

ESTTA Tracking number: **ESTTA777870**

Filing date: **10/19/2016**

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

Proceeding	91224832
Party	Defendant Chief
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Submission	Motion to Dismiss 2.132
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Date	10/19/2016
Attachments	Chief Motion for Judgment Under 37 CFR 2.132.pdf(373586 bytes) 37 CFR 2.132 Motion - Gagnier Declaration .pdf(286269 bytes) MTD Exhibit A.pdf(1473529 bytes) Exhibit B.pdf(451044 bytes) Exhibit C.pdf(1283025 bytes) 37 CFR 2.132 Motion - Margossian Declaration.pdf(283146 bytes) Chief Motion 37 CFR 2.132 Certificate of Service.pdf(102701 bytes)

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

In the matter of Application Serial No. 86539709 and 86539648
Filed on February 19, 2015
For the marks BE BRAVE and CHIEF BE BRAVE
Published in the Official Gazette on July 14, 2015

SCOUT MARKETING, INC.,)	
)	Opposition No.'s 91224831 and
)	91224832
Opposer,)	
)	APPLICANT'S MOTION FOR
)	JUDGMENT UNDER
v.)	37 C.F.R § 2.132(a)
)	
CHIEF, INC.,)	
)	
)	
Applicant.)	

APPLICANT'S MOTION FOR JUDGMENT UNDER 37 C.F.R § 2.132(a)

Pursuant to Trademark Rule 2.132(a), Applicant, Chief, Inc. ("Applicant") moves for Judgment on the grounds that Opposer, Scout Marketing, Inc. ("Opposer"), has failed to prosecute. Opposer has failed to take any testimony in this matter and has failed to enter any evidence in support of its Opposition. The time for Opposer to do so has expired.

STATEMENT OF FACTS

On November 12, 2015, Opposer filed its Notices of Opposition Nos. 91224831 and 91224832 for Application Nos. 86539709 and 86539648. The Trademark Trial and Appeal Board ("TTAB") immediately set a Case Schedule for this matter, which provided that Applicant's Answer was due on December 21, 2015; a Discovery Conference was to be had no

later than January 21, 2016; Initial Disclosures were due February 20, 2016; Expert Disclosures were due June 19, 2016; Discovery closed July 19, 2016; Plaintiff's Pretrial Disclosures were due September 2, 2016; and Plaintiff's 30-day trial period ended on October 17, 2016. Applicant filed its Answer on December 21, 2015. Pursuant to the Case Schedule, a Discovery Conference was held between the parties.

Since the outset of the proceeding, Opposer has failed to meet the deadlines set out by the Case Schedule. Opposer served its Initial Disclosures upon the Applicant on February 24, 2016. *See* Declaration of Christina Gagnier ("Gagnier Decl."), Exhibit A. Thereafter, Opposer served Expert Disclosures upon Applicant on June 20, 2016. *See* Gagnier Decl., Exhibit B.

The parties have exchanged discovery in this matter, however, the Opposer consistently disregarded discovery deadlines. *See* Declaration of Stephanie Margossian ("Margossian Decl.") Despite Discovery closing on July 19, 2016 per the Case Schedule, Opposer continued to serve documents upon the Applicant up to July 27, 2016. *See* Margossian Decl. Applicant determined that documents provided by Opposer in discovery were insufficient to allow Applicant to adequately prepare for trial, prompting Applicant to file a Motion to Compel Discovery on September 17, 2016. *See* Margossian Decl., DE 10. As of this date, the TTAB has not ruled on the Applicant's Motion to Compel Discovery.

On September 14, 2016, Opposer filed a Motion to Consolidate the above named Opposition proceedings. *See* DE 5. Applicant timely responded to Opposer's Motion to Consolidate on September 29, 2016. *See* DE 13. The TTAB has not yet ruled on the Opposer's Motion to Consolidate.

On September 16, 2016, Opposer filed its Motion for Summary Judgment. *See* DE 8 and 9. Applicant then filed a Motion for Rule 56(D) Discovery on September 23, 2016. *See* DE 12.

As of the date of this Motion, the TTAB has not yet issued an Order suspending these proceedings. The TTAB has also not yet ruled on these motions.

On September 2, 2016, Opposer served upon Applicant its Pretrial Disclosures. *See* Gagnier Decl., Exhibit C. Opposer's Pretrial Declarations stated that Opposer intended to take the testimony of four witnesses and enter a number of exhibits into evidence. *Id.* Although the Opposer's Trial Period ended on October 17, 2016, as of the date of this Motion, Opposer has failed to enter testimony from any witnesses or enter any exhibits as evidence. *See* Gagnier Decl.

ARGUMENT

Trademark Rule 2.132(a) provides that a party may obtain an involuntary dismissal for failure of the party in position of Plaintiff to take any testimony or offer any other evidence. *See* 37 C.F.R. § 2.132(a). Despite representing in its September 2, 2016 Pretrial Disclosures that Opposer would be taking testimony of four witnesses, as of this date Applicant has not received notice of depositions of any of the four listed witnesses, nor has Opposer submitted testimony of these witnesses into evidence. *See* Gagnier Decl., Exhibit C. In addition, Opposer represented in its September 2, 2016 Pretrial Disclosures that it would be presenting a number of exhibits. *See Id.* As of this date, Opposer has not submitted any exhibits into evidence. *See* Gagnier Decl.

Although Opposer filed a Motion for Summary Judgment in this proceeding, the TTAB has not issued an order suspending the proceedings. The Motion for Summary Judgment does not automatically suspend the proceedings. Rather, only an order of the TTAB can formally suspend the proceedings. *See* TBMP § 528.03; *See also Super Bakery Inc. v. Benedict* 96USPQ.2d 1134 (Trademark Tr. & App. Bd. September 16, 2010). Without an order from the TTAB formally suspending the proceedings, all case deadlines continue to run. *See* TBMP § 5.103(a). Since the TTAB has not issued an order formally suspending the proceedings in this

matter the parties are required to continue to abide by the Case Schedule, and Opposer was required to submit all trial evidence by October 17, 2016. *See* DE 2.

Opposer has failed to submit any evidence or testimony within its designated trial period. Therefore, it has failed to prosecute this matter, and it is appropriate that Applicant now move for Judgment under Trademark Rule 2.132(a). *See Hewlett-Packard Co. v. Olympus Corp.* 931 F.2d 1551, 153 (Fed. Cir. 1991).

Trademark Rule 2.132(a) states that a motion for Judgment should be filed before the opening of the moving party's testimony period. 37 C.F.R. § 2132(a). Applicant's testimony period commences on November 16, 2016. As such, Applicant's motion is timely.

Applicant is ready to begin its trial period and to defend its marks. Although Opposer brought these actions, it has demonstrated its unwillingness or reluctance to see their prosecution through by consistently failing to adhere to case deadlines. Opposer's failure to submit evidence or testimony of any kind during its designated trial period is also indicative of its unwillingness to prosecute these matters. Opposer's Motion for Summary Judgment did not automatically suspend these proceedings. If Opposer were serious about prosecuting these matters, it would have taken note that an Order to Suspend had not been issued, and would have taken steps to submit evidence or testimony during its trial period.

Trademark Rule 2.132(a) relieves the Applicant from the burden of having to incur the expense and time of a trial where an Opposer has failed to prosecute its case. As Opposer has presented no record of evidence or testimony establishing its case, it has shown no right to relief. Accordingly, Applicant moves for Judgment under 37 C.F.R. § 2.132(a).

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