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

Proceeding	92050860
Party	Defendant American Strongman Corporation
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

TRANS WORLD INTERNATIONAL, INC.

Petitioner,

v.

**AMERICAN STRONGMAN
CORPORATION**

Registrant.

Petition for Cancellation No.: 92/050860

Directed to Reg. No.: 3,522,878

**REGISTRANT’S MOTION FOR JUDGMENT FOR PLAINTIFF’S FAILURE TO
PROVE CASE PURSUANT TO 37 CFR §2.132(B)**

Now comes American Strongman Corporation (“Registrant”) by and through its counsel and hereby submits this Motion for Judgment for Plaintiff’s Failure to Prove Case pursuant to Trademark Rule 2.132(b).

INTRODUCTION

Registrant has filed this motion for judgment directed to insufficiency of Petitioner’s trial evidence. Because Petitioner’s testimony period has passed, Petitioner failed to take any testimony, and because Petitioner has offered no further evidence other than a copy of PTO records, Registrant moves for dismissal of this action on the ground that upon the law and the facts the Petitioner has shown no right to relief.

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BACKGROUND

American Strongman Corporation filed this Petition for Cancellation of Registrant's United States Trademark Registration No. 3,522,878 on April 23, 2009. Petitioner is the owner of Trademark Registration No. 2484106, registered September 4, 2001, for the mark WORD'S STRONGEST MAN. Registrant is the owner of the mark AMERICAN'S STRONGEST MAN. Petitioner has alleged that Registrant's trademark at least in part is identical to Petitioner's mark in significance, general appearance, and verbal identification as to be likely to cause confusion, to cause mistake, or to deceive.

Registrant filed its answer on May 25, 2009 generally and specifically denying Petitioner's allegations. Discovery requests were exchanged between the parties through the dates assigned by the Board. The date assigned by the Board for Petitioner's 30-days trial period to end was originally March 30, 2010. By Order dated January 29, 2010, the Board granted Petitioner's request to extend discovery and trial dates. By operation of this order, Petitioner's testimony period was reset to close on May 29, 2010

On the last day of Petitioner's testimony period, Petitioner filed an uncontested motion to extend the close of its testimony period until July 28, 2010 contending that Petitioner's principal witness was no longer an employee of the Petitioner's company. This motion was granted by the Board's order dated July 15, 2010, which reset the close of Petitioner's testimony for July 28, 2010.

Yet again, on the last day of Petitioner's extended testimony period (this period has been extended for four (4) months already), Petitioner filed another motion to extend the close of its testimony period for an additional 60 days. This time Petitioner alleged

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that they have "identified a new principal witness," but the witness is out of town. Registrant filed its response immediately requesting that the Board denies Petitioner's motion to extend its testimony period.

Respondent argued that Petitioner has vaguely and insufficiently alleged its good cause for the extension request. Specifically, Respondent maintained that, similar to their first motion, Petitioner has failed to provide any detailed information as to the identity of its "new principal witness." Moreover, Respondent maintained that Petitioner's need for an extension is a result of Petitioner's delay and lack of diligence during previously set testimony periods.

After hearing both parties' arguments on August 10, 2010, the board issued its order on August 23, 2010 denying Petitioner's request. Specifically the Board held that:

"The reasons for Petitioner's delay in seeking an extension of its testimony period do not constitute good cause at this juncture in the case, especially since Petitioner has repeatedly sought extension requests on the last day of its testimony period when such requests could have been easily sought earlier in its testimony period. Moreover, the Board finds that the need for an extension is primarily based upon Petitioner's own lack of diligence in completing its testimony in a timely fashion."

Registrant is now filing this motion pursuant to 37 CFR §2.132(b) and requesting for judgment directed to the insufficiency of Petitioner's trial evidence because petitioner's testimony period has passed and Petitioner has offered no evidence other than a copy of PTO records. Accordingly, Registrant moves for dismissal of this action on the ground that upon the law and the facts the Petitioner has shown no right to relief.

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ARGUMENT

Pursuant to 37 CFR §2.132(b) defendant may appropriately file a motion for judgment directed to the sufficiency of a plaintiff's trial evidence when the plaintiff's testimony period has passed, and the plaintiff has offered no evidence other than a copy of copies of PTO records. In such a situation, the defendant may, without waiving its right to offer evidence in the event the motion is denied, move for dismissal on the ground that upon the law and the facts the plaintiff has shown no right to relief.

Here, Petitioner was engaged in locating and identifying a witness since March of 2010. Their testimony period has been extended twice and was reset to end on July 28, 2010. Petitioner's testimony period has passed and Petitioner failed to offer any evidence or prepare any testimony other than the copies of PTO records showing their registered mark. Accordingly, Petitioner simply cannot prove its case to cancel the Registration.

Petitioner is the party who brought this cancellation proceeding in the first instance, and it carries the burden of going forward in a timely manner. Yet, they have failed to offer any evidence whatsoever that would make out a prima facie case, further validating registrant's request for this judgment. *See: Syntex (U.S.A.) Inc. v. E.R. Squibb & Sons Inc., 14 U.S.P.Q.2d 1879, 1880 (TTAB 1990) (marks not identical and the relationship, if any, between the parties' goods not apparent from the face of pleaded registration); Newhoff Blumberg Inc. v. Romper Room Enterprises, Inc. (2.132(b) requires decision on merits of the case); and Litton Business Systems, Inc. v. J. G. Furniture Co., Inc., 190 U.S.P.Q. 431, 434 (TTAB 1976) (Board will not use judicial*

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notice to remedy plaintiff's failure to present adequate evidence). Here, Petitioner cannot prevail simply on the basis of its prior registration for WORLD'S STRONGEST MAN for a number of reasons. First, the WORLD'S STRONGEST MAN registration was already in place when Applicant applied for the subject mark, AMERICA'S STRONGEST MAN. WORLD'S STRONGEST MAN was registered on 9/4/2001 and AMERICA'S STRONGEST MAN was applied for on February 4, 2008 and Registered on October 21, 2008. Thus, the U.S.P.T.O. has already reviewed and approved the Registration in light of the Petitioner's mark. Further, the marks are clearly and obviously distinguishable and, therefore, confusion among the marks is highly unlikely.

As such, it would be impossible for Petitioner to prevail on its Petition for Cancellation.

CONCLUSION

Therefore, Registrant requests a Judgment in favor of Registrant for Plaintiff's Failure to Prove Case pursuant to Trademark Rule 2.132(b).

Respectfully Submitted,
LAW OFFICES OF SEPEHR DAGHIGHIAN, P.C.

/Sepehr Daghighian/

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CERTIFICATE OF SERVICE

I am a Member of the Bar of California, not a Party in the Action, and I hereby certify that I caused to be served on Attorneys for Opposer a true and correct copy of each of the foregoing documents:

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was served on August 27, 2010 by U.S. First Class Mail with postage prepaid, in an envelope addressed to:

Stephen A. Hill
Rankin, Hill & Clark LLP
38210 Glenn Avenue
Willoughby, OH 44094-7808

I declare under the penalty of perjury of the United States that the foregoing is true and correct.

Executed on August 27, 2010 at Beverly Hills, California.

/Sepehr Daghighian/

Sepehr Daghighian, Esq.