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

Proceeding	92058909
Party	Defendant Fashion One Television LLC
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Attachments	64884-3 Motion for Judgment.pdf(126940 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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FASHION TV Programmgesellschaft mbH)	
)	
Petitioner/Plaintiff)	
)	Cancellation No. 92058909
v.)	
)	Registration No. 3482166
FASHION ONE TELEVISION LLC)	
)	
Registrant/Defendant)	
)	
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**MOTION FOR JUDGMENT FOR PLAINTIFF’S FAILURE TO PROVE CASE UNDER
37 C.F.R. SECTION 2.132(a) AND (c)**

Defendant, through its newly appointed attorneys [See Exhibit A], hereby moves for Judgment for Plaintiff’s Failure to Prove Case under Section 37 C.F.R. Section 2.132(a) and (c). In this connection, Plaintiff’s trial period opened on January 28, 2015 and ended on February 28, 2015. At no time has Plaintiff offered or introduced any evidence in support of its case in chief, nor have these dates ever been enlarged.

While Defendant’s trial period opened on March 29, 2015 and ends April 29, 2015, Defendant invokes the “discretionary” clause under Section 2.132 (c). Thus in the event this motion is denied, Defendant respectfully requests that it be given sufficient time to put on its case in chief if necessary.

MEMORANDUM

FACTS

Plaintiff, a former business affiliate of Defendant, filed on March 19, 2014 a petition to cancel Registration No. 3482166 covering the mark FASHIONONE owned by Defendant. Defendant's registration issued August 5, 2008. The Board transmitted its standard Discovery and Trial Schedule via order dated March 25, 2014, giving Defendant up until May 4, 2014 to answer or otherwise plead. An answer was timely filed and served on April 29, 2014.

In accordance with the Board's Scheduling Order of March 25, 2014, the discovery period was set to close on November 30, 2014. Plaintiff on November 18, 2014 noticed the Rule 30(b)(6) and Rule 31(a)(3) deposition of Fashion One Television, LLC through its owner, Michael Gleissner, a resident of Singapore, on written questions.

On November 20, 2014, Defendant, in turn, noticed the depositions of "Gabriel Lisowski, Adam Lisowski aka Michel Adam and Zaineb Alhaner of Fashion TV...", all of whom reside in Austria. Defendant also sought the depositions via written questions under "TTAB Rule 404.3(b)."

On November 26, 2014, the parties, through counsel, stipulated only to an enlargement of the discovery period from November 30, 2014 to January 15, 2015. This stipulation was sought by Plaintiff's counsel, was prepared by Plaintiff's counsel, and filed by Plaintiff's counsel. To the best of new counsel's understanding, at no time has Plaintiff's counsel sought or obtained an enlargement of all other related dates in the Board's Order of March 25, 2014, nor did the Board ever approve the stipulated enlargement of the discovery period.

To new counsel's understanding, neither party ever completed or received responses to the depositions by written questions. Neither party has sought to compel such answers nor has either party engaged in any other form of discovery.

Without further enlargement, Plaintiff's pre-trial disclosures were due on January 14, 2015. Its trial period opened on January 28, 2015, and ended on February 28, 2015. At no time has Plaintiff served its pre-trial disclosures, nor has it offered or introduced any testimony or other evidence in support of its various allegations in its petition to cancel.

THE LAW

It is well established that a defendant may appropriately file a motion for judgment directed to the sufficiency of a plaintiff's trial evidence, when the plaintiff's testimony period has passed, and when plaintiff has not taken testimony or offered any other evidence. 37 C.F.R. Section 2.132(a). In such a situation, the defendant may, without waiving its right to offer evidence in the event the motion is denied, move for dismissal for failure of the plaintiff to prosecute. While a motion for judgment under 37 C.F.R. Section 2.132(a) should be filed before the opening of the moving party's testimony period, the Board may, in its discretion, grant the motion if it is filed thereafter. See 37 C.F.R. Section 2.132 (c).

"While it is true that the law favors judgments on the merits wherever possible, it is also true that the Patent and Trademark Office is justified in enforcing its procedural deadlines." *Hewlett-Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 18 USPQ2d 1710 (Fed. Cir. 1991).

ARGUMENT

In view of these well-established principles and rules, dismissal of Plaintiff's petition to cancel and alleged claims is well justified in this particular instance. In fact, a close examination of Plaintiff's petition to cancel reveals that at no time has it sufficiently alleged standing, use of a

similar mark in commerce with the United States, or even how it is damaged by registration of Defendant's mark. Simply put, Plaintiff is no more than a former "business affiliate" of Defendant and an "intermeddler" attempting to disrupt the legitimate business of Defendant. When viewed within this context, there is perhaps ample reason why Plaintiff has offered no testimony or other evidence in support of its various allegations. Plaintiff simply is not damaged by Registration No. 3482166, nor has it ever been damaged.

It also should be noted that Plaintiff is represented by counsel who is an experienced trademark practitioner. Thus, the apparent failure to secure an enlargement of all other discovery and trial dates when Plaintiff filed the enlargement of the discovery period from November 30 to January 15, 2015, does not appear inadvertent or with excusable neglect. Nor has Plaintiff moved to compel or otherwise secure completion of its depositions on written questions. Finally, Plaintiff's complete failure to offer any evidence in any form during its trial period, evidences Plaintiff's lack of interest in continuing with the case it brought.

CONCLUSION

While Defendant makes this motion on the last day of its testimony period, it is respectfully requested that the Board exercise its discretion and dismiss the petition to cancel. Defendant's mark has been registered since 2008. And considering Petitioner's constructive notice of Defendant's long standing rights to FASHIONONE in the United States, Petitioner has had ample time to vindicate its alleged damage. Suffice it to say, in the event Defendant's motion is denied, Defendant respectfully requests that it be given sufficient time to complete its case in chief.

In view thereof, further action is respectfully solicited.

Respectfully submitted,

FASHION ONE TELEVISION LLC

Date: April 29, 2015

/s/ Barth X. deRosa

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Counsel for Registrant/Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Judgment for Plaintiff's failure to Prove Case Under 37 C.F.R. Section 2.132(a) and (c) is being forwarded this 29th day of April, 2015 to counsel for Petitioner by first class mail, addressed to:

RAYMOND J DOWD
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/s/ Barth X. deRosa
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EXHIBIT A

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

FASHION TV PROGRAMMGESELLSCHAFT mbH)	
Petitioner)	
v.)	Cancellation No. 92058909
FASHION ONE TELEVISION LLC)	Registration No. 3482166
Registrant)	

REVOCATION OF POWER OF ATTORNEY AND APPOINTMENT OF NEW POWER OF ATTORNEY

The undersigned hereby revokes the existing power of attorney for the above-identified proceeding and appoints Barth X. deRosa, Samuel D. Littlepage, and Jenny T. Slocum, all members of a Bar, and the firm of Dickinson Wright PLLC, 1875 Eye Street, N.W., Suite 1200, Washington, D.C. 20006, as its attorneys to transact all business in the Trademark Trial and Appeal Board in connection therewith, and upon whom notices of process in the proceedings affecting the mark may be served.

NEW CORRESPONDENCE ADDRESS

The Patent and Trademark Office/Trademark Trial and Appeal Board is requested to send all correspondence to the attention of Barth X. deRosa, at Dickinson Wright PLLC, 1875 Eye Street, N.W., Suite 1200, Washington, D.C. 20006; to telephone number 202-408-5955; to facsimile number 202-659-1559 or email at bderosa@dickinsonwright.com

Respectfully submitted,
FASHION ONE TELEVISION LLC



By : MICHAEL GLEISSNER
Title : SOLE MEMBER
Date : APRIL 28, 2015