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

Proceeding	92057198
Party	Defendant Pure Fishing, Inc.
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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**

SWIFT FLY FISHING)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92057198
)	
)	Registration No. 2062238
PURE FISHING, INC.)	
)	
Registrant.)	
)	

REGISTRANT’S MOTION FOR INVOLUNTARY DISMISSAL

Pure Fishing, Inc. (“Registrant”), pursuant to 37 CFR § 2.132 and Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) § 534.01, moves for involuntary dismissal on the ground of the failure of Petitioner, Swift Fly Fishing (“Petitioner”), to prosecute and in the alternative, on the ground that upon the law and the facts Petitioner has shown no right to relief. As grounds for this motion, Registrant as follows:

1. Petitioner commenced this cancellation proceeding with the filing of the Petition for Cancellation on May 8, 2013 (Docket (“Dkt.”) #1). The Board set a scheduling order, including trial dates. (Dkt. #2) Registrant filed a timely answer to the petition for cancellation on June 24, 2013. (Dkt. #4) In its answer, Registrant denied the material allegations of the petition, and raised the defense that had not discontinued use of the mark that is the subject of the registration with intent not to resume use; therefore, contrary to the allegations of the petition, it has not abandoned the mark and the subject registration is not subject to cancellation.

2. By consent motion filed on September 16, 2013, Petitioner moved the Board to suspend proceedings for a period of ninety (90) days so that they could engage in settlement

discussions. (Dkt. #5) In that motion, that parties stipulated, among other things, that Petitioner would make pretrial disclosures by June 4, 2014, and that Petitioner's 30-day trial period would end on July 19, 2014. (Dkt. #5)

3. By order of October 7, 2013 (Dkt. #6), the Board suspended the proceeding, adopting the schedule in the consent motion. However, the order included an automatic re-start date. "In the event that there is no word from either party concerning the progress of their negotiations, upon conclusion of the suspension period, proceedings shall resume without further notice or order from the Board, upon the schedule set out in petitioner's September 16, 2013 motion." (Dkt #6) (emphasis in original).

4. Prior to the pretrial disclosure deadline of June 4, 2014, Petitioner made no pretrial disclosures. More importantly, prior to the ending of Petitioner's 30 day trial period on July 19, 2014, Petitioner has taken no trial testimony, has submitted no notices of reliance, and otherwise has offered no evidence. At no time did Petitioner request additional time for taking testimony, or receive any additional time.

5. Although Petitioner attached several items to its Petition, any item other than a certificate of registration that is the subject of the proceeding, in accord with 37 CFR § 2.122(d), is not evidence. *See* 37 CFR § 2.122 ("Except as provided in paragraph (d)(1) of this section [relating to copies of registrations in evidence], an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached unless identified and introduced in evidence as an exhibit during the period for the taking of testimony.")

6. 37 CFR § 2.132 permits the party in the position of the defendant (here, the Registrant) respondent to move for dismissal, without waiving the right to offer evidence in the

event the motion is denied. Registrant makes this motion pursuant to Section 2.132(a), and in the alternative, pursuant to Section 2.132(b).

7. Pursuant to 37 CFR § 2.132(a), Registrant moves for dismissal on the ground of the failure of the Petitioner to prosecute. As outlined above, “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.” *See id.* Therefore, dismissal on the ground of the failure of the Petitioner to prosecute is appropriate.

8. In the alternative, pursuant to 37 CFR § 2.132(b), Registrant moves 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. Section 2.132(b) applies when the only evidence of record is the relevant certificate of registration. Petitioner did not attach a photocopy of Registrant’s certificate of registration for the EPIC mark, (Reg. No. 2,062,238) to its Petition, so neither Section 2.122(d) nor 2.132(b) should apply. However, Petitioner did attach as Exhibit 1 to its Petition the Office Action issued by the Examining Attorney on July 23, 2012, which refused registration based on the Registrant’s registration for the EPIC mark. Within that Office Action, the Examining Attorney included printouts concerning Registrant’s registration for the EPIC mark. While Registrant submits that the attachment of the Office Action does not satisfy the requirements of 37 CFR § 2.122, the fact remains that no other evidence has been submitted during the Petitioner’s trial period that would show a right to relief.

9. Registrant is mindful that the interest of the Board is in doing justice. If Registrant is required to proceed with its trial period, then it submits that the evidence will show that contrary to the allegations of the Petition, Registrant was selling and offering for sale the goods recited in the registration under the EPIC mark well after the 2002-2003 time frame

alleged in the Petition. Registrant's combined Section 8 Declaration and Section 9 Renewal was filed and accepted in 2007, several years after the 2002-2003 time frame alleged in the petition. Moreover, the evidence will show that Registrant was selling and offering for sale the goods recited in the registration under the EPIC mark continuously up to at least 2011. In 2012 and 2013, Registrant temporarily scaled back its use of that mark in connection with a planned a "re-boot" of the product line. It engaged in product re-design and development and a revised marketing strategy, and began taking orders in 2013, resulting in substantial sales of the goods recited in the registration under the EPIC mark in early 2014.

10. This motion is timely, because it is filed before the opening of the testimony period of Registrant, the moving party. *See* 37 CFR § 2.132(c).

WHEREFORE, Registrant requests that the Petition for Cancellation be dismissed.

Respectfully Submitted,

/s/ Michael S. Denniston
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One of the Attorneys for Registrant

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the above and foregoing Answer to Petition for Cancellation on:

Darren S. Rimer
Email: trademarks@rimermath.com

By email and on:

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by placing a copy of the same in the United States Mail, first class postage prepaid, on this 24th day of July, 2014.

/s/ Michael S. Denniston
OF COUNSEL