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

Proceeding	92054629
Party	Defendant Wohali Outdoors, LLC
Correspondence Address	S MAX HARRIS DOYLE HARRIS DAVIS & HAUGHEY 1350 SOUTH BOULDER, SUITE 700 TULSA, OK 74119 UNITED STATES max.harris@1926blaw.com
Submission	Other Motions/Papers
Filer's Name	S. Max Harris
Filer's e-mail	max.harris@1926blaw.com, steve.harris@1926blaw.com
Signature	/s/ S. Max Harris
Date	12/30/2011
Attachments	1637-5 - Wohali's Reply on Not Default & Mot to file Answer - Final & Submitted.pdf (6 pages)(22848 bytes) Ex. I - Declaration of Jeremy T. Griffin.pdf (2 pages)(517990 bytes) Ex. J - Declaration of Jonathan Brocksmith.pdf (2 pages)(515611 bytes) Ex. K - Declaration of Brittney Pettine.pdf (2 pages)(511986 bytes)

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

In re Registration No. 3,904,929)	
)	
SHELTERED WINGS, INC.)	Cancellation No. 92054629
)	
Petitioner,)	
)	
v.)	
)	
WOHALI OUTDOORS, LLC,)	
)	
Respondent.)	
)	

**RESPONDENT WOHALI OUTDOORS, LLC’S REPLY TO SHELTERED WINGS,
INC.’S RESPONSE TO WOHALI OUTDOORS, LLC’S RESPONSE
TO NOTICE OF DEFAULT AND MOTION FOR LEAVE TO FILE ANSWER**

Respondent, Wohali Outdoors, LLC (“Respondent” or “Wohali”), submits the following in reply to Petitioner, Sheltered Wings, Inc’s (“Petitioner” or “Sheltered Wings”), response filed 12/28/2011.

I. INTRODUCTION

Sheltered Wings argues Wohali’s evidence (declarations) is suspect. Sheltered Wings challenges the declarations submitted (sworn statements made under penalty of perjury), yet Sheltered Wings has not submitted any evidence (declarations or otherwise) to impeach them.

Sheltered Wings’ effort to preclude Wohali from answering the Petition demonstrates that Sheltered Wings is attempting to avoid consideration of its Petition on the merits. Sheltered Wings first sought consideration of the issue of Wohali’s mark before the USPTO.¹ Later

¹ See Wohali’s Combined Response to Notice of Default and Respondent’s Motion for Leave to File Answer and Brief in Support, filed 12/13/2011 (referred to herein as “Wohali’s Brief”), at Ex. “B”, pages 2-7.

Sheltered Wings filed and then dismissed its Federal suit challenging Wohali's mark.² Now Sheltered Wings seeks a third bite at the apple. The settlement discussions (referred to by Sheltered Wings) were terminated by Wohali when it learned the USPTO had rejected Sheltered Wings' Application Serial No. 85095903 for "EAGLE" based on Wohali's registered mark. The prior action by Sheltered Wings before the USPTO was not disclosed by Sheltered Wings to Wohali or the Federal District Court.

II. WOHALI HAD NO OBLIGATION TO ANSWER THE PETITION UNTIL IT RECEIVED NOTICE FROM THE USPTO OF AN ANSWER DATE

Sheltered Wings concedes delay here will not result in substantial prejudice to Sheltered Wings and Wohali has a meritorious defense, by failing to address these issues in its response. Sheltered Wings instead makes the unsupported allegation that Wohali failed to answer willfully or as the result of gross neglect.

Sheltered Wings' response brief (and supporting declaration) add nothing to the argument and are largely a repetition of Wohali's Brief. It is irrelevant that Wohali's counsel received the Petition via email on October 10th. TBMP Rule 303.03(a) states Wohali "is under no obligation to file an answer to the complaint in an opposition or cancellation proceeding until it receives the Board's notification setting the time for filing an answer." See also *Nabisco Brands, Inc. v. Keebler Co.*, 28 U.S.P.Q.2d 1237, FN 1 (1993) ("[A]n applicant or registrant that has received from another party a copy of an opposition or petition to cancel that the party has filed in the Patent and Trademark Office is under no obligation to file an answer thereto until it receives from the Board a notice of institution setting the time for filing an answer." Regardless, Sheltered Wings argues (without any authority in support) that this may not be a "bright-line rule".

² See Wohali's Brief at Ex. "H".

Sheltered Wings argues without evidentiary support that Wohali's declarations³ are "suspect." Sheltered Wings has nothing to impeach these sworn statements. Relying on *Jack Lenor Larsen, Inc. v. Chas. O. Larson Co.*, 44 U.S.P.Q.2d 1950 (1997), Sheltered Wings contends there is a presumption that orders mailed by the Board are received. Within the same case, the Board addresses a respondent's claim that it did not receive four separate orders. Recognizing the Board and the U.S. Postal Service are not perfect, the Court stated:

"To accept the declaration as sufficient rebuttal, we would have to conclude that each of the various Board employees who prepared one or more of the orders in this case failed to mail them or, if mailed, than the Postal Service failed to deliver them. Admittedly, neither the Board nor the Postal Service can be argued to be an error-free operation, and it would not be a great leap of faith to conclude that one of these orders was either not mailed or, if mailed, not delivered. It would, however, be a great leap to reach the same conclusion as to all four orders. . ."

Id. at 3.

See also *Nabisco Brands, Inc.*, 28 U.S.P.Q.2d at 2 (Court concluded respondent had no obligation to respond to a summary judgment motion prior to receiving notice from the Board.) The presumption that mail is received is a rebuttable presumption.⁴ The Declarations submitted by Wohali rebut the presumption. If there is any doubt: "The Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt in favor of the defendant." TBMP Rule 312.02.

Sheltered Wings contends Mr. Griffin's declaration is insufficient because it does not name the persons he spoke with or the mail procedures at Wohali. Filed herewith as Exhibits "I", "J" and "K" are the Declarations of Mr. Griffin, Jonathan Brocksmith and Brittney Pettine.

³ Exhibits "E", "F" and "G" filed with Wohali's Brief on 12/13/2011.

⁴ *Jack Lenor Larsen*, 44 U.S.P.Q.2d at 3. See also *U.S. v. Garrity, Jr.*, 433 F.2d 649, 652 (8th Cir. 1970).

Each state there is a locked postal box outside the Wohali facility; they are the only three with access to the key; Brittney Pettine is responsible for collecting the mail and distributing it; and that none of them received the notice allegedly mailed on October 12th.

A. Wohali's Actions Show It Intends To Contest Sheltered Wings' Petition And But For A Mailing Error, The Answer Would Have Been Filed By The Deadline Set In The Notice (November 21st)

The fact the answer deadline was established on October 12th is irrelevant because no one informed Wohali or its counsel of same. The actions taken by Wohali in successfully defending the Federal lawsuit and its actions taken on and after December 8th when it became aware its answer was allegedly past due, show Wohali intends to contest Sheltered Wings' Petition.

When Mr. Harris and Ms. James initially took action, if they had become aware of the answer deadline at that time, there was more than ample time to file an answer by November 21st. When Ms. James contacted the USPTO Trademark and Trial Board, she did not obtain the name of the person she communicated with. This in no way suggests her statements are untruthful.

B. The Board Sets The Time To Answer; There Is No Deadline Set Forth In The TBMP

Wohali's initial investigation took place within thirty days of the Petition being filed. Sheltered Wings stresses that Wohali's counsel received the Petition via email on October 10, 2011. TBMP Rule 310.03(a) and 37 CFR §2113 state a notice will be sent designating a time, not less than thirty days from its mailing, when the answer is due. The fact Wohali knew of the Petition is irrelevant. If Wohali had failed to timely file a response brief or reply brief, it would be relevant when the document was received, as TBMP Rule 502.02 (and 37 CFR §2.127(a)) govern the response and reply time on a motion. (The Board generally does not set the deadline on a motion. The TBMP Rule does.) However, that is not the case here.

III. CONCLUSION

Sheltered Wings argues Wohali's evidence (declarations) is suspect. However, Sheltered Wings has failed to present any conflicting evidence. The authority submitted by Sheltered Wings is either inapplicable or supports Wohali being permitted to file an answer.

Wohali successfully defended Sheltered Wings' prior claims in the Federal lawsuit (Sheltered Wings moved for a voluntary dismissal) and will do so here. The evidence and relevant authority show that default judgment should not be entered against Wohali.

Wohali prays the Court refrain from entering default judgment against Wohali and instead permit Wohali to file its Answer and Affirmative Defenses (filed as an attachment on 12/13/2011).

Respectfully Submitted,

/S. Max Harris/

Steven M. Harris, OBA #3913

S. Max Harris, OBA #22166

DOYLE HARRIS DAVIS & HAUGHEY

1350 South Boulder, Suite 700

Tulsa, OK 74119

(918) 592-1276

(918) 592-4389 (fax)

steve.harris@1926bLaw.com

max.harris@1926bLaw.com

Attorneys for Respondent, Wohali Outdoors, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of Respondent Wohali Outdoors, LLC's Reply to Sheltered Wings, Inc's Response to Wohali Outdoors, LLC's Response to Notice of Default and Motion for Leave to File Answer, was served by First Class Mail, postage prepaid, this 30th day of December, 2011, upon the following:

James D. Peterson
Jennifer L. Gregor
GODFREY & KAHN, S.C.
One East Main Street, Suite 500
Madison, Wisconsin 53701-2719

A copy of same was also sent via electronic mail, this 30th day of December, 2011, to the following:

James D. Peterson jpeterson@gklaw.com
Jennifer L. Gregor jgregor@gklaw.com

/s/ S. Max Harris/

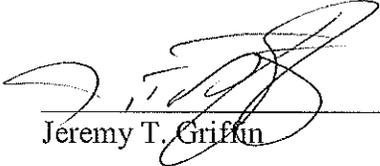
S. Max Harris

confirmed it was not received by Wohali. Neither Brittney Pettine or JT Brocksmith were aware of the October 12th Notice prior to speaking with me.

5. There have been other instances (unrelated to this matter) when Wohali did not receive mail correctly addressed to the address stated above, because it was delivered to another person or business by mistake. In the instances Wohali is aware of, the recipient eventually delivered the mail to Wohali. Here, Wohali never received the October 12th Notice allegedly mailed that day.

I, Jeremy T. Griffin, hereby declare, state and verify under penalty of perjury that the above and foregoing statements are true and correct.

Executed this 24th day of December, 2011.



Jeremy T. Griffin

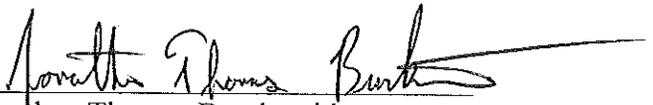
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were aware of it. I told JT Griffin that I had not received and was unaware of it prior to him discussing it with me at that time.

5. There have been other instances (unrelated to this matter) when Wohali did not receive mail correctly addressed to the address stated above, because it was delivered to another person or business by mistake. In the instances Wohali is aware of, the recipient eventually delivered the mail to Wohali. Here, Wohali never received the October 12th Notice allegedly mailed that day.

I, Jonathan Brocksmith, hereby declare state and verify under penalty of perjury that the above and foregoing statements are true and correct.

Executed this 29th day of December, 2011.

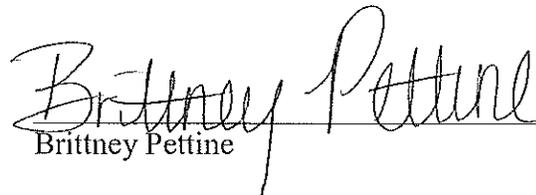

Jonathan Thomas Brocksmith

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4. There have been other times (unrelated to this) when Wohali did not receive mail correctly addressed to the address stated above, because it was delivered to another person or business by mistake. In the instances Wohali is aware of, the recipient eventually delivered the mail to Wohali. Here, Wohali never received the October 12th Notice allegedly mailed that day.

I, Brittney Pettine, hereby declare, state and verify under penalty of perjury that the above and foregoing statements are true and correct.

Executed this 29 day of December, 2011.


Brittney Pettine

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