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**UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451**

Mailed: November 23, 2005

Opposition No. **91163924**

Fountain of Youth Properties,
Inc.

v.

Laura Pucktt

Before Holtzman, Rogers and Drost, Administrative Trademark
Judges.

By the Board:

On August 26, 2005, opposer filed a motion for summary judgment on its pleaded claim of likelihood of confusion under Section 2(d) of the Trademark Act. Office records indicate no response thereto.

When a party fails to file a brief in response to a motion, the Board may treat the motion as conceded. See Trademark Rule 2.127(a) and TBMP §502.04 (2d ed. rev. 2004). In light of the dispositive nature of opposer's motion, however, we have exercised our discretion to also consider the motion on its merits.

Opposer's motion is based on applicant's failure to timely respond to opposer's requests for admissions, served June 7, 2005. Opposer contends that pursuant to Fed. R.

Civ. P. 36(a), its requests for admissions are deemed admitted and thus all issues have been conclusively established in its favor. In view thereof, opposer argues that no genuine issue of material fact exists and opposer is entitled to judgment as a matter of law.

There is no dispute that applicant failed to timely respond to opposer's requests for admissions. As noted in TBMP § 527.01(d)(2d ed. rev. 2004):

If a party upon which requests for admission have been served fails to file a timely response thereto, the requests will stand admitted (automatically), and may be relied upon by the propounding party pursuant to 37 CFR § 2.120(j)(3)(i), unless the party upon which the requests were served is able to show that its failure to timely respond was the result of excusable neglect; or unless a motion to withdraw or amend the admissions is filed pursuant to Fed. R. Civ. P. 36(b), and granted by the Board.

See Fed. R. Civ. P. 6(b) and 36(a); *Hobie Designs, Inc. v. Fred Hayman Beverly Hills, Inc.*, 14 USPQ2d 2064 (TTAB 1990); see also TBMP §§ 407.03(a) and 525 (2d ed. rev. 2004).

Applicant has not filed a motion to withdraw or amend the admissions or shown that its failure to timely respond to the requests for admissions was a result of excusable neglect. In view thereof, the requests for admission are deemed admitted.

The facts established by applicant's admissions include the following: that opposer has been using its

pleaded mark continuously in the United States prior to any date of first use by applicant (admission No. 9); that applicant has not yet commenced use of its mark (admission No. 3); that applicant's mark is confusingly similar to opposer's mark (admission No. 18); that the parties' goods and services are the same and are sold through the same trade channels to the same types of purchasers (admission Nos. 23-25; 29 and 31); and that consumers purchasing applicant's goods and services are likely to be confused as to the source or sponsorship of the parties's respective goods and services (admission Nos. 43-46). These admissions demonstrate that no genuine issues of material fact exist as to opposer's pleaded claim of priority and likelihood of confusion under Section 2(d) of the Trademark Act.

Accordingly, opposer's motion for summary judgment is granted as conceded and as well-taken; the notice of opposition is sustained; and registration to applicant is refused.