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

Proceeding no.	91288002
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PLANT-SMART, LLC, Opposer, v. MOZZA, LLC, Applicant.	Mark: MOZZA App. Serial No.: 97433257 Opposition No.: 91288002

APPLICANT'S MOTION AND MEMORANDUM OF LAW SEEKING JUDGMENT OF DISMISSAL DUE TO OPPOSER'S FAILURE TO PROSECUTE CASE PURSUANT TO 37 CFR § 2.132(a)

Pursuant to 37 C.F.R. § 2.132(a) and Trademark Board Manual of Procedure ("TBMP") §§ 534.01 and 534.02, Applicant Mozza, LLC ("Applicant" or "Mozza"), through its undersigned counsel, makes this motion and submits this Memorandum of Law seeking a judgment of dismissal on the grounds that Opposer Plant-Smart, LLC ("Opposer" or "Plant-Smart") has failed to prosecute its case. Opposer has failed to take any testimony or offer any evidence in support of its Opposition, and the time to do so has expired.

Plant-Smart filed the instant Opposition against Application Serial No. 97433257 for Mozza's mark MOZZA. 1 TTABVUE 3–6. Pursuant to the Board's trial order, Plant-Smart's 30-day Trial Period ended on October 6, 2024. 2 TTABVUE 3. Because October 6, 2024 was a Sunday, Plant-Smart's 30-day Trial Period extended to Monday, October 7, 2024. Plant-Smart failed to take any testimony or offer any evidence in support of its Opposition by October 7th, and Plant-Smart's testimony period has now passed.

Moreover, as discussed below, Plant-Smart has engaged in a pattern of willful disregard for the Board's requirements in other disputes with Mozza, causing both the Board and Applicant to expend unnecessary resources.

As such, Applicant respectfully requests that judgment be entered dismissing the Opposition with prejudice.[1]

I. STATEMENT OF FACTS

A. Procedural Background

On May 27, 2022, Mozza filed an application to register the MOZZA trademark ("Applicant's Mark") in connection with "restaurant and bar services" in International Class 43 based on its use in commerce at least as early as November 14, 2006. Applicant's Mark was assigned Serial No. 97433257 and published on July 4, 2023.

On November 1, 2023, after two extensions of time, Plant-Smart filed the instant Opposition against Applicant's Mark, alleging fraud and a likelihood of confusion between Applicant's Mark for "restaurant and bar services" in Class 43 and Plant-Smart's mark MOZZA TEEZA for "cheese substitutes" in Class 29. 1 TTABVUE 3–6.

The Board entered a Scheduling Order on November 1, 2023, and in compliance therewith, Applicant served its Answer on December 11, 2023. The parties participated in a Discovery Conference on January 10, 2024. Mozza served its Initial Disclosures on February 9, 2024, the deadline set by the Board, and two days after the deadline, Plant-Smart served Initial Disclosures.

After serving Initial Disclosures, Plant-Smart failed to serve or conduct any discovery, or submit any testimony whatsoever. Plant-Smart did not serve Pretrial Disclosures, which were due

[1] Mozza's trial period begins today, November 5th, and Mozza requests that the Board exercise its discretion and grant the motion, which has been filed on the day of the opening of Mozza's testimony period. *See* 37 C.F.R. § 2.132(c).

August 22, 2024, nor did it introduce any trial evidence during Plaintiff's Trial Period, which ended on October 6, 2024. *See* 2 TTABVUE 3. Indeed, since serving Initial Disclosures, Plant-Smart has taken no steps to prosecute the Opposition.

B. Prior Proceedings in Which Plant-Smart was Warned to Comply With the Board's Requirements

1. First Prior Dispute

Mozza previously opposed Plant-Smart's application to register the mark MOZZOTTA for "cheese substitutes." *See* Opp. No. 91266151. In response, Plant-Smart filed three cancellation proceedings, containing nearly 400-paragraphs and spanning 69-pages, against Mozza's incontestable registrations. *See* Canc. Nos. 92076098, 92076099, and 92076100 (the "Mozza Cancellations"). Shortly thereafter, Plant-Smart filed three sets of amended petitions to cancel, containing an additional 17-pages of purported allegations and other information, followed quickly by yet another set of three amended petitions to cancel, containing an additional 15-pages. *Id.*

Following Mozza's motion to dismiss the Mozza Cancellations, the Board *sua sponte* found that Plant-Smart's original petition contained "matter generally inappropriate for a pleading," and that it "fail[ed] to provide a short and plain statement of Plant-Smart's claims as required by Federal Rule of Civil Procedure 8(a) and Trademark Rule 2.112(a)." As for the subsequent amendments, the Board noted they "exacerbate[d] rather than cure[d]" such noncompliance. 14 TTABVUE 8 (Canc. No. 92076098); 13 TTABVUE 8 (Canc. Nos. 92076099 and 92076100). Consequently, the Board strongly encouraged Plant-Smart to "secure the services of an attorney," noting that although Plant-Smart was *pro se*, "strict compliance with the Trademark Rules of Practice, and where applicable, the Federal Rules of Civil Procedure, is

expected." 14 TTABVUE 14 (Cance. No. 92076098); 13 TTABVUE 14 (Canc. Nos. 92076099 and 92076100).

Following Plant-Smart's filing of a fourth pleading, Mozza made a motion to dismiss, which Plant-Smart failed to respond to, leading to the dismissal with prejudice of the petitions to cancel. 17 TTABVUE 2 (Canc. No. 92076098); 16 TTABVUE 2 (Canc. Nos. 92076099 and 92076100).

2. Second Prior Dispute

On November 17, 2021, Mozza filed a Notice of Opposition against Plant-Smart's registration of the mark MOZZA TEEZA for "cheese substitutes" in Class 29 on the basis of a likelihood of confusion with Mozza's design marks, M PIZZERIA MOZZA, OSTERIA MOZZA M, and M PIZZA MOZZA 2GO, for "restaurant and bar services" in Class 43. *See* Opp. No. 91272992.

Notwithstanding the Board's warnings in the first prior dispute, Plant-Smart responded to Mozza's 20-paragraph Notice of Opposition with a 77-page, 425-paragraph answer replete with irrelevant and inflammatory statements concerning Mozza's owners and its trademark counsel. 8 TTABVUE 1 (Opp. No. 91272992); 4 TTABVUE 1–77 (Opp. No. 91272992). Following Mozza's first motion to strike Plant-Smart's Answer as non-compliant (*see* 5 TTABVUE 1–18) (Opp. No. 91272992), the Board allowed Plant-Smart a second opportunity to file an answer and provided Plant-Smart with step-by-step guidance as to how to do so appropriately. 8 TTABVUE 2–7 (Opp. No. 91272992). There, once again, the Board strongly encouraged Plant-Smart to "secure the services of an attorney…." 8 TTABVUE 4 (Opp. No. 91272992). Moreover, the Board reiterated that "[s]trict compliance with the Trademark Rules of Practice, and where applicable the Federal

Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel." *Id.* at 6.

II. ARGUMENT

A. Applicable Legal Standard

Pursuant to 37 C.F.R. § 2.132(a) and TBMP §§ 534.01 and 534.02, a defendant may move for dismissal for failure of the plaintiff to prosecute where the plaintiff's testimony period has passed, and the plaintiff has not taken testimony or offered any other evidence. *See Hester Industries, Inc. v. Tyson Foods Inc.*, 2 U.S.P.Q.2d 1645 (T.T.A.B. 1987); *The Hartwell Co. v. Shane*, 17 U.S.P.Q.2d 1569 n.4 (T.T.A.B. 1990).

Although the law favors judgments on the merits when possible, in instances such as here, the Board is nevertheless "justified in enforcing its procedural deadlines." *Hewlett Packard Co. v. Olympus Corp.*, 931 F.2d 1551, 1554 (Fed. Cir. 1991). The purpose of such a motion is to save the defendant from the expense and delay of continuing with the trial where the plaintiff has failed to offer any evidence during its testimony period. *Litton Business Systems, Inc. v. J.G. Furniture Co. Inc.*, 190 U.S.P.Q. 428 (T.T.A.B. 1976); TBMP § 534.02.

B. Opposer Failed to Take Testimony or Offer Any Evidence Prior to the Expiration of its Trial Period

Plant-Smart has failed to take testimony or offer any other evidence, and the time to do so has expired. As noted above, Opposer's 30-day Trial Period ended on October 7, 2024 (October 6th being a Sunday). That date has come and gone, and Opposer has offered no evidence to support its case. Opposer has failed to conduct any discovery or submit any testimony. Opposer has not served Pretrial Disclosures and has not introduced any trial evidence, nor has it sought an enlargement of its testimony period. Opposer has failed to take any action or show any interest in pursuing this Opposition since serving its Initial Disclosures.

Moreover, Opposer's redundant filings spanning multiple disputes has resulted in Applicant incurring significant attorney fees and business interruptions in order to defend itself. To save Applicant from further expenses, and in alignment with TBMP § 534.02's purpose of saving the defendant the expense and delay of continuing such a trial, Plant-Smart's Opposition should be dismissed with prejudice.

C. Plant-Smart's *Pro Se* Status Should Not Prevent Dismissal

Plant-Smart's deliberate disregard for the Board's orders has extended throughout multiple disputes. The Board has already warned Plant-Smart that despite its *pro se* status, strict compliance with the Board's procedural requirements is expected. 14 TTABVUE 14 (Canc. No. 92076098); 13 TTABVUE 14 (Canc. Nos. 92076099 and 92076100); 8 TTABVUE 6 (Opp. No. 91272991). Moreover, the Board has already encouraged Plant-Smart to obtain legal counsel multiple times. *Id*. As previously stated in response to Plant-Smart's voluminous pleadings, the Board has "limited resources." 14 TTABVUE 8 (Canc. No. 92076098); 13 TTABVUE 8 (Canc. Nos. 92076099 and 92076100). Plant-Smart's waste of such limited resources should not be allowed to continue.

Furthermore, Plant-Smart filed this Opposition with unclean hands, which has involved, *inter alia*, filing baseless trademark cancellation proceedings against Mozza's incontestable trademark registrations; filing reams of pleadings, totaling hundreds of pages and containing legally irrelevant, false, and scandalous assertions, despite repeated admonitions from the Board; and hurling unfounded and inflammatory allegations at Mozza and its counsel in this and other trademark proceedings.

In contrast to *pro se* parties acting in good faith, Plant-Smart's pattern of disregarding the Board's admonitions indicate a deliberate indifference to the Board's requirements. Plant-Smart

has been afforded multiple opportunities to familiarize itself with the Trademark Rules and the Board's requirements, but has instead chosen time and time again to flout those rules and requirements. Plant-Smart's waste of the Board's limited resources and non-compliance with the rules of this body should not be allowed to continue.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Board grant its motion for a judgment dismissing the instant Opposition with prejudice.

Respectfully submitted,

COZEN O'CONNOR

Dated: November 5, 2024

/s/ Lisa A. Ferrari

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on November 5, 2024, a copy of the foregoing **APPLICANT'S MOTION AND MEMORANDUM OF LAW SEEKING JUDGMENT OF DISMISSAL DUE TO OPPOSER'S FAILURE TO PROSECUTE CASE PURSUANT TO 37 CFR § 2.132(a)**, is being electronically filed with the United States Patent and Trademark Office, Trademark Trial and Appeal Board, at http://estta.uspto.gov/.

/s/ Keren Dadon

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2024, I caused a copy of the foregoing **APPLICANT'S MOTION AND MEMORANDUM OF LAW SEEKING JUDGMENT OF DISMISSAL DUE TO OPPOSER'S FAILURE TO PROSECUTE CASE PURSUANT TO 37 CFR § 2.132(a)**, to be served upon Petitioner, via email, addressed as follows:

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Petitioner, pro se

/s/ Keren Dadon