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

Proceeding	91198918
Party	Defendant DARRELL D BIRD
Correspondence Address	DARRELL D BIRD PO BOX 740181 HOUSTON, TX 77274-0181 UNITED STATES darrellbrd58@yahoo.com
Submission	Other Motions/Papers
Filer's Name	Gus E. Pappas
Filer's e-mail	guspappas@sbcglobal.net, hlingle@sbcglobal.net
Signature	/s/ Gus E. Pappas
Date	06/01/2011
Attachments	motion to set aside judgment.pdf (10 pages)(474793 bytes)

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

Abita Brewing Company, LLC,)	
)	Opposition No. 91198918
Opposer,)	
)	
v.)	Serial No. 85063984
)	
Darrell D. Bird,)	
)	Mark: GATOR
Applicant.)	

**MOTION TO SET ASIDE NOTICE OF JUDGMENT AND, ALTERNATIVELY,
MOTION TO SET ASIDE DEFAULT JUDGMENT**

Dear Sir or Madam:

COMES NOW, Applicant, DARRELL D. BIRD, (“Applicant”), and files this his Motion to Set Aside Notice of Default Judgment and, alternatively, Motion to Set Aside Default Judgment, and in support thereof would respectfully show the Court the following:

I.

On or about March 9, 2011, Abita Brewing Company, LLC, (the “Opposer”), filed its Notice of Opposition to Darrell D. Bird’s Application Serial No. 85/063,984. The Board then assigned the Opposition proceeding its cause number and issued a letter which, among other items, set forth the deadlines for the opposition proceeding, a true and correct copy of the letter is attached hereto and labeled as **Exhibit A**. Counsel for the Opposer and Counsel for the Applicant subsequently spoke on at least two different occasions with regard to the Notice of Opposition. During their conversation on or about April 15, 2011, Counsel for the Opposer indicated that the Opposer consented to a thirty (30) day extension of time for the Applicant to file an Answer to the Notice of Opposition, which consent was memorialized by an e-mail on

even date from Counsel for the Opposer to Counsel for the Applicant, a copy of which is attached hereto and labeled as **Exhibit B**. Counsel for the Applicant believed that Counsel for the Opposer would file the Stipulation regarding the extension of time. Notwithstanding, Counsel for the Applicant's trial and hearing schedule became incredibly busy so that he did not realize that no such Stipulation was ever, in fact, filed prior to the Board's issuance of the Notice of Default on May 16, 2011. After reviewing his file for this case, Counsel for the Applicant discovered that neither his office, nor Counsel for the Opposer's office had filed the Stipulation regarding the extension of time for the Applicant to file an Answer to the Notice of Opposition. This Motion is filed in an effort to have the opportunity for the Applicant's defenses and/or claims in the above-numbered opposition be reinstated by way of extending the deadline for which the Applicant to file an Answer to the Notice of Opposition.

II

The facts contained in this Motion are supported by the following evidence:

Exhibit A - March 9, 2011 Scheduling Letter; and

Exhibit B - April 15, 2011 E-mail from Counsel for the Opposer.

III.

On May 16, 2011, the Board sent a Notice of Default as a result of the failure of the Applicant to file an Answer to the Notice of Opposition. The failure of the Applicant was neither intentional, nor wilful, but rather the result of mistake by Counsel for the Applicant. Counsel for the Applicant believed that Counsel for the Opposer was willing to file a Stipulation with the Board that memorialized the Opposer's consent for the Applicant to have an additional thirty (30) days to file his Answer. The Board was never made aware of the Opposer's Consent in this regard. As the deadline set forth by the Board by which the Applicant was to Answer the

Notice of Opposition came and went, the Board perhaps believed that the Applicant did not intend to respond to the Notice of Opposition and, accordingly, on May 16, 2011, issued its Notice of Default. Counsel for the Applicant and Counsel for the Opposer have discussed the possibility of settlement, which would obviate the necessity of the Applicant filing an Answer in this proceeding, however, to the extent that no such settlement was reached within that time frame, the Applicant intended and still intends to Answer the Notice of Opposition and appear for all other purposes in this proceeding.

On May 16, 2011, Counsel for the Applicant spoke with Counsel for the Opposer with regard to the deadline to file the Applicant's Answer to the Notice of Opposition. Counsel for the Opposer agreed to extend the time for the Applicant to file his Answer to June 1, 2011. Based upon the same, concurrently herewith, Counsel for the Applicant is filing a Stipulation for the Board's consideration that extends the deadline for the Applicant to file his Answer to the Notice of Opposition to June 1, 2011, and Bird's Answer.

The Applicant should not be prejudiced from asserting his defenses and/or claims as a result of Counsel for Applicant's mistake by previously failing to file the Stipulation regarding the deadline for the Applicant to file an Answer to the Notice of Opposition. Based upon the same, good cause exists for the Board to set aside the Notice of Judgment and/or Default Judgment, and extend the deadline for the Applicant to file his Answer to the Notice of Opposition.

IV.

As good cause exists to set aside the Notice of Default Judgment and/or Default Judgment which justice dictates in this case, the Applicant respectfully requests that the Notice

of Default Judgment sent on May 16, 2011 and/or Default Judgment be set aside, and that the Applicant's deadline to file an Answer to the Notice of Opposition be extended to June 1, 2011.

WHEREFORE, PREMISES CONSIDERED, Applicant prays that upon consideration of this Motion, that the relief requested herein be granted, the Notice of Default Judgment and, Alternatively, Motion to Set Aside Default Judgment be set aside, that the Board extend the deadline by which the Applicant file an Answer to the Notice of Opposition to June 1, 2011, and for such other and further relief, at law and in equity, to which the Applicant is entitled.

Respectfully submitted,

/s/ Gus E. Pappas

Gus E. Pappas
ATTORNEY FOR APPLICANT
DABNEY & PAPPAS
1770 St. James Place, Suite 408
Houston, TX 77056
Phone: 713-621-2678
Fax: 713-621-0074

Opposition No. 91198918

CERTIFICATE OF SERVICE

I, Gus E. Pappas, do hereby certify that a true and correct copy of the above and foregoing Motion to Set Aside Notice of Default Judgment and, alternatively, Motion to Set Aside Default Judgment has been sent to the Opposer, by and through its attorney of record, Todd S. Owers, CARVER, DARDEN, KORETZKY, TESSIER, FINN, BLOSSMAN & AREAUX, LLC, 1100 Poydras Street, Suite 3100, New Orleans, Louisiana 70163, *via certified mail, return receipt requested*, on the 1st day of June, 2011

/s/ Gus E. Pappas

Gus E. Pappas

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

Mailed: March 9, 2011

Opposition No. 91198918
Serial No. 85063984

BIRD, DARRELL D

PO BOX 740181
HOUSTON, TX 77274-0181
darrellbrd58@yahoo.com

Abita Brewing Company, LLC

v.

Bird, Darrell D

Raymond G. Areaux (33643)
Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC
1100 Poydras Street, Suite 3100
New Orleans, LA 70163
areaux@carverdarden.com

ESTTA397182

A notice of opposition to the registration sought by the above-identified application has been filed. A service copy of the notice of opposition was forwarded to applicant (defendant) by the opposer (plaintiff). An electronic version of the notice of opposition is viewable in the electronic file for this proceeding via the Board's TTABVUE system: <http://ttabvue.uspto.gov/ttabvue/v?qs=91198918>.

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations ("Trademark Rules"). These rules may be viewed at the USPTO's trademarks page: <http://www.uspto.gov/trademarks/index.jsp>. The Board's main webpage (<http://www.uspto.gov/trademarks/process/appeal/index.jsp>) includes information on amendments to the Trademark Rules applicable to Board proceedings, on Alternative Dispute Resolution (ADR), Frequently Asked Questions about Board proceedings, and a web link to the Board's manual of procedure (the TBMP).

Plaintiff must notify the Board when service has been ineffective, within 10 days of the date of receipt of a returned service copy or the date on which plaintiff learns that service has been ineffective. Plaintiff has no subsequent duty to investigate the defendant's whereabouts, but if plaintiff by its own voluntary investigation or through any other means discovers a newer correspondence address for

EXHIBIT A

the defendant, then such address must be provided to the Board. Likewise, if by voluntary investigation or other means the plaintiff discovers information indicating that a different party may have an interest in defending the case, such information must be provided to the Board. The Board will then effect service, by publication in the Official Gazette if necessary. See Trademark Rule 2.118. In circumstances involving ineffective service or return of defendant's copy of the Board's institution order, the Board may issue an order noting the proper defendant and address to be used for serving that party.

Defendant's ANSWER IS DUE FORTY DAYS after the mailing date of this order. (See Patent and Trademark Rule 1.7 for expiration of this or any deadline falling on a Saturday, Sunday or federal holiday.) **Other deadlines the parties must docket or calendar are either set forth below (if you are reading a mailed paper copy of this order) or are included in the electronic copy of this institution order viewable in the Board's TTABVUE system at the following web address:**
<http://ttabvue.uspto.gov/ttabvue/>.

Defendant's answer and any other filing made by any party must include proof of service. See Trademark Rule 2.119. **If they agree to, the parties may utilize electronic means, e.g., e-mail or fax, during the proceeding for forwarding of service copies.** See Trademark Rule 2.119(b)(6).

The parties also are referred in particular to Trademark Rule 2.126, which pertains to the form of submissions. **Paper submissions, including but not limited to exhibits and transcripts of depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.**

Time to Answer	4/18/2011
Deadline for Discovery Conference	5/18/2011
Discovery Opens	5/18/2011
Initial Disclosures Due	6/17/2011
Expert Disclosures Due	10/15/2011
Discovery Closes	11/14/2011
Plaintiff's Pretrial Disclosures	12/29/2011
Plaintiff's 30-day Trial Period Ends	2/12/2012
Defendant's Pretrial Disclosures	2/27/2012
Defendant's 30-day Trial Period Ends	4/12/2012
Plaintiff's Rebuttal Disclosures	4/27/2012
Plaintiff's 15-day Rebuttal Period Ends	5/27/2012

As noted in the schedule of dates for this case, the parties are required to have a conference to discuss: (1) the nature of and basis for their respective claims and defenses, (2) the possibility of settling the case or at least narrowing the scope of claims or defenses, and (3) arrangements relating to disclosures, discovery and

introduction of evidence at trial, should the parties not agree to settle the case. See Trademark Rule 2.120(a)(2). Discussion of the first two of these three subjects should include a discussion of whether the parties wish to seek mediation, arbitration or some other means for resolving their dispute. Discussion of the third subject should include a discussion of whether the Board's Accelerated Case Resolution (ACR) process may be a more efficient and economical means of trying the involved claims and defenses. Information on the ACR process is available at the Board's main webpage. Finally, if the parties choose to proceed with the disclosure, discovery and trial procedures that govern this case and which are set out in the Trademark Rules and Federal Rules of Civil Procedure, then they must discuss whether to alter or amend any such procedures, and whether to alter or amend the Standard Protective Order (further discussed below). Discussion of alterations or amendments of otherwise prescribed procedures can include discussion of limitations on disclosures or discovery, willingness to enter into stipulations of fact, and willingness to enter into stipulations regarding more efficient options for introducing at trial information or material obtained through disclosures or discovery.

The parties are required to conference in person, by telephone, or by any other means on which they may agree. A Board interlocutory attorney or administrative trademark judge will participate in the conference, upon request of any party, provided that such participation is requested no later than ten (10) days prior to the deadline for the conference. See Trademark Rule 2.120(a)(2). The request for Board participation must be made through the Electronic System for Trademark Trials and Appeals (ESTTA) or by telephone call to the interlocutory attorney assigned to the case, whose name can be found by referencing the TTABVUE record for this case at <http://ttabvue.uspto.gov/ttabvue/>. The parties should contact the assigned interlocutory attorney or file a request for Board participation through ESTTA only after the parties have agreed on possible dates and times for their conference. Subsequent participation of a Board attorney or judge in the conference will be by telephone and the parties shall place the call at the agreed date and time, in the absence of other arrangements made with the assigned interlocutory attorney.

The Board's Standard Protective Order is applicable to this case, but the parties may agree to supplement that standard order or substitute a protective agreement of their choosing, subject to approval by the Board. The standard order is available for viewing at: <http://www.uspto.gov/trademarks/process/appeal/guidelines/stdagmnt.jsp>. Any party without access to the web may request a hard copy of the standard order from the Board. The standard order does not automatically protect a party's confidential information and its provisions must be utilized as needed by the parties. See Trademark Rule 2.116(g).

Information about the discovery phase of the Board proceeding is available in chapter 400 of the TBMP. By virtue of amendments to the Trademark Rules effective November 1, 2007, the initial disclosures and expert disclosures scheduled during the discovery phase are required only in cases commenced on or after that date. The TBMP has not yet been amended to include information on these disclosures and the parties are referred to the August 1, 2007 Notice of Final Rulemaking (72 Fed. Reg. 42242) posted on the Board's webpage. The deadlines for

pretrial disclosures included in the trial phase of the schedule for this case also resulted from the referenced amendments to the Trademark Rules, and also are discussed in the Notice of Final Rulemaking.

The parties must note that the Board allows them to utilize telephone conferences to discuss or resolve a wide range of interlocutory matters that may arise during this case. In addition, the assigned interlocutory attorney has discretion to require the parties to participate in a telephone conference to resolve matters of concern to the Board. See TBMP § 502.06(a) (2d ed. rev. 2004).

The TBMP includes information on the introduction of evidence during the trial phase of the case, including by notice of reliance and by taking of testimony from witnesses. See TBMP §§ 703 and 704. Any notice of reliance must be filed during the filing party's assigned testimony period, with a copy served on all other parties. Any testimony of a witness must be both noticed and taken during the party's testimony period. A party that has taken testimony must serve on any adverse party a copy of the transcript of such testimony, together with copies of any exhibits introduced during the testimony, within thirty (30) days after the completion of the testimony deposition. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing after briefing is not required but will be scheduled upon request of any party, as provided by Trademark Rule 2.129.

If the parties to this proceeding are (or during the pendency of this proceeding become) parties in another Board proceeding or a civil action involving related marks or other issues of law or fact which overlap with this case, they shall notify the Board immediately, so that the Board can consider whether consolidation or suspension of proceedings is appropriate.

ESTTA NOTE: For faster handling of all papers the parties need to file with the Board, the Board strongly encourages use of electronic filing through the Electronic System for Trademark Trials and Appeals (ESTTA). Various electronic filing forms, some of which may be used as is, and others which may require attachments, are available at <http://estta.uspto.gov>.

**Trademark Opposition - Abita Brewing Company v. Darrell Bird**

Friday, April 15, 2011 11:32 AM

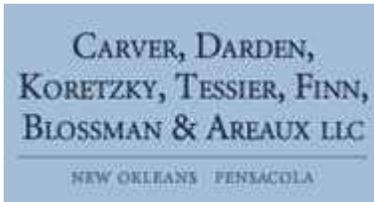
From: "Todd S. Owers" <owers@carverdarden.com>
To: "guspappas@sbcglobal.net" <guspappas@sbcglobal.net>
Cc: "Raymond G. Areaux" <areaux@carverdarden.com>, "IP Secretary" <ipsecretary@carverdarden.com>, "IP Paralegal" <ipparalegal@carverdarden.com>

Gus,

This e-mail follows our first telephone conversation on March 28, 2011 and our second conversation a few minutes ago. Abita Brewing Company consents to a 30-day extension of time for Mr. Bird to file his answer to the Notice of Opposition.

I understand from our second conversation that Mr. Bird has produced some bottles of product with a label bearing the term GATOR and that you will send me a picture of same.

Best regards,

**Todd S. Owers**

Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC
Energy Centre - 1100 Poydras Street - Suite 3100
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EXHIBIT B