

TTAB



06-17-2002

U.S. Patent & TMO/TM Mail Rcpt Dt. #70

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

\_\_\_\_\_  
MCCAW CELLULAR COMMUNICATIONS, INC.,

OPPOSER,

v.

OPPOSITION No. 94,808

TERRY L. WRIGHT,

APPLICANT.  
\_\_\_\_\_

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TRADEMARK TRIAL AND  
APPEAL BOARD

MOTION FOR DISMISSAL FOR OPPOSER'S FAILURE TO PROVE CASE  
AND REQUEST FOR STAY

Commissioner for Trademarks  
Box TTAB NO FEE  
2900 Crystal Drive  
Arlington, VA 22202-3513

Dear Sir:

McCaw Cellular Communications, Inc. ("Opposer") is in the position of plaintiff in this matter and its time for taking testimony expired on May 19, 2002. During its time to for taking testimony, Opposer did not take any testimony or offer any evidence. Therefore, Terry L. Wright ("Applicant") submits this motion for dismissal on the ground of Opposer's failure to prosecute.

Opposer did not introduce any evidence prior to the expiration of its time for taking testimony. Opposer attached photocopies of its registrations to its Notice of Opposition, but failed to properly offer its registrations into evidence in accordance with Trademark Rule 2.122(d), 37 CFR § 2.122(d). Rule 2.122(d) provides that a party's registrations may be received in evidence, and made part of the record, if the Notice of Opposition is accompanied by two copies of the registration, prepared and issued by the Patent and Trademark Office, showing both

the current status of and current title to the registration. Opposer simply attached one uncertified copy of each of its registrations to its Notice of Opposition. Therefore, Opposer has not offered its registrations into evidence.

During its time for taking testimony, Opposer served a Notice of Deposition. Opposer failed to serve a copy of this Notice upon Applicant's counsel. Opposer noticed that the testimony be taken on May 17, 2002. Pursuant to *Consolidated Foods Corp. v. Ferro Corp.*, 189 USPQ 582 (TTAB 1976), when a party seeks to take the testimony deposition of an adverse party, "it is incumbent that the deposing party...cause a subpoena to be issued by the United States District Court..." 189 USPQ 582, 283. In *Consolidated Foods*, the applicant failed to appear at a testimony deposition noticed by the opposer. *Id.* The TTAB stated that the person noticed was under no obligation to appear "due to the opposer's failure to compel his attendance with a subpoena." *Id.* at 584. Applicant was under no obligation to appear at the deposition noticed by Opposer because he was not served with a subpoena, and Applicant did not appear. No testimony was taken of Mr. Wright or any other person.

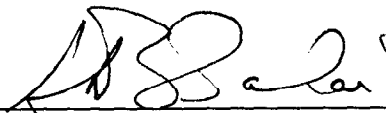
Further, Applicant did not consent to having his testimony taken without being served a subpoena. Opposer's counsel telephoned Applicant's counsel on May 17, 2002 and we advised them that Applicant would not consent to the deposition noticed. On that date, two days remained in Opposer's testimony period. Opposer failed to obtain a subpoena to compel Applicant's testimony or to request an extension of time to take testimony before its time for taking testimony expired.

As shown above, Opposer has failed to offer any evidence in the current proceeding. Therefore, Applicant's motion for dismissal for Opposer's failure to prove its case should be granted.

Applicant requests that its time period for taking testimony be stayed pending the determination of this motion.

Dated: June 14, 2002

Respectfully submitted

By:   
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**CERTIFICATE OF SERVICE**

I, **STEPHEN B. SALAI, ESQ.**, a **PARTNER** with the firm of **HARTER, SECREST & EMERY LLP**, hereby certify that I have served the within **MOTION FOR DISMISSAL FOR OPPOSER'S FAILURE TO PROVE CASE AND REQUEST FOR STAY** by causing a copy of the same to be mailed, postage-prepaid to:

Heidi L. Sachs, Esq.  
Perkins Coie LLP  
1201 Third Avenue  
Suite 4800  
Seattle, WA 98101-3099

Dated: June 14, 2002

  
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**STEPHEN B. SALAI, ESQ.**