

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

DUNN

Mailed: August 19, 2015

Cancellation No. 92061407

Advance Marketing Plus Corp.

v.

*Ellie Ann North, Francisco N. Gil, Vivian Gil
Rovelli, and Victoria Weingartner*

By the Trademark Trial and Appeal Board:

The case comes up on Respondents' motion to set aside notice of default, which is contested.

On June 24, 2015, the Board issued notice of default to Respondents because no answer had been filed. On July 24, 2015, Respondents filed a response asserting that one of the joint Respondents was "the person responsible for the Respondents' Mark" and did not file the answer based on her responsibility as "the primary caretaker for her terminally-ill father." Respondents also asserts that the default was not willful, that the brevity of the default period caused no prejudice to Petitioner, and that Respondents have a meritorious defense inasmuch as Respondents believe Petitioner's claims to be unfounded, and plan to file a motion to

dismiss. On July 27, 2015, Respondents filed a substitute response with a correct rendition of the subject mark.

On August 10, 2015, Petitioner opposed setting aside notice of default, contending that Respondents failed to demonstrate good cause for filing the late answer inasmuch as Respondents' response asserting the unavailability of one joint respondent should not excuse the three remaining joint respondents from defense of the registration, that the failure to respond constituted gross neglect, that Respondents still have submitted no answer, and have not shown that they have a meritorious defense to the pleaded claims.

The standard which has consistently been applied by the Board (and the courts) in order to permit the late filing of an answer is that set forth in Fed. R. Civ. P. 55(c), i.e., that of good cause. This good cause is usually found to have been established (1) if the delay in the filing was not the result of willful conduct or gross neglect, (2) if the delay will not result in substantial prejudice to the plaintiff, and (3) if the defendant has a meritorious defense. *See Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1992).

In the present case, Respondent's failure to timely file its answer clearly was not the result of any willful conduct or gross neglect, and we see no prejudice to Petitioner. While the Board agrees that that scheduling conflicts of one joint Respondent cannot delay this proceeding indefinitely, there is no willful conduct where a party merely requires a transition period based on a personal situation. Respondent now is on notice that information regarding the mark must be available

during this proceeding, and must take any necessary steps to ensure no further delay.

Turning to the second and third factors first, inconvenience and delay alone do not amount to substantial prejudice warranting entry of default judgment. Witnesses or evidence becoming unavailable due to the passage of time may be considered substantial prejudice for default judgment purposes. *See DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000). A meritorious defense does not require the Board to evaluate the merits of the opposition. Rather, all that is necessary is a plausible response to the allegations contained in the petition to cancel. See 10A FED. PRAC. & PROC. CIV. § 2697 (3d ed.) (“The underlying concern is to determine whether there is some possibility that the outcome of the suit after a full trial will be contrary to the result achieved by the default.”). Here, Respondent’s assertions that Petitioner’s claims are unfounded suffice to show a meritorious defense.

Accordingly, Respondent’s response to notice of default is GRANTED, and notice of default is set aside. Respondent is allowed until SEVEN DAYS from the mailing date of this order to file its answer or motion to dismiss.

Proceedings herein are resumed, and dates are reset as follows:

Deadline for Discovery Conference	9/27/2015
Discovery Opens	9/27/2015
Initial Disclosures Due	10/27/2015
Expert Disclosures Due	2/24/2016
Discovery Closes	6/30/2015
Plaintiff’s Pretrial Disclosures	8/14/2015
Plaintiff’s 30-day Trial Period Ends	9/28/2015

Defendant's Pretrial Disclosures	10/13/2015
Defendant's 30-day Trial Period Ends	11/27/2015
Plaintiff's Rebuttal Disclosures	12/12/2015
Plaintiff's 15-day Rebuttal Period Ends	1/11/2016

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 Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.