

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

Mailed: February 14, 2014

Cancellation No. 92057488

A to U Services, Inc.
dba A to U Sewer Service

v.

Precision Sewer Services LLC

Yong Oh (Richard) Kim, Interlocutory Attorney:

On September 10, 2013, respondent was allowed thirty days to show cause why the Board should not enter default judgment against respondent for its failure to file a timely answer.

On October 15, 2013, the Board received respondent's motion (dated October 8, 2013) to set aside the notice of default and for leave to file a late answer. The motion is contested.

As a preliminary matter, respondent's response to the Board's notice of default was due on October 10, 2013. Although respondent's filing includes a certificate of service under Trademark Rule 2.119 on petitioner dated October 8, 2013, it does not include a certificate of

mailing under Trademark Rule 2.197.¹ As such, respondent's paper is considered filed as of the date of receipt, i.e., October 15, 2013. Accordingly, respondent's filing is untimely. However, considering that the filing was only two days² late with little impact on these proceedings and pursuant to the Board's inherent authority to control the disposition of cases on its docket, the Board will consider the motion. See *Carrini Inc. v. Carla Carini S.R.L.*, 57 USPQ2d 1067 (TTAB 2000).

Under Fed. R. Civ. P. 55(c), "[t]he court may set aside an entry of default for good cause". 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).

¹ A certificate of mailing is neither necessary nor appropriate for documents filed via the Board's Electronic System for Trademark Trials and Appeals (ESTTA). See TBMP §§ 110.07 and 110.09 (2013).

² The due date for the answer, i.e., October 10, 2013, fell on a Thursday. Considering that Monday, October 14, 2013, was a Federal holiday, respondent's filing on Tuesday, October 15, 2013, was two days late. See Trademark Rule 2.196.

Here, respondent asserts that its failure to comply with the deadline was "largely the result of the improper, incomplete and uncertain status of the filing of a petition, in addition to the lack of professional courtesy or ability to answer correspondence with counsel" as well as "ongoing litigation" between the parties. *Respondent's Motion*, p. 2. Respondent's contentions are not well taken. Trademark Rule 2.111(a) requires that a petition for cancellation be served "on the owner of record for the registration" or "the owner's domestic representative of record, at the correspondence address of record in the Office." That respondent was represented by counsel in a civil action does not obligate petitioner to recognize counsel as respondent's representative in the Board proceeding and to serve said counsel with the petition for cancellation. *See Jacques Moret Inc. v. Speedo Holdings B.V.*, 102 USPQ2d 1212, 1216 (TTAB 2012) (petitioner must serve either the owner of record or the domestic representative, if appointed, at address of record and may forward a courtesy copy to an attorney it believes is representing respondent). Therefore, there was nothing "improper" or "unethical" about petitioner's service of the petition for cancellation directly on respondent. Moreover, that there is a separate civil action between the parties neither negates nor automatically suspends this

proceeding so as to relieve respondent from the deadlines that are set in this proceeding.

However, the Board does not find on the record before it that respondent's default was willful or in bad faith. As offered by petitioner in its brief, respondent's default "is more likely ... the result of [respondent's] mistaken and completely unsupported belief that the Petition was of 'uncertain status.'" *Brief in Opposition*, p. 3. An unsupported but mistaken belief demonstrates neither bad faith nor a willful disregard of a court's (in this case the Board's) rules and procedures. *See, e.g., Information Systems and Networks Corp. v. U.S.*, 994 F.2d 792, 796 (Fed. Cir. 1993) ("one should inquire whether the defaulting party willfully declined to follow a court's rules and procedures").

Further, there is no evidence that petitioner would be prejudiced if default is set aside given the early stage of this proceeding. Finally, as part of its response, although not in the nature of a formal answer to the petition, respondent has denied petitioner's claims of fraud and priority and likelihood of confusion based on respondent's own claim of ownership of the common elements of the parties' marks thereby showing its intent to defend itself in this proceeding and demonstrating that it has a

meritorious defense to petitioner's claims.³ See *DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000).

In view thereof, the notice of default is hereby **DISCHARGED**. Respondent is allowed until **MARCH 14, 2014**, to serve and file its answer to the petition for cancellation. If the parties are currently engaged in settlement negotiations and are contemplating a suspension of proceedings to facilitate those discussions, it is advised that a stipulated motion to suspend proceedings be filed prior to the filing of an answer as the Board will not suspend proceedings for the purpose of settlement after the filing of an answer and prior to the discovery conference since the discovery conference itself provides an opportunity to discuss settlement. See "Miscellaneous Changes to Trademark Trial and Appeal Board Rules," 72 Fed. Reg. 42242, 42245 (Aug. 1, 2007).

Dates are **RESET** as follows:

Time to Answer	3/14/2014
Deadline for Discovery Conference	4/13/2014
Discovery Opens	4/13/2014
Initial Disclosures Due	5/13/2014
Expert Disclosures Due	9/10/2014
Discovery Closes	10/10/2014
Plaintiff's Pretrial Disclosures Due	11/24/2014

³ The showing of a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint. See TBMP § 312.02.

Plaintiff's 30-day Trial Period Ends	1/8/2015
Defendant's Pretrial Disclosures Due	1/23/2015
Defendant's 30-day Trial Period Ends	3/9/2015
Plaintiff's Rebuttal Disclosures Due	3/24/2015
Plaintiff's 15-day Rebuttal Period Ends	4/23/2015

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.

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