accordingly, Applicant moves for Judgment under 37 C.F.R. §2.132(a).

Even assuming, arguendo, that the registration pleaded by Opposer is part of the evidentiary record under 37 C.F.R. §2.122(d)(1), Opposer's opposition is dismissible for failure to take testimony under 37 C.F.R. §2.132(b). Subsection (b) of Rule 2.132 provides that if no evidence other than trademark registrations are offered into evidence, an Applicant can move for dismissal "on the ground that upon the law and the facts the party in the position of Plaintiff has shown no right to relief" 37 C.F.R. §2.132(b). As such, Applicant's motion should be granted.

The rule states:

If no evidence other than a copy or copies of Patent and Trademark Office records is offered by any party in the position of Plaintiff, 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 that upon the law and the facts the party in the position of Plaintiff has shown no right to relief.

37 C.F.R. §2.132(b)

The Trademark Trial and Appeal Board has frequently ruled under 37 C.F.R. §2.132(b) that when the only evidence in the record is the Opposer's registration(s), the Applicant is entitled to dismissal. *Hyde Park Footwear v. Hampshire-Designers, Inc.*, 197 USPQ639 (TTAB 1977) is frequently cited for this proposition. In that case, the Applicant's trademark SEAL HARBOR was alleged to create a likelihood of confusion, mistake or deception by virtue of the

similarity of the mark to the mark of the Opposer Hyde Park Footwear. The Board stated:

The registrations alone are incompetent to establish any facts with regard to the nature or extent of Opposer's use and advertising of its trademarks or any reputation they enjoy or what purchaser's reactions to them may be...however, when there is a difference between the marks or between the goods, or both, it is incumbent upon the Plaintiff to persuade us that there is a reasonable likelihood of confusion.

Id. at 641. *See Syntex (U.S.A.) Inc. v. E.R. Squibb & Sons Inc.*, 14 USPQ2d 1879, 1880 (TTAB 1990).

The Board's recent precedential decision in *Sterling Jewelers Inc. v. Romance & Co., Inc.*, 110 USPQ2d 1598 (TTAB 2014) is directly on point. In that case, just as in this case, Sterling Jewelers filed a notice of opposition, but then took no testimony and offered no evidence during its trial period. Sterling Jewelers did attach a copy of its pleaded registration (more than Opposer has done in this case), but still the Board found that did not put that registration into evidence. Just as with Opposer in this case, Sterling Jewelers did not take any discovery or take any evidence. Accordingly, the Board granted Romance & Co.'s motion for involuntary dismissal and dismissed the notice of opposition in that case with prejudice.

Another recent decision by the Board is on point. *Ston Cor Group, Inc. v. Cupa Materiales, S.A.*, Opposition No. 91190420 (TTAB 2012). While not precedential, the reasoning of the Board is applicable in this case.

Here, while both of the marks at issue include the same word combination "Candylicious," the similarity between the marks ends there. Applicant's mark is used in connection with its flavored hookah tobacco (International Class 34), whereas the purported mark of Opposer is used in connection with a candy store (International Class 30). Accordingly, it is entirely likely that the marks create very different and distinct commercial impressions upon

consumers and there is no likelihood of confusion. Absent testimony and other evidence to prove likelihood of confusion, Opposer has failed to meet its burden and Applicant's motion should be granted.

For the foregoing reasons, the Board should grant Applicant Haze Tobacco, LLC's motion for Judgment.

Respectfully submitted,
HAZE TOBACCO, LLC

Dated: September 22, 2014

By: /Kevin Shenkman/ _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion for Judgment has been served by First Class postage prepaid mail to attorney of record for Opposer, MICHAEL S. SPRADLEY, SPRADLEY PLLC, 3200 SOUTHWEST FREEWAY, SUITE 3300, HOUSTON, TX 77027.

On this 22nd day of September, 2014

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