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TO:	**Karl Kochersperger**
FROM:	**Maria Starn, Esq.**
DATE:	**December 29, 2006**
BWB&O FILE NO.:	**1174.272 / File No. Cancellation Proceeding #92043152**
NO. OF PAGES:	**31**
MESSAGE:	**Re: Motion to Dismiss mailed 12/7/06. Please note that the attachments to the Declaration of MAS were too lengthy to fax.**

If you have any problems, please call Francesca at (949) 221-1000.

PLEASE DELIVER THIS TRANSMISSION AS SOON AS POSSIBLE.

Nicole Whyte, Esq.
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Attorney for Registrant
SANTANA'S GRILL, INC.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ARTURO SANTANA GALLEGO, Petitioner, v. SANTANA'S GRILL, INC., Registrant.	Cancellation Nos. 92043152 (Consolidated) 92043160 92043175 I hereby certify that this Motion for Default Judgment and the concurrently filed Declaration of Michael A. Sandstrum, and all marked attachments, if any, are being deposited with the United States Post Office via Certified Mail and addressed to Trademark Trial & Appeal Board, P.O. Box 1451, Alexandria, VA 22313-1451 12-7-06 Date Michael A. Sandstrum

REGISTRANT'S MOTION FOR JUDGMENT UNDER TRADEMARK RULE 2.132(a)

Registrant, SANTANA'S GRILL, INC., hereby submits this Motion to Dismiss the Petitions to Cancel filed by Petitioner, ARTURO SANTANA GALLEGO, including Cancellation Proceeding Nos. 92043152, 92043160, and 92043175 (consolidated), on grounds that Petitioner has failed to prosecute his case. 37 C.F.R. § 2.132(a); *Procyon Pharmaceuticals*

Inc. v. Procyon Biopharma Inc., 61 USPQ2d 1542 (T.T.A.B. 2001). Specifically, Petitioner's testimony period closed on October 16, 2006 (extended from September 29, 2006) without the taking of any testimony and without the submission of any documentary evidence or otherwise to the Board. In light of Petitioner's complete failure to introduce any evidence in support of the claims asserted in the Petitions to Cancel Registration Nos. 2631458, 2682978, and 2634976, a default judgment dismissing this cancellation proceeding should be taken against Petitioner.

I. INTRODUCTION

Petitioner's Trial Testimonial period was set to close on September 30, 2006. However, on September 22, 2006, in lieu of taking trial testimony, Petitioner made a written settlement offer to Registrant. [Declaration of Michael A. Sandstrum ("Sandstrum Decl.") at ¶ 2] The basic terms of the settlement offer included the payment of certain monies to Petitioner in exchange for Registrant's exclusive right to use the disputed service marks/names and a dismissal of the pending action, among other terms. [Id. at Exh. A.] On the same day, Registrant confirmed its acceptance to the basic terms of Petitioner's settlement offer. [Id. at Exh. B] In a good faith attempt to work out the details of a written Settlement Agreement and Release without prejudicing Petitioner, Registrant proposed a two-week extension of Petitioner's trial testimony period which was set to close on September 30, 2006. [Sandstrum Decl. at ¶ 3, Exh. C.] Upon receiving Petitioner's consent to the same, on September 26, 2006, *Registrant* filed a motion with the Board to extend *Petitioner's* trial testimony period to October 16, 2006. **All other dates, including Registrant's own testimony period, were requested to remain the same.** The Board granted the consent motion on October 4, 2006.

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With Registrant's 30-day testimony period set to open on October 30, 2006, Registrant made every effort to finalize the terms of the Settlement Agreement before the commencement of its testimony period. On September 25, 2006, September 26, 2006, September 27, 2006 and October 4, 2006, Registrant sent written correspondence to Petitioner with draft language for the written Settlement Agreement and requested Petitioner's comments/proposed language regarding the same. [Sandstrum Decl. at ¶ 4, Exh. D.] However, Petitioner failed to respond to Registrant's repeated requests for draft language to incorporate into the Settlement Agreement.

On October 10, 2006, without sending any comments or proposed language to Registrant, Petitioner requested that Registrant forward a copy of its proposed settlement agreement so that, in the words of Petitioner, "we can wrap this up." [Sandstrum Decl. at ¶ 5, Exh. E.] In response, on October 12, 2006, Registrant emailed Petitioner a copy of its draft Settlement Agreement and Mutual Release ("Agreement") and requested that Petitioner advise of any comments as soon as possible. [Sandstrum Decl. at ¶ 6, Exh. F.] On October 19, 2006, still having heard nothing from Petitioner, Registrant sent another email to Petitioner requesting Petitioner's comments to the Settlement Agreement noting that time is of the essence with the Registrant's impending trial testimonial period set to open the following month. [Sandstrum Decl. at ¶ 7, Exh. G.]

It was not until October 27, 2006 that Petitioner responded to the draft Agreement sent by Registrant on October 12, 2006. [Sandstrum Decl. at ¶ 8, Exh. H.] By email dated October 27, 2006, Petitioner confirmed that "the agreement is fine as is." [Id.] The only issue that arose was in connection with Petitioner's request of Registrant to share in the costs of transcribing the Settlement Agreement from English to Spanish. [Id.] However, again on October 31, 2006,

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Petitioner reassured Registrant that Petitioner is "agreeable on the material points" of the written Agreement. [Id.]

On November 2, 2006, Registrant confirmed via e-mail to Petitioner that Petitioner approved the written Settlement Agreement and Mutual Release prepared by Registrant. [Sandstrum Decl. at ¶ 9, Exh. I.] Registrant attached yet another copy of the Agreement to the e-mail for transcription by Petitioner with only minor revisions to the dates and a request for a physical address for "Notice" issues to be incorporated into the Agreement. [Id.]

On November 6, 2006 and November 7, 2006, with no response from Petitioner, Registrant sent yet another email to Registrant emphasizing the need to finalize the Agreement to avoid further disruption to Registrant's business plans. [Sandstrum Decl. at ¶ 10, Exh. J.] Registrant continued to request that the Agreement be fully executed as soon as possible, and after not received a response gave Petitioner until November 10, 2006.

Due to the substantial delay on the party of the Petitioner, on November 7, 2006, over six weeks since the tentative settlement had been reached on September 22, 2006, and in an effort to protect its interests, **Registrant obtained the consent of Petitioner to file a motion to extend the close of Registrant's testimony period to December 21, 2006.** [Sandstrum Decl. at ¶ 11] The consent motion was granted by the Board on November 8, 2006. [Id.] The Petitioner's trial testimonial period had already lapsed on October 16, 2006, and no request was made by Petitioner to extend his trial testimonial period. In turn, as noted above, Registrant, sought the consent of Petitioner to extend its trial testimonial period until December 21, 2006.

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After receiving nothing on November 10, 2006, and with Registrant's approaching testimony period, on November 13, 2006, Registrant sent written correspondence to Petitioner demanding that Petitioner's signatures to the Agreement be received by Registrant no later than November 15, 2006. [Sandstrum Decl. at ¶ 12, Exh. K.] Registrant noted that if signatures were not received by end of business day on November 15, 2006, $5,000.00 would be deducted from the agreed upon settlement amount for every week that the agreement remains unsigned. [Id.] In response, on November 14, 2006, Petitioner affirmed that Petitioner's signatures to the Agreement would be received by Friday, November 17, 2006, and sent Fed-Ex to Registrant for delivery on Monday, November 20, 2006. [Sandstrum Decl. at ¶ 13, Exh. L.] Then, on November 17, 2006, Petitioner confirmed that the translation had been received and that Petitioner's signatures would be delivered one day later to Registrant via facsimile on Tuesday, November 21, 2006. [Sandstrum Decl. at ¶ 14, Exh. M.] Yet again on November 20, 2006, Petitioner's counsel again confirmed that they should have signatures by November 21, 2006. [Sandstrum Decl. at ¶ 15, Exh. N.]

However, at end of business day on November 21, 2006, Registrant had still not received any signatures from Petitioner prompting yet another email by Registrant to Petitioner notifying Petitioner that signatures had not been received as promised. [Sandstrum Decl. at ¶ 16, Exh. O.] On November 22, 2006, Registrant's counsel replied that one of her clients had been delayed on a trip to Mexico and that all signatures would be received today (November 22, 2006) and would be sent via facsimile or email scan as soon as received. [Id.].

Despite Registrant's diligent efforts, by November 28, 2006, Registrant still had not received Petitioner's signatures to the Agreement. [Sandstrum Decl. at ¶ 17, Exh. P.] On

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November 29, 2006, Petitioner's counsel revealed that an undisclosed significant problem had arose which may require that Petitioner's counsel withdraw as counsel of record for Petitioner. [Sandstrum Decl. at ¶ 18] Registrant immediately notified Petitioner on November 29, 2006 that Registrant's testimony period had already commenced (set to close on December 21, 2006) and requested that Petitioner immediately advise Registrant of the status of signatures/settlement so that appropriate action could be taken, including possibly filing a motion to dismiss pursuant to 37 C.F.R. § 2.132. [Sandstrum Decl. at ¶ 18, Exh. Q.] As of the filing of this Motion for Judgment on December 7, 2006, **Petitioner has not responded to Registrant's request for a status of signatures/settlement prompting Registrant to file this motion for dismissal.**

Registrant respectfully requests that the Board grant the instant motion and enter default judgment dismissing the cancellation proceedings against Petitioner. Alternatively, if the Board decides to deny Registrant's instant motion to dismiss, Registrant requests that the Board reset its Trial Testimonial period to close March 31, 2007, and keep Petitioner's testimonial period closed. 37 C.F.R. § 2.132

II. PETITIONER'S FAILURE TO PRESENT ITS CASE IN CHIEF WITHIN THE ESTABLISHED TESTIMONIAL PERIOD IS GROUNDS FOR DISMISSAL UNDER 37 CFR § 2.132(a).

Dismissal is appropriate under 37 CFR § 2.132 (a) where Petitioner has completely failed to take any trial testimony and has failed to submit any evidence to the Board via Notice of Reliance during the proscribed testimony period, absent a showing of good cause. Specifically, Trademark Rule 2.132(a) provides as follows:

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(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 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 party in the position of defendant and for rebuttal.

Here, Petitioner's trial testimony period expired on October 16, 2006 per the consent motion filed by Registrant on September 26, 2006 and approved and ordered by the Board on October 4, 2006. [Attached hereto as Exhibit A is a true and correct copy of the Board's order granting an extension of Petitioner's Testimony Period to October 16, 2006]. Considering Petitioner's failure to offer any testimony or documentary evidence in support of its Petition to Cancel, a dismissal of the petition is warranted. See *Litton Business Systems, Inc. v. F.G. Furniture Co., Inc.*, 190 USPQ 431, 434 (T.T.A.B. 1976) ("Since the plaintiff bears the burden of persuasion in the usual case - and because Trademark Rule 2.132 so provides - the plaintiff may be non-suited in the event it fails to provide sufficient evidence to establish a prima facie case.").

It is Petitioner that has the burden of proving his case and tendering the necessary evidence to the Board and defendant in support of his claims. *Id.*; see also 37 CFR § 2.121(b)(1). In those cases where petitioner has failed to present its case in chief, Trademark Rule 2.132 has been implemented. As stated in *Litton Business Systems, Inc.*, the purpose of Rule 2.132 is "to save the defendant from the expense and delay of presenting evidence and a brief and awaiting a decision if and when it is apparent that plaintiff has dropped the matter or has failed to present a prima facie case." *Id.* Where as here, Petitioner has not taken any testimony or submitted any

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evidence during his testimony period, Petitioner has failed to carry his burden of proof and thus cannot prevail on his claims. See *Pumpkin Ltd. v. Seed Corps*, 43 USPQ2d 1582, 1588 (T.T.A.B. 1997).

A. Interests Of Judicial Economy Weigh Heavily In Favor Of Dismissing The Claims Asserted By Petitioner In Its Petition To Cancel

While the law does favor judgments on the merits, it is also true that adherence to and enforcement of procedural deadlines by the Patent and Trademark Office is necessary and justifiable. *Hewlett-Packard Co. v. Olympus Corp.* 18 USPQ2d 1710 (T.T.A.B. 1991). In fact, in decisions of the Board involving the issue of excusable neglect, the Board has found that the most dominant factors to consider in determining whether excusable neglect exists are: (1) the reasons for not adhering to the proscribed testimony period and, (2) the resultant delay created and its potential impact on judicial proceedings. *Pumpkin Ltd. v. Seed Corps*, 43 USPQ2d 1582, 1586 (T.T.A.B. 1997); See also *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858 (T.T.A.B. 1998) (finding that opposer's negligent failure to comply with the set trial schedule and the resultant adverse impact on the orderly administration of the case was inexcusable).

Here, Petitioner was put on notice of the controlling trial deadlines on multiple occasions. On May 5, 2006, this Board granted Registrant's motion to extend the trial testimony periods of both Petitioner and Registrant. [Attached hereto as Exhibit B is a true and correct copy of the Board's ruling dated May 5, 2006]. Pursuant to the May 5, 2006 Board ruling, Petitioner's 30-day testimony period was set to close on September 30, 2006.

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Then, on September 25, 2006, in light of the tentative settlement agreement reached between Petitioner and Registrant, Registrant agreed to file a consent motion to extend the close of Petitioner's trial testimony period from September 30, 2006 to October 16, 2006. [Sandstrum Decl. at ¶ 3, Exh. C]. The Board granted the motion on October 4, 2006 and notice of the ruling was electronically served on Petitioner by the Board on the same day. [Attached hereto as Exhibit C is a true and correct copy of the Board's ruling dated October 4, 2006].

Thus, Petitioner had ample notice of its 30-day trial testimony period. Despite knowledge of the closing date, Petitioner's testimony period came and went and Petitioner failed to introduce any evidence on his behalf. It was wholly within Petitioner's control to either offer testimony during the assigned period or move for an extension of its trial testimony period. Registrant is not aware of any reason for Petitioner's failure to take the necessary precautions other than an undisclosed "problem" of which Registrant was not made aware until after the opening of its own testimony period. [Sandstrum Decl. at ¶ 18]. Such an unexplained delay does not constitute good cause under 37 CFR 2.132(a). See *Procyon Pharmaceuticals Inc. v. Procyon Biopharma, Inc.*, 61 USPQ 2d 1542, 1543 (T.T.A.B. 2001) ("the Board has found that mere unexplained delay in initiating action in an affected time period does not constitute good cause" (citing *Luehrmann v. Kwik Kopy Corp.*, 2 USPQ2d 1303 (T.T.A.B. 1987)).

Petitioner's failure to abide by the timeline assigned by the board is detrimental to the orderly administration of inter parte proceedings. See *Atlanta-Fulton County Zoo Inc. v. DePalma*, 45 USPQ2d 1858, 1860 (T.T.A.B. 1998). Moreover, Petitioner's complete disregard for the timelines imposed by the Board creates undue delay and a strain on the Board's limited resources. See generally, *Notice of Final Rulemaking*, 63 FR 48081 (September 9, 1998)

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(discussion regarding the purpose of inter parte rules designed to promote expeditious prosecution and defense of cases without undue delay).

Further, Registrant has been prejudiced by the unreasonable delay caused by Petitioner's actions, including without limitation, the expenditure of substantial time, attorneys' fees and expenses in preparing for the Trial Testimonial periods during the time period just prior to Petitioner's settlement offer to Registrant. Due to the dilatory actions of Petitioner in continuing to promise Registrant that the Settlement Agreement was agreeable and that signatures would be forthcoming, and Registrant's reliance upon the same, it has been several months since Registrant and Registrant's counsel have prepared for the Trial Testimony periods. As a result, the initial preparation time expended by Registrant and Registrant's counsel has been lost. In the event that the instant motion is denied, Registrant and Registrant's counsel will be required to expend substantial additional time, attorneys' fees and expenses to re-prepare (gear up) for the Trial Testimonial period.

B. <u>The Board Has Discretion To Grant Registrant's Motion Even After The Commencement of Registrant's Testimony Period</u>

Pursuant to 37 CFR § 2.132 (c), the Board, in its discretion, may grant a motion to dismiss under 2.132(a) after the commencement of defendant's testimony period. In pertinent part, 37 CFR § 2.132(c) provides as follows:

> (c) A motion filed under paragraph (a) or (b) of this section 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 a motion under paragraph (a) even if the motion was filed after the opening of the testimony*

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period of the moving party.

On the facts of this case, the interests of justice and judicial economy favor the granting of this motion despite the motion being filed after the opening of Registrant's testimony period. Here, substantial time and money had been expended by Registrant in drafting the written settlement agreement, engaging in communications with Registrant regarding the settlement agreement and in verbal and written communications with Petitioner's counsel regarding the settlement agreement, all of which had been ongoing between the parties for nearly two months prior to the commencement of Registrant's testimony period, set to close on December 21, 2006. [Attached as Exhibit D is a true and correct copy of the Board's ruling dated November 8, 2006] With multiple assurances from Petitioner's counsel that the written Settlement Agreement was acceptable to Petitioner and that Petitioner's signatures were forthcoming, Registrant did not proceed with its testimony period which opened on November 21, 2006. Moreover, it was not until after the commencement of Registrant's testimony period, on November 29, 2006, that Petitioner advised of a significant problem, possibly requiring Petitioner's counsel to withdraw from further representation. [Sandstrum Decl. at ¶ 18]. Since November 29, 2006, Petitioner has not responded to Registrant's requests for signatures nor Registrant's notice of intent to file the instant motion. [Id.]

III. CONCLUSION

Based upon the foregoing reasons, it is respectfully requested that the Board grant Registrant's Motion to Dismiss the claims asserted by Petitioner in its Petitions to Cancel Registration Nos. 2631458, 2682978, and 2634976 [Cancellation Proceeding Nos. 92043152,

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92043160, and 92043175 (consolidated)]. Alternatively, in the event the Board denies Registrant's instant motion to dismiss, Registrant requests that the Board reset its Trial Testimonial period to close March 31, 2007, and keep Petitioner's testimonial period closed. 37 C.F.R. § 2.132

Dated: December 7, 2006

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

Nicole Whyte, Esq.
Michael A. Sandstrum, Esq.
Attorneys for Registrant
SANTANA'S GRILL, INC.

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 20320 S.W. Birch Street, Second Floor, Newport Beach, California 92660.

On December 7, 2006, I served the within document(s) described as:

REGISTRANT'S MOTION FOR JUDGMENT UNDER TRADEMARK RULE 2.132(a)

on the interested parties in this action as stated on the attached mailing list.

[X] (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I certify that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on December 7, 2006, at Newport Beach, California.

I declare under penalty of perjury that the foregoing is true and correct.

Kristie Elliott
(Type or print name)

(Signature)

BREMER WHYTE BROWN & O'MEARA LLP
20320 S.W. BIRCH STREET

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Santana's Grill, Inc. v. Arturo Castaneda, et al.

Case No. 03 CV 2340 6 (RBB)

BWB&O CLIENT: **Santana's Grill, Inc., Claudia Vallarta-Santana**
BWB&O FILE NO.: **1177.272**

SERVICE LIST

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EXHIBIT "A"

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: October 4, 2006

Cancellation No. 92043152
92043160
92043175

ARTURO SANTANA GALLEGO

v.

SANTANA'S GRILL, INC.

Karl Kocherperger, Paralegal

Respondent's consented motion filed September 26, 2006 to extend testimony periods is granted. Trademark Rule 2.127(a).

Testimony periods are reset in accordance with respondent's motion.

EXHIBIT "B"

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: May 5, 2006

Cancellation No. 92043152
92043160
92043175

ARTURO SANTANA CALLEGO

v.

SANTANA'S GRILL, INC.

Karl Kochersperger, Paralegal

Respondent's consented request to extend testimony periods filed April 27, 2006 is granted as corrected.

Accordingly, trial dates are reset as follows:

THE PERIOD FOR DISCOVERY TO CLOSE:	CLOSED
30-day testimony period for party in position of plaintiff to close:	September 30, 2006
30-day testimony period for party in position of defendant to close:	November 29, 2006
15-day rebuttal testimony period to close:	January 13, 2007

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

EXHIBIT "D"

Nicole Whyte, Esq.
Michael Sandstrum, Esq.
Bremer Whyte Brown & O'Meara, LLP
20320 S.W. Birch Street, Second Floor
Newport Beach, CA 92660
(949) 221-1000
(949) 221-1001 (Fax)

Attorney for Registrant
SANTANA'S GRILL, INC.

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ARTURO SANTANA GALLEGO, Petitioner, v. SANTANA'S GRILL, INC., Registrant.	Cancellation Nos. 92043152 (Consolidated) 92043160 92043175 I hereby certify that this Declaration of Michael A. Sandstrum and the accompanying attachments, concurrently filed an served with Registrant's Motion for Judgment is being deposited with the United States Post Office via Certified Mail and addressed to Trademark Trial & Appeal Board, P.O. Box 1451, Alexandria, VA 22313 1451 12-7-06 Date Michael A. Sandstrum

I, MICHAEL A. SANDSTRUM, HEREBY DECLARE THE FOLLOWING:

1. I am an attorney at law duly licensed to practice before all of the courts of the State of California and am a partner in the law firm of Bremer Whyte Brown & O'Meara, attorneys of record for Registrant, SANTANA'S GRILL, INC., in the above-entitled cancellation

proceedings. As such I have personal knowledge of the facts stated herein and if called upon as a witness I could and would competently testify to the below facts which are personally known to me.

2. On September 22, 2006, Petitioner made a written settlement offer to Registrant through its counsel of record, Cris Armenta. (Attached hereto as Exhibit A is a true and correct copy of the email from Ms. Armenta to me dated September 22, 2006). On the same day, September 22, 2006, Registrant confirmed its assent to the basic terms of Petitioner's settlement offer. (Attached hereto as Exhibit B is a true and correct copy of the email from me to Ms. Armenta dated September 22, 2006).

3. In an effort to prevent prejudice to the Petitioner while the settlement agreement was being negotiated, **Registrant proposed** a two-week extension of Petitioner's then pending testimony period which was set to close on September 30, 2006. (Attached hereto as Exhibit C is a true and correct copy of the email from me to Ms. Armenta dated September 25, 2006).

4. From September 25, 2006 through October 4, 2006, Registrant sent multiple emails and made telephone calls to Petitioner's counsel regarding the pending settlement and draft language for the written Settlement Agreement and requested Petitioner's comments/proposed language regarding the same. (Attached hereto as Exhibit D are true and correct copies of the emails from me to Ms. Armenta dated September 25, 2006, September 26, 2006, September 27, 2006 and October 4, 2006).

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5. On October 10, 2006, without sending any comments or proposed language to Registrant, Petitioner requested that Registrant forward a copy of its proposed settlement agreement to Petitioner. Attached hereto as Exhibit E is a true and correct copy of the email from Ms. Armenta to me dated October 10, 2006.

6. On October 12, 2006, I emailed a copy of Registrant's draft Settlement Agreement and Mutual Release and Attached to Ms. Armenta. Attached hereto as Exhibit F is a true and correct copy of the email from me to Ms. Armenta dated October 12, 2006.

7. On October 19, 2006, I sent a follow-up email to Ms. Armenta requesting her approval of the Settlement Agreement emailed on October 12, 2006, noting that time is of the essence with Registrant's impending trial testimony period set to open the following month. Attached hereto as Exhibit G is a true and correct copy of the email from me to Ms. Armenta dated October 19, 2006. I also sent follow-up emails to Petitioner's counsel, Ms. Armenta on my blackberry regarding the status of Ms. Armenta's client signatures to the written settlement agreement.

8. Finally, on October 27, 2006 and again on October 31, 2006, Ms. Armenta sent written correspondence confirming that the proposed written Settlement Agreement and Mutual Release prepared by Registrant was acceptable to Petitioner. Attached hereto as Exhibit H are true and correct copies of the emails from Ms. Armenta to me dated October 27, 2006 and October 31, 2006.

9. In confirming Petitioner's acceptance of the proposed written Settlement Agreement and Release, on November 2, 2006, Registrant sent an updated copy of the Settlement Agreement to

Petitioner for transcription from English to Spanish. The accompanying email from Registrant also requested that Petitioner provide a physical address for "Notice" issues to include in the Agreement. Attached hereto as Exhibit I is a true and correct copy of the email from me to Ms. Armenta dated November 02, 2006.

10. With no response from Petitioner to my email dated November 2, 2006, I sent additional emails to Petitioner requesting immediate execution of the mutually agreed upon written Settlement Agreement and Mutual Release. Attached hereto as Exhibit J are true and correct copies of the emails from me to Ms. Armenta dated November 6, 2006 and November 7, 2006.

11. On November 7, 2006, I obtained the consent of Petitioner to request an extension of the close of Registrant's testimony period to December 21, 2006. On November 7, 2006, I filed a consent motion with the Board which was granted on November 8, 2006.

12. With Registrant's approaching testimony period, on November 13, 2006, Registrant sent written correspondence to Petitioner demanding that Petitioner's signatures to the Agreement be received by Registrant no later than November 15, 2006. As so much time had passed, promised made and broken by Petitioner, and because the delay was negatively impacting Registrant, Registrant further notified Petitioner that if signatures were not received by November 15, 2006, Registrant would deduct $5,000.00 from the agreed upon monetary payment to be paid to Petitioner for every week that the signatures were not received. Attached hereto as Exhibit K is a true and correct copy of the email from me to Ms. Armenta dated November 13, 2006.

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13. On November 14, 2006, Ms. Armenta assured me that Petitioner's signatures to the written Settlement Agreement would be received by Registrant on November 20, 2006. Attached as Exhibit L is a true and correct copy of the email from Ms. Armenta to me dated November 14, 2006, confirming that Petitioner's signatures would be received by Registrant on Monday, November 20, 2006 via Fed Ex delivery.

14. Then again on November 17, 2006, Ms. Armenta confirmed that Petitioner's signatures were forthcoming. Attached as Exhibit M is a true and correct copy of the email from Ms. Armenta to me dated November 17, 2006, confirming that Petitioner's signatures would be received by Registrant on Tuesday, November 21, 2006 via facsimile.

15. Further reassurance that the signatures would be delivered to Registrant was provided by Ms. Armenta on November 20, 2006. Attached as Exhibit N is a true and correct copy of the email from Ms. Armenta to me dated November 20, 2006, confirming that Petitioner's signatures would be received by Registrant on Tuesday, November 21, 2006.

16. By end of business day on November 21, 2006, Petitioner signatures had still not been received. In reply to Registrant's request for a status of the signatures, Ms. Armenta represented that the signatures were delayed but would be sent via email scan or fax on November 22, 2006. Attached as Exhibit O is a true and correct copy of the email from me to Ms. Armenta dated November 21, 2006 notifying Petitioner that signatures had not been received as promised. On November 22, 2006, Ms. Armenta replied that one of her clients had been delayed on a trip to Mexico but that all signatures would be received today (November 22, 2006) and that they would

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be sent to Registrant via email scan or facsimile. Also attached as Exhibit O is a true and correct copy of the email response from Ms. Armenta to me dated November 22, 2006.

17. Despite Registrant's diligent efforts, by November 28, 2006, Registrant still had not received Petitioner's signatures to the Agreement. Attached as Exhibit P is a true and correct copy of the email from me to Ms. Armenta dated November 28, 2006, confirming that signatures had not yet been received.

18. On November 29, 2006, Ms. Armenta revealed to me that a significant problem had arisen which may require her to withdraw from any further representation of Petitioner. Ms. Armenta would not disclose the scope and extent of the potential problem. I immediately followed-up with an email confirming our conversation and requesting an immediate status of Petitioner's signature to the Settlement Agreement so that appropriate action could be taken, including a possible motion to dismiss pursuant to 37 CFR 2.132. As of the date of this declaration, I have not received a response. Attached hereto as Exhibit Q is a true and correct copy of the email from me to Ms. Armenta dated November 29, 2006.

19. Registrant and Registrant's counsel spent considerable time, money and expense in preparing for the Trial Testimony periods just prior to Petitioner's settlement offer in September 2006. With Petitioner's continued promises that the written Settlement Agreement prepared by Registrant was acceptable and that signatures to the same would be forthcoming, the time spent by Registrant and Registrant's counsel in preparing for the Trial Testimony periods several months ago has been lost. As a result, in the event that the instant motion is denied, Registrant and Registrant's counsel will be required to expend substantial additional time, attorneys' fees

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and expenses to re-prepare (gear up) for the Trial Testimonial period.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 2, 2006

By: _____
Michael A. Sandstrum

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 20320 S.W. Birch Street, Second Floor, Newport Beach, California 92660.

On December 7, 2006, I served the within document(s) described as:

DECLARATION OF MICHAEL A. SANDSTRUM TO REGISTRANT'S MOTION FOR JUDGMENT UNDER TRADEMARK RULE 2.132(a)

on the interested parties in this action as stated on the attached mailing list.

[X] (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Newport Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I certify that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on December 7, 2006, at Newport Beach, California.

I declare under penalty of perjury that the foregoing is true and correct.

Kristie Elliott
(Type or print name)

(Signature)

BREMER WHYTE BROWN & O'MEARA LLP
20320 S.W. BIRCH STREET

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Santana's Grill, Inc. v. Arturo Castaneda, et al.

Case No. 03 CV 2340 6 (RBB)

BWB&O CLIENT: Santana's Grill, Inc., Claudia Vallarta-Santana
BWB&O FILE NO.: 1177.272

SERVICE LIST

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