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

Proceeding	92047819
Party	Defendant Powder
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Attachments	Wexler Reply in support of response to order to show cause.pdf (5 pages)(202926 bytes)

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

In the matter of trademark Cancellation No. 92/047,819
For the mark POWDER + Design
Registration No. 2,843,001

PAUL STUART INC., Petitioner, vs. GRACE WEXLER (by Assignment), Registrant.	Cancellation No. 92047819 REGISTRANT'S REPLY IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE

Reply in Support of Response to Order to Show Cause Why Default Should Not be Entered

In its Reply to Registrant's Response to Order to Show Cause, Petitioner Paul Stuart, Inc. ("Petitioner") argued that default judgment should be entered against Registrant Grace Wexler ("Registrant") based on the grounds that 1) Registrant had actual or implied notice of the Petition to Cancel Registrant's POWDER + Design mark before the Notice of Default issued, and 2) Registrant committed fraud on the U.S. Patent and Trademark Office ("PTO"). Petitioner is wrong on both grounds.

Despite Petitioner's assertion that "it is simply not possible that Registrant did not have notice of the petition for cancellation until after the Default Notice," Petitioner indeed did not have notice of the Petition for Cancellation because her then-attorney failed to inform her of the petition until after the Notice of Default issued. *See* Declaration of Grace Wexler in Support of Response to Order to Show Cause ("Wexler Decl."), ¶ 5. Registrant's former attorney had

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mistakenly assumed that he was authorized to act on Registrant's behalf, despite the fact that he had neither informed Registrant about nor consulted Registrant regarding the Petition for Cancellation of Registrant's POWDER + Design mark. Registrant should not be harmed as a result of her former attorney's actions when she had no knowledge of the Petition for Cancellation, and her former attorney's statements and inaction relating to the Petition should not be imputed to Registrant when she neither authorized nor knew about the statements or inaction. *See Paolo's Assocs. Ltd. P'ship v. Bodo*, 21 U.S.P.Q.2d 1899, 1902 (Comm'r of Patents & Trademarks 1990) (citing *Trust Co. Bank v. Tingen-Millford Drapery Co., Inc.*, 119 F.R.D. 21, 22 (E.D.N.C. 1987)). This is particularly true given the Trademark Trial & Appeal Board's ("Board") strong preference for determining cases on the merits. *See Paolo's*, 21 U.S.P.Q.2d at 1902.

Based on the foregoing and the arguments set forth in Registrant's Response to Order to Show Cause, Registrant has shown that the failure to timely respond to the Petition to Cancel was not the result of her willful conduct or gross neglect. Further, nowhere in Petitioner's Reply does Petitioner allege or state facts upon which the Board can presume that Petitioner will be substantially prejudiced if the Board does not enter default judgment against Registrant. *See* Trademark Trial & Appeal Board Manual of Procedure ("TBMP") § 312.02 (citing, *e.g.*, *DeLorme Publ'g Co. v. Eartha's Inc.*, 60 U.S.P.Q.2d 1222, 1224 (T.T.A.B. 2000)) ("Good cause why default judgment should not be entered against a defendant, for failure to file a timely answer to the complaint, is usually found 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

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defendant has a meritorious defense to the action."). Here, there was a delay of less than two (2) months between the deadline for filing an answer to the Petition to Cancel and the time when Registrant filed the answer. Not only does Petitioner fail to allege it is prejudiced by this minor delay, but Petitioner itself delayed the proceeding by asking Registrant to agree to a thirty-day extension of time to file its Reply to Registrant's Response to Order to Show Cause. This resulted in a December 19, 2007 deadline for the Reply. Petitioner used this entire extension, filing its Reply on December 19, 2007, which demonstrates that Petitioner is not prejudiced by a delay of less than two (2) months in filing the answer.

Based on the arguments herein and in Registrant's Response to Order to Show Cause, Registrant has shown that 1) the failure to timely respond was not the result of her willful conduct or gross neglect, 2) Petitioner will not be substantially prejudiced by the delay, and 3) Registrant has a meritorious defense to the Petition to Cancel. Thus, this case does not warrant a default judgment against Registrant as a result of the delay in filing the answer.

In addition to Petitioner's argument that Registrant failed to show good cause why default should not be entered in this case, Petitioner has raised a baseless ground of fraud on the PTO as a reason why default judgment should be entered. Petitioner argues that Registrant admits in her declaration that she never used her POWDER + Design mark in connection with swimwear. This misstates Registrant's statement in her declaration that "[t]he POWDER & Design mark is used on all of the clothing items listed in the registration, except swimwear. Our swimwear line will be launched in 2008." Wexler Decl., ¶ 8. Although Registrant is not currently using the POWDER + Design mark in connection with swimwear, Registrant was using the mark in connection with swimwear upon filing for

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registration of her POWDER + Design mark and through the date of registration of the mark. *See* Application Serial No. 78/200,085 (POWDER + Design). The Declaration merely indicates that Registrant is not currently selling swimwear and has not yet launched a fully scaled-up line of swimwear, a plan in place for 2008. Further, whether Petitioner believes it may have an additional ground for cancellation is not relevant to whether a default judgment is warranted, particularly when it has not been pleaded, as in this case.

Because Registrant has shown good cause for the failure to timely respond to the Petition to Cancel and because Registrant did not commit fraud on the PTO through filing for registration of her POWDER + Design mark, default judgment should not be entered in this case, particularly in light of the Board's preference for determining cases on the merits. Any doubt as to whether default judgment should be entered should be resolved in favor of Registrant. TBMP § 312.02 ("[T]he Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant."); *see also Paolo's*, 21 U.S.P.Q.2d 1899.

Respectfully submitted this 8th day of January, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On January 8, 2008, I caused a true copy of Registrant's REPLY IN SUPPORT OF RESPONSE TO ORDER TO SHOW CAUSE to be served via U.S. First Class Mail, with postage thereon fully prepaid, to the following counsel of record:

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