

ESTTA Tracking number: **ESTTA576602**

Filing date: **12/13/2013**

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

Proceeding	91212693
Party	Defendant Kunshan M.U.S. International Co., Ltd.
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Date	12/13/2013
Attachments	Motion to Set Aside Default MUS serial 85611497 opp 91212693.pdf(230151 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEL BOARD**

In the Matter of Application Serial No. 85/611,497
Filed on April 30, 2012 for the Mark MUS
Published in the Official Gazette on August 6, 2013

MICRONEL AG.,

Opposer,

v.

**M. U. S. INTERNATIONAL CO.,
LIMITED**

Applicant.

Opposition No.: 91212693

MOTION TO SET ASIDE NOTICE OF DEFAULT JUDGMENT

I. Introduction

Pursuant to Federal Rule of Civil Procedure 55(c) and the Trademark Trial and Appeal Board Manual of Procedures ("TBMP") §§ 312.01 and 312.02, Applicant M. U. S. International Co., Limited. ("Applicant" or "MUS") hereby brings this Motion to Set Aside Notice of Default ("Motion") in Opposition No. 91212693 for an order setting aside the entry of notice of default judgment against it in the United States Patent and Trademark Office before the Trademark Trial and Appeal Board ("Board").

II. Statement of Facts

On August 6, 2013, Applicant's trademark, Serial No. 85/611,497, for the Mark "MUS" was published for opposition (hereinafter, "Mark"). On September 26, 2013, Opposer, Micronel AG ("Opposer") thereafter filed its Notice of Opposition. Counsel for MUS received the Notice of Opposition, but due to Opposer's heading and naming of the parties, counsel mistakenly and

inadvertently neglected to docket a response to Opposer's Notice of Opposition. In the Notice of Opposition, Opposer named the parties in the matter as MICRONEL AG (Opposer) and MICRONEL INTERNATIONAL CO., LTD, which counsel for MUS now assumes refers to its client, however no such entity was ever represented by counsel for MUS. The Mark was originally filed on April 30, 2012 by KUNSHAN M. U. S. INTERNATIONAL CO., LTD. The Mark was then assigned to M. U. S. INTERNATIONAL CO., LIMITED. At no time was a party named MICRONEL INTERNATIONAL CO., LTD, as named by Opposer represented by counsel for MUS nor was such a party listed as owner of the at issue Mark. When counsel became aware of the fact that its client, M. U. S. INTERNATIONAL CO., LIMITED was the subject of this proceeding, it immediately contacted and began preparing its response to the Notice of Opposition. MUS believes that it has a meritorious defense that will succeed on the merits, namely, that it has valid and superior rights to the Mark as to Opposer. As the Board's preference for a determination of cases on the merits, the default should be set aside. MUS should not suffer due to the inadvertent mistake by its counsel that resulted in its counsel failing to take proper action.

III. Legal Argument

The standard for whether or not a default should be set aside is whether Applicant can show "good cause" as to why judgment by default should not be entered against it. *Fed. R. Civ. P.* 55. The standard for good cause, as determined by the Board is: (1) the delay in filing an answer was not the result of willful conduct or gross negligence on the part of Applicant, (2) the Opposer will not be substantially prejudiced by the delay, and (3) the Applicant has a meritorious defense to the action. *TBMP* § 312.02.

Here, this is no danger or prejudice to Opposer in granting the present Motion. Opposer filed its Notice of Opposition on September 26, 2013 based on the belief that it will be damaged by the registration of Applicant's Mark. Opposer alleged that it has been in business for the past 43 years. Thus, the delay of less than six weeks should the Board grant this Motion, resetting of the trial dates, and acceptance of Applicant's answer will not damage or prejudice Opposer.

There is no willful or gross neglect on the part of Applicant. Instead, there was an inadvertent docketing error based on the title and heading of the parties in the Notice of Opposition which lead to Applicant's counsel to fail to take proper action. When there is no evidence that the failure was willful, costs incurred in preparing and filing a motion will not be found to support a finding of prejudice. *Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 USPQ2d 1899, (no evidence that failure was willful; costs incurred in preparing and filing motion not sufficient to support finding of prejudice). In the instant case, Opposer did not have to expend any costs to prepare or file such a motion as the Board issued the Notice of Default on its own accord, which is when Applicant realized its docketing error and took immediate steps to contact Applicant and take the necessary steps to respond.

Gross negligence is a high standard, and examples cited as such in the *TBMP* include failure to file an answer six months after the due date, far beyond the less than six weeks since the due date in the instant action, which only occurred as a result of a docketing error or some other miscommunication. *DeLorme Publishing Co v. Eartha's Inc.*, 60 USPQ2d 1222, 1557.

Inadvertence of counsel is a recognized grounds for overturning a default. *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (failure to answer due to inadvertence on part of Defendant's counsel); *Moran v. Mitchell*, E. D. Va. 1973, 354 F. Supp. 86 ("Default entered as result of defense counsel's mistaken belief that he had 15 days, rather

than ten, in which to file responsive pleadings, and from defense counsel's misapprehension that counsel for plaintiff would agree to a late filing, would be set aside, particularly as defendants raised what might be a valid defense to the merits of the action"). In the instant case, delay occurred from a docketing error due to confusion as to the proper parties in the proceeding which resulted in the failure to timely file an answer, on which basis the notice of default should be overturned.

The submission of an answer is considered satisfactory for satisfying there is a meritorious defense. *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991) (the two other factors having been shown, Defendant was allowed time to show meritorious defense by submission of an answer). Furthermore, it has been held that the showing of a meritorious defense does not require an evaluation of the merits of the case; all that is required is a plausible response to the allegations in the complaint. *DeLorne*, supra at 1224. Applicant hereby submits its answer concurrently with the instant Motion as preferred in *TBMP* § 312.01.

Fed. R. Civ. P. 55 is to be liberally construed in order to provide relief from onerous consequences of defaults and default judgments, to provide relief from the onerous consequences of such an entry, and with any doubt being resolved in favor of setting aside such default. *Tolson v. Hodge*, (N. C. 1969) 411 F. 2d 123; *Barber v. Turberville*, 218 F. 2d 34; *Horn v. Intelectron Corp.*, (S. D. N. Y. 1968), 294 F. Supp. 1153; *Singer Co. v. Greever and Walsh Wholesale Textile, Inc.*, (E. D. Tenn. 1977), 82 F. R. D. 1; *Johnson v. Harper*, (D. C. Tenn. 1975), 66 F. R. D. 103; *Hamilton v. Edell*, (E. D. Pa. 1975), 67 F. R. D. 18.

Likewise, *TBMP* § 312.01 states:

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. Accordingly, the Board is very 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.

Accordingly, as Opposer will not be prejudiced and that federal policy favors a decision on the merits rather than default on procedural grounds, the Board should grant the Motion so that the opposition may be litigated on its merits.

IV. Conclusion

Applicant has demonstrated that the judgment should be set aside and the concurrently filed Answer be entered. For the reasons set forth in this Motion, Applicant respectfully requests that this Motion be granted and the Answer concurrently submitted with this Motion be accepted.

Date: December 13, 2013

Respectfully submitted,

 /s/ Mitesh Patel
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CERTIFICATE OF TRANSMISSION

I certify that on the 13th day of December 2013, that the foregoing **MOTION TO SET ASIDE NOTICE OF DEFAULT JUDGMENT** is being electronically transmitted via the Electronic System for Trademark Trials and Appeals ("ESTTA") at <http://estta.uspto.gov/>.

By: /s/ Mitesh Patel
Mitesh Patel

CERTIFICATE OF SERVICE

I certify that on the 13th day of December 2013, a true copy of the foregoing **MOTION TO SET ASIDE NOTICE OF DEFAULT JUDGMENT** is being served by mailing a copy thereof by first class mail, postage prepaid, in an envelope addressed as follows:

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By: /s/ Mitesh Patel
Mitesh Patel