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

Proceeding	91216932
Party	Defendant Rapid Capital Funding LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Trademark Application Serial No. 86111998
Published in the *Official Gazette* on June 10, 2014

RAPID FUNDING, LLC,

Opposer,

Opposition No. 91216932

v.

RAPID CAPITAL FUNDING, LLC,

Applicant.

**MOTION TO SET ASIDE NOTICE OF DEFAULT AND MOTION FOR LEAVE TO
FILE A LATE ANSWER**

Applicant, Rapid Capital Funding, LLC, by and through its undersigned attorneys, and pursuant to 37 C.F.R. § 2.116(a) and Fed. R. Civ. P. 6(b), hereby submits this motion to set aside the notice of default and for leave to file a late Answer in this Opposition proceeding.

STATEMENT OF FACTS AND PRELIMINARY STATEMENT

Applicant filed the subject Application on November 6, 2013. The mark was published for opposition on June 10, 2014 and the Notice of Opposition followed on June 18, 2014. Although Applicant's counsel received an electronic Notice of Opposition, Applicant was never actually served with the Opposition pleading, as required under the rules. Additionally, the actual Opposition pleading was not attached to the Notice of Opposition as filed and recorded with TTAB in the TTABVUE system. To confirm, Applicant's counsel contact the USPTO directly regarding the Opposition pleading, and it was confirmed that the Opposition pleading was not uploaded into the TTABVUE system.

Notwithstanding the lack of actual service, it was Applicant's counsel intent to file Applicant's response by the original due date upon electronic receipt of the Opposition pleading. The initial due date was set at forty (40) days after the mailing of the Notice of Opposition, which was July 28, 2014. However, due to inadvertent mistake, Applicant's counsel calendared the response due for sixty (60) days rather than forty (40) days, and failed to communicate with Opposer's counsel within the time period regarding the lack of service of the Opposition pleading. Applicant's counsel was unaware of the Notice of Default until returning from vacation, and upon receiving and reviewing the same, is now filing this motion. Applicant's counsel has since received the Opposition pleading and is filing its Answer and Response in conjunction with this motion.

LEGAL ARGUMENT

“If a defendant who has failed to file a timely answer to the complaint, responds to a notice of default by filing a satisfactory showing of good cause why default judgment should not be entered against it, the Board will set aside the notice of default. Similarly, if the defendant files such a showing in response to a motion by the plaintiff for default judgment, or in support of its own motion asking that its late-filed answer be accepted, default judgment will not be entered against it.” Trademark Trial and Appeal Board Manual of Procedure (TBMP), Section 312.02 (3d ed. 2011); see also Fed. R. Civ. P. 55(c). “Good cause why default judgment should not be entered against a defendant, for failure to file a timely answer to the complaint, is usually found when the defendant shows that (1) the delay in filing an answer was not the result of wilful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action. 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.” TBMP Section 312.02 (3d ed. 2011).

“The 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. Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely response, and tends to resolve any doubt on the matter in favor of the defendant.” TBMP, Section 312.02 (3d ed. 2011). The federal cases are in accord with the policy of the Board.

In analyzing excusable neglect, the TTAB has relied on the Supreme Court's discussion of excusable neglect in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). See, e.g., *Mattel, Inc. v. Henson*, 88 Fed. Appx. 401 (Fed. Cir. 2004) (confirming applicability of *Pioneer* factors to TTAB proceedings). The *Pioneer* case dealt with a bankruptcy rule permitting a late filing if the movant's failure to comply with an earlier deadline ‘was the result of excusable neglect.’” 507 U.S. at 382, 113 S.Ct. 1489. The Supreme Court defined the inquiry into excusable neglect as:

at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the [nonmoving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395, 113 S.Ct. 1489. In practice before this Board in particular, the TTAB “is lenient in accepting late-filed answers, especially when the answer is filed relatively soon after the due date.” See *Mattel, Inc. v. Henson*, 88 Fed. Appx. at 401, n.1.

Under the circumstances, the Board has ample reason to employ its leniency and authorize the late filing of an Answer. It is hard to imagine how Opposer could have been prejudiced in the time between July 28, 2014 and now, and further taking into consideration that Applicant was not timely served with the Opposition pleading. For the last several years

Applicant's common law marks and Opposer's unregistered trademark have coexisted, with no objection from Opposer. Applicant does not, however, urge estoppel on this motion (as to the substance of the Opposition). Applicant merely raises this issue to demonstrate that Opposer has not been harmed in any quantum greater than it had already been for the previous several years, by virtue of the delay since the July 28, 2014 deadline, and cannot demonstrate prejudice.

Thus, the length of the delay is not significant in this context. The reason for the delay is fairly characterized as honest error. Additionally, there is no impact on other pending judicial proceedings, nor is there any issue of bad faith.

Default judgment is an extreme sanction, and "a weapon of last, not first, resort." *Martin v. Coughlin*, 895 F. Supp. 39 (N.D.N.Y. 1995). Ultimately, there is no reason in this situation to depart from the well-known preference in the federal courts that litigation disputes be resolved on their merits. *See Richardson v. Nassau County*, 184 F.R.D. 497, 501 (E.D.N.Y. 1999).

CONCLUSION

The delay here was not the result of wilful conduct or gross neglect. Due to Applicant not receiving service of the Opposition pleading and Applicant's counsel mistake in calendaring the due date of the response, the actual time for the response had lapsed. As a mere twenty (20) days has elapsed, there is no prejudice to the Opposer. Lastly, Applicant has meritorious defenses, which is set forth in the Answer and Affirmative Defenses filed concurrently hereto. Although Applicant does not believe that sworn testimony is necessary at this pleading stage to establish that Applicant has a meritorious defense, Applicant will provide such evidence if the Board so requires.

For the foregoing reasons, Applicant respectfully requests that the default entered in this matter be set aside, and that leave be granted to file a late Answer.

Dated: August 20, 2014

Respectfully Submitted,

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of August, 2014, a true copy of the foregoing MOTION TO SET ASIDE NOTICE OF DEFAULT AND MOTION FOR LEAVE TO FILE A LATE ANSWER was served in the following manner, per the prior written agreement of counsel:

VIA EMAIL

Hatch Ray Olsen Sandberg, LLC
730 17th Street, Ste 200
Denver, CO 80202
Email: jjacobs@hatchlawyers.com

By:  _____

William D. Weyrowski

CERTIFICATE OF ELECTRONIC FILING

The undersigned certifies that this submission (along with any paper referred to as being attached or enclosed) is being filed with the United States Patent and Trademark Office via the Electronic System for Trademark Trials and Appeals (ESTTA) on this 20th day of August, 2014.

By:  _____

William D. Weyrowski