

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
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General Contact Number: 571-272-8500

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Mailed: July 19, 2014

Opposition No. 91213763

Inhale, Inc.

v.

KSX Enterprise, Inc.

***By the Trademark Trial
and Appeal Board:***

Pursuant to the Board's January 29, 2014 order, opposer/counterclaim defendant Inhale, Inc. ("Inhale") was allowed until February 28, 2014 to file an answer to the counterclaim in this case. *See* Trademark Rule 2.196.

The following motions are now pending before the Board:

- 1) applicant/counterclaimant KSX Enterprises, Inc.'s ("KSX") motion (filed April 8, 2014) for default judgment in the counterclaim; the motion is contested; and
- 2) Inhale's motion (filed April 17, 2014) to accept its late-filed answer, which was filed under separate cover on the same date.

KSX's attorney's change of correspondence address, filed April 8, 2014 is noted and made of record.¹

¹ Inhale's amended certificate of service, filed April 17, 2014, reflecting service on KSX's counsel at the new address is noted and accepted.

Inhale's failure to file a timely answer to the counterclaim was already raised by KSX's motion for default judgment. *See* TBMP Section 312.01 (2014). Accordingly, Inhale's motion to accept its late-filed answer is essentially a second response to KSX's motion for default judgment, and will not receive consideration as a separate motion in this decision.

In response to KSX's motion for default judgment, Inhale filed a response and declaration, and states that it failed to file a timely answer to the counterclaim because the copy of the answer served on Inhale did not include page 4 of the answer and counterclaim filed by KSX with the Board. Inhale argues that as the pages were not numbered, and the title of the answer did not mention a counterclaim, Inhale was unaware of the counterclaim. Inhale's counsel also states that he sent two letters regarding the upcoming discovery conference to KSX's counsel at the prior address of record, but received no response, and never received a copy of the motion for default judgment from KSX, but instead received a fax copy from Inhale's client. Accordingly, Inhale asks that the motion for default judgment be denied and that its late-filed answer be accepted.

However the issue of a defendant's failure to file a timely answer is raised, the standard for determining whether default judgment should be entered based on such failure is the Fed. R. Civ. P. 55(c) standard, i.e., whether the defendant has shown good cause why default judgment should not be entered against it. As a general rule, good cause to set aside a

defendant's default will be found where the defendant's delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where defendant has a meritorious defense. See *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). The determination of whether default judgment should be entered against a party lies within the Board's sound discretion. In exercising that discretion, the Board is mindful of its policy to decide cases on their merits where possible and therefore only reluctantly enters judgment by default for failure to timely answer. See TBMP Section 312.02.

The Board finds that Inhale's failure to file an answer to the counterclaim was inadvertent in that it was unaware of the counterclaim.² Further, there is no indication that KSX is in any way prejudiced by Inhale's failure to timely answer, and Inhale has set forth a meritorious defense by way of the denials set forth in its answer.

In view thereof, KSX's motion for default judgment on the counterclaim is hereby **denied**. Inhale's concurrently filed answer is accepted and made of record.

Counsel for both sides are reminded that they should regularly review the electronic file in this case at:

² The Board notes that an order scheduling a time for answer to the counterclaim was issued by the Board on January 29, 2014. Inhale's counsel should carefully review any orders issued by the Board in the future. Counsel for both sides should ensure that mailings are made to the correct address.

<http://ttabvue.uspto.gov/ttabvue/v?pno=91213763&pty=OPP&eno=12> to avoid missing any filings.

Discovery and testimony periods are reset as follows.

Deadline for Discovery Conference	8/21/2014
Discovery Opens	8/21/2014
Initial Disclosures Due	9/20/2014
Expert Disclosures Due	1/18/2015
Discovery Closes	2/17/2015
Plaintiff's Pretrial Disclosures Due	4/3/2015
Plaintiff's 30-day Trial Period Ends	5/18/2015
Defendant's Pretrial Disclosures Due	6/2/2015
Defendant's 30-day Trial Period Ends	7/17/2015
Plaintiff's Rebuttal Disclosures Due	8/1/2015
Plaintiff's 15-day Rebuttal Period Ends	8/31/2015

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.
