

ESTTA Tracking number: **ESTTA231563**

Filing date: **08/20/2008**

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

Proceeding	91185688
Party	Defendant Gigi'S CupCakes
Correspondence Address	Paul W. Kruse Boen McAllester Norton PLLC Suite 1600 511 Union Street Nashville, TN 37219 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Paul W. Kruse
Filer's e-mail	trademarks@bonelaw.com
Signature	/Paul W. Kruse/
Date	08/20/2008
Attachments	Motion to Dismiss (00297575).PDF (4 pages)(27293 bytes)

an extension of time to do so. Despite this discrepancy as to the identity of the Opposer, the Board instituted Opposition No. 91185688 on August 7, 2008.

Federal Rule of Civil Procedure 12 (b)(6) provides that a claim may be dismissed for failure to state a claim upon which relief may be granted. According to TBMP Section 503.02, filing a motion to dismiss for failure to state a claim upon which relief may be granted is a test solely of legal sufficiency of the complaint. In this case, Opposer has failed to state a claim upon which relief may be granted because it failed to timely file its notice of opposition and should as a consequence be dismissed.

Pursuant to TBMP Section 307.04, the provisions regarding a late filed opposition are as follow:

Because the timeliness requirements of Section 13(a) of the Act, 15 U.S.C. Section 1063(a), for the filing of an opposition are statutory, they cannot be waived by stipulation of the parties, nor can they be waived by the Commissioner upon petition.

Accordingly, an opposition filed after the expiration of the would-be opposer's time for opposing must be rejected by the Board as late. No proceeding will be instituted; rather, the opposition papers will be returned, and any submitted opposition fee will be refunded. The would-be opposer's remedy lies in the filing of a petition for cancellation, pursuant to section 14 of the Act, 15 U.S.C. Section 1064, when and if a registration is issued.

Opposer's notice of opposition filed on August 6, 2008, was not timely filed. Section 307.04 of the TBMP is clear. The statutory requirements for the timely filing of a notice of opposition cannot be waived by the parties or by the Commissioner. TBMP Section 307.04 provides for no discretion regarding the timeliness requirement of a notice of opposition. Opposer's proper recourse before the Board is to pursue cancellation if and when Ser. No. 77/316,340 matures into a registration. The Board's August 7, 2008 institution of Opposition

No. 91185688 was improper and, consequently, Opposer's notice of opposition must be dismissed.

For the foregoing reasons, Opposer has not stated a timely claim against Ser. No. 77/316,340. Accordingly, Applicant respectfully requests that the Board dismiss Opposition No. 91185688.

Please direct all communications to the undersigned at (615) 238-6300 or trademarks@bonelaw.com.

Gigi's Cupcakes, LLC

A handwritten signature in black ink, appearing to read 'Paul W. Kruse', written over a horizontal line.

By: _____

Name: Paul W. Kruse

Title: Attorney

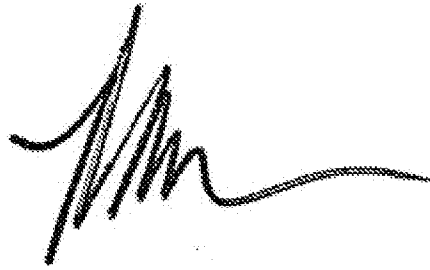
Date: August 20, 2008

Submitted by:

Bone McAllester Norton PLLC
511 Union Street
Suite 1600
Nashville, Tennessee 37219

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing paper was served on Applicant's attorney, Adam W, Tracey, Esq. with an address at Pernod Ricard USA, LLC, 100 Manhattanville Road, 4th Floor, Purchase, New York 10577, via first class mail, postage prepaid, today August 20, 2008.

A handwritten signature in black ink, appearing to read 'Paul W. Kruse', written over a horizontal line.

By: _____
Paul W. Kruse