

09/22/2003 11:00 AM

Attorney Docket No. 4344-400001

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

DETROIT ENTERTAINMENT, LLC. )  
)  
                                  Opposer, )  
)  
                                  vs. )  
)  
MOTOR CITIES CASINOS, LLC. )  
)  
                                  Applicant. )  
\_\_\_\_\_ )

Opposition No. 91151905



08-28-2003

U.S. Patent & TMO/TM Mail Rpt Dt. #78

**DEFENDANT MOTOR CITIES CASINOS, LLC'S (APPLICANT'S)  
MOTION FOR JUDGMENT FOR PLAINTIFF'S FAILURE TO PROVE CASE**

**I. Introduction**

In the above-identified Opposition No. 91-151,905, Detroit Entertainment, L.L.C. ("Plaintiff" or "Opposer") failed to take any testimony or otherwise admit into evidence any proofs in support of its opposition during its 30-day testimony period ending July 16, 2003. There is no justifiable basis for Plaintiff's failure to prove its case during its 30-day testimony period. Nor has the Board suspended the opposition or otherwise delayed the testimony period. Therefore, Plaintiff's opposition should be dismissed with prejudice.

**II. Applicable Rules and Discussion**

Pursuant to 35 C.F.R. § 2.132(a):

If 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, any party in the position of defendant may, without waiving the right to offer evidence in the event the motion is denied, move for dismissal on the ground of the failure of the plaintiff to prosecute. . . . In

the absence of a showing of good and sufficient cause, judgment may be rendered against the party in the position of plaintiff.

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 the plaintiff has not taken testimony or offered any other evidence. See TBMP § 534.01-02. See also, e.g., *Hewlett-Packard Co. v. Olympus Corp.* 931 F.2d 1551 (Fed Cir. 1991); *Procyon Pharmaceuticals Inc. v. Procyon Biopharma, Inc.*, 61 USPQ2d. 1542, 1544 (TTAB 2001); *S F W Licensing Corp. v. DiPardo Packing Ltd.*, 660 USPQ2d. 1372, 1374 (TTAB 2001).

In this case, Plaintiff has taken no action whatsoever to prosecute its action during its testimony period. Attached as Exhibit A is the Board's most recent scheduling order for this matter showing Plaintiff's testimony period to close on July 16, 2003. The Board's scheduling order reflected in Exhibit A is in fact an amended scheduling order pursuant to stipulation between the parties to extend dates. Therefore, Plaintiff has had adequate time in order to prepare its case and offer evidence during its testimony period.

Plaintiff's only action during its testimony period ending on July 16, 2003, was to submit a letter to Defendant dated July 7, 2003, proposing a nominal offer of settlement. Plaintiff's proposed settlement offer is attached as Exhibit B<sup>1</sup>. Plaintiff's settlement offer, made only nine days before close of its testimony period, did not stay proceedings. See 37 C.F.R. § 2.117. In fact, Plaintiff's counsel specifically noted in its letter that "this offer

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<sup>1</sup> Plaintiff's settlement letter is offered solely to show what Plaintiff did during its testimony period and to rebut a possible argument that somehow the settlement letter stayed proceedings. Otherwise, the letter is protected pursuant to F.R.E. 408.

alone may not be used as a basis for a motion for suspension of the opposition proceedings under Trademark Rule 2.117(c)."

In response to Plaintiff's settlement offer, Defendant sent a letter dated July 9, 2003 (Exhibit C) indicating that the offer would be considered, but not suggesting or even implying that the matter had been settled or would otherwise be stayed pending consideration of the offer. In fact, correspondence from Defendant's counsel specifically asked for additional discovery that had been previously promised by Plaintiff's counsel in anticipation of Defendant's testimony period. Therefore, there is no basis or reason to suggest that Plaintiff's settlement offer somehow constituted a stay or an agreement between the parties to stay the proceedings pending settlement discussions.

Finally, Plaintiff cannot offer the mere existence of settlement negotiations as a basis to argue excusable neglect for its failure to prosecute its case. *See Alanta-Fulton County Zoo, Inc. v. Depalma*, 45 USPQ2d. 1858 (TTAB 1998).

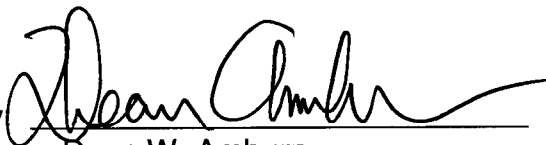
### III. Conclusion

For Plaintiff's failure to prosecute its opposition a directed verdict in Defendant's favor is appropriate pursuant to 37 C.F.R. §2.132(a).

Respectfully submitted,  
**HARNES, DICKEY & PIERCE, P.L.C.**

Dated: August 27, 2003

By



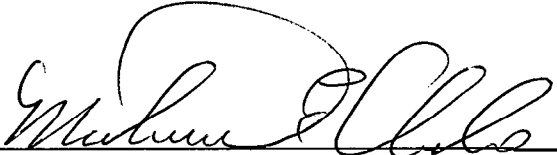
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Attorneys for Applicant  
MOTOR CITIES CASINOS, LLC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27<sup>th</sup> day of August, 2003, a true and correct copy of the foregoing ***Defendant Motor Cities Casinos, LLC's (Applicant's) Motion For Judgment For Plaintiff's Failure To Prove Case*** was served on the following via hand-delivery:

R. Richard Costello  
Michael J. McCue  
**QUIRK & TRATOS**  
3773 Howard Hughes Parkway  
Suite 500 North  
Las Vegas, NV 89109



A handwritten signature in cursive script, appearing to read "Michael J. McCue", is written over a horizontal line.

**A**

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
2900 Crystal Drive  
Arlington, Virginia 22202-3513

Mailed: April 25, 2003

Opposition No. 91/151,905

DETROIT ENTERTAINMENT, LLC

v.

MOTOR CITIES CASINOS LLC

**Shirley Hassan, Paralegal Specialist:**

Opposer's consented motion (filed April 9, 2003) to extend discovery and trial dates is granted. Trademark Rule 2.127(a).

Discovery and trial dates are reset as modified herein:

Accordingly, proceedings herein are resumed and trial dates are reset as follows:

<b>THE PERIOD FOR DISCOVERY TO CLOSE:</b>	<b>April 17, 2003</b>
<b>30-day testimony period for party in position of plaintiff to close:</b>	<b>July 16, 2003</b>
<b>30-day testimony period for party in position of defendant to close:</b>	<b>September 14, 2003</b>
<b>15-day rebuttal testimony period for plaintiff to close:</b>	<b>October 29, 2003</b>

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served

**Opposition No. 151,905**

on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.



**HARNES, DICKEY & PIERCE, P.L.C.**

ATTORNEYS AND COUNSELORS

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ST. LOUIS, MISSOURI

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July 9, 2003

*Via Facsimile and First Class Mail*

R. Richard Costello

**QUIRK & TRATOS**

3773 Howard Hughes Parkway

Suite 500 North

Las Vegas, NV 89109

Re: Detroit Entertainment LLC, Opposer v. Motor Cities Casinos, LLC, Applicant  
Application Serial No. 75/646,977 in Class 25  
Opposition No. 91151905

Dear Mr. Costello:

Thank you for your letter of July 7, 2003 extending an offer of settlement to my client. I will forward the offer to her for consideration. In the meantime, I again request to depose the Motor City Casino employees that were previously noticed for deposition. When the notices of deposition were initially sent out, you expressed a willingness to provide dates for these individuals. If you have changed your position in this regard, please let me know. Otherwise, please provide available dates for deposing these individuals.

Thank you for your attention to this matter.

Very truly yours,



Dean W. Amburn

DWA/jmm



TTAB

HARNES, DICKEY & PIERCE, P.L.C.  
ATTORNEYS AND COUNSELORS  
P.O. BOX 828  
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Commissioner for Trademarks  
2900 Crystal Drive  
Arlington Virginia 22202-3514

Sir:

EL623310069US

08-28-2003  
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EXPRESS MAILING CERTIFICATE

Applicant: Motor Cities Casinos  
Opposition No.: 91151905  
For: MOTOR CITIES CASINOS  
Docket: 4344-400001

"Express Mail" Mailing Label Number..... EL 623310069 US

Date of Deposit: ..... August 27, 2003

I hereby certify and verify that the accompanying Transmittal Letter (in duplicate), Defendant Motor Cities Casinos, LLC's (Applicant's) Motion For Judgment For Plaintiff's Failure To Prove Case, with attached Proof of Service, return receipt postcard and this Express Mail Certificate are being deposited with the United States Postal Service "Express Mail Post Office To Addressee" service under 37 C.F.R. 1.10 on the date indicated above and are addressed to Box TTAB - No Fee, Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3514.

  
\_\_\_\_\_  
Signature of Person Mailing Documents

HARNES, DICKEY & PIERCE, P.L.C.  
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August 27, 2003

Box TTAB - No Fee  
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2900 Crystal Drive  
Arlington Virginia 22202-3514

Re: Opposition No. 91150915  
In the Matter Of Application Serial No. 75/646,977  
Mark: MOTOR CITIES CASINOS  
Our Ref. No. 4344-400001

Sir:

Enclosed please find the following:

1. Express Mail Certificate;
2. Defendant Motor Cities Casinos, LLC's (Applicant's) Motion For Judgment For Plaintiff's Failure To Prove Case; and
3. Return receipt postcard.

The Commissioner is hereby authorized to charge any additional fees which may be required to Deposit Account No. 08-0750. A duplicate copy of this transmittal letter is enclosed.

Respectfully submitted



Dean W. Amburn  
Reg. No. 46,517

DWA/jmm  
Enc.

cc: R. Richard Costello, Esq.