

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

mbm/gcp

Mailed: August 30, 2016

Opposition No. 91227887

Shenzhen Auto-vox Technology Co. Ltd

v.

IMAX Corporation

By the Trademark Trial and Appeal Board:

This proceeding now comes before the Board for consideration of Applicant's motion (filed August 9, 2016) to set aside the Board's July 5, 2016, notice of default. Opposer filed an opposition to Applicant's motion on August 16, 2016.

On May 11, 2016, Opposer filed a notice of opposition¹ opposing the registration of Applicant's mark IMAXPLUS and Design, as illustrated below, for "Bite indicators; Bite sensors; Fishing tackle; Game equipment, namely, chips; Gaming devices, namely, gaming machines, slot machines, bingo machines, with or without video output; Mountaineering and rock climbing equipment, namely, climbing cams and anchors made of metal; Radio controlled model vehicles; Skateboards; Skis; Snowboards; Surf boards; Swim

¹ As grounds for opposition, Opposer has asserted the claims of likelihood of confusion and dilution.

fins; Swimming flippers; Swimming jackets; Toy masks; Toy robots; Work-out gloves” in International Class 28.²



The Board’s May 16, 2016, institution order set the deadline to answer the notice of opposition for June 25, 2016. Applicant did not file an answer by the set deadline, nor did Applicant file a timely motion to extend its time to answer. In view thereof, the Board issued a notice of default on July 5, 2016 requiring Applicant to show cause why judgment should not be entered against it. Applicant did not respond to the Board’s notice of default by the set deadline. Applicant filed an untimely motion to set aside the default on August 9, 2016. Notwithstanding the untimeliness of Applicant’s motion, the Board, in its discretion, has decided to entertain Applicant’s motion, particularly since Opposer responded to the motion on the merits.

In support of its motion, Applicant maintains that it failed to file a timely answer to the notice of opposition due to its investigation of the claims and difficulties in browsing United States websites. Applicant also maintains that it failed to respond to the notice of default by the deadline due to technical

² Application Serial No. 86675025, filed on June 25, 2015, based on an allegation of use in commerce under Section 1(a) of the Trademark Act, claiming August 3, 2010 as the date of first use and October 20, 2010 as the date of first use in commerce.

difficulties. The Board also notes that the Board's May 16, 2016, institution order to Applicant was returned as undeliverable.³

Whether default judgment should be entered against a party is determined in accordance with Fed. R. Civ. P. 55(c), which provides in pertinent part that "for good cause shown the court may set aside an entry of default." 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 Hyman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). The Board is very reluctant to enter default judgment for failure to file a timely answer and tends to resolve any doubt on the matter in favor of the defendant. TBMP § 312.02 (2016).

In this case, the Board finds that Applicant has demonstrated good cause to set aside the Board's notice of default for the reasons set forth below.

First, the Board finds that Opposer is not prejudiced by Applicant's approximate six-week delay. Second, based on the record, the Board finds that the reasons for Applicant's delay were not willful or in bad faith. Finally, although Applicant failed to file an answer to the notice of opposition with its motion to set aside the default, Applicant's motion nevertheless sets forth

³ It is the responsibility of a party to a proceeding before the Board to ensure that the Board has the party's current correspondence address, including an email address, if applicable. TBMP § 117.07 (2016). If a party fails to notify the Board of a change of address, with the result that the Board is unable to serve correspondence on the party, default judgment may be entered against the party. *Id.*

Applicant's defenses to the claims in Opposer's notice of opposition. The Board therefore finds that Applicant has asserted a meritorious defense to the notice of opposition.

To the extent Applicant's motion filed August 9, 2016 was intended as Applicant's answer to the notice of opposition, said motion does not comply with Rule 8(b) of the Federal Rules of Civil Procedure, which is made applicable to this proceeding by Trademark Rule 2.116(a).

Fed. R. Civ. P. 8(b) provides, in part:

(b) Defenses; Admissions and Denials.

(1) *In General*. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

...

(5) *Lacking Knowledge or Information*. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

The notice of opposition filed by Opposer herein consists of two introductory paragraphs and thirty-one (31) numbered paragraphs setting forth the basis of Opposer's claim of damage. In accordance with Fed. R. Civ. P. 8(b), it is incumbent on Applicant to answer the notice of opposition **by specifically admitting or denying the allegations contained in each paragraph. If Applicant is without sufficient knowledge or information on which to**

form a belief as to the truth of any one of the allegations, it should so state and this will have the effect of a denial.

Decision and Trial Schedule

In view of the foregoing, Applicant's motion to set aside default is **GRANTED** and the Board's July 5, 2016 notice of default is hereby set aside. Applicant is allowed until **September 19, 2016** in which to file and serve on counsel for Opposer an answer herein that complies in full with Fed. R. Civ. P. 8(b).

Remaining trial dates are reset as follows:

Deadline for Discovery Conference	10/19/2016
Discovery Opens	10/19/2016
Initial Disclosures Due	11/18/2016
Expert Disclosures Due	3/18/2017
Discovery Closes	4/17/2017
Plaintiff's Pretrial Disclosures Due	6/1/2017
Plaintiff's 30-day Trial Period Ends	7/16/2017
Defendant's Pretrial Disclosures Due	7/31/2017
Defendant's 30-day Trial Period Ends	9/14/2017
Plaintiff's Rebuttal Disclosures Due	9/29/2017
Plaintiff's 15-day Rebuttal Period Ends	10/29/2017

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 2.135.

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.

Information for Pro Se Party

The Board notes that Applicant is representing itself in this proceeding. Although Trademark Rule 11.14 permits an entity to represent itself, it is strongly advisable for a party who is not acquainted with the technicalities of the procedural and substantive law involved in *inter partes* proceedings before the Board to secure the services of an attorney who is familiar with such matters. The United States Patent and Trademark Office (USPTO) cannot aid in the selection of an attorney. As the impartial decision maker, the Board may not provide legal advice; it may provide information solely as to procedure.

Any party who does not retain counsel should be familiar with the authorities governing this proceeding, including the Trademark Trial and Appeal Board Manual of Procedure (TBMP) and the Trademark Rules of Practice (37 C.F.R. Part 2), both accessible directly from the Board's web page at <http://www.uspto.gov/trademarks/process/appeal/index.jsp>. Also on the Board's web page are links to ESTTA, the Board's electronic filing system⁴ at <http://estta.uspto.gov>, and TTABVUE, for case status and prosecution history at <http://ttabvue.uspto.gov/ttabvue>.

Trademark Rules 2.119(a) and (b) require that every paper filed in the USPTO in a proceeding before the Board must be served upon the attorney for the other party, or on the party if there is no attorney. Proof of service must be

⁴ The Board strongly encourages parties to file all papers through ESTTA, which operates in real time and provides a tracking number that the filing has been received. For assistance in using ESTTA, call 571-272-8500.

made before the paper will be considered by the Board. Accordingly, copies of all papers filed in this proceeding must be accompanied by a signed statement indicating the date and manner in which such service was made. *See* TBMP § 113.03 (2016). The statement, whether attached to or appearing on the paper when filed, will be accepted as prima facie proof of service, must be signed and dated, and should take the form of a certificate of service as follows:

I hereby certify that a true and complete copy of the foregoing (insert title of submission) has been served on (insert name of opposing counsel or party) by mailing said copy on (insert date of mailing), via First Class Mail, postage prepaid (or insert other appropriate method of delivery) to: (name and address of opposing counsel or party).

Signature _____
Date _____

Strict compliance with the Trademark Rules of Practice and the Federal Rules of Civil Procedure (where applicable) is required of all parties before the Board, whether or not they are represented by counsel. *See McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, 1212 n.2 (TTAB 2006). The Board's order instituting this proceeding also includes information with which Applicant should be familiar.

This *inter partes* proceeding is similar to a civil action in a federal district court. The parties file pleadings and a range of possible motions. This proceeding includes designated times for disclosures, discovery (discovery depositions, interrogatories, requests for production of documents and things, and requests for admission to ascertain the facts underlying an adversary's

case), a trial period, and the filing of briefs. The Board does not preside at the taking of testimony; all testimony is taken out of the presence of the Board during the assigned testimony or trial periods. The written transcripts thereof, together with any exhibits thereto, are then filed with the Board. No paper, document, or exhibit will be considered as evidence unless it has been introduced in evidence in accordance with the applicable rules.