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

Proceeding	92052523
Party	Defendant Dalps & Leisure Products Supply Corporation
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Submission	Motion to Dismiss 2.132
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Date	10/10/2011
Attachments	7012.201.401 Motion to Dismiss copy.pdf ( 3 pages )(38686 bytes )

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

<p><i>In re Registration No. 2,542,903 for the mark IRON BODY (Stylized)</i></p> <p>Formatic Xpressions, LLC</p> <p>Petitioner</p> <p>v.</p> <p>DALPS &amp; Leisure Products Supply Corporation</p> <p>Respondent</p>	<p>Cancellation No. 92-052,523</p> <p><b><u>Motion to Dismiss for Petitioner's Failure to Prosecute</u></b></p>
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Commissioner for Trademarks  
Attn: Trademark Trial and Appeal Board  
P.O. BOX 1451  
Alexandria, VA 22313-1451

Dear Commissioner:

Respondent DALPS & Leisure Products Supply Corporation (“Respondent”) respectfully requests that the Trademark Trial and Appeal Board (“Board”) dismiss the above-captioned Cancellation on the grounds that Petitioner, Formatic Xpressions, LLC (“Petitioner”) has failed to prosecute the case pursuant to TBMP § 534.02 and 37 C.F.R. § 2.132(a).

**Factual Background**

Pursuant to the Scheduling Order in this case, Respondent, through its counsel, served interrogatories and documents requests via email on Petitioner on the last day of discovery, June 13, 2011. The parties had previously agreed to service of any documents in this case via email. Petitioner’s responses to Respondent’s discovery were due on July 18, 2011. As of the date of this Motion, Petitioner has still not responded to Respondent’s discovery requests, nor did Petitioner request an extension of time to respond. Petitioner did not serve any discovery on Respondent.

Petitioner's pretrial disclosures were due on July 28, 2011. As of the date of this Motion, Petitioner has not served any pretrial disclosures on Respondent.

Petitioner's 30-day trial period closed on September 11, 2011 without Petitioner noticing any testimony depositions nor filing a Notice of Reliance. As of the date of this Motion, Petitioner has not indicated that it intends to take any testimony, nor did it, at any time, request an extension of time of its testimony period.

Shortly after the close of Petitioner's testimony period, on September 13, 2011, counsel for Respondent emailed counsel for Petitioner indicating that any effort to serve discovery responses or testimony would be objected to as untimely. Counsel for Respondent also requested that Petitioner dismiss the action. When no response was forthcoming, counsel for Respondent sent follow-up emails on September 19 and 20 and a placed phone call to counsel for Respondent on September 20. Counsel for Petitioner replied via email late on September 20, indicating that he would contact Petitioner. Counsel for Respondent has not heard from counsel for Petitioner since September 20, 2011.

### **Argument**

Pursuant to TBMP § 534.02, Respondent may move to dismiss this Cancellation because "the plaintiff's testimony period has passed and the plaintiff has not taken testimony or offered any other evidence." *See also* 37 C.F.R. § 2.132(a).

In *Hewlett-Packard Co. v. Olympus Corp.*, 18 U.S.P.Q.2d 1710 (Fed. Cir. 1991), Olympus moved the Board to dismiss Hewlett-Packard's opposition for failure to prosecute and the Board granted the Motion. Hewlett-Packard appealed that decision to the Federal Circuit, but the Federal Circuit upheld the dismissal. The Federal Circuit upheld the Board's dismissal on the grounds that "[a]s opposer, it was incumbent on Hewlett, if it wished to postpone the deadline for taking testimony, to timely seek an enlargement of its testimony period." *Hewlett-Packard*, 18 U.S.P.Q.2d at 1712.

Here, Petitioner did not indicate it was going to take any testimony or that it was going to rely on any documents during its testimony period, nor did Petitioner seek an enlargement of time of its testimony period. Respondent's motion is timely under 37 C.F.R. § 2.132(c) as it is being filed before the opening of its testimony period.

**Conclusion**

For the foregoing reasons Respondent requests that Cancellation No. 92-052,523 be dismissed with prejudice for failure of Petitioner to prosecute and that the Cancellation be suspended pending determination of this Motion, pursuant to 37 C.F.R. § 2.127(d). Alternatively, should this Motion be denied, Applicant requests that the Board reset the Respondent’s testimony period and the Petitioner’s rebuttal period. *See* TMEP § 534.02.

Date: October 10, 2011

Respectfully submitted,

/Raphael A. Gutierrez/  
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**Certificate of Electronic Transmission**

The undersigned hereby certifies that this document is being transmitted electronically through ESTTA pursuant to 37 C.F.R. §2.195(a) on this 10<sup>th</sup> day of October, 2011.

/Raphael A. Gutierrez/  
Raphael A. Gutierrez  
Jackson Intellectual Property Group, PLLC

**Certificate of Service**

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address of record by Facsimile or email (by agreement only) on this 10<sup>th</sup> day of October, 2011.

/Raphael A. Gutierrez/  
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