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

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| Proceeding | 91250626 |
| Party | Defendant Melissa K. McRae, D.O., Inc. |
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| Submission | Other Motions/Papers |
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| Date | 08/23/2020 |
| Attachments | VITALITY NATURAL WELLNESS - Motion for Judgment for Failure to Prove Case.pdf(321418 bytes) |

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

VITALITY WELLNESS CENTER, INC.,

Opposer,

v.

MELISSA K. MCRAE, DO, INC.

Applicant

) Opposition No. 91250626

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APPLICANT’S MOTION FOR JUDGMENT FOR FAILURE TO PROVE CASE

Applicant Melissa K. McRae, DO, Inc. t/a Vitality Natural Wellness and Medspa, by and through its undersigned counsel, and pursuant to TBMP Sections 534.01 and 534.02 (2020), 37 C.F.R. Section 2.132 (a), files the following Motion for Judgment for Failure to Prove Case.

BACKGROUND AND FACTS

On or about August 30, 2019 Opposer Vitality Wellness Center filed a Notice of Opposition against registration of the Applicant’s mark VITALITY NATURAL WELLNESS AND MEDSPA. The Board instituted this proceeding and issued a Conference, Discovery, Disclosure and Trial Schedule in connection with the Opposition proceeding. The Applicant filed a timely Answer to the Notice of Opposition.

The Board set the deadline for the Discovery Conference for November 13, 2019. The Opposer made no effort to contact the Applicant to set up a date and time for the discovery conference. The attorney for the Applicant contacted the Opposer’s counsel, the Messrs. Wasch, via email on November 19, 2020 to call to their attention the Discovery Conference deadline, and to inquire when they wished to set up the conference, but received no response.

Counsel for the Applicant made several other attempts in early 2020 to connect with the Opposer's counsel to determine the intention of the Opposer to prosecute the Opposition, but continued to receive no response with the exception of an email on March 6, 2020 indicating Opposer's counsel would be available the following day for a phone call. The Applicant's counsel responded via email on March 7, 2020 that she was unavailable on that day but suggested alternate times for a call. Opposer's counsel never responded to the March 7th email or a follow up email on March 14, 2020. As time passed without hearing from counsel for the Opposer, counsel for the Applicant sent still another email to the Opposer's counsel on July 28, 2020 and received no response.

Counsel for Opposer has taken no discovery or testimony nor provided any evidence in this Opposition. The deadline set by the Board for the Opposer's (Plaintiff's) 30 day trial period expired on August 9, 2020. The Applicant's (Defendant's) trial period set by the Board does not commence until September 8, 2020, so this Motion is timely filed.

ARGUMENT AND RELIEF REQUESTED

It is clear from the proceeding record that the Opposer (party in the position of Plaintiff) has not taken any testimony or offered any evidence in support of the allegations in the Opposition, and thus has failed to prove the alleged case. Moreover, the above stated background and facts show that the Opposer, from the very beginning of the proceeding, has made no effort to take any steps whatsoever to prosecute the Opposition, although counsel for the Applicant did make efforts to communicate with the Opposer's counsel. Under the circumstances, it is unjust to require the Applicant to expend time and resources defending its

trademark in a testimony period.

Wherefore, pursuant to TBMP Section 534, 37 C.F.R. Section 2.132 (a), the Applicant respectfully requests that the Board grant judgment to the Applicant on the basis of the Opposer's failure to provide any evidence in support of the allegations in the Opposition. In the alternative, the Applicant requests that the Board dismiss the Opposition on the ground of the Opposer's failure of to prosecute.

Respectfully submitted,

/Susan C Chaires/

Susan C Chaires

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Attorney for Applicant

Dated: _____

CERTIFICATE OF SERVICE

I confirm that on August 23, 2020 I served a copy of the above Motion for Judgment to Opposer's attorney by email to the following:

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