

ESTTA Tracking number: **ESTTA749989**

Filing date: **06/02/2016**

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

Proceeding	91218260
Party	Defendant Jack and Jill Foundation Limited
Correspondence Address	ROBERTO LEDESMA LEWIS & LIN LLC 45 MAIN STREET SUITE 608 BROOKLYN, NY 11201 UNITED STATES roberto@ilawco.com
Submission	Opposition/Response to Motion
Filer's Name	Roberto Ledesma
Filer's e-mail	roberto@ilawco.com
Signature	/Roberto Ledesma/
Date	06/02/2016
Attachments	Response to Opposers Motion Shamrock Fund.pdf(112924 bytes )

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

Maurice D. Landers,  
Opposer,

v.

Jack and Jill Foundation Limited,  
Applicant.

Opposition No. 91218260

Mark: THE SHAMROCK FUND

Application Ser. No. 79107704

**APPLICANT’S RESPONSE IN OPPOSITION TO OPPOSER’S MOTION FOR  
RELIEF FROM ENTRY OF FINAL JUDGMENT**

Jack and Jill Foundation Limited (“Applicant” or “J&J”) by its counsel hereby submits this response to Opposer’s motion for relief from entry of final judgment and respectfully requests that the Trademark Trial and Appeal Board deny Maurice D. Landers’ (“Opposer” or “Landers”) motion.

At the outset, Applicant notes that Opposer’s motion was inaccurately titled and filed as a motion to set aside or vacate entry of a “default judgment.” However, the Board entered a final judgment in the form of a summary judgment and not a “default” judgment. See the Board’s April 28, 2016 decision. In the order dated April 28, 2016, the Board granted Applicant’s motion for summary judgment as conceded and dismissed the instant opposition proceeding with prejudice.

Default judgments for failure to timely answer a complaint are not favored by the law and are treated with more liberality by the Board than are other motions under Fed. R. Civ. P. 60(b) for relief from other types of judgments such as a summary judgment or a judgment entered after trial on the merits. See TBMP §§312.03, 544; see also *Williams v. Five Platters, Inc.*, 181 USPQ 409, 410 (TTAB 1974) (motion to set aside judgment

for failure to respond to motion for summary judgment denied), *aff'd*, 510 F.2d 963, 184 USPQ 744 (CCPA 1975). The instant matter *does not* involve a default judgment for failure to answer a complaint – but is instead more in the nature of an attempt to set aside a final judgment entered by the Board against Opposer.

A motion to set aside or vacate a final judgment in a Board proceeding is governed by Rule 60(b) of the Federal Rules of Civil Procedure. Opposer's motion for relief contends that the Board's final judgment should be vacated on the grounds set forth in subsection (1) of Fed. R. Civ. P. 60(b) "mistake, inadvertence, surprise, or excusable neglect".

Relief from a final judgment is an extraordinary remedy to be granted only in exceptional circumstances. TBMP §544. There is nothing exceptional about the circumstances in the instant case. Opposer's May 18, 2016 motion for relief states: "You can see from the Applicant's summary judgment brief that Opposer has all its evidence compiled and prepared (over approx. the past year and a half)." See Opposer's Motion for relief, pg. 3. The facts and evidence of record are not in dispute.

As set forth in Applicant's March 3, 2016 motion for summary judgment, the undisputed facts demonstrate that Applicant J&J is entitled to summary judgment because Opposer Landers cannot demonstrate that it owns senior rights to the SHAMROCK FUND mark. *See Diaz*, 83 U.S.P.Q.2d at 1331 (granting summary judgment to applicant as to priority and dismissing opposer's opposition under Section 2(d) with prejudice); *Aktieselskabet af 21. November 2001 v. Fame Jeans Inc.*, 77 U.S.P.Q.2d 1861, 1864 (T.T.A.B. 2006) (same); *Leatherwood Scopes Int'l Inc. v.*

*Leatherwood*, 63 U.S.P.Q.2d 1699, 1704 (T.T.A.B. 2002) (same); *Corp. Document Servs. Inc. v. I.C.E.D. Mgmt. Inc.*, 48 U.S.P.Q.2d 1477, 1480 (T.T.A.B. 1998) (same).

There is no genuine issue of material fact that the evidence submitted by Opposer Landers is legally insufficient to establish priority. See Applicant's March 3, 2016 motion for summary judgment. The evidence fails as a matter of law to show that Opposer acquired trademark rights in a SHAMROCK FUND mark before Applicant's October 14, 2011 priority date. Moreover, none of the responses and documents produced indicate that Opposer has used a SHAMROCK FUND mark to render actual fundraising services or any services of any kind. Because Opposer's evidence shows no use or insignificant use of the mark for the relevant services and relevant time period Opposer cannot prove priority of use, a necessary prerequisite of its Section 2(d) claim. See *Life Zone Inc. v. Middleman Group Inc.*, 87 U.S.P.Q.2d 1953, 1959 (T.T.A.B. 2008) ("Unfortunately for opposer, there is very little record evidence of its common-law trademarks and no evidence of its priority of use." "[W]ithout proof of priority, opposer cannot prevail.").

As a result, Landers, who is the Opposer and bears the burden of proof for the claims brought in this proceeding, does not have a meritorious claim in the action. Moreover, Applicant would be prejudiced by the Board granting Opposer's motion because it would have to continue to spend time and resources defending Opposer's unsupported claims. The party who seeks relief from a final judgment "must persuasively show" that such relief is warranted for one of the reasons set forth in Fed. R. Civ. P. 60(b). TBMP §544. Opposer's primary contention to set aside the judgment is that he misunderstood the TBMP and he did not "concede" defeat by failing to submit a

response to Applicant's motion for summary judgment. While Opposer may not concede defeat, it is clear based on the facts and evidence in the record that Opposer cannot support his claims and the Board's dismissal of the opposition was proper, irrespective of whether or not Opposer filed a response to Applicant's summary judgment motion.

Therefore, Applicant respectfully requests that the Board deny Opposer's motion to vacate the order of judgment and that the opposition remain dismissed.

Respectfully submitted,  
Roberto Ledesma

/Roberto Ledesma/  
Roberto Ledesma  
Brett E. Lewis  
Lewis & Lin, LLC  
45 Main St. Suite 608  
Brooklyn, NY 11201  
718-243-9323

Date: June 2, 2016

#### CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon Opposer this 2<sup>nd</sup> day of June, 2016, by mailing a copy thereof via first-class mail, postage pre-paid, to MAURICE LANDERS, 30-80 33RD ST 3RD FLOOR, ASTORIA, NY 11102.

/Roberto Ledesma/  
Roberto Ledesma