

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

CV/MCF

Mailed: June 5, 2007

Opposition No. 91162244

VITALITY FOODSERVICE, INC

v.

INDIANA BOTANIC GARDENS, INC.

**Thomas W. Wellington,
Administrative Trademark Judge:**

On January 25, 2006, opposer filed a consented motion to extend time to its testimony period.¹ The Board granted this request on January 26, 2006, extending plaintiff's testimony period to February 26, 2006. The remaining testimony periods were not reset or otherwise rescheduled.²

The Board has no record that further extension requests were filed, nor have the parties informed the Board of the status of their settlement negotiations. Pursuant to the

¹ The Board notes that opposer previously filed (on March 4, 2005) a motion to compel discovery. However, since the filing of that motion, opposer filed two other motions including its motion to extend its testimony period, which makes no mention of the motion to compel. The subsequent motions were granted by the Board with a resumption of the testimony periods. In view thereof, the Board presumes that any dispute that gave rise to the motion to compel has been resolved and that the motion is moot.

²As noted in the Board's May 31, 2005 order granting the motion to suspend the proceedings, "proceedings shall resume without further notice or order from the Board." Likewise upon granting the motion to extend the plaintiff's testimony period the order explicitly stated, "Testimony periods are reset in accordance with opposer's motion."

Board's May 31, 2006 order, opposer's rebuttal period closed on May 12, 2006 and, by operation of Trademark Rule 2.128(a)(1), its brief was due sixty days thereafter.

Opposer's trial brief has not been filed with the Board.

Trademark Rule 2.128(a)(3) provides that when a party in the position of plaintiff fails to file a main brief, an order may be issued allowing plaintiff until a set time, not less than fifteen days, in which to show cause why the Board should not treat such failure as a concession of the case. The rule further provides that if plaintiff fails to file a response to the order, or files a response indicating that it has lost interest in the case, judgment may be entered against plaintiff. *See CTRL Systems, Inc. v. Ultraphonics of North America Inc.*, 52 USPQ2d 1300, 1302 (TTAB 1999) (opposer's failure to respond to order to show cause under Rule 2.128 resulted in entry of judgment).

In view of the above, opposer is allowed until thirty (30) days from the mailing date of this order to show cause why the Board should not treat its failure to file a brief as a concession of the case, failing which a judgment dismissing the notice of opposition with prejudice will be entered against opposer.
