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02-24-2003

U.S. Patent & TMOfc/TM Mail Rcpt Dt. #64

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

DADA CORPORATION,	)
	)
Petitioner,	)
	)
v.	) Cancellation No. 92040714
	)
DAMANI DADA ENTERPRISES, INC.	)
	)
Respondent.	)

**PETITIONER'S RESPONSE TO RESPONDENT'S  
MOTION FOR RELIEF FROM DEFAULT JUDGMENT**

By way of its Motion for Relief from Default Judgment Based Upon Surprise, Inadvertence or Excusable Neglect ("Motion for Relief"), Damani Dada Enterprises, Inc. ("Damani Dada") seeks the extraordinary relief of vacating a judgment validly entered by the Trademark Trial and Appeal Board ("Board"). In so doing, Damani Dada casts about in an attempt to assign blame to others for the existence of the default judgment. However, while this approach proves futile, as discussed below, it is noteworthy that Damani Dada's papers do not contest the validity of the second Notice of the cancellation proceeding as effected by the Board by publication. In any event, Damani Dada's conduct which led to the present judgment does not evince "good cause" sufficient to disturb the judgment.

I. The Board's Notice Was Valid

Notice of the Petition to Cancel was effected by the Board on July 3, 2002 when the Board mailed a copy of the Notice to the correspondence address maintained in the file of the petitioned registration. As discussed below, that the Respondent failed to maintain proper records with the United States Patent and Trademark Office ("Trademark Office") does not negate this

02/24/03 12:11:53

notice. In any event, an “additional notice” was given to Respondent by publication in the OFFICIAL GAZETTE on October 8, 2002. While this second notice gave Respondent thirty (30) days to respond and/or enter an appearance, the Board effectively gave Respondent over three (3) months to respond. However, no response was made for nearly four (4) months.

Damani Dada does not challenge the validity of the notice of the Petition to Cancel by publication in the OFFICIAL GAZETTE – and no such challenge could be countenanced. This means of notice is expressly outlined in the Trademark Rules. *See* 37 C.F.R. §2.118 (“When the notices sent by the Patent and Trademark Office to any registrant are returned to the Office undelivered . . . *additional* notice *may* be given by publication in the Official Gazette for such period of time as the Commissioner may direct.”) (emphasis supplied). Moreover, publication in the OFFICIAL GAZETTE is a common means for the Trademark Office to communicate to all interested third parties significant events which may be relevant to trademark registrations issued by the Trademark Office and/or the rights of others. *See e.g.*, 15 U.S.C. §1062, 15 U.S.C. §1063. Furthermore, upon information and belief, Pryor Cashman Sherman & Flynn, LLP (“Pryor Cashman”), counsel for Damani Dada at the time of publication, is experienced in the practice of trademark law and likely maintains a subscription<sup>1</sup> to the OFFICIAL GAZETTE, in which the Notice was published. Moreover, while Damani Dada did not identify the “third party” who provided the “advisory” to its counsel as to the existence of the present proceeding, if such advisory was provided by a watch service, then the publication of the Notice in the OFFICIAL GAZETTE would likely have been conveyed to counsel as well.

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<sup>1</sup> The OFFICIAL GAZETTE is also accessible on-line at the website maintained by the Trademark Office.

## II. No Good Cause Is Shown to Disturb the Judgment

Two recipients of Damani Dada's attention are the Trademark Office and the Petitioner, Dada Corporation ("Dada"). However, Damani Dada need look no further than itself for the reason that two Notices issued by the Board regarding the cancellation proceeding went unheeded. Indeed, by various acts and omissions, Damani Dada is itself responsible for its predicament and has failed even now to demonstrate good cause for the extraordinary relief of vacating a judgment.

First, Damani Dada seeks to blame the Trademark Office for allegedly failing to amend the records to account for the Power of Attorney mailed on April 5, 2002 ("POA"). However, since the POA was facially defective, the Trademark Office was under no duty to give it any effect. The POA, which related to more than one application and registration, was not filed in compliance with the Rules. Indeed, both the Trademark Rules and the TEMP are quite clear on this point:

A party *may* file a power of attorney that relates to *more than one* trademark application or registration, or to all existing and future applications and registration of that party. A party relying on such a power of attorney *must*:

(1) Include a copy of the previously filed power of attorney; or

(2) Refer to the power of attorney, specifying the filing date of the previously filed power of attorney; the application serial number (if known), registration number, or inter partes proceeding number for which the original power of attorney was filed; and the name of the party who signed the power of attorney; or, if the application serial number is not known, submit a copy of the application or a copy of the mark, and specify the filing date.

*See* 37 C.F.R. §2.17(d) (emphasis supplied); *see also* TEMP, §602.01(a). Patently, the POA, found at Exhibit A of the Declaration of Teresa A. Lee attached to the Motion for Relief, does not comply with these mandatory requirements. The Rules go on to say that a power of attorney should be

accepted “[i]f the applicant or registrant meets these requirements.” However, since these non-discretionary requirements were not met, the POA was not accepted. Since the defective POA was not accepted by the Trademark Office — through the fault of Damani Dada — Damani Dada cannot now be heard to complain that it did not receive notice of the Petition based on a defective and unaccepted POA filed on its behalf.<sup>2</sup>

Additionally, the Trademark Office was under no obligation to advise Damani Dada that the fatally defective POA was not accepted. *See* TEMP §602.01 (no requirement for the filing of a “proper” power of attorney “because the filing of a power of attorney is not mandatory in a trademark case”).

Moreover, Damani Dada has long assumed the risk of not receiving critical correspondence from the Trademark Office and/or the Board concerning its registration since the registration was, for a number of years, without a proper correspondence address. The petitioned registration issued on June 24, 1997. On that date, any power of attorney then residing in the file terminated. *See* TEMP §602.01(c) (“The Office considers a power of attorney to end with registration”). Moreover, on that date the Capital Heights “address [wa]s listed as the correspondent address in the U.S. Patent and Trademark Office records to which all USPTO correspondence pertaining to the above registration . . . is sent”, Lewis Decl. ¶2.

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<sup>2</sup> Aside from the obvious and fatal defects found in the POA, it is noted that the POA was not filed according to the *recommended* procedure: (“Notices of change of correspondence address *should be filed electronically* through TEAS, at <http://www.uspto.gov/teas/index.html>. When a notice is filed electronically, *the Office receives it within seconds after filing, and immediately issues a confirmation of filing via e-mail that includes the date of receipt and a summary of the submission.*”) (emphasis supplied).

Thereafter, Damani Dada relocated from its Capital Heights, Maryland location to New York – on or about January 2000. *See* Declaration of Dwayne Lewis (“Lewis Decl”), ¶3.<sup>3</sup> Damani Dada failed to advise the Trademark Office of its new address. Nearly two years later, on or about November 21, 2001, Damani Dada apparently changed its location again, and yet again failed to notify the Trademark Office of this further address change. Lewis Decl: ¶4.<sup>4</sup>

Thus, despite two different relocations over a several year period, Damani Dada failed in its obligation to maintain an accurate correspondence address. Indeed, the Rules are quite clear about this duty:

It is the applicant’s responsibility to maintain a current and accurate correspondence address in its application file. If the correspondence address changes, the Office must be *promptly* notified in writing. 37 C.F.R. §2.18.”

*See* TEMP §603.03 (emphasis supplied). Therefore, even assuming that the POA should have been accepted by the Trademark Office (notwithstanding its clear non-compliance with the Rules), it is irrefutable that Damani Dada was unable to receive communications from the Trademark Office and/or the Board for a period of *over twenty-seven (27) months*.

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<sup>3</sup> The Lewis Declaration is notable for the fact that it did not state that Damani Dada did not have actual knowledge of the Notice and/or proceeding before it was notified by its counsel.

<sup>4</sup> Damani Dada claims that it notified the United States Post Office (“Post Office”) of its change of address. This, of course, does not discharge its obligations under the Trademark Rules. Moreover, it is patently unreasonable to rely on the Post Office to deliver mail by having to track through two different change of address forms submitted over two years prior—especially when Damani Dada has an affirmative obligation to notify the Trademark Office directly. Moreover, these forms, which were filed over three (3) years ago, usually are effective for only a very limited duration.

Secondly, Damani Dada seeks to lay the blame for its current predicament on Petitioner. This assertion is unfair and founded on clear misrepresentations of fact. Respondent alleges:

upon information and belief<sup>5</sup>, [Petitioner] and its trademark counsel, Jacobson, had actual knowledge that *Damani Dada* is currently being represented by Pryor Cashman due to a cancellation proceeding (hereinafter the “DC Proceeding”) that was instituted by Pryor Cashman *on behalf of Damani Dada* and Kyarra Inspires Incorporated (hereinafter “Kyarra”) against [Petitioner]’s registration for the mark DADA with Foreign Characters . . . .

Respondent’s Motion for Relief, p. 4 (emphasis supplied). Thus, Damani Dada argues that Dada should have known that Damani Dada was represented by Pryor Cashman because Pryor Cashman represented Damani Dada in Cancellation Proceeding No. 92040616 (“another *inter partes* proceeding”). However, the basis for this argument is clearly contradicted by the facts. Damani Dada is not, was not, and has never been a party to the other *inter partes* proceeding. That proceeding was brought by Kyarra Inspires only. This can clearly be seen by the filings of Kyarra Inspires in that case, excerpts of which are attached hereto as Exhibit A.

Thus, as adjusted for by the facts, Damani Dada’s position is that Dada should have known that Damani Dada was represented by Pryor Cashman in the present proceeding because Pryor Cashman represented Kyarra Inspires in another *inter partes* proceeding. This nonsensical argument falls under its own weight. Moreover, there is no indication that the parties are related or – prior to the present Motion – that the parties are both represented by the same counsel. Indeed, even the present Motion does not attempt to explain any relationship between the two parties, except

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<sup>5</sup> This “assumption” is mysteriously transformed into a “fact” in the very next paragraph. See Motion for Relief, p. 5 ( “despite its actual knowledge regarding Pryor Cashman’s representation of Damani Dada. Had Jacobson done so, the default judgment entered by the Board would have been avoided.”)

for the *incorrect* assertion that the other *inter partes* proceeding was brought by Kyarra Inspires and Damani Dada.

As to the claimed meritorious defenses alleged by Damani Dada, Dada notes that it has timely complied with an Examiner's requirement relating to the pleaded registration. In any event, the basis for Dada's Petition is not limited to the pleaded registration.

Finally, it is unfair to deny Dada the present judgment, in light of the facts and circumstances of this case.

In view of the foregoing, Dada respectfully requests that the Board deny the Motion for Relief.

Respectfully submitted,

DADA CORPORATION



Date: February 24, 2003

By:

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CERTIFICATE OF SERVICE

I hereby certify that on this 24<sup>th</sup> day of February, 2003, a true copy of the foregoing Petitioner's Response to Respondent's Motion for Relief from Default Judgment was served by first-class mail, postage prepaid, upon counsel for Applicant:

Teresa A. Lee  
Pryor Cashman Sherman & Flynn, LLP  
410 Park Avenue  
10<sup>th</sup> Floor  
New York, N.Y. 10022



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

-----X  
Kyarra Inspires Incorporated : Cancellation No.: 92040616  
Petitioner, :  
-v- : In re Registration No. 1,896,120  
 : (DADA with Foreign Characters)  
 :  
Dada Corporation, : Date of Issuance: May 30, 1993  
 :  
 :  
Registrant. :  
-----X

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**PETITIONER'S MEMORANDUM OF LAW IN OPPOSITION  
TO RESPONDENT'S MOTION TO DISMISS AND MOTION TO STRIKE  
AND IN SUPPORT OF PETITIONER'S CROSS MOTION FOR LEAVE  
TO FILE THE SECOND AMENDED PETITION**

Kyarra Inspires Incorporated ("Petitioner"), by its attorneys Pryor Cashman Sherman & Flynn LLP, respectfully submit this memorandum of law in opposition to Respondent's Motion To Dismiss And Motion To Strike, and in support of Petitioner's motion pursuant to Federal Rule of Civil Procedure 15 for leave to file the Second Amended Petition, annexed to the accompanying Declaration of Brad D. Rose, Esq. For the reasons stated herein, Respondent's Motion to Dismiss and Motion to Strike should be dismissed, and Petitioner should be granted leave to file the Second Amended Petition.

**ARGUMENT**

As an initial matter, Petitioner renews its argument that the instant Cancellation proceeding should be suspended pending the final disposition of the Section 8 Action against Registration No. 1,896,120 for DADA with Foreign Characters (the "Korean

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

In the Matter of Trademark Registration No. 1,896,120

For the Mark, DADA *with Foreign Characters*

Date of Issuance: May 30, 1993

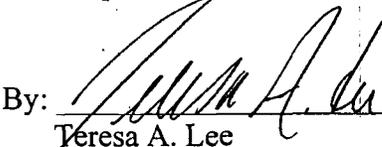
-----X  
Kyarra Inspires Incorporated :  
Petitioner, : Cancellation No.: 92040616  
-against- :  
Dada Corporation, :  
Registrant :  
-----X

**PETITIONER'S NOTICE OF MOTION TO  
SUSPEND CANCELLATION PROCEEDINGS**

PLEASE TAKE NOTICE that, upon the annexed *Motion To Suspend Cancellation Proceedings* dated July 1, 2002 and the exhibits attached thereto, in support of Petitioner's *Motion To Suspend Cancellation*, Petitioner Kyarra Inspires Incorporated, by its attorneys Pryor Cashman Sherman & Flynn LLP, hereby moves the Trademark Trial And Appeal Board to suspend the instant proceeding, for good cause, pursuant to TBMP §510.03(a); 37 C.F.R. §2.117(c) until a final determination is made on Dada Corporation's "Combined Declaration Under Sections 8 and 15" (hereinafter the "Use Affidavit") filed on May 30, 2001.

Dated: New York, NY  
July 1, 2002

Respectfully submitted,

By:   
Teresa A. Lee  
Brad D. Rose

Pryor Cashman Sherman & Flynn LLP  
410 Park Avenue  
New York, NY 10022  
212 421 4100

Attorneys for Petitioner  
Kyarra Inspires Incorporated

EXHIBIT A

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

In the Matter of Trademark Registration No. 1,896,120

For the Mark, DADA *with Foreign Characters*

Date of Issuance: May 30, 1993

-----X  
Kyarra Inspires Incorporated

Petitioner,

-against-

Dada Corporation,

Registrant  
-----X

Cancellation No.: 92040616

**PETITIONER'S MOTION TO SUSPEND CANCELLATION PROCEEDINGS**

Pursuant to TBMP §510.03(a); 37 C.F.R. §2.117(c), Kyarra Inspires Incorporated (hereinafter the "Petitioner"), by its attorneys Pryor Cashman Sherman & Flynn LLP, hereby submits this *Motion To Suspend Cancellation Proceedings* (hereinafter the "*Motion To Suspend*") in connection with the above-referenced proceeding relating to U.S. Registration No. 1,896,120 (hereinafter the "Korean Registration"), pursuant to the Board's discretion to suspend such proceedings, for good cause, until a final determination (hereinafter the "Section 8 Action") is made on Dada Corporation's "Combined Declaration Under Sections 8 and 15" (hereinafter the "Use Affidavit") filed on May 30, 2001:

Simultaneous with the filing of the instant *Motion to Suspend*, Petitioner has filed an *Amended Pleadings of Petition For Cancellation* wherein Petitioner set forth the following four (4) grounds for cancellation: (i) the Korean Registration is *void ab initio* given that Boo Yl

WHEREFORE, Petitioner hereby prays that the instant *Motion To Suspend* be granted pending final disposition of the Section 8 Action.

Dated: New York, NY  
July 1, 2002

Respectfully submitted,

By: \_\_\_\_\_

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Brad D. Rose

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Kyarra Inspires Incorporated



