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

Proceeding	92048667
Party	Defendant Peter Baumberger
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Attachments	Motion for Judgment.pdf (5 pages)(22159 bytes)

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

Jules Jurgensen/Rhapsody, Inc.,	)	
	)	Cancellation No: 92048667
Petitioner,	)	
	)	Registration No.: 3,181,224
v.	)	
	)	
Peter Baumberger,	)	
	)	
Respondent.	)	

MOTION FOR JUDGMENT UNDER TRADEMARK RULE 2.132(a)

Respondent Peter Baumberger ("Respondent"), through the undersigned counsel, respectfully submits this Motion for Judgment under Trademark Rule 2.132(a) and requests that judgment be entered in its favor.

I. PROCEDURAL BACKGROUND

On December 26, 2007, Petitioner filed the Petition to Cancel Respondent's Registration No. 3,181,224 on the ground of priority and likelihood of confusion. Petitioner failed to identify Morton Clayman as a potential witness either in initial or pretrial disclosures. Petitioner nevertheless attempted to enter the testimony deposition of Mr. Clayman. However, on Respondent's Motion, the Board struck the testimony of Mr. Clayman in its entirety. (Order of July 6, 2009 at 8 ("Order").) Aside from Mr. Clayman's testimony deposition which is now stricken from the record, Petitioner has submitted no other evidence in this proceeding. Petitioner's testimony period closed on April 2, 2009. Absent any evidentiary submissions, Petitioner will not be able to satisfy its burden of proof in this action. Therefore, the Board should dismiss the case with prejudice and enter judgment in this action in favor of Respondent.

II. ARGUMENT

When a party fails to submit evidence during its testimony period, the Board should dismiss the case absent a showing of excusable neglect. 37 C.F.R. § 2.132(a); *HKG Industries Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156 (TTAB 1998). Here, aside from the testimony deposition of Morton Clayman, which has now be stricken from the record, Petitioner submitted no evidence during its testimony period. Moreover, Petitioner's failure to adhere to the rules regarding disclosure of witnesses, which resulted in the Board's decision to strike Mr. Clayman's testimony, does not constitute excusable neglect. See *Gard Industries, Inc. v. Minnesota Mining and Manufacturing Co.*, 119 USPQ 497 (TTAB 1958). For example, in *Gard Industries*, the opposer's only evidence consisted of the discovery deposition of its president. However, the opposer failed to submit a notice of reliance to properly introduce the testimony. *Id.* at 498. The Board refused to recognize the deposition as part of the record, and it granted applicant's motion under Trademark Rule 2.132 for dismissal of the opposition "on the ground that opposer has failed to submit any evidence in support of its pleading during the time allowed for that purpose." *Id.*

Here, as in *Gard Industries*, Petitioner's evidentiary submission did not adhere to the Board's rules. Moreover, the Board in its opinion of July 6, 2009 noted that Petitioner offered no "satisfactory explanation" for its failure to comply with the disclosure rules. Order at 6. Therefore, the fact that Petitioner attempted to enter evidence into the record but nevertheless failed to follow the rules does not constitute excusable neglect.

Absent record evidence of any kind, Petitioner cannot meet its burden of proof, and therefore cannot prevail in this action. In a cancellation proceeding, the challenger bears the burden of proving by a preponderance of the evidence a substantive ground to cancel the registered trademark. *General Motors Corp. v. Aristide & Co.*, 87 USPQ2d 1179 (TTAB 2008); *Green Thumb Products v. Green Thumb Publisher, Inc.*, 112 USPQ 149 (Comm'r Pat. 1957); *General Motors Corp.*, 87 USPQ2d at 1181-1182. Where a petitioner fails to offer any evidence whatsoever prior to the expiration of its period for testimony-in-chief, it fails to prove its case-in-chief and therefore cannot prevail. *Hester Industries Inc. v. Tyson Foods Inc.*, 2 USPQ2d 1645 (TTAB 1987).

Because Petitioner cannot, as a matter of law, prevail in this case on the record before the Board, no reason exists for going forward with the remaining testimony periods. Therefore, in the interest of judicial economy, and in the interest of conserving the resources of Respondent, an individual watch maker, the Board should enter judgment in favor of Respondent.

III. CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Board grant its Motion for Judgment under Trademark Rule 2.132(a). In the event that the Board denies this Motion, Respondent respectfully requests that its deadline for submitting Pretrial Disclosures be reset at thirty days after the date of the Board's order denying the Motion and that all other trial dates be reset accordingly.

Dated: July 20, 2009

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT
PETER BAUMBERGER

CERTIFICATE OF SERVICE

The undersigned certifies that the attached **MOTION FOR JUDGMENT UNDER TRADEMARK RULE 2.132(a)** was served on the below-identified counsel for Petitioner on July 20, 2009 by the means indicated below

☒ U.S. Mail, postage prepaid
☒ Email
☐ Hand Delivery

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