

ESTTA Tracking number: **ESTTA75928**

Filing date: **04/12/2006**

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

Proceeding	91161954
Party	Plaintiff PABST BREWING COMPANY
Correspondence Address	WILLIAM B. NASH JACKSON WALKER L.L.P. 112 E. PECAN STREET, SUITE 2100 SAN ANTONIO, TX 78205  bnash@jw.com
Submission	Opposition/Response to Motion
Filer's Name	Michael Moreno
Filer's e-mail	dmunsch@jw.com
Signature	/Michael Moreno/
Date	04/12/2006
Attachments	Opp91161954.PDF ( 5 pages )

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

---

Pabst Brewing Company,	§	
	§	
Opposer	§	Opposition No. 91161954
	§	
v.	§	
	§	
LONE STAR STEAKHOUSE & SALOON, INC.,	§	U.S. Serial No. 75/883,254
	§	
Applicant	§	Mark: LONE STAR & DESIGN
	§	

---

**OPPOSER'S RESPONSE IN OPPOSITION TO APPLICANT'S  
MOTION TO SET ASIDE NOTICE OF DEFAULT**

Pabst Brewing Company, Opposer herein, files this Response in Opposition to Applicant's Motion to Set Aside Notice of Default and in support thereof, respectfully shows the following:

I. INTRODUCTION AND BACKGROUND

1. This is an opposition proceeding initiated by Pabst Brewing Company on or about August 25, 2004.
2. The initial deadline for Applicant to have filed its answer was October 13, 2004, which Applicant never met.
3. On or about November 22, 2004, Applicant moved to suspend the proceedings for three months because the parties were engaged in settlement discussions.
4. On or about January 25, 2005, the Board suspended the proceedings for six months to afford the parties time to reach a settlement.
5. No settlement was reached and the six-month suspension period expired .

6. On November 21, 2005, the Board mailed each party a notice that the proceedings had resumed and setting Applicant's deadline to file its answer to the Notice of Opposition as December 21, 2005.

7. On January 24, 2006, the Board entered a notice of default against Applicant for failure to file its answer and ordering it to show cause within thirty days why judgment by default should not be entered against it. Applicant did not respond within the thirty-day period.

8. On or about March 24, 2006, Applicant filed a Motion to Set Aside Notice of Default, claiming that it never received the Board's notices on November 21, 2005 and January 24, 2006.

9. It is to this motion that Opposer now responds.

## II. ARGUMENT IN OPPOSITION

10. If a defending party fails to file an answer to a complaint during the time allowed, the Board may issue a notice of default. 37 CFR § 2.106(a); Fed. R. Civ. P. 55(a). Once a notice of default is entered, it should not be set aside absent a showing of "good cause" by the party seeking to avoid the consequences of its failure to timely answer. *See* TBMP 312.01 (Default); Fed. R. Civ. P. 55(c). Good cause why default should not be entered against a defendant for failure to timely file an answer exists when (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action. *See* TBMP 312.02 (Setting Aside Notice of Default); *see also DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000).

11. Applicant is not entitled to have the notice of default set aside because he Applicant has failed to meet his burden under Rule 55(c) of the Federal Rules of Civil Procedure.

The only explanation Applicant offers for his failure to timely file an answer is that he did not receive a copy of the Board's November 21, 2005 and January 24, 2006 correspondence.<sup>1</sup> While this assertion is curious because Applicant's counsel's address has not changed since the institution of this action, this excuse is simply not enough to establish "good cause" as required by the Federal Rules of Civil Procedure and the Trademark Trial and Appeal Board. In its Motion, Applicant has made no attempt to explain what procedures are in place to assure proper handling of mail from U.S. Trademark Office and, further, why it failed to investigate the status of the proceedings prior to March 21, 2006, particularly where, as here, the 6-month suspension expired in the summer of 2005. *See also* TMEP 1705.05 (providing that even where a party can deny that it received notice, relief will be denied if the party "waited too long before investigating the problem or requesting corrective action."). This lack of diligence on Applicant's part belies any attempt to establish "good cause" for purposes of setting aside the default in this matter.

12. "Good cause" likewise does not exist in this case because Applicant has not made the requisite showing of a meritorious defense. TBMP 312.02 (setting forth elements of "good cause"). Although the TTAB Manual of Procedure provides that a late answer be submitted with the response to a notice of default, Applicant has failed to do so. *See* TBMP 312.01 ("When a defendant who has not yet filed an answer to a complaint files a response to a notice of default, or to a motion for default judgment, the late answer should normally be submitted with the response.") By so doing, Applicant has not established that it has bona fide defenses to the opposition. Nor can he do so. As more fully explained in the Notice of Opposition, Opposer is the senior user of the LONE STAR mark for at least thirty years prior to Applicant's claimed

---

<sup>1</sup> Applicant does not contend that he did not receive the Board's January 25, 2005 correspondence which provided that the suspension would expire at the end of six month's time. As such, Applicant was "on notice" that the proceedings were subject to resume at any time after July 25, 2005 – which is six months after January 25, 2005.

date of first use. There simply is no meritorious defense that Applicant can offer to defeat Opposer's priority claim to the LONE STAR mark. Because Applicant has made no showing of *any* meritorious defense, "good cause" simply does not exist to set aside the default.

13. Applicant's failure to timely file its answer is tantamount to gross neglect. Applicant has missed its deadline to file its answer not only once, but twice. Applicant failed to timely file its answer initially in October 2004, yet was ultimately spared the consequences of that failure by the Board's suspension of the proceedings. Applicant is now seeking to avoid the consequences of its negligence for a second time. Because Applicant has not even attempted to provide an explanation for failing to investigate or inquire as to the status of the proceedings following the expiration of the 6-month suspension and has wholly failed to demonstrate that it has a meritorious defense to the opposition, Applicant has not established "good cause" to justify the setting aside of the Board's notice of default.

### III. CONCLUSION & PRAYER

FOR THESE REASONS, Opposer Pabst Brewing Company respectfully requests the Board to deny Applicant's Motion to Set Aside Notice of Default, and to grant Opposer such other and further relief to which it shows itself justly entitled.

RESPECTFULLY SUBMITTED,

Jackson Walker, L.L.P.  
112 East Pecan St., Suite 2400  
San Antonio, Texas 78205  
(210) 978-7700  
(210) 978-7790 (Fax)

/Michael A. Moreno/  
William B. Nash  
Michael A. Moreno  
ATTORNEYS FOR PETITIONER,  
PABST BREWING COMPANY

**CERTIFICATE OF TRANSMISSION**

I hereby certify that a true and correct copy of the foregoing "Response in Opposition to Motion Set Aside Notice of Default" has been transmitted to the TTAB on April 12, 2006, through the ESTTA online submission system.

/Michael A. Moreno/  
Michael A. Moreno

**CERTIFICATE OF MAILING**

I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being deposited on this the 12th day of April, 2006, with the United States Postal Service via Express Mail, Label addressed to:

Phillip L. Free, Jr.  
Crowe & Dunlevy, P.C.  
20 North Broadway, Ste. 1800  
Oklahoma City, OK 73102-8273

EV011373136US

Belen B. Longoria  
Belen B. Longoria  
Belen B. Longoria  
Signature of Person Mailing Paper or Fee