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

Proceeding	91205346
Party	Defendant Incredible Edibles Inc
Correspondence Address	INCREDIBLE EDIBLES INC 8030 REMMET AVE STE 4 CANOGA PARK, CA 91304-6411 UNITED STATES farida@psaservice.net
Submission	Motion to Reopen
Filer's Name	Evan Anderson, Esq.
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Date	08/23/2012
Attachments	TTAB - HUBBY'S EDIBLES - MOTION TO ACCEPT LATE ANSWER and ANSWER.pdf (16 pages)(3833013 bytes)

experienced a 40% drop in the sales as a result of the Opposer's sales activities. *Declaration of Brett Abrams Paragraph 3.*

After discovering that consumer confusion had resulted from the emergence of Opposer in the Applicant's primary channels of trade, Applicant decided to file a lawsuit against the Opposer in Federal Court for trademark infringement and unfair competition. *Declaration of Brett Abrams Paragraph 3.* Applicant would later find out, after its deadline to file its Answer passed, that on May 16, 2012 the Opposer had filed a Notice of Opposition against the Applicant's HUBBY'S EDIBLES trademark application. *Declaration of Brett Abrams Paragraph 4.*

In 2011, Applicant instructed its accounting firm to file a trademark application for the HUBBY'S EDIBLES trademark that is the subject matter of the present dispute. *Declaration of Paul Shively Paragraphs 3 and 4.* Subsequent to the filing of the HUBBY'S EDIBLES trademark application, and following Applicant's discovery that a Notice of Default had been issued in the present matter, the President for Applicant was informed by his accountant that when the assistant to Applicant's accountant filed the HUBBY'S EDIBLES trademark application, she listed her email address as the correspondent's email address for the HUBBY'S EDIBLES trademark application. *Declaration of Paul Shively Paragraph 4.*

At this time, Applicant also learned that when its accountant's assistant left the accounting firm after filing the HUBBY'S EDIBLES trademark application, her email address remained as the correspondent's email address of record for the HUBBY'S EDIBLES trademark application and her email account was not forwarded to another email account at the accounting firm. *Declaration of Paul Shively Paragraph 4.* As such, no employee working for the Applicant

or the Applicant's accounting firm was capable of receiving any email communications from the USPTO or the TTAB.

Upon discovering that a Notice of Default had been issued in the present matter, Applicant also learned that its accountant's assistant listed its manufacturing warehouse as the Applicant's correspondence address in the HUBBY'S EDIBLES trademark application. While the address was listed correctly, the assistant for Applicant's accountant failed to list a specific individual in the Correspondent's contact information. *Declaration of Brett Abrams Paragraph 6.* As such, any communications from the USPTO or TTAB were not directed to any specific individual at Applicant's address. When mail was sent to Applicant's warehouse facility at the time of the filing of this Notice of Opposition, a part-time bookkeeper who works for the Applicant was in charge of picking up Applicant's mail. *Declaration of Brett Abrams Paragraph 6.*

Prior to receiving notice from its accountant that the Applicant missed its deadline to file its Answer, the President of the Applicant's company did not receive any notice of the Notice of Opposition for the present proceeding and was unaware that such a proceeding had been instituted. *Declaration of Brett Abrams Paragraph 6.* As soon as the President for the Applicant's company discovered that the deadline to file the Answer had been missed and a Notice of Default had been entered against the Applicant, Applicant hired the law firm currently representing him in the present matter and requested that a Motion to Accept a Late Answer and the Answer itself be filed explaining the circumstances that led to the missed deadline and also to fulfill its obligations to file an Answer to the Notice of Opposition. *Declaration of Brett Abrams Paragraph 5.*

Arguments

Federal Rule of Civil Procedure 55 (c) provides that an entry of default may be set aside upon a showing of good cause. Fed. R. Civ. P. 55 (c). As set forth in the penultimate case on this area of law, the Supreme Court ruled in *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership* that three factors are to be considered when determining whether excusable neglect applies to a particular case. *Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1992). The Court considers three factors when deciding whether to set aside default: (1) whether the defendant's culpable conduct led to default; (2) whether the defendant has a meritorious defense; and (3) whether setting aside default would prejudice the plaintiff. *Id.* at 925-26. In addition, "[t]he law does not favor defaults," and "therefore, any doubts as to whether a party is in default should be decided in favor of the defaulting party." *Bonita Packing Co. v. O'Sullivan*, 165 F.R.D. 610, 614 (C.D. Cal. 1995).

In matters before the TTAB, the excusable neglect analysis has taken into account all relevant circumstances surrounding the party's omission or delay, including (1) the danger of prejudice to the non-movant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was in the reasonable control of the movant, and (4) whether the movant acted in good faith.

In the present matter, the Applicant satisfies all three factors when deciding whether to set aside the entry of default and as such default should be set aside and Applicant's Answer should be accepted by the Board and considered timely filed and the trial dates should be reset accordingly.

1. The Applicant's Culpable Conduct Did Not Lead to the Default

District courts have found a negligent failure to respond excusable if a party files a late filed Answer and is able to offer a credible, good faith explanation for the delay that negates “any intention to take advantage of the opposing party, to interfere with judicial decision-making, or otherwise manipulate the legal process.” *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d at 691, 697 (9th Cir. 2001).

In the present matter, there is no danger of prejudice to the non-movant Opposer, the length of the delay is short and will not have any significant impact on the present judicial proceedings, the reason for the delay was inadvertent as none of the Applicant’s principal executives were aware of the present matter nor received effective notice that the present proceeding had commenced, and finally, Applicant acted in good faith based on the fact that once it was made aware of the present judicial matter, it proceeded expeditiously to retain legal counsel and remedy the missed deadline for the filing of its Answer.

In the present matter, the reason for the delay was entirely the result of an inadvertent act and mistake and was in no way based on an intention to take advantage of the opposing party, to interfere with judicial decision making, or otherwise manipulate the legal process. As Applicant was not aware that the present proceeding had commenced, and in fact was in the process of initiating its own legal action against the Opposer, it is clear that that its failure to file an Answer by the deadline in the present proceeding was the result of an inadvertent act and mistake. Once Applicant’s present counsel was retained, counsel for Applicant began work on both the present Motion and the Answer as soon as was reasonably possible and was filed both with the TTAB as soon as was possible.

The fact that Applicant’s Answer was filed late was not intentional and was the result of inadvertence. It was not planned, intentional, strategically advantageous, and in fact, is the

antithesis of something that would be done intentionally for any form of advantage in the present matter. As a potential penalty for a late filed Answer is an entry of default in favor of the Opposer, there is no good reason that can even be imagined that would justify intentionally filing an Answer past the deadline for the Answer to be filed.

This assertion is even further demonstrated by the fact that Applicant sought to remedy the situation as soon it was aware of the fact that the deadline to file its Answer had passed and in doing so immediately retained counsel and proceeded to file the present Motion and an Answer. Based on the speed with which the Answer was filed once legal counsel was retained and able to assess how best to respond, the reason for the delay should be viewed in favor of the Applicant.

2. The Applicant Has a Meritorious Defense

A defense is considered meritorious if “there was some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.” *Hawaii Carpenters’ Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir. 1986). All that is required is an assertion of “a factual or legal basis that is sufficient to raise a particular defense; the question of whether a particular factual allegation is true is resolved at a later stage.” *Audio Toys, Inc. v. Smart AV Pty Ltd.*, 2007 U.S. Dist. LEXIS 44078, *8 (N.D. Cal. June 6, 2007).

In the present matter, all that is required to prove that Applicant has a meritorious defense is the denial of those claims that constitute the basis for Opposer’s Opposition. Being that the present Opposition involved the issue of likelihood of confusion, and Applicant denied all claims made by Opposer in the Notice of Opposition in the Answer filed contemporaneously with this Motion, Applicant has fulfilled its obligation to prove that it has a meritorious defense. As the

Applicant has a meritorious defense, which is a complete denial of those claims that constitute the basis for the Opposition, this factor should be found in favor of the Applicant.

3. The Setting Aside of Default Would Not Prejudice the Opposer

Prejudice is determined by whether a party will be hindered in pursuing its claim. *See Knoebber*, 244 F.3d at 701. The fact that a party may be denied a quick victory is not sufficient to deny relief from default judgment. *Bateman v. United States Postal Service*, 231 F.3d 1220, 1225 (9th Cir. 2000). “The delay must result in tangible harm such as loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion.” *Audio Toys*, 2007 U.S. Dist. LEXIS at *9.

As the current proceeding is still in its early stages, prior to any discovery conferences, requests for discovery, testimony, or dispositive motion practice, the delay in the current proceeding does not result in any tangible harm, does not increase the difficulty of discovery, and does not give Applicant any enhanced opportunity to commit any fraudulent activities or collusion. Allowing the case to move forward on the merits after only a short delay should not prejudice the Opposer’s ability to litigate its case. The only prejudice that might result to the Opposer by a denial of default judgment is that the Opposer will not be able to ensure an easy victory. As no prejudice will result to Opposer in allowing the present Opposition to proceed, the third and final good cause factor is satisfied.

In the present matter, should the proceeding be allowed to resume, nothing will have changed in the case, with the exception of the Opposer having received a copy of the Applicant’s Answer several weeks after it was initially due, which does not prevent the Opposer from proving its case. Further, because an Answer simply represents the Applicant’s admission or denial of claims asserted by the Opposer, and does not have to be responded to nor is a response

permissible, the Opposer has adequate time before the filing of any dispositive motions by which to review the Answer.

Overall, Opposer will not be substantially prejudiced by a short delay in receiving the Answer, which Applicant filed as soon as it discovered it had missed the deadline to file its Answer, retained counsel, and informed its attorney the reasons and facts that caused it to miss the deadline for its Answer.

For the reasons stated above, Applicant respectfully requests that its late-filed Answer be accepted and that judgment by default not be entered against it.

Dated as of: August 23, 2012

By: /evananderson/

Evan Anderson
Brand Ventures Intellectual Property Law
2434 Lincoln Blvd., Floor 2
Los Angeles, CA 90291
Attorney for Applicant

PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **APPLICANT'S MOTION TO ACCEPT A LATE ANSWER** has been served on Bradley Jensen, counsel for Opposer, on August 23, 2012, via First Class U.S. Mail, postage prepaid to:

Bradley Jensen
Jensen & Associates
124 Matisse Circle
Aliso Viejo, CA 92656

By: /evananderson/
Evan Anderson

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I, BRETT ABRAMS, hereby declare as follows:

1. I am an individual over 18 years of age and have personal knowledge of the matters set forth herein. The matters set forth herein are true and correct and if called upon to testify to these matters, I could and would do so competently.

2. I am the fifty percent (50%) shareholder of Incredible Edibles, Inc. (the "Company"), and am the president of the Company. I oversee day-to-day operations of the business, including accounting and legal.

3. We recently discovered a company, Hubby's Edibles, was infringing upon our Mark, causing considerable confusion in the market, which resulted in more than a 40% drop in sales. This company contracted the main trade publication in our industry and threatened to sue the publication if the publication continued to carry our advertising. This same company has contested our Trademark. We intend to file a complaint against the infringing company in Federal court for trademark infringement and unfair competition.

4. In 2011, I asked our accounting firm to file a trademark application for my Company's trademark, "Hubby's Edibles." Subsequently, my accountant advised me that his assistant had filed the application using her email as the email accountant listed as the correspondent's email address. After that she had left the accounting firm, prior to the filing of the Notice of Opposition, her email had not been forwarded, and that my company had missed a filing date.

5. Once I discovered that we had missed our filing date, I hired a law firm to handle the filing of an Answer for Opposition No. 91205246.

6. Our company address in Canoga Park, California was correctly listed for correspondence, however the correspondence was not addressed to any individual. It should have been addressed to me. The Canoga Park address is where we manufacture, warehouse and ship our product. We have a part-time bookkeeper who picks up the mail. If any

1 correspondence was sent to that address regarding the late filing, I did not receive it. I will have
2 my attorney update the contact information.

3 I declare under penalty of perjury that the foregoing is true and correct and was executed
4 on this 20th day of August, 2012, in Canoga Park, California.

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7 BRETT ABRAMS

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I, PAUL SHIVELY, hereby declare as follows:

1. I am an individual over 18 years of age and have personal knowledge of the matters set forth herein. The matters set forth herein are true and correct and if called upon to testify to these matters, I could and would do so competently.

2. I am the outside accountant for Incredible Edibles, Inc. (the "Company").

3. Brett Abrams from the Company asked my accounting firm to file an application for a trademark for "Hubby's Edibles."

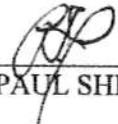
4. I had my assistant file the paperwork, and she used her email for correspondence. Subsequently, she left the firm and her email was not forwarded to any active email account.

5. Once I checked her email, after July 9, 2012, I discovered that a filing date had been missed, I promptly notified Brett Abrams at the Company.

6. One of the main trade publications that the Company advertises in dropped the Company's advertising. I contacted the publication and was informed that a company named Hubby's Edibles, LLC, which is the Plaintiff, had threatened to sue the publication for running the Company's ads.

7. I visited the California State Bar's website and discovered that Bradley Jensen, who is the attorney representing Plaintiff, had his license to practice law suspended on June 18th, 2012 and he is no longer eligible to practice law.

I declare under penalty of perjury that the foregoing is true and correct and was executed on this 20th day of August, 2012, in Los Angeles County, California.



PAUL SHIVELY

5. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 5 of the Notice of Opposition, and therefore, denies said allegations.
6. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 6 of the Notice of Opposition, and therefore, denies said allegations.
7. Applicant admits the allegations set forth in Paragraph 7 of the Notice of Opposition.
8. Applicant admits that its HUBBY'S EDIBLES trademark application was published for Opposition on April 17, 2012 and admits that Opposer filed a Notice of Opposition on May 16, 2012 when the deadline to file its Notice of Opposition was May 17, 2012. Applicant has insufficient knowledge as to whether the Opposer's Notice of Opposition was timely filed, as certain facts could be discovered during the duration of the present proceeding that could result in a determination that the Notice of Opposition contains certain deficiencies that would thus render it not filed in a timely manner.
9. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 9 of the Notice of Opposition, and therefore, denies said allegations.
10. Applicant has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 10 of the Notice of Opposition, and therefore, denies said allegations.
11. Applicant denies the allegations set forth in Paragraph 11 of the Notice of Opposition.
12. Applicant denies the allegations set forth in Paragraph 12 of the Notice of Opposition.
13. Applicant denies the allegations set forth in Paragraph 13 of the Notice of Opposition.
14. Applicant denies the allegations set forth in Paragraph 14 of the Notice of Opposition.
15. Applicant denies the allegations set forth in Paragraph 15 of the Notice of Opposition.
16. Applicant denies the allegations set forth in Paragraph 16 of the Notice of Opposition.

WHEREFORE, Applicant prays that this Opposition be denied and the registration of U.S. Application Serial No. 85/463,956 be granted.

Dated as of: August 23, 2012

By: /evananderson/

Evan Anderson
Brand Ventures Intellectual Property Law
2434 Lincoln Blvd., Floor 2
Los Angeles, CA 90291

Attorney for Applicant

PROOF OF SERVICE

I hereby certify that a true and complete copy of the foregoing **APPLICANT'S ANSWER** has been served on Bradley Jensen, counsel for Opposer, on August 23, 2012, via First Class U.S.

Mail, postage prepaid to:

Bradley Jensen
Jensen & Associates
124 Matisse Circle
Aliso Viejo, CA 92656

By: /s/Evan Anderson
Evan Anderson