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

Proceeding	92060254
Party	Defendant Hartz Hotel Services, Inc. dba Grand Hospitality
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Filer's Name	Robert G. Shepherd
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Signature	/Robert G. Shepherd/
Date	03/04/2015
Attachments	MotionToSetAsideDefault.PDF(184812 bytes) RGS_Declaration.PDF(133252 bytes)

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

Ventoux Holdings LLC	Petitioner	
vs.		Cancellation No. 92060254
Hartz Hotel Services Inc. d/b/a Grand Hospitality,	Registrant	

To: United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451

MOTION TO SET ASIDE NOTICE OF DEFAULT AND PERMIT FILING OF THE ANSWER

STATEMENT OF THE FACTS

As set forth in the declaration of Robert G. Shepherd submitted herewith, this cancellation action began with the service of the Petition to Cancel on counsel for Registrant Hartz Hotel Services, Inc. d/b/a Grand Hospitality (hereinafter "Hartz") in the beginning of November. Shortly thereafter, Hartz began to negotiate with Cancellation Petitioner Ventoux Holdings LLC (hereinafter "Ventoux") to resolve the matter. When it became clear to that the negotiation of the settlement would not be completed by the time the answer was due on December 9, 2014, counsel for Hartz requested consent from counsel for Ventoux for a 30 day extension of time to answer which was given. Thereafter, the application for the 30 day

extension was granted by the TTAB making the answer due on January 8, 2015. The date was docketed by Hartz' counsel.

On December 23, 2014, the parties were able to agree on the last of 4 points that would be the core of the settlement. Counsel for Petitioner asked Registrant's Counsel to prepare the first draft of the settlement agreement to which he agreed. In passing, Counsel for the Registrant mentioned to his assistant that the case was settled.

Returning to work on January 4, 2015, Registrant's Counsel was told by his partner with whom he had practiced for 20 years that he was leaving to practice elsewhere and that the secretary that they had shared for that same period of time was leaving with him.

The following two weeks were consumed with the preparations for his departure. The need to draft the settlement agreement and get a further extension of time to answer completely slipped counsel's mind and he was not reminded by his assistant because he had told her the case was settled.

Realizing that the date by which to answer had passed, Counsel for the Registrant drafted the settlement agreement and sent it to Counsel for the Petitioner with a request that she consent to a further extension of the time to answer to allow the parties to finish negotiating. She declined to consent. Shortly thereafter, the Trademark Trial and Appeal entered a Notice of Default, requiring the filing of this motion.

Attached to the declaration of Robert Shepherd is Registrants proposed answer. Petitioner's ground for cancellation is abandonment by way of non-use of the mark by Registrant. Registrant, in its answer has denied the allegation and stated affirmatively that the mark is in use.

LEGAL ARGUMENT

It is well settled that if a party who has failed to file a timely answer responds to a Notice of Default by showing of good cause why default judgment should not be entered against it, the Notice of Default should be set aside. T.B.M.P. §312.02; *See also* Fed. R. Civ. P. 55(c). *See Fred Hayman Beverly Hills, Inc., v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991).

To show "good cause" the party moving to set aside the Notice of Default must establish that (1) the delay in the filing is not the result of willful conduct or gross neglect on the part of the defendant; (2) the delay will not result in substantial prejudice to the plaintiff; and (3) the defendant has a meritorious defense to the action. *Fred Hayman Beverly Hills, Inc.,* 21 USPQ2d at 1557; *See also* TBMP §312.02.

In the present case, the delay in filing an answer was not the result of willful conduct or gross neglect on the part of Hartz. Counsel for Hartz was diligently pursuing settlement of the cancellation action and had resolved the major points to the settlement agreement. He had arranged for one 30 day extension of time in which to answer with the Petitioner but intervening events caused counsel for Hartz to simply forget that a further extension was necessary until the time to file the answer or a further request had passed. Counsel then drafted the settlement agreement as had been discussed, but Counsel for the Petitioner refused to agree to a further extension of time in which Registrant and Petitioner could have presumably completed the negotiation of the settlement agreement.

We also note that in this case the failure to file the answer was caused by the attorney for the Registrant. As stated in *Paolo's Associates Ltd. Partnership v. Bodo*, "... where it is the attorney rather than the party itself that is responsible for the failure to properly defend an action, as is true of the instant case, courts are likely to vacate default." *Paolo's Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1902 (Comm'n. 1990). Clearly, the delay in filing an

Answer was not the result of willful conduct or gross neglect on the part of Applicant and, as was stated in *Paolo's Associates Ltd. Partnership v. Bodo*, Applicant should not be punished because its counsel failed to timely file the answer.

Allowing Registrant to Answer the Petition to Cancel does not prejudice the Petitioner in any way. The parties had agreed on the core points of a settlement of the matter before the default and once the Notice of Default is set aside, Registrant believes that the parties should be able to conclude negotiations and settle the matter quickly. Furthermore, even if the parties are unable to resolve the matter amicably, the parties are at the start of the case and Petitioner may proceed with its case, if necessary, once discovery and trial dates are reset. As a result, at this very early stage of the Cancellation proceeding, Petitioner will not be substantially prejudiced by Registrant's delay in filing the Answer.

Finally, Registrant has a meritorious defense to the Petition to Cancel. It is Petitioner's contention that the Registrant is no longer using the registered mark in connection with the services listed in the registration and has therefore abandoned the mark.. In Registrant's proposed Answer to the Petition to Cancel, appended to the declaration of Robert G. Shepherd as exhibit "A", Registrant pleads affirmatively that the mark remains in use. It is recognized that submission of a non-frivolous Answer adequately shows that an Applicant has a meritorious defense. *Fred Hayman Beverly Hills, Inc.,* 21 USPQ2d at 1557. Here, the allegation of continuing use clearly shows that Registrant has a meritorious defense.

CONCLUSION

For the reasons set forth above, Registrant asserts that it has established good cause why Default Judgment should not be entered against Registrant for failure to timely file an Answer and that, instead, Notice of Default should be set aside and the answer submitted herewith as an exhibit to the Declaration of Robert G. Shepherd should be accepted and filed. In considering this matter, Applicant respectfully reminds the Board that it is the policy of the Board and the Federal Courts to decide cases on their merits and not by default. TBMP §312.02. *See also CTRL Systems Inc. v. Ultraphonics of North Amwerica Inc.,* 52 USPQ2d 1300 (TTAB 1999). Furthermore, any doubt that the Board may have should be resolved in favor of Applicant. TBMP §312.02. Therefore, Applicant respectfully requests that the Board not enter default judgment , and order that the attached Answer be filed with the Board, and that parties proceed with the discovery conference and the discovery period in this matter.

Respectfully Submitted,

Hartz Hotel Services, Inc. d/b/a Grand Hospitality

BY: _____

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Attorney for Respondent

CERTIFICATE OF FILING

I hereby certify that this Motion to Set Aside Notice of Default is being filed with the United States Patent and Trademark Office via the Trademark Trial and Appeal Board's Electronic System for Trademark Trials and Appeals [ESTTA] on-line filing process.

3/4/2015		3/4/2015
(Date of Deposit)	(Signature)	(Date of Signature)

3014621

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing Motion to Set Aside Notice of Default was served, this 4th day of March 2015, via First Class Mail, Postage Prepaid, addressed as follows:

ULRIKA E MATTSSON
MCDERMOTT WILL & EMERY LLP
227 W MONROE STREET , SUITE 4400
CHICAGO, IL 60606-5096
UNITED STATES

Dated: 3/4/2015

BY: _____

Robert G. Shepherd, Esq.
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Attorney for Respondent

3014621

Docket No. 3561-156 US (81140)

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

Ventoux Holdings LLC	Petitioner	
vs.		Cancellation No. 92060254
Hartz Hotel Services Inc. d/b/a Grand Hospitality,	Registrant	

To: Trademark Trial and Appeal Board
Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

DECLARATION OF ROBERT G. SHEPHERD

SIR:

I, Robert G. Shepherd, state the following:

1. The petition to cancel registration 3,481,069 owned by registrant was served on the undersigned as petitioner's counsel at the beginning of November.

2. After conferring with registrant Hartz Hotel Services, Inc., I contacted petitioner's counsel and initiated settlement negotiations.

3. Those negotiations continued through the month of November. On December 1st, when it became clear that the negotiations were still going to take some time to complete, I requested that petitioner's counsel consent to a 30 day extension of time in which to answer the petition to cancel to allow us additional time in which to negotiate a settlement of the matter.

4. After conferring with her client, petitioner's counsel granted the request and a motion was filed extending the time in which to answer by 30 days.

5. The motion was granted and the time in which to answer was extended until January 8, 2015. That date was docketed in Registrant's counsel's docketing system.

6. Counsel for the parties continued to negotiate the 4 key points that would resolve the litigation. On December 23, 2014, in response to a proposal I had made, petitioner's counsel accepted language which resolved the last of the 4 points that were key to the settlement of the case. In passing I mentioned to my assistant that I had settled the case.

7. In her e-mail to me, petitioner's counsel requested that I prepare the first draft of the settlement agreement which I agreed to do.

8. Returning to work on January 4, 2015, I was told by my partner, a person with whom I had worked for 20 years that he was resigning from the firm to practice elsewhere and that the secretary we had shared for about that same period of time was departing with him.

9. The next two weeks had everyone's energies directed to dealing with the departure of my partner and secretary. As a result, the need to draft the settlement agreement and get an additional extension of time to answer the matter completely slipped my mind. Because I has told my assistant that the matter was settled, she did not bring it to my attention.

10. The week after my partner and our secretary had left, I realized the error I had made and immediately drafted the settlement agreement.

11. Once the draft was approved by our client I forwarded it to counsel for the petitioner along with a request that her client consent to a further extension of time to answer to allow us to review and discuss the final settlement agreement and resolve the matter.

12. Opposing counsel advised that her client would not consent to the further extension of time.

13. While I was preparing the motion to reopen the time to answer and prepare the proposed answer, the Trademark Trial and Appeal Board entered a notice of default.

14. The motion has now been recast as a motion to set aside the Notice of Default and Permit the Filing of the Answer which submitted herewith as Exhibit A.

15. I believe the answer submitted herewith as Exhibit A, by denying that the mark has been abandoned and stating affirmatively that the mark is currently in use, presents a meritorious defense.

16. I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and, further, that these statements were made with knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Dated: 3/4/2015, 2015 By: _____
Robert G. Shepherd, Esq.

EXHIBIT A

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

Ventoux Holdings LLC	Petitioner	
vs.		Cancellation No. 92060254
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ANSWER TO PETITION FOR CANCELLATION

Registrant, in answer to the allegations set forth in the petition to cancel filed by Petitioner Ventoux Holdings LLC states as folows:

1. Registrant is without sufficient information to admit or deny the allegations set forth in the first paragraph of the petition and therefore denies same, leaving petitioner to its proofs.

2. Admitted.

3. Registrant is without sufficient information to admit or deny the allegations set forth in the third paragraph of the petition and therefore denies same, leaving petitioner to its proofs.

4. Registrant denies the allegations of paragraph 4 of the petition and states affirmatively that the mark remains in use on a website that makes reservations for hotel guests and has done so continuously since before the issuance of Registration 3,481,069.

5. Registrant denies the allegations of paragraph 5 of the petition.

WHEREFORE, Respondent respectfully requests that Trademark Trials and Appeal Board dismiss the petition of Ventoux Corp.

Respectfully Submitted,

Hartz Hotel Services, Inc. D/B/A Grand Hospitality

Date: 3/4/2015

By:_____

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