

I. Factual And Procedural Background

Pursuant to the Trial Order issued by the United States Patent and Trademark Office on November 20, 2002, FRITOS ENCANTO's Answer to the Petition for Cancellation was due on Monday, December 30, 2002. FRITOS ENCANTO is not based in the United States, but rather in Monterrey, Mexico. FRITOS ENCANTO was never served with the Trial Order and Petition for Cancellation. The Trial Order and Petition for Cancellation was sent to Mr. Philip N. Islip at the address of FRITOS ENCANTO's current counsel and was received by FRITOS ENCANTO's counsel on November 25, 2002. At that time, FRITOS ENCANTO's current counsel had not been engaged by FRITOS ENCANTO in over four years and Mr. Islip had left FRITOS ENCANTO's current counsel almost four-and-a-half years earlier. FRITOS ENCANTO's current counsel made several attempts to contact FRITOS ENCANTO and was not successful in notifying FRITOS ENCANTO of the Trial Order and attached Petition for Cancellation until December 24, 2002, when notice was received by a layperson at FRITOS ENCANTO and was internally forwarded to the authorized representative of FRITOS ENCANTO after the Christmas holidays. Only after December 30, 2002 could FRITOS ENCANTO's current counsel verify with FRITOS ENCANTO its authorization to represent FRITOS ENCANTO as counsel in this cancellation action. For these reasons, FRITOS ENCANTO was unable to file its Answer on or before the December 30, 2002 deadline.

Having recently learned of the pending cancellation proceeding and provided authorization to its current counsel to represent it in this cancellation action, FRITOS ENCANTO now seeks permission of the Board to file its Answer. FRITOS ENCANTO has no knowledge of any Notice of Default being issued by the Board. FRITOS ENCANTO is aware of the Motion to Enter Default for failure to timely respond to the Petition of Cancellation filed by

CONCHITA FOODS with the Board. However, FRITOS ENCANTO simultaneously files an opposition to CONCHITA FOODS' Motion to Enter Default.

II. The Board Should Grant Leave For FRITOS ENCANTO To File A Late Answer

In *inter partes* cases before the Board, the Federal Rules of Civil Procedure ("Federal Rules") apply "wherever applicable and appropriate," unless the Rules of Practice in Trademark Cases provide otherwise. Rule 2.116, 37 C.F.R. § 2.116. The Trademark Rules do not establish a standard for determining the circumstances under which an Answer to a Petition for Cancellation may be filed late. Similarly, the Trademark Rules do not establish a standard for determining when a default or a default judgment may be set aside. Accordingly, Federal Rules 6(b), 55(c) and 60(b) all apply.

FRITOS ENCANTO files the instant motion for leave to file a late Answer as an anticipatory showing of good cause why judgment by default should not be entered. In the alternative, the motion is filed as a request for extension of time to file an Answer pursuant to Federal Rule 6(b), a motion to set aside default pursuant to Federal Rule 55(c), and/or a motion for relief pursuant to Federal Rule 60(b). Specifically, FRITOS ENCANTO seeks leave to file its Answer after the original deadline set forth in the Trial Order.

A. Discretion Of The Board To Grant Leave To File A Late Answer

Because the law favors deciding cases on their merits, courts and the Board are generally reluctant to grant judgments by default and generally strive to resolve doubt in favor of setting aside a default. *See Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 U.S.P.Q.2d 1899 (Comm'r 1990); *see also Morris v. Charnin*, 85 F.R.D. 689 (S.D.N.Y. 1980); *Alopri v. O'Leary*, 154 F.Supp. 78 (E.D.Penn. 1957); *Thrifty Corporation v. Bomax Enterprises*, 228 U.S.P.Q. 62 (TTAB 1985); *Regent Baby Products Corp. v. Dundee Mills, Inc.*, 199 U.S.P.Q. 571

(TTAB 1978). A motion to set aside a default is addressed to the sound discretion of the Board, may be granted for good cause, and "is usually granted when no substantial prejudice will result to the plaintiff and [when] the defendant, not being guilty of gross neglect, claims the existence of a meritorious defense." *Kulakowich v. A/S Borgestad*, 36 F.R.D. 185, 186 (E.D.Penn. 1964). Furthermore, courts have held that it is an abuse of a court's discretion not to set aside a default when circumstances are such that the plaintiff would not be prejudiced, the defendant has established a meritorious defense and the defendant did not engage in willful or bad faith conduct leading to default. See *Heleasco Seventeen, Inc. v Drake*, 102 F.R.D. 909, 917 (D.Del. 1984).

B. Good Cause Exists To Grant Leave To File A Late Answer

Good cause exists as to why FRITOS ENCANTO should be allowed to file its Answer and why default judgment should not be entered against FRITOS ENCANTO. See TBMP 317.01. First, FRITOS ENCANTO's delay in filing the Answer is not the result of willful conduct or gross neglect by FRITOS ENCANTO. The delay in filing is entirely inadvertent. FRITOS ENCANTO was not directly served with the Trial Order and attached Petition of Cancellation. The Trial Order and attached Petition of Cancellation was sent to Philip N. Islip of FRITOS ENCANTO's current counsel and was received on November 25, 2002. However, at the time of receipt of the Trial Order and attached Petition of Cancellation, and Mr. Islip had left FRITOS ENCANTO's current counsel over four-and-a-half years earlier and FRITOS ENCANTO had not engaged its current counsel in over four years. Consequently, FRITOS ENCANTO's current counsel had to verify its authorization to represent FRITOS ENCANTO in connection with this cancellation proceeding. After numerous failed attempts, which were delayed by the fact that FRITOS ENCANTO's current counsel received the Trial Order and

attached Petition of Cancellation only days before the Thanksgiving holiday weekend, by FRITOS ENCANTO's current counsel to contact FRITOS ENCANTO in Mexico, and in light of the pre-Christmas holiday delay in international correspondence, FRITOS ENCANTO received notice of the Trial Order and Petition of Cancellation only on December 24, 2002, on the eve of the Christmas holidays, which are celebrated in Mexico. On December 24, 2002, only a layperson at FRITOS ENCANTO took receipt of the notice, which was internally forwarded to the authorized representative of FRITOS ENCANTO not until after the holidays. Therefore, by the time that FRITOS ENCANTO received notice of the Trial Order and Petition of Cancellation, it was too late to authorize FRITOS ENCANTO's current counsel to prepare and file its Answer before the expiration of the period for filing the Answer on December 30, 2002. However, as soon as FRITOS ENCANTO contacted its current counsel regarding the Petition of Cancellation, counsel for FRITOS ENCANTO immediately began efforts to file an Answer.

Second, CONCHITA FOODS will not be substantially prejudiced by the delay in filing of the Answer. No substantive, procedural or financial prejudice will result from the late Answer. In addition, the dates and deadlines set forth in the Trial Order need not be altered in light of the late Answer. The proceeding may continue according to the original schedule set forth in the Trial Order.

Third, FRITOS ENCANTO strongly desires the opportunity to defend its registration. FRITOS ENCANTO is prepared to defend the cancellation proceeding initiated by CONCHITA FOODS and will assert meritorious defenses to the allegations set forth in the Petition of Cancellation.

Finally, public interest demands that cases and claims be decided on their merits. *See Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 U.S.P.Q.2d 1899 (Comm'r 1990).

FRITOS ENCANTO requests that the Board exercise its discretion to allow FRITOS ENCANTO to file its Answer late, thereby mandating that the claims be decided on the merits.

III. Conclusion

For the reasons set forth herein, good cause exists for allowing FRITOS ENCANTO to file a late Answer. In order to allow the proceedings to be decided on the merits, FRITOS ENCANTO respectfully requests that the Board exercise its discretion by granting leave for FRITOS ENCANTO to file a late Answer.

Dated: January 17, 2003

Respectfully submitted,

BAKER & McKENZIE

By: 

Kimberly F. Rich

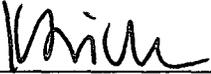
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ATTORNEYS FOR REGISTRANT
FRITOS ENCANTO DE MONTERREY,
S.A. DE C.V.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REGISTRANT'S MOTION FOR LEAVE TO FILE LATE ANSWER** was served on counsel for Petitioner, this 17th day of January, 2003, by sending same via United Parcel Service express, overnight service, postage prepaid to:

Jesus Sanchelima
Sanchelima & Associates, P.A.
235 S.W. Le Jeune Road
Miami, Florida 33134-1762



Kimberly F. Rich

GENERAL DENIAL

Except as herein expressly admitted, FRITOS ENCANTO denies each and every allegation contained in the Petition for Cancellation.

SPECIFIC RESPONSES

1. FRITOS ENCANTO has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 1 of the Petition for Cancellation and, therefore, denies said allegations.

2. FRITOS ENCANTO has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 2 of the Petition for Cancellation and, therefore, denies said allegations.

3. FRITOS ENCANTO has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 3 of the Petition for Cancellation and, therefore, denies said allegations.

4. FRITOS ENCANTO has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 4 of the Petition for Cancellation and, therefore, denies said allegations.

5. FRITOS ENCANTO has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 5 of the Petition for Cancellation and, therefore, denies said allegations.

6. FRITOS ENCANTO denies the allegations set forth in Paragraph 6 of the Petition for Cancellation.

7. FRITOS ENCANTO denies the allegations set forth in Paragraph 7 of the Petition for Cancellation.

8. FRITOS ENCANTO has insufficient knowledge or information as to the truth of the allegations set forth in Paragraph 8 of the Petition for Cancellation and, therefore, denies said allegations.

AFFIRMATIVE DEFENSES

1. The Petition for Cancellation fails to state a claim upon which relief may be granted.

2. Each and every one of the purported claims in the Petition of Cancellation is barred by the doctrine of laches.

3. Each and every one of the purported claims in the Petition of Cancellation is barred by the doctrine of unclean hands.

4. Each and every one of the purported claims in the Petition of Cancellation is barred by the doctrine of estoppel.

5. Each and every one of the purported claims in the Petition of Cancellation is barred by the doctrine of acquiescence.

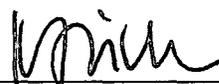
PRAYER FOR RELIEF

Registrant FRITOS ENCANTO denies that Petitioner CONCHITA FOODS is entitled to the relief requested. Registrant FRITOS ENCANTO respectfully prays that Registration No. 2,105,538 not be canceled or declared void.

Dated: January 17, 2003

Respectfully submitted,

BAKER & MCKENZIE

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ATTORNEYS FOR REGISTRANT
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **ANSWER TO PETITION FOR CANCELLATION** was served on counsel for Petitioner, this 17th day of January, 2003, by sending same via United Parcel Service express, overnight service, postage prepaid to:

Jesus Sanchelima
Sanchelima & Associates, P.A.
235 S.W. Le Jeune Road
Miami, Florida 33134-1762



Kimberly F. Rich

Petitioner's Motion to Enter Default, Registrant hereby incorporates by reference the arguments set forth in Registrant's Request for Leave to File a late Answer.

Dated: January 17, 2003

Respectfully submitted,

BAKER & MCKENZIE

By: 

Kimberly F. Rich

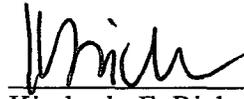
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REGISTRANT'S OPPOSITION TO MOTION TO ENTER DEFAULT** was served on counsel for Petitioner, this 17th day of January, 2003, by sending same via United Parcel Service express, overnight service, postage prepaid to:

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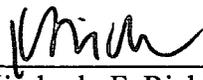
- (3) Answer to Petition for Cancellation;
- (4) Certificate of Service for Answer to Petition for Cancellation;
- (5) Postcard.

A self-addressed return postcard in accordance with T.M.E.P. Section 703 itemizing all of the above referenced documents filed with the United States Patent and Trademark Office.

Dated: January 17, 2003

Respectfully submitted,

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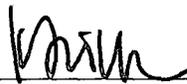
- (3) Answer to Petition for Cancellation;
- (4) Certificate of Service for Answer to Petition for Cancellation;
- (5) Registrant's Opposition to Motion to Enter Default;
- (6) Certificate of Service for Registrant's Opposition to Motion to Enter Default; and
- (7) Postcard.

A self-addressed return postcard in accordance with T.M.E.P. Section 703
itemizing all of the above referenced documents filed with the United States
Patent and Trademark Office.

Dated: January 17, 2003

Respectfully submitted,

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