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Mailed: January 28, 2015

Cancellation No. 92052260

Steven Westlake

v.

Edgar Alexander Barrera

Wendy Boldt Cohen, Interlocutory Attorney:

This case comes up before the Board on: 1) Respondent's motion (filed October 6, 2014) for involuntary dismissal pursuant to Trademark Rule 2.132, on the ground that Petitioner has failed to prosecute this case¹ and 2) Petitioner's October 27, 2014 filing.

Motion for involuntary dismissal

Regarding Respondent's motion to dismiss under Trademark Rule 2.132, such a motion should be filed before the opening of the testimony period of the moving party. *See* Trademark Rule 2.132(a) and (b); TBMP § 534. As last reset in the Board's January 16, 2014 order, Respondent's testimony period closed September 27, 2014. In this instance, Respondent untimely filed its motion to dismiss after the close of its testimony period.

¹ It is noted the October 6, 2014 motion was filed as a confidential document with the Board. If a party submits any brief, pleading, motion or other such filing containing confidential information either electronically via ESTTA or by paper under seal, the party must also submit for the public record a redacted version of said paper. Thus, for confidential submissions filed either via ESTTA or by paper, two versions are required a confidential version as well as a redacted version available for public view. *See* TBMP § 412.04.

Based on the foregoing, the motion to dismiss will receive no consideration.

Petitioner's October 27, 2014 filing

Regarding Petitioner's October 27, 2014 filing, inasmuch as Petitioner argues that "the record shows no genuine issue of material fact," the Board construes the motion as one for summary judgment. A motion for summary judgment is a pretrial device and should be filed prior to the opening of the first testimony period as originally set or as reset. *See* Trademark Rule 2.127(e)(1) and TBMP § 528.02. The Board, in its discretion, may deny as untimely any summary judgment motion filed thereafter. *See La Maur, Inc. v. Bagwells Enterprises, Inc.*, 193 USPQ 234, 235-36 (Comm'r 1976).

Because the first testimony period opened June 29, 2014, Petitioner's October 27, 2014 filing is an untimely motion for summary judgment and will receive no consideration. Respondent's December 10 and 12, 2014 responses thereto are therefore, moot and will receive no consideration.

Notwithstanding the foregoing, the Board notes that the time for Petitioner to take testimony has expired² and the record demonstrates that Petitioner has failed to submit any evidence or take any testimony during its assigned testimony period. *Cf.* Trademark Rule 2.132 and TBMP § 534. In view thereof, Petitioner is allowed **fifteen days** from the date of this order to show cause why judgment should not be rendered against him for failure to prosecute this case, failing which judgment may be entered against

² Petitioner's trial period ended July 29, 2014.

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Petitioner. *Id.* Proceedings are otherwise suspended. Any paper filed during the pendency of this show cause order which is not relevant thereto will be given no consideration.