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

Proceeding	91228569
Party	Defendant True Fabrications, Inc.
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Attachments	Motion to Set Aside Notice of Default and Leave to Accept Late Answer.pdf(438556 bytes)

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

In the Matter of Trademark Application Serial No. 86765971

Filing Date: September 23, 2015

Mark: REVEL PAPER

Published in the *Official Gazette*: February 17, 2016

PAPER INK PRESS, LLC,

Opposer

Opposition No.

91228569

v.

TRUE FABRICATIONS, INC.

Applicant

**MOTION TO SET ASIDE NOTICE OF DEFAULT AND FOR LEAVE TO ACCEPT LATE
ANSWER TO OPPOSITION**

Applicant, True Fabrications, Inc., (“Applicant”), moves to set aside the notice of default entered on August 11, 2016 and for leave to file its late answer to the Notice of Opposition filed by Paper Ink Press, LLC (“Opposer”). A copy of the Applicant’s Answer has been filed contemporaneously with this Motion. In support of its Motion, Applicant states as follows:

INTRODUCTION

Applicant hereby moves to set aside the Notice of Default and for leave to file its late answer on the grounds that good cause exists as to why Applicant failed to file a timely answer. As is set forth more fully below, the delay in filing the answer was not the result of willful conduct or gross neglect on the part of the Applicant, Opposer will not be substantially prejudiced by the delay, and Applicant has a meritorious defense to the Opposition.

STATEMENT OF FACTS

On June 22, 2016, Opposer filed a Notice of Opposition, Opposition No. 91228569. On June 22, 2016, the Trademark Trial and Appeal Board (“TTAB”) issued a Scheduling Order for the Opposition giving Applicant originally until August 1, 2016 to file its answer to the opposition. As set forth in the certification of the under signed, Applicant’s counsel of record, filed herewith, Applicant’s counsel prepared an answer, but was unable to file due to an unexpected circumstances that arose limiting counsel’s accessibility to the necessary files. Counsel delegated an authorized individual to timely file the answer, however due to a miscommunication, this individual was under the impression the answer had been previously filed resulting in the failure to timely file the answer.

Applicant stresses that, up until recently, it was under the impression that the answer had been timely filed by its counsel. The undersigned informed Applicant of the notice of default and was given strict instructions to move for a remedy to this default. To this end, Applicant is filing the present Motion and simultaneous Answer to the Notice of Opposition.

GOOD CAUSE EXISTS AS TO WHY DEFAULT JUDGMENT SHOULD NOT BE ENTERED AGAINST OPPOSITION AND AS TO WHY APPLICANT'S LATE ANSWER TO COUNTERCLAIM SHOULD BE ACCEPTED

Legal Standard

The issue of whether default judgment should be entered against a defendant for failure to file a timely answer to the complaint may also be raised by means other than the TTAB's issuance of a notice of default. For example, the defendant itself, realizing that it is in default, may file a motion asking that its late-filed answer be accepted. *See, e.g., Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 USPQ2d 1899, 1902-03 (Comm'r 1990) (plaintiff's motion for default judgment and defendant's motion to accept late answer) and *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991) (motion to accept late answer filed before notice of default issued). *See also* TBMP §312.01 and §508.

However the issue is raised, the standard for determining whether default judgment should be entered against the defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard, that is, whether the defendant has shown good cause why default judgment should not be entered against it. *See* TBMP §312.01.

Good cause for avoiding entry of default judgment can be established when the defendant shows that “(1) the delay in filing an answer was not the result of willful 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. *See* TBMP §312.02.

The TTAB has sound discretion in determining whether to enter default judgment against a party. *See* TBMP §312.02. “The courts and the Board are reluctant to grant judgments by default and tend to resolve doubt in favor of setting aside a default, since the law favors deciding cases on

their merits.” Additionally, Courts are more likely to vacate a default “where it is the attorney rather than the party itself that is responsible for the failure to properly defend an action.” *See Assocs. Ltd. P’Ship v. Paolo Bodo, supra*; TBMP §312.02.

The Delay in Filing an Answer was not the Result of Willful Conduct or Gross Neglect

Applicant intended, at all times, to defend its registration. Applicant had given instructions to timely respond to the Opposition and was under the impression that the answer had effectively filed.

More importantly, as soon as Applicant learned that the miscommunication by its former counsels had caused the issuance of the Notice of Default, Applicant instructed counsel to take the necessary steps to contact Opposer’s counsel and remedy the situation.

While respectful of the importance of deadlines for critical timelines, unforeseen circumstance can result in chaotic environments wherein even the most organized of individuals can falter. Neither Applicant nor Applicant’s counsel is seeking condonation of these circumstances, rather each asks the Board to recognize that Applicant’s failure to comply with the deadline was primarily the result of the miscommunication by its counsel and not due to any fault or actions of the Applicant. Therefore this failure to comply should not be attributed against the Applicant.

Based on the foregoing, the TTAB should find that Applicant’s failure to file a timely response to the Petition for Opposition was not the result of Applicant’s willful or gross negligent conduct, but rather due to a miscommunication by its counsel, as Applicant was under the impression that the answer was timely filed.

Opposer will not be Substantially Prejudiced by the Delay

In practice before this Board in particular, the TTAB “is lenient in accepting late-filed answers” when the delay is not excessive. *See, Mattel, Inc. v Henson*, 88 Fed. Appx. At 401, n.1. Applicant’s response to the Petition for Opposition was due on August 1, 2016. The present motion and Applicant’s late-filed response to the Petition for Opposition are being filed on August 31, 2016. This is a short delay which will not hinder Opposer’s business or substantially prejudice Opposer.

Indeed, there is no indication that Opposer will suffer substantial prejudice if the TTAB allows Applicant’s late response to the Petition for Opposition. The only feasible basis for a claim of prejudice to Opposer would be a delay in adjudicating the Opposer’s claims. However, it is well settled that “delay alone is not a sufficient basis for establishing prejudice.” *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 U.S.P.Q.2d 1154, 1156 (T.T.A.B. 1991). Applicant submits that, even if a delay was a sufficient basis for establishing prejudice, a delay of one month would not rise to the level of prejudice. Under the circumstances, the Board has ample reason to employ its leniency and authorize the late filing of an Answer.

Applicant has a Meritorious Defense in this 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 §312.02; *DeLorme Publishing Co., Inc. v. Eartha’s, Inc.*, 60 U.S.P.Q.2d (BNA) 122, at 6 (TTAB 2000).

Applicant’s response to Opposer’s Opposition, submitted simultaneously with the present Motion, shows that Applicant has a meritorious defense to the Opposition. Indeed, Applicant maintains that there is no likelihood of confusion between its Application No. 86765971 and

Opposer's asserted mark, has denied the Opposer's assertions of priority and, thus, has adequately met the meritorious defense criterion for setting aside the Notice of Default.

CONCLUSION

Setting aside the Notice of Default and granting leave to Applicant to file its late response to the Petition for Opposition in this case would be compatible with the TTAB's expressed policy that favors deciding cases on their merits. Furthermore, Applicant has shown that good cause exists for the TTAB to allow Applicant's response. As it is the TTAB's tendency to resolve any doubt in the favor of the petitioner in such matters, Applicant respectfully moves the TTAB to Applicant's response and to reschedule the discovery deadlines and trial dates as necessary.

Respectfully Submitted,
TRUE FABRICATIONS, INC.

By: 

Vicky Bajwa, Attorney for Applicant
True Fabrications, Inc.
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**DECLARATION OF VICKY BAJWA IN SUPPORT OF APPLICANT'S MOTION TO SET
ASIDE NOTICE OF DEFAULT AND FOR LEAVE TO ACCEPT LATE ANSWER TO
OPPOSITION**

I, Vicky Bajwa, declare as follows:

1. I am an attorney licensed to practice in the State of Washington and before the United States Patent and Trademark Office (USPTO). I am counsel of record for Applicant, True Fabrications, Inc. I have personal knowledge of the facts set forth below and, if called as a witness, I could testify competently thereto.
2. I am in-house counsel for Applicant and currently the sole member of the Applicant's legal team.

3. On June 22, 2016, Opposer filed a Notice of Opposition, Opposition No. 91228569.
4. On June 22, 2016, the Trademark Trial and Appeal Board (“TTAB”) issued a Scheduling Order for the Opposition giving Applicant until August 1, 2016 to file its answer to the Opposition.
5. On July 18, 2016, in the ordinary course of business, I began drafting Applicant’s answer to the opposition.
6. On July 20, 2016, I submitted the answer to Applicant for review, at Applicant’s request.
7. On or around July 22, 2016, I learned of some personal matters that required my immediate attention, limiting my work schedule until August 9, 2016.
8. Among other tasks, I had to delegate the filing of the answer to an employee temporarily assigned to assist me. I instructed the employee to file the answer by the August 1, 2016 deadline.
9. On July 27, 2016, upon receiving approval from Applicant, I received confirmation that the answer had been filed and served by mail.
10. On or around August 11, 2016, I learned of the notice of default entered into by the TTAB for failure to answer.
11. On or around August 22, 2016, I learned that the temporary employee delegated to file the answer had not done so. According to the employee, who is no longer employed for other reasons, they had viewed a different file involving a separate Opposition proceeding between the same Opposer and Applicant, verified that the Answer has been filed and marked the task as complete. This employee did not verify the date of the Answer nor the Opposition No.
12. The failure to answer was primarily due to miscommunication on my part. I had not informed the employee there were two similar files between the same parties, nor did I adequately verify the filing receipt upon being told the task the Answer had been filed in this proceeding.

13. I am disappointed in the situation as it arose, as it is not an accurate representation of how I handle critical papers and correspondence.

14. Applicant has diligently sought to protect its mark. Applicant was under the impression the answer had been filed and the proceedings were carrying on in their ordinary course.

15. I have informed the Applicant of the Notice of Default and the underlying cause. Applicant has graciously retained me as counsel of record contingent on the TTAB granting leave to accept the late answer.

16. On August 18, 2016, I informed Opposer's counsel of record that I would be filing a motion to set aside the notice of default in this proceeding.

17. The Motion to Set Aside Notice of Default and Leave to Accept Late Answer to Opposition filed herewith is the same answer previously prepared for timely filing with only minor changes.

I declare under penalty and perjury that the foregoing is true and correct to the best of my knowledge. Executed on August 31, 2016 in Seattle, Washington.

By: 

Vicky Bajwa, Attorney
True Fabrications, Inc.
154 N 35th Street
Seattle, WA 98103
Tel.: (206) 209-5561
Fax: (206) 299-9345

Attorney for Applicant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 31st day of August, 2016, a true copy of the foregoing MOTION TO SET ASIDE NOTICE OF DEFAULT AND FOR LEAVE TO ACCEPT LATE ANSWER TO OPPOSITION is being deposited with the U.S. Postal Service as first class mail, postage prepaid, to Counsel for Opposer at the address below, and that courtesy service is being made via e-mail as well:

VIA EMAIL AND FIRST CLASS MAIL

H. Michael Brucker, Esq.
H. Michael Brucker Law Corp.
5855 Doyle Street, Suite 110
Emeryville, CA 94608

Email: michael@hmblawoffice.com

CERTIFICATE OF ELECTRONIC FILING

The undersigned certifies that a true copy of the foregoing MOTION TO SET ASIDE NOTICE OF DEFAULT AND FOR LEAVE TO ACCEPT LATE ANSWER TO OPPOSITION is being filed with the United States Patent and Trademark Office via the Electronic System for Trademark Trials and Appeals (ESTTA) on this 31st day of August, 2016.

By: 

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Attorney for Applicant