

**UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451**

Lykos

Mailed: March 3, 2009

Cancellation No. 92050200

Game Sportswear, Ltd.

v.

Vandous E. Stripling

Angela Lykos, Interlocutory Attorney

On December 22, 2008, respondent filed a consented motion to extend his time to answer the petition to cancel as well as all dates in this case. The Board approved the motion, and in accordance therewith, applicant's revised deadline to file an answer was February 21, 2009. On February 24, 2009, respondent filed via the Board's electronic filing system, ESTTA, a second motion with an allegation of petitioner's consent to extend his time to file an answer and to reset all dates in this proceeding. The Board approved the order on the same date. Shortly thereafter, on February 26, 2009, counsel for petitioner filed a communication with the Board stating that contrary to the allegations contained in respondent's February 24, 2009 motion, petitioner did not consent to an extension of

time.<sup>1</sup> Counsel for petitioner contacted the Board regarding respondent's motion, and the Board suggested having a telephone conference to resolve the dispute. The parties agreed to hold a conference at 2 P.M. EST on Monday, March 2, 2009. The Board determined that additional written briefing of the issues under consideration would be unnecessary.

The conference was held as scheduled among Thomas A. Gallagher, counsel for petitioner, Vandous E. Stripling, appearing *pro se*, and the undersigned, as the Board attorney responsible for resolving interlocutory disputes in this proceeding.

Based on the record, it is clear that petitioner did not give its consent to respondent for the extension filed on February 24, 2009. In view thereof, the Board's February 28, 2009 order approving the extension of time of all dates in this case is hereby vacated.

The Board now turns to the issue of whether respondent's February 24, 2009 motion should be granted on the merits. To the extent that applicant's motion was filed after the expiration of his time period to file an answer, it is being construed as a combined motion to file his

---

<sup>1</sup> The communication was served on respondent via e-mail. The Board advised counsel for petitioner that absent an agreement amongst the parties, service by e-mail is not an appropriate form of service. The parties confirmed during the conference that they had agreed to service by e-mail.

answer late, and to extend all subsequent dates in this case.

Insofar as respondent is in technical default under Fed. R. Civ. P. 55 for failure to timely answer the petition to cancel, we will analyze whether default judgment is warranted in this case. The standard for whether default judgment should be entered against a party is determined in accordance with Fed. R. Civ. P. 55(c), which reads in pertinent part: "for good cause shown the court may set aside and entry of default." As a general rule, good cause to set aside a defendant's default will be found where the defendant's delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where the defendant has a meritorious defense. *See Fred Hyman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991). Moreover, the Board is reluctant to grant judgments by default, since the law favors deciding cases on their merits. *See Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 USPQ2d 1899 (Comm'r 1990).

First, there is no evidence that respondent's failure to timely answer the petition was either willful or the result of gross neglect. Indeed, as respondent explains, his failure to file an answer was due to the fact that he was traveling for business, and assumed that the parties were still negotiating a settlement. Second, the Board can

see no prejudice to petitioner, other than delay.

Finally, the Board finds that respondent has indicated that he has a meritorious defense to the proceeding which shall be set forth in his answer. Whether respondent will prevail in this proceeding is, of course, a matter for trial.

Next the Board considers respondent's request to extend all subsequent dates in this case. After careful review of the record and consideration of the parties' arguments made during the telephone conference, the Board finds that respondent's extension request is warranted. The record shows no evidence of bad faith on the part of respondent. While it is undisputed that respondent did not obtain petitioner's consent for a second extension request, respondent did not purposefully make a misrepresentation before the Board in his February 24, 2009 motion. Rather, respondent mistakenly assumed that since the parties had discussed the possibility of settlement in December 2008 that he had petitioner's consent to file a second extension request. The Board warned respondent, however, that any further "consented" motions filed without obtaining petitioner's consent would be denied and expose respondent to the entry of sanctions.

Thus, in the interest of proactively managing the Board's docket and in light of respondent's *pro se* status,

respondent must first secure permission from the appropriate interlocutory attorney by telephone before filing any unconsented or unstipulated motion in this matter. See generally TBMP Section 527.03 (2d ed. rev. 2004) and authorities cited therein; see also *Carrini Inc. v. Carla Carini S.R.L.*, 57 USPQ2d 1067, 1071 (TTAB 2000) ("Board possesses the inherent authority to control the disposition of cases on its docket"); *International Finance Corp. v. Bravo Co.*, 64 USPQ2d 1597, 1604 n.23 (TTAB 2002) (Board prohibited petitioner from filing any further motions to compel without prior Board permission).

The Board explained to respondent his general obligations as a *pro se* litigant as summarized in the information appended to the end of this order. Respondent was apprised that Fed. R. Civ. P. 8(b) provides, in part:

A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.

As noted by the Board, the petition to cancel filed by petitioner herein consists of twelve (12) paragraphs setting

forth the basis of petitioner's claims, and that in accordance with Fed. R. Civ. P. 8(b) it is incumbent on respondent to answer the petition to cancel by **admitting or denying** the allegations contained in each paragraph.

Respondent was provided with the example of "Paragraph 1. Denied. Paragraph 2. Denied." Further, the Board stated that if respondent is without sufficient knowledge or information on which to form a belief as to the truth of any one of the allegations, it should so state and this will have the effect of a denial.

During the telephone conference, the parties agreed to a sixty day suspension of the case to pursue settlement discussions, contingent upon respondent providing information to petitioner within fifteen days of the mailing date of this order. In accordance therewith, insofar as the parties are negotiating for a possible settlement of this case, proceedings herein are suspended until sixty (60) days from the mailing date of this action, subject to the right of either party to request resumption at any time. See Trademark Rule 2.117(c).

In the event that there is no word from either party concerning the progress of their negotiations, upon conclusion of the suspension period, proceedings shall resume without further notice or order from the Board, upon the schedule set out below.

Deadline for Answer	<b>5/4/09</b>
Deadline for Discovery Conference	<b>6/3/09</b>
Discovery Opens	<b>6/3/09</b>
Initial Disclosures Due	<b>7/3/09</b>
Expert Disclosures Due	<b>10/31/09</b>
Discovery Closes	<b>11/30/09</b>
Plaintiff's Pretrial Disclosures	<b>1/14/10</b>
Plaintiff's 30-day Trial Period Ends	<b>2/28/10</b>
Defendant's Pretrial Disclosures	<b>3/15/10</b>
Defendant's 30-day Trial Period Ends	<b>4/29/10</b>
Plaintiff's Rebuttal Disclosures	<b>5/14/10</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>6/13/10</b>

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

If, during the suspension period, either of the parties or their attorneys should have a change of address, the Board should be so informed.

The Board thanks the parties for their participation.

\* \* \*

Pro Se Information

As noted above, respondent is not represented by legal counsel in this proceeding. While Patent and Trademark Rule 10.14 permits any person to represent himself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in a cancellation proceeding to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney.

The Trademark Rules of Practice, other federal regulations governing practice before the Patent and Trademark Office, and many of the Federal Rules of Civil Procedure govern the conduct of this proceeding. The Trademark Rules are codified in part two of Title 37 of the Code of Federal Regulations (also referred to as the CFR). There are other rules in part one of Title 37, relevant to filing of papers, meeting due dates, etc., that are also applicable to this case. The CFR and the Federal Rules of Civil Procedure, are likely to be found at most law libraries, and may be available at some public libraries. If petitioner or respondent wishes to obtain a copy of Title

37 of the CFR, it may be ordered for a fee from the Government Printing Office, Washington, D.C. 20401, or from the U.S. Government Bookstore, using the following web address: <http://bookstore.gpo.gov/actions/GeneralSearch.do>.

The parties may also refer to the Trademark Trial and Appeal Board Manual of Procedure (TBMP) and the Trademark Rules of Practice, both available on the USPTO website, [www.uspto.gov](http://www.uspto.gov).

Respondent is reminded that Trademark Rules 2.119(a) and (b) require that every paper filed in the Patent and Trademark Office in a proceeding before the Board must be served upon the attorney for the other party (or adversary), or on the party (or adversary) if there is no attorney, and proof of such service must be made *before the paper will be considered by the Board*. Consequently, copies of all papers that the parties may subsequently file in this proceeding must be accompanied by "proof of service" of a copy on the other party or the other party's counsel.

"Proof of service" usually consists of a signed, dated statement attesting to the following matters: (1) the nature of the paper being served, (2) the method of service (e.g., first class mail), (3) the person being served and the address used to effect service, and (4) the date of service.



entering the 8-digit proceeding number, click on any entry in the prosecution history to view that paper in PDF format.

The first revision of the second edition (March 2004) of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) has been posted on the USPTO web site at [www.uspto.gov/web/offices/dcom/ttab/tbmp/](http://www.uspto.gov/web/offices/dcom/ttab/tbmp/).

\* \* \*

