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

Proceeding	92061407
Party	Defendant Ellie Ann North, Francisco N. Gil, Vivian Gil Rovelli, Victoria Weingartner
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Date	07/24/2015
Attachments	Motion_Set_Aside.pdf(107278 bytes )

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

Cancellation No. 92061407

ADVANCE MARKETING PLUS CORP.

vs.

ELLIE ANN NORTH ET AL  
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**RESPONDENTS' MOTION TO SET ASIDE NOTICE OF DEFAULT**

Respondents, Ellie Ann North (“North”), Francisco Gil (“Gil”), Vivian Gil Rovelli (“Rovelli”) and Victoria Weingartner (“Weingartner”) (collectively “Respondents”) hereby file their Motion to Set Aside the Notice of Default issued on June 24, 2015 in cancellation proceeding no. 92061407.

**RELEVANT FACTS**

***The Petition for Cancellation***

On April 22, 2015, Advance Marketing Plus Corp. (“Petitioner”) filed a petition for cancellation (the “Petition”) of the registered trademark for HONGONSAN owned by Respondents, Reg. No. 4522172 (the “Respondents’ Mark”). The Respondents’ Mark has been in use in commerce since September 1, 1995 (Petition, Goods/Services Subject to Cancellation, p. 1).

In support of the Petition, Petitioner alleged that Petitioner was a prior user of the HONGONSAN mark in commerce. Petitioner cited to Petitioner’s own trademark application for the HONGONSAN mark, Appl. Serial No. 76488746 filed on February 10, 2003 (the “Petitioner’s Mark”). In its trademark application, the Petitioner alleged that the

Petitioner's Mark has been in use in commerce since February 2002<sup>1</sup> (Petition, Mark Cited by Petitioner as Basis for Cancellation, p. 2).

In the Petition, Petitioner sought cancellation of Respondents' Mark on two bases: a) likelihood of confusion with Petitioner's mark (section entitled "Priority" in the Petition), and b) abandonment of Respondents' Mark (Petition, Sections II-III, paras. 6-8).

***Respondents' Lack of Responsive Pleading***

Respondents failed to file a responsive pleading to the Petition by June 10, 2015. As a result, on June 24, 2015, the Trademark Trial and Appeal Board ("Board") issued a notice of default under Fed. R. Civ. P. 55(a) (the "Notice"). In the Notice, the Board stated that Respondents are allowed until thirty days from the mailing date of the Notice to show cause why judgment by default should not be entered against Respondents.

Amongst the Respondents, Respondent Weingartner is the person responsible for the Respondents' Mark. In the past six months, Weingartner has been unable to fully attend to her responsibilities with respect to the Respondents' Mark due to personal matters of extreme importance, namely, Weingartner was the primary caretaker for her terminally-ill father.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION**

A party may move to set aside a notice of default by filing a satisfactory showing of good cause why default judgment should not be entered against it. Fed. R. Civ. P. 55(c). Also, TBMP 312.02. Good cause is usually found when: a) the delay in filing the answer was not the result of the willful conduct or gross neglect on the part of the defendants; b) the plaintiff will not be substantially prejudiced by the delay; c) the defendant has a meritorious

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<sup>1</sup> No specific day was alleged as part of the date of first use listed in the Petitioner's Mark.

defense to the action. TBMP 312.02. Good cause is also found when the opposing party committed fraud or misconduct. Fed. R. Civ. P. 60(b)(3).

While the decision to set aside the notice of default is in the discretion of the Board, the Board “must be mindful of the fact that it is the policy of the law to decide cases on their merits. Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant.”

TBMP 312.02.

In the present action, Respondents respectfully move to set aside the Notice and allege as follows:

The delay in filing a responsive pleading was not the result of the willful conduct or gross neglect on the part of the Respondents. Indeed, as explained above, in the past six months, Weingartner has been unable to fully attend to her responsibilities with respect to the Respondents’ Mark due to personal matters of extreme importance, namely, Weingartner was the primary caretaker for her terminally-ill father. The lack of responsive pleading being filed with the Board by the Respondents is therefore non-willful and does not amount to gross neglect.

Moreover, the Petitioner will not be substantially prejudiced by the delay. In fact, a responsive pleading was due to be filed no later than June 10, 2015 (Notice, p. 1). Therefore, from the time Respondents were to file their responsive pleading until the filing of the present Motion to Set Aside only forty-four (44) days have elapsed. As a result, Petitioner cannot in good faith argue that it has been substantially prejudiced by the delay.

Importantly, Respondents seek to present meritorious claims in this action in the form of a motion to dismiss. In their motion to dismiss, Respondents will seek to have the Petition

dismissed because: 1) the Petitioner has no standing to sue; and 2) the Petitioner failed to state a claim for likelihood of confusion. The two bases for Respondents' motion to dismiss relate to the fact that Petitioner did not and cannot establish priority of use of the HONGONSAN mark. Indeed, the Petitioner's Mark has only been in use in commerce since February 2002 (Petition, Mark Cited by Petitioner as Basis for Cancellation, p. 2). To the contrary, the Respondents' Mark has been used in commerce since September 1, 1995, or approximately seven years before the Petitioner's use of the Petitioner's Mark (Petition, Goods/Services Subject to Cancellation, p. 1). Thus, the Petitioner's Mark was clearly not used in commerce prior to the Respondents' Mark. For that reason, the Petitioner has no standing to cancel the Respondents' Mark. Further, Petitioner failed to state a claim of likelihood of confusion because priority of use is one of the elements to be established in a likelihood of confusion claim and Petitioner failed to establish priority of use.

Finally, Petitioner's allegation in the Petition that "Petitioner has used in commerce the mark **HONGONSAN** ... prior to Respondents' adoption of the mark" amounts to fraud or at least a misrepresentation of facts as Petitioner's use of the HONGONSAN mark is clearly not prior in time to the use of the HONGONSAN mark by the Respondents. Such allegation is directly contradicted by the record evidence of the USPTO for the Petitioner's Mark and the Respondents' Mark.

As a consequence, because the delay in filing a responsive pleading was not the result of the willful conduct or gross neglect on the part of the Respondents, because the Petitioner will not be substantially prejudiced by the delay, because Respondents seek to present meritorious claims in this action in the form of a motion to dismiss, and because Petitioner's

allegations in the Petition amount to fraud or at least to misrepresentations of facts, Respondents have shown good cause why the Notice should be set aside by the Board.

WHEREFORE, the Respondents respectfully move the Board to set aside the Notice and allow the Respondents to file a responsive pleading, namely, their motion to dismiss the Petition, within seven (7) business days from the Board's decision.

Dated: July 24, 2015

Respectfully submitted,

/s/ Isabelle Jung  
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**CERTIFICATE OF SERVICE**

I hereby certify that this Motion to Set Aside Notice of Default is being electronically transmitted in PDF format to the Trademark Trial and Appeal Board through the Electronic System for Trademark Trials and Appeals (ESTTA) on the date indicated below. I hereby further certify that on the date indicated below true and complete copy of this Motion to Set Aside Notice of Default has been served on opposing counsel listed below by electronic mail.

/s/ Isabelle Jung  
Isabelle Jung  
July 24, 2015

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