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

Baxley

Mailed: July 9, 2010

Cancellation No. 92051924

Doteco LLC

v.

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By the Trademark Trial and Appeal Board:

On March 3, 2010, the Board sent a notice of default to respondent because no answer was of record. On March 23, 2010, respondent, representing itself,[1] filed a communication with the Board in apparent response to the notice of default.

In response to respondent's communication, petitioner, on April 9, 2010, filed a motion to strike respondent's communication and to enter default judgment. No response to petitioner's motion is of record.

Respondent's response indicates that it does not intend to concede this case. Accordingly, the Board declines to grant petitioner's motion as conceded. See Trademark Rule 2.127(a).

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[1] While Patent and Trademark Rule 11.14(e) permits respondent to represent itself, a person who is not acquainted with the technicalities of the procedural and substantive law involved in a cancellation proceeding is advised 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.

In support of its motion to strike and for entry of default judgment, petitioner contends that respondent did not serve the communication upon petitioner and that, in any any event, such communication is not responsive to the notice of default.

The Board, however, notes that respondent's communication includes petitioner's correspondence address in the caption thereof.[2] Therefore, the Board presumes that respondent attempted service of its communication upon petitioner by mail concurrently with its mailing that communication to the Board. The Board further presumes that the service copy was not delivered to petitioner. Accordingly, to the extent that the motion to strike respondent's communication is based on alleged failure of service, that motion is denied. The Board will consider respondent's communication.

Nonetheless, the Board agrees with petitioner that respondent's communication is nonresponsive to the notice of default. A review of respondent's communication indicates

[2] Trademark Rule 2.119(a) requires that every submission that respondent files in this proceeding be served upon petitioner's attorney before the Board will consider that communication. All submissions that respondent may subsequently file in this proceeding must be accompanied by a signed statement indicating the date and manner in which such service was made, e.g. by mail. The statement, whether attached to or appearing on the submission when filed, will be accepted as prima facie proof of service. Respondent is advised that the Board will not consider any further submissions that it files without proof of service upon petitioner at its correspondence address of record.

that it is neither an answer to the petition to cancel nor a proper response to the notice of default. Rather, in such communication, respondent sets forth a history of respondent's business and alleged use of its involved .ECO mark, without either admitting or denying each of the allegations in the petition to cancel or explaining why respondent did not file its answer in a timely manner. However, the Board, in its discretion, finds that the communication does not prejudice petitioner and therefore declines to strike that communication.[3] Cf. TBMP Section 506.01 (2d ed. rev. 2004). Accordingly, the motion to strike respondent's communication as nonresponsive is also denied.

To the extent that such communication is intended as an answer to the petition to cancel, it does not comply with Federal Rule of Civil Procedure 8(b), made applicable this proceeding by Trademark Rule 2.116(a). 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

[3] Nonetheless, to the extent that respondent argues the merits of its case in its communication, those arguments are premature. Further, exhibits attached to respondent's communication are not evidence on respondent's behalf in this case. To be used as evidence, those exhibits must be identified and introduced in evidence as exhibits during respondent's testimony period. See Trademark Rule 2.122(c).

> 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.

The petition to cancel filed by petitioner herein consists of twenty-eight paragraphs setting forth the basis of petitioner's claim of damage. In accordance with Fed. R. Civ. P. 8(b), respondent should answer the petition to cancel by simply admitting or denying the allegations contained in each paragraph. 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.

Further, to the extent that respondent's communication is intended as a response to the notice of default, the standard for determining whether default judgment should be entered against a defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard, i.e., whether the defendant has shown good cause why default judgment should not be entered against it. As a general rule, good cause to set aside a defendant’s default will be found: (1) where the defendant’s delay has not been willful or in bad faith, (2) when prejudice to the plaintiff is lacking, and (3) where defendant has a meritorious defense. See *Fred Hayman Beverly Hills, Inc. v. Jacques*

Bernier Inc., 21 USPQ2d 1556 (TTAB 1991). Respondent's communication includes no showing of cause why default judgment should not be entered against respondent. In particular, respondent does not explain why it did not file its answer in a timely manner, how petitioner is not prejudiced by respondent's delay,[4] and how it has a defense on the merits to the petition to cancel.[5]

Nonetheless, in exercising its discretion and keeping in mind the Board's reluctance to enter default judgment, the Board will allow respondent a second and final opportunity to respond properly to the notice of default.[6] See TBMP Section 312.02 (2d ed. rev. 2004). Accordingly, the notice of default is hereby continued. Respondent is allowed until **twenty days** from the mailing date set forth in this order to file a proper response to the notice of default in which it shows good cause why default judgment should not be entered against it for its failure to file an

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[4] Prejudice must be more than the mere inconvenience and delay caused by respondent's failure to take timely action, and more than petitioner's loss of any tactical advantage which it otherwise would enjoy as a result of respondent's delay. Rather, prejudice contemplates an adverse effect on petitioner's ability to litigate this case, e.g., where respondent's delay has resulted in lost evidence or unavailable witnesses. See *Pratt v. Philbrook,* 109 F.3d 18 (1st Cir. 1997).

[5] For purposes of responding to a notice of default, a showing of a meritorious defense requires only submission of an answer which is not frivolous. See *Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 USPQ2d 1899, 1902-03 (Comm'r 1990).

[6] Petitioner's motion for default judgment is moot.

answer in a timely manner.[7] Such response should be accompanied by an answer that complies with Fed. R. Civ. P. 8.

In defending the petition to cancel, respondent should review the Trademark Board Manual of Procedure (TBMP), online at http://www.uspto.gov/web/offices/dcom/ttab/tbmp/index.html the Trademark Rules of Practice, online at http://www.uspto.gov/trademarks/law/tmlaw.pdf, and the Federal Rules of Civil Procedure, online at http://www.law.cornell.edu/rules/frcp. Respondent is urged to file submissions herein through the Board's Electronic System for Trademark Trials and Appeals (ESTTA) database, available online at http://estta.uspto.gov.

Proceedings herein are otherwise suspended.

[7] The Board will look with disfavor upon any further failure by respondent to comply with the Trademark Rules of Practice and, where applicable, the Federal Rules of Civil Procedure.