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

Proceeding	92044624
Party	Plaintiff J. Christopher Carnovale J. Christopher Carnovale 785 Pacific Road Oakville, L6L 6M3 CANADA
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

J. CHRISTOPHER CARNOVALE	:	
	:	
Petitioner	:	
	:	
v.	:	Canc. No. 92044624
	:	
THE BRAND EXPERIENCE LLC	:	
	:	
Registrant	:	

**PETITIONER'S OPPOSITION TO
REGISTRANT'S MOTION TO VACATE DEFAULT JUDGMENT**

Petitioner J. Christopher Carnovale (“Carnovale”) hereby opposes the motion to vacate default judgment granting cancellation of Registration Nos. 2384600, 2477694 and 2593603. The motion was filed on February 22, 2007 by Registrant The Brand Experience LLC, (“Brand”). However, Brand did not serve a copy of the Motion on Carnovale. Carnovale learned of the motion on June 20, 2007, when the Board sent an order setting a date for filing a response.

The petition to cancel Brand’s registrations was granted more than one year ago on April 25, 2006, and the Commissioner's order cancelling the registrations was issued on May 10, 2006.

Brand alleges that it became aware of the cancellation of the registrations on or about the second or third week of November 2006. Brand concedes that it never filed an answer to the petition. However, Brand claims it failed to answer the petition because it did not receive personal service of any pleadings, nor did it see the publication of the notice in the Official Gazette. Brand further admits that (a) the address on file with the Office in connection with the cancelled registrations is incorrect due to Brand's own failure to notify the Office of his change of address; and (b) Brand did not feel it necessary to monitor the Official Gazette.

The Trademark Manual of Examining Procedure specifically states that it is an owner's responsibility to maintain a current and accurate correspondence address. TMEP 603.03.

Moreover, contrary to Brand's assertion, Carnovale tried unsuccessfully to locate Brand during the pendency of the cancellation proceeding.

Brand claims that the Board has the authority to vacate default judgment in a cancellation proceeding where a registrant's failure to respond was due to mistake, inadvertence, surprise or excusable neglect. Brand's own admissions show there was no excusable neglect here. Indeed, if Brand did not receive the Board's notice instituting the proceeding, the petition to cancel and notice of default, this was due to Brand's failure to advise the Office of its change of address and its lack of due diligence in monitoring its registrations.

A determination of excusable neglect should take into account the circumstances surrounding the delay, the danger of prejudice to the non-movant, the length of the delay, the potential impact on judicial proceedings, and whether the delay was within the reasonable control of the movant. *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership et al.*, 507 U.S. 380 (1993); *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1586 (TTAB 1997). Brand knowingly failed to take action within its control, i.e., updating its address and insuring that it was on file with respect to the registrations. Therefore, Brand's inaction and negligence is not excusable and the default judgment should not be vacated.

Brand also states that default judgment should be vacated because (1) it has not abandoned its marks, (2) Carnovale has not established superior rights, (3) there is no likelihood of confusion and (4) Carnovale's claims are barred by the doctrine of laches. However, none of this constitutes evidence of excusable neglect.

Brand further alleges that (1) the sole basis of the petition to cancel was that Brand's marks were cited as a bar to registration of Carnovale's mark and (2) Brand has not attempted to communicate with Brand or demand that Brand cease use of the marks at issue. According to Brand, this is evidence that use or registration of Carnovale's mark is not of importance to Carnovale. If this were true, however, Carnovale would not have filed the petition for cancellation.

CONCLUSION

For the foregoing reasons, the petition for cancellation should be dismissed.

Respectfully submitted,

J. CHRISTOPHER CARNOVALE

By


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Dated: July 19, 2007

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing has been served on Registrant's counsel Wayne V. Harper of Greenberg Traurig at Suite 650, 450 South Orange Avenue, Orlando, Florida 32801, by first class mail, postage prepaid, on July 19, 2007.

