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

Proceeding	92047058
Party	Defendant Megan L. Murphy
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the matter of Cancellation No. 92047058: MEGAN L. MURPHY

ROBERT P. HORNSBY, JR.,	)	
	)	
Petitioner,	)	
	)	CANCELLATION NO. 92047058
v.	)	
	)	
MEGAN L. MURPHY	)	
	)	
Registrant.		

REGISTRANT'S MOTION TO DISMISS FOR PLAINTIFF'S FAILURE TO TAKE TESTIMONY OR PROVE CASE

The Registrant, Megan L. Murphy, through her attorneys of record in this matter, K&L Gates LLP, hereby moves for dismissal and judgment against the Petitioner, Robert P. Hornsby, Jr, pursuant to the procedural rules of this Board.

This matter began over two years ago, when Petitioner Robert Hornsby instituted the above proceedings in February of 2007, seeking to cancel the Registrant's U.S. Trademark Registration No. 3,062,810 for the service mark, ARTOCRACY. The cancellation was sought on grounds of purported "fraud" in the application, "threats" and "intimidation." Mr. Hornsby has been granted multiple extensions of the discovery period and was granted a previous extension of his testimony period already. That extension, granted on March 10, 2010, established that the current testimony period was to conclude

on April 15, 2010. Petitioner's testimony period is now expired. Despite the Board's previous accommodations for Petitioner's lack of diligence, Mr. Hornsby has once again failed to take appropriate action to prosecute his dubious petition for cancellation.

The Registrant, Ms. Murphy, moves for dismissal of the claims and judgment in her favor, pursuant to 37 C.F.R. § 2.132(a). Mr. Hornsby has failed to take testimony or offer any other evidence without good and sufficient cause, and without doing so, is unable to demonstrate the requisite showing of fraud.

I. Petitioner's testimony period has passed and he has, without good and sufficient cause, failed to take testimony or offer any other evidence.

Involuntary dismissal is warranted under 37 C.F.R. § 2.132(a), when: "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." Upon such inaction by the plaintiff, "any party in the position of defendant may ... move for dismissal on the ground of the failure of the plaintiff to prosecute." *Id.* If the plaintiff cannot show "good and sufficient cause" for the failure, "judgment may be rendered against [him]." *Id.*

The "good and sufficient cause" standard is equivalent to the "excusable neglect" standard that must be met by any motion under Fed. R. Civ. P. 6(b). Excusable neglect is defined as:

> failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and vigilance of his counsel or on promises made by the adverse party.

Hewlett-Packard Co. v. Olympus Corp., 931 F.2d 1551, 1552-53 (Fed. Cir. 1991) (citations omitted). The purpose of a motion under 37 C.F.R. § 2.132(a) is to save the defendant the expense and delay of continuing with the trial in those cases where the plaintiff has failed

to prosecute. *See Litton Business Systems, Inc. v. J.G. Furniture Co. Inc.*, 190 U.S.P.Q. 428 (T.T.A.B. 1976).

The plaintiff in this case has repeatedly failed to comply with the scheduling obligations established by this Board. Mr. Hornsby has already been granted an extension of his testimony period. That request was granted after extensions of the discovery period as well. Petitioner's original testimony period was scheduled to close on November 6, 2009. Nevertheless, the testimony period was extended until April 15, 2010 to provide Mr. Hornsby with sufficient time to schedule and conduct a deposition of Mr. Hughes, or any other potential witness.

Mr. Hornsby has not taken any further action during this extension, or offered any other evidence. His failure to take proper action in accordance with the scheduling order is a result of his own carelessness, inattention and/or willful disregard of the process of this Board. Mr. Hornsby is aware of the Board's rules, aware of the schedule in this matter, and has had ample time and opportunity to prosecute his claims. Yet he has taken no additional steps to depose Mr. Hughes, or any other potential witness – the purpose for which an extension was granted.

Furthermore, contrary to his previous requests for extension, Mr. Hornsby can no longer claim his inaction is the consequence of some unexpected or unavoidable hindrance. The claimed difficulties he experienced during the last testimony period should have made him cognizant of the time constraint and of the need for diligence in managing his testimony period. Mr. Hornsby's failure to prosecute is therefore without good and sufficient cause, and Ms. Murphy should be saved the time and expense of continuing with trial where there has been no testimony taken or evidence presented against her.

Accordingly, this case should be dismissed and judgment should be rendered against the plaintiff, pursuant to 37 C.F.R. § 2.132(a).

II. Absent additional testimony or evidence offered by the plaintiff, the requisite showing of fraud has not been proven.

Mr. Hornsby seeks to cancel defendant's registered trademark, claiming the "registration was obtained fraudulently" under 15 U.S.C. § 1064(3). The evidence relied upon cannot possibly prove such a claim.

The Federal Circuit recently elevated the burden of proof necessary to cancel a trademark based on fraud. In *In re Bose*, the Court held that the alleged "deception must be willful to constitute fraud." 580 F.3d 1240, 1243 (Fed. Cir. 2009). In order to satisfy this heavy burden, the plaintiff must prove that the defendant made a false, material representation with the subjective intent to deceive the PTO. *Id.* at 1245. "Subjective intent, however difficult it may be to prove, is an indispensable element in the analysis." *Id.* Absent the requisite subjective intent to mislead the PTO, even a material misrepresentation does not qualify as fraud under 15 U.S.C. § 1064(3). *Id.* at 1243.

Furthermore, the court emphasized that a charge of fraud must "be proven 'to the hilt' with clear and convincing evidence. There is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the charging party." *Id.* (quoting *Smith Int'l, Inc. v. Olin Corp.*, 209 U.S.P.Q. 1033, 1044 (T.T.A.B. 1981)).

The plaintiff has provided zero evidence, let alone clear and convincing evidence, to indicate that Ms. Murphy subjectively intended to deceive the PTO in her trademark registration. Mr. Hornsby's evidence consists solely of internet archive records, which suggest only that his internet domain, "artocracy.com" was registered prior to Ms. Murphy's "artocracy.org", which says nothing about the use of the mark ARTOCRACY or

Ms. Murphy's subjective intent. This evidence is relied upon to prove that Mr. Hornsby had legal rights superior to the rights of Ms. Murphy, that Ms. Murphy knew that those rights were superior to her own and that Ms. Murphy intentionally deceived the PTO by failing to disclose these facts in her application. However, the registration of a particular domain name does not necessarily contribute anything to the determination of when trademark rights are conferred. A domain name does not confer trademark rights "unless it is also used to identify and distinguish [a] source of goods or services." 1 *McCarthy on Trademarks and Unfair Competition* § 7:17.50 (4th ed.). There is no evidence on record to indicate that Mr. Hornsby's domain was being used as such, or is even now. Mr. Hornsby's evidence supports nothing more than the proposition that he registered a similar domain name slightly earlier than Ms. Murphy. Fraud is not proven simply by demonstrating that an "applicant ... is aware of another party's prior use of the designation in a non-trademark sense." *McCarthy*, § 31:76. Without producing additional evidence, Mr. Hornsby has demonstrated nothing more than his prior use of ARTOCRACY in a non-trademark sense.

Even if there were facts to suggest that Mr. Hornsby had a prior right to the use of ARTOCRACY, there is no evidence on record that can prove that Ms. Murphy knew that right was superior to her own and that she intentionally deceived the PTO in her application. Mr. Hornsby is relying solely on the fact that his internet domain was registered on an earlier date to satisfy his heavy burden of proving Ms. Murphy's subjective intent to deceive. Needless to say, a finding of fraud based on such limited facts would necessarily require the Board to inappropriately engage in speculation, inference, and surmise. This is especially so, given that all doubts must be resolved against Mr.

Hornsby. Ms. Murphy's application for registration was based on a good faith belief in her right to the ARTOCRACY mark. She had no reason to believe that Mr. Hornsby had a superior right, and there was no subjective intent to deceive the PTO. Therefore, Mr. Hornsby's allegations cannot possibly constitute fraud under the standard set forth in *Bose*.

Despite being given multiple extensions and every opportunity to prove his claims, Mr. Hornsby has failed to prosecute this matter. Additionally, the facts as they stand – without further testimonial or evidentiary support – cannot possibly support a finding of fraud. Further accommodations at this point would only reward his lack of diligence and cause Ms. Murphy to suffer continued undue delay and cost in the resolution of these proceedings. Accordingly, this case should be dismissed and judgment rendered in favor of Ms. Murphy, pursuant to 37 C.F.R. § 2.132(a).

Dated this 19th day of April, 2010.

K&L GATES LLP

By /jmkeyes/

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CERTIFICATE OF SERVICE

I, Cari Hollabaugh, hereby certify that a true and complete copy of the foregoing document: **Registrant's Motion to Strike,** was served on Petitioner on April 19, 2010 by enclosing a copy of said documents in an envelope addressed as set forth below and by causing such envelope to be delivered as indicated below:

Mr. Robert P. Hornsby, Jr.
1038 Waverly Street
Philadelphia, PA 19147
bobhornsby@gmail.com

[X] BY MAIL: A true and correct copy of such document was placed in a sealed envelope, addressed as shown above, and such correspondence was deposited, with postage fully prepaid, in a United States Post Office mail box at Spokane, WA on the same day in the ordinary course of business.

[ ] BY PERSONAL SERVICE: A true and correct copy of such document was placed in a sealed envelope, addressed as shown above and the undersigned caused such envelope to be delivered by hand to the offices of the addressee.

[ ] BY FACSIMILE: Such document was faxed to the facsimile transmission machine with the facsimile machine number stated above. Upon completion of the transmission, the transmitting machine issued a transmission report showing the transmission was complete and without error.

[ ] BY ELECTRONIC MAIL: Such document was transmitted to the e-mail address listed above. The e-mail was not returned as undeliverable

I declare, under penalty of perjury, that the foregoing is true and correct and is executed April 19, 2010 at Spokane, Washington.

Cari M. Hollabaugh

Cari Hollabaugh