

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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General Contact Number: 571-272-8500

CME

Mailed: July 19, 2014

Opposition No. 91210103

The Coca-Cola Company

v.

Alberto Soler d/b/a Coki Loco and  
Miriam Soler

**Before Cataldo, Taylor and Greenbaum,  
Administrative Trademark Judges.**

**By the Board:**

This case now comes up on (i) Opposer's motion to amend, filed February 6, 2014, (ii) Applicants' Request for Reconsideration of the Board's order of February 3, 2014 ("Prior Order"), filed March 3, 2014 ("RFR I"), (iii) Opposer's combined motion for sanctions and default judgment, filed May 14, 2014, (iv) Co-Applicant Miriam Soler's relinquishment of rights, filed May 18, 2014, and (v) Applicants' amended request for reconsideration, filed May 21, 2014 ("RFR II").<sup>1</sup> Applicants oppose Opposer's combined motion for sanctions and default judgment. Applicants did not respond to Opposer's motion to amend nor did Opposer respond to Applicants' requests for reconsideration.

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<sup>1</sup> Co-Applicants' change of correspondence address, filed June 18, 2014, is noted and the Board's records have been updated accordingly.

***Opposer's Motion for Sanctions***

By way of background, in the Prior Order the Board ruled on a number of motions and imposed several procedural requirements, including that Applicants refrain from filing any unconsented pre-trial motions without first participating in a telephone conference with Opposer and the assigned Interlocutory Attorney to discuss the basis for the proposed motion and receive, if warranted, the Board's approval to file the motion. *See* Prior Order, pp. 10-11. The Board also reminded Applicants that "all certificates of services must be ***signed by both applicants.***" *Id.* at 12 (emphasis in original). The Board warned that Applicants may be subject to sanctions, including entry of judgment against them, for violation of the Prior Order. *See id.* at p. 11.

Opposer seeks sanctions in the form of judgment in its favor on the ground that Applicants violated the Prior Order because they (i) filed RFR I without first participating in a telephone conference with the Board and Opposer and obtaining the Board's approval to file RFR I, *see* Motion for Sanctions/Default, p. 2-3, and (ii) failed to sign the certificate of service attached to RFR I. *See id.* p. 3.

A request for reconsideration is a procedural tool by which a party may obtain reconsideration or modification of a Board order or decision with which the party is dissatisfied. As such, a request for reconsideration is fundamentally different from a "motion," which typically concerns the

conduct of a party to the proceeding or the procedural posture of the case. In issuing the Prior Order, it was not the intent of the Board to deny Applicants the right to seek review of a Board order, but to more closely manage motions practice related to the parties' conduct in this case. Accordingly, we do not construe the Prior Order as requiring that Applicants obtain the Board's prior authorization before filing a request for reconsideration.<sup>2</sup> Moreover, Applicants' failure to sign the certificate of service attached to RFR I is not sufficiently egregious to warrant sanctions in the form of entering judgment against Applicants. For these reasons, Opposer's motion for sanctions in the form of judgment is **DENIED**.

***Opposer's Motion for Default Judgment***

"However the issue [of default] is raised, the standard for determining whether default judgment should be entered against the defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard." TBMP §§ 312.01 and 508 (2014). Under Fed. R. Civ. P. 55(c), default may be set aside "for good cause." As a general rule, good cause will be found where the defendant's delay is not the result of willful conduct or gross neglect, where prejudice to the plaintiff is lacking, and where the defendant has a meritorious defense. *See Fred Hyman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). The

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<sup>2</sup> Applicants' assertions on pages 2-3 of their response brief that the Board should enter sanctions against Opposer will be given no further consideration as the Board generally does not consider "motions" embedded in other filings.

determination of whether default judgment should be entered against a party lies within the sound discretion of the Board. In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. *See Paolo's Assocs. Ltd. P'ship v. Paolo Bodo*, 21 USPQ2d 1899, 1902 (Comm'r 1990). Accordingly, the Board is reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant. *See id.*

As last reset, Applicants' deadline to file an answer in this proceeding was February 28, 2014, *see* Prior Order, p. 13, and no answer has yet been filed. As Opposer points out, the filing of Opposer's motion to amend did not automatically toll the time for Applicants to file an answer. Still, as of Applicants' answer deadline, Opposer's motion to amend its pleading was pending and Applicants apparently believed that "there [was] no effective and legal complaint ... to answer." Response, p. 3. Under these circumstances, we find that it would be inequitable to enter default judgment against Applicants for failure to timely file an answer to Opposer's original complaint, particularly as Opposer has not alleged, much less established, that witnesses or evidence have become unavailable due to the passage of time, or that it has suffered any other substantial prejudice. *See Delorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224-25 (TTAB 2000). The Board acknowledges that Applicants have not yet set forth a meritorious

defense to the notice of opposition, but we will allow them time to do so. For these reasons, Opposer's motion for default judgment is **DENIED**.<sup>3</sup>

***Opposer's Motion to Amend***

Opposer's motion to amend is **GRANTED** as conceded because Applicants failed to respond thereto. *See* Trademark Rule 2.127(a); *Central Mfg., Inc. v. Third Millennium Tech., Inc.*, 61 USPQ2d 1210, 1211 (TTAB 2001); *Boston Chicken, Inc. v. Boston Pizza Int'l, Inc.*, 53 USPQ2d 1053, 1054 (TTAB 1999). Accordingly, Opposer's [proposed] amended notice of opposition accompanying its motion to amend is accepted and made of record and is now Opposer's operative pleading herein.<sup>4</sup>

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<sup>3</sup> Notwithstanding this determination, Applicants should have been proactive rather than allow their answer deadline to lapse. If they were uncertain about what effect Opposer's filing may have had on their answer deadline, they should have requested a telephone conference with Opposer and the assigned Interlocutory Attorney to discuss the deadlines in the proceeding or filed a motion to extend their answer deadline or a motion to suspend proceedings pending disposition of Opposer's motion. *See* TBMP 502.04 (noting that a party should not presume that the Board will reset dates when it determines a pending motion); *Cf. See Super Bakery Inc. v. Benedict*, 96 USPQ2d 1134, 1136 (TTAB 2010) (mere filing of motion for summary judgment or other motion which is potentially dispositive of a case does not automatically suspend proceedings; only an order of the Board formally suspending proceedings has such effect), *clarified*, 665 F.3d 1263, 101 USPQ2d 1089, 1092 (Fed. Cir. 2011). Applicants are reminded that although they have made a business decision to represent themselves in this proceeding, they must strictly comply with all the applicable rules and procedures. *See* Board's Order of November 14, 2013, pp. 2-3 and 5. It is unlikely that the Board will be lenient if Applicants fail to comply with the applicable rules and procedures in the future.

<sup>4</sup> The Board will set a time for Applicants to answer Opposer's amended notice of opposition if, or when, this proceeding is resumed.

***Requests for Reconsideration***

We will not consider the merits of RFR I because Applicants did not sign the certificate of service as required by Trademark Rule 2.119(a) and the Prior Order. RFR II, filed May 21, 2014, also will be given no consideration because it is untimely, having been filed more than one month after issuance of the Prior Order. See Trademark Rule 2.127(b) (“Any request for reconsideration or modification of an order or decision issued on a motion must be filed within one month from the date of service thereof.”).

Notwithstanding the foregoing, RFR I includes a purported summary of a telephone conversation between Co-Applicant Alberto Soler and Opposer’s counsel, Ms. Parks, on August 26, 2013. The summary includes the following statement attributed to Mr. Soler:

So, I say just this for you now: Mr. Rodriguez and Mr. Akcime (Mr. Wright, Vuelta and others and William Soler, my brother and Miriam Soler my mother) are associates of mines [sic] and members of an association I planned for my business venture. I am in charge- owner of the association and legal authority over the marks the members have under their names. The association owns the marks not the applicants based on the business and contract term executed.

RFR I, p. 7.

Involved application Serial No. 85672347 was filed by Alberto Soler, an individual doing business as Coki Loco, and Miriam Soler, an individual, based on Applicants’ allegation of a *bona fide* intention to use the mark in commerce, pursuant to Trademark Act Section 1(b), 15 U.S.C. § 1051(b). An

application filed pursuant to Section 1(b) of the Trademark Act, must include a verified statement that:

the applicant has a bona fide intention to use the mark shown in the accompanying drawing in commerce on or in connection with the specified goods or services; that the applicant believes it is entitled to use the mark in commerce; that to the best of the declarant's knowledge and belief, no other person has the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when applied to the goods or services of the other person, to cause confusion or mistake, or to deceive; and that the facts set forth in the application are true.

Trademark Rule 2.33(b)(2); *see also* TMEP § 1201 (April 2014) (providing that an application under Section 1(b) of the Trademark Act “must be filed by a party who is entitled to use the mark in commerce, and must include a verified statement that the applicant is entitled to use the mark in commerce and that the applicant has a bona fide intention to use the mark in commerce as of the application filing date.”). If it is a business entity “which has the *bona fide* intention to use a particular mark, and yet the intent-to-use application is filed in the name of an individual, then said application will be deemed to be *void ab initio*.” *American Forests v. Sanders*, 54 USPQ2d 1860, 1862 (TTAB 1999) (recognizing that Section 1 of the Trademark Act must be strictly complied with and holding an intent-to-use application filed by an individual void where the entity that had a *bona fide* intention to use the mark in commerce on the application filing date was a partnership composed of the individual applicant and her husband), *aff'd*, 232 F.3d 907 (Fed. Cir. 2000); *see also In re Tong Yang Cement Corp.*, 19 USPQ2d 1689, 1690 (TTAB

1991) (finding application void where the mark was owned by a joint venture but the application was filed in the name of only one member of the joint venture).

Inasmuch as Mr. Soler has stated on the record that it is not Applicants but a business association that owns the involved mark, Applicants are allowed until **THIRTY DAYS** from the mailing date of this order to show cause why judgment should not be entered against them on the ground that the involved application is *void ab initio*.

In view of the foregoing, consideration of Co-Applicant Miriam Soler's motion to relinquish is deferred. Proceedings are otherwise **SUSPENDED**.

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