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

Proceeding	91165506
Party	Plaintiff Sara Lee Global Finance, L.L.C. Sara Lee Global Finance, L.L.C. 1000 E. Hanes Mill Rd. Winston-Salem, NC 27105
Correspondence Address	Nicholas J. Valenziano, Jr. SARA LEE CORPORATION 1000 E. Hanes Mill Rd. WINSTON-SALEM, NC 27105 bbradford@saralee.com
Submission	Motion for Default Judgment
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Date	02/23/2007
Attachments	BODYFIT - MOT FOR DEFAULT.pdf (6 pages)(220098 bytes)

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

In the Matter of Application Serial No. 78/386,608
Published on February 1, 2005
Mark: BODYFIT & Design

HBI BRANDED APPAREL ENTERPRISES, LLC **Successor in interest of** **SARA LEE GLOBAL FINANCE, L.L.C.**	)	
Opposer,	)	
v.	)	**Opposition No. 91165506**
TSA CORPORATE SERVICES, INC.	)	
Applicant.	)	

Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

OPPOSER HBI BRANDED APPAREL ENTERPRISES, LLC'S COMBINED MOTION FOR DEFAULT JUDGMENT AND OPPOSITION TO APPLICANT'S MOTION FOR JUDGMENT

Pursuant to 37 C.F.R. §2.106(a) and Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §§ 312.01 and 508, Opposer HBI Branded Apparel Enterprises, LLC ("Opposer"),[1] respectfully moves the Trademark Trial and Appeal Board to enter a default judgment against Applicant, TSA Corporate Services, Inc. ("Applicant"), as Applicant has failed to timely file an answer. In addition, Opposer submits its opposition to Applicant's motion for judgment on the grounds that Opposer could not conduct discovery without Applicant supplying an answer to Opposer's notice of opposition setting forth denials and admissions.

[1] Opposer HBI Branded Apparel Enterprises, LLC has filed a Motion to Substitute Opposer simultaneously herewith.

WHEREFORE, Opposer respectfully requests a default judgment against Applicant and an order denying Applicant's motion for judgment.

BRIEF IN SUPPORT OF MOTION

Factual Background

On June 1, 2005, Sara Lee timely filed a Notice of Opposition contending that the mark BODYFIT BY SPORTS AUTHORITY and Design, published in the Official Gazette dated February 1, 2005 (TM93) for "men's, children's and ladies' apparel, namely, shirts, shorts, pants, tights, warm up suits, jackets, vests, gloves, hats, visors, caps, athletic footwear and hosiery," in International Class 25 would cause Sara Lee (now HBI Branded Apparel Enterprises, LLC) damage. Declaration of Randel S. Springer in Support ("Springer Dec.") at ¶3. On June 10, 2005, the opposition was instituted and the Trademark Trial and Appeal Board ("TTAB" or "Board") mailed notice of the due date for answering the above-captioned opposition, setting a due date for answering 40 days after the mailing of the notice, or July 20, 2005. Springer Dec. at ¶4. On July 19, 2005, Applicant filed a Motion for an Extension of Time to Answer with Consent. Springer Dec. at ¶5. On July 19, 2005, the TTAB granted Applicant's motion to extend time, allowing Applicant to file an answer by September 18, 2005. Springer Dec. at ¶6. On September 12, 2005, Applicant filed a Motion for Suspension for Settlement with Consent. Springer Dec. at ¶7. On September 12, 2005, the TTAB suspended proceedings and reset the dates for discovery and testimony. Proceedings were suspended until March 11, 2006. Applicant was given thirty days from the date proceedings resumed, or until April 10, 2006, to file an answer. Springer Dec. at ¶8. On December 28, 2005, Applicant's counsel filed a change of correspondence address. Springer Dec. at ¶9. To date, and well after the expiration of the thirty day period in which Applicant had to answer, Applicant has failed to answer Sara Lee's

opposition. Springer Dec. at ¶10. Applicant took no action on this matter, other than filing a change of address, for over 16 months before filing a motion for default judgment alleging that Opposer has failed to prosecute this action.

Discussion

37 C.F.R. §2.106(a) and TBMP §§ 312.01 and 508 provide that if the party in the position of the defendant fails to answer within the time provided, the opposition may be decided as in the case of default. In this case, the TTAB issued an unambiguous order giving Applicant until April 10, 2006 to file an answer. Applicant not only failed to provide an answer by that date, but it waited over ten months after it had a duty to answer to take any substantive action in this case. Applicant did file a change of correspondence address on December 28, 2005 indicating that at least Applicant's counsel was aware of this pending action as of that date and thus Applicant is bound by inaction on behalf of itself or counsel. *See Pioneer Investment Services Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 396-97 (1993) (party bound by counsel's inaction). Although the TTAB has not issued a notice of default, Applicant has been in technical default since April 11, 2006. *See DeLorme Pub. Co. v. Eartha's Inc.*, 60 U.S.P.Q.2d 1222, 1223 n.4 (TTAB 2000).

With respect to Applicant's motion for judgment, Applicant's failure to answer prejudiced Opposer, preventing Opposer from knowing what allegations were denied or admitted and what allegations would require discovery. Without an answer, Opposer could not formulate and serve discovery nor take testimony. The delay and use of resources to address Applicant's failure to answer has only further prejudiced Opposer.

The issue presented by both Opposer's motion for default judgment and by Applicant's motion for judgment is whether "good cause" exists for the conduct of the parties. Applicant

cannot show "good cause" for its failure to answer while Opposer can demonstrate an objective, well-founded reason for not proceeding with discovery and testimony. Good cause for discharging a default is generally found if (1) the delay in filing is not the result of willful conduct or gross neglect, (2) the delay will not result in substantial prejudice to the opposing party, and (3) the defendant has a meritorious defense. *DeLorme*, 60 U.S.P.Q.2d at 1223 (denying applicant's motion to set aside default for failure to answer and granting opposer's motion for default judgment for failure to answer). Applying these factors, the Board should enter judgment against Applicant and deny Applicant's motion for judgment.

Applicant has either willfully ignored or grossly neglected its duty to answer. Applicant's counsel, having knowledge of this as of December 28, 2005, when the change of correspondence address was filed, had knowledge of the case. *See* Springer Dec. at ¶8. In its motion for judgment, Applicant chooses to ignore the fact that it failed to file an answer and thus has provided no explanation for its failure to answer. At this point, allowing Applicant to answer after over ten months have passed since the due date would create unreasonable delay and is more than regrettable or negligible delay; it constitutes substantive prejudice as to Opposer and further burdens the Board. If Applicant is allowed to now answer, Opposer and the Board will be consumed with a matter that could have been resolved months ago had Applicant timely fulfilled its unambiguous duties. Opposer, like all parties that appear before the Board, is entitled to the swift resolution of matters impinging upon its trademark rights. Any further delay will prejudice Opposer by imposing further and unnecessary legal costs, a timely delay in resolution of its rights, and further consumption of its corporate resources, namely the time of in-house intellectual property counsel. Because Applicant failed to answer, Applicant has not raised any defense, let alone a "meritorious defense," to Opposer's opposition. Accordingly,

applying the factors set forth in *DeLorme*, Applicant cannot demonstrate "good cause" to set aside its default.

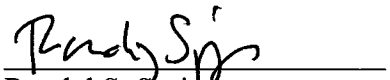
In contrast to Applicant's conduct, Opposer timely filed its opposition and attempted settlement. The Board entered its September 12, 2005 order setting April 10, 2006 as the due date for Applicant's answer. Opposer could not proceed with discovery without an answer. Accordingly, Opposer could not have taken discovery or testimony because of the circumstances created by and wholly within the control of Applicant. Thus, good cause exists for Opposer to have not taken discovery and testimony in this case.

Conclusion

Applicant's failure to answer warrants a default judgment against Applicant and further warrants denying Applicant's motion for judgment.

Respectfully submitted,

Dated: February 23, 2007

By: 

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CERTIFICATE OF SERVICE

I do hereby certify that on February 23, 2007, I filed via electronic means (ESTTA) this OPPOSER HBI BRANDED APPAREL ENTERPRISES, L.L.C.'S COMBINED MOTION FOR DEFAULT JUDGMENT AND OPPOSITION TO APPLICANT'S MOTION FOR JUDGMENT with the:

U. S. Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451

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