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

Proceeding	91206372
Party	Defendant Eric Bischoff
Correspondence Address	SCOTT HERVEY WEINTRAUB GENSHLEA CHEDIAK 400 CAPITOL MALL FL 11 SACRAMENTO, CA 95814-4434 UNITED STATES trademarks@weintraub.com
Submission	Other Motions/Papers
Filer's Name	Scott M. Hervey
Filer's e-mail	trademarks@weintraub.com, eibarra@weintraub.com
Signature	/Scott M. Hervey/
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

C.I.H., Inc. Opposer, v. Bischoff, Eric, Application Serial No. 85457190 BUFFALO BILL CODY Applicant.	Opposition No. 91206372 **MOTION TO SET ASIDE DEFAULT; [PROPOSED] ANSWER**

I.

Introduction

Pursuant to Federal Rule of Civil Procedure ("FRCP") 55(c), and Trademark Trial And Appeal Board Manual Of Procedure ("TBMP") § 312.01 and § 312.02, Eric Bischoff ("Creative") hereby brings this Motion to Set Aside Default ("Motion") in the above referenced opposition be set aside for good cause.

II.

Statement of Facts

On March 6, 2012 the Board issued a Motion granting consolidation of Opposition Nos. 91203249, 91203540 and 91203746 for the marks BUFFALO BILL CODY, BUFFALO BILL CODY BEER THE SPIRIT OF THE WILD WILD WEST WYOMING TERRITORY BREWING CO. and BUFFALO BILL CODY BEER THE SPIRIT OF THE WILD WILD WEST WYOMING TERRITORY BREWING CO. stating that "When cases involving

common questions of law or fact are pending before the Board, the Board may order the consolidation of the cases. *See* Fed. R. Civ. P. 42(a); Regatta Sport Ltd. v. Telux-Pioneer Inc., 20 USPQ2d 1154 (TTAB 1991); and Estate of Biro v. Bic Corp., 18 USPQ2d 1382 (TTAB 1991)." Additionally, the Board simultaneously granted suspension of the proceedings pending final disposition of the civil action between the parties. *See* Trademark Rules 2.127(a) and 2.117(a).

Further, Applicant and its counsel were unaware of this opposition which appears to have been filed on August 1, 2012. Applicant's counsel first became aware of this Opposition on September 26, 2012 when Applicant's counsel was checking the status of the trademark on the TSDR System of the USPTO website. Applicant's counsel has reviewed its email "in-box" at trademarks@weintraub.com and was unable to find a copy of the Notice of Opposition. As such, Applicant's counsel was unaware of the existence of the Opposition and that an Answer that was due on September 11, 2012. Applicant should not suffer due to its counsel not having received an email which resulted in failure to take the proper action.

III.

Legal Argument

The standard for whether a default should be set aside is whether the defendant shows "good cause." FRCP 55. The standard for good cause, as determined by the TTAB, is: (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action. TBMP § 312.02.

There, was no willful or gross neglect by Applicant. Instead, a technical issue prevented Applicant from becoming aware that an Answer was due. When there is no evidence

that the failure was willful, costs incurred in preparing and filing a motion will not be found sufficient to support a finding of prejudice. Paolo's Associates Limited Partnership v. Paolo Bodo, 21 USPQ2d 1899, (no evidence that failure was willful; costs incurred in preparing and filing motion not sufficient to support finding of prejudice).

Gross negligence is a high standard, and examples cited as such in the *TBMP* include failure to file an answer six months after the due date. This is well beyond the approximate one month since the due date in the instant action, which only occurred as a result of a technical issue that prevented Applicant from receiving the Notice of Opposition. DeLorme Publishing Co v. Eartha's Inc., 60 USPQ2d 1222, 1557. Inadvertence of counsel is a recognized grounds for overturning a default. Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc., 21 USPQ2d 1556, 1557 (failure to answer due to inadvertence on part of defendant's counsel); Moran v. Mitchell, E.D.Va.1973, 354 F.Supp. 86 ("Default entered as result of defense counsel's mistaken belief that he had 15 days, rather than ten, in which to file responsive pleadings, and from defense counsel's misapprehension that counsel for plaintiff would agree to a late filing, would be set aside, particularly as defendants raised what might be a valid defense to the merits of the action"). In the instant case, Applicant's failure to file an answer is due to an error in communication between its counsel and opposing counsel. On that basis, the default should be overturned.

Accordingly, the Board should liberally construe the statute in this instant matter and grant the Motion, so that the opposition may be litigated on its merits as is preferred under the law.

IV.

Conclusion

For the foregoing reasons, the Motion should be granted, the default set aside, and Applicant's Proposed Answer accepted.

Dated: October 8, 2012 Respectfully submitted,

Eric Bischoff

/SH/

Scott M. Hervey, Attorney for Applicant
Weintraub Tobin Chediak Coleman Grodin law corporation
9665 Wilshire Boulevard, 9th Floor
Beverly Hills, CA 90212
shervey@weintraub.com; trademarks@weintraub.com

[PROPOSED] ANSWER

Eric Bischoff (hereinafter referred to as "Applicant"), hereby answers the Opposition filed by C.I.H., Inc. ("Opposer") against Applicant's trademark application for BUFFALO BILL CODY Serial No. 85/457,190 (the "Application").

Applicant, Eric Bischoff., hereby answers the Notice of Opposition of C.I.H., Inc. as follows:

1. Answering paragraph one of the Notice of Opposition, Applicant admits that Applicant's U.S. Trademark Application Serial No. 85/457,190 published for opposition on April 3, 2012 and that Opposer filed a request for a 90-day extension to file a Notice of Opposition. As to the remaining allegations contained therein, Applicant does not have sufficient knowledge or information to form a belief and accordingly denies the allegations.

2. Answering paragraph two of the Notice of Opposition, Applicant denies the allegations contained herein as the owner of U.S. Trademark Application Serial No. 85/457,190 for BUFALLO BILL CODY is Eric Bischoff Entertainment, LLC.

3. Answering paragraph three of the Notice of Opposition, Applicant denies the allegations contained therein.

4. Answering paragraph four of the Notice of Opposition, Applicant denies that Opposer has prior and superior common law trademark rights in the mark "Buffalo Bill" in connection with saloon and bar services and that such services naturally relate to beer. As to the remaining allegations contained therein, Applicant does not have sufficient knowledge or information to form a belief and accordingly denies the allegations.

5. Answering paragraph five of the Notice of Opposition, Applicant denies that "the original cherrywood Buffalo Bill Bar...has been in continuous operation since 1902." The

"Buffalo Bill Bar" Opposer refers to is a physical bar structure, which at one time belonged to Buffalo Bill, and is located in the restaurant of the Irma Hotel, which is owned by Opposer. As such, the bar is not a business operation and thus cannot be "in operation." As to the remaining allegations contained therein, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein, and accordingly denies the allegations.

6. Answering paragraph six of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein, and accordingly denies the allegations.

7. Answering paragraph seven of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein, and accordingly denies the allegations.

8. Answering paragraph eight of the Notice of Opposition, Applicant denies that Opposer advertises and promotes the name Buffalo Bill to the general public in association with bar and saloon services. Opposer advertises and promotes the Irma Hotel's factual and historical relationship with Buffalo Bill. As to the remaining allegations contained therein, Applicant does not have sufficient knowledge or information to form a belief and accordingly denies the allegations.

9. Answering paragraph nine of the Notice of Opposition, Applicant denies that Opposer provides saloon or bar services under the mark Buffalo Bill, that such services "necessarily include the sale of beer," that "the mark Buffalo Bill in connection with saloon and bar services has become widely and favorably known to the public as associated with Opposer," and that Opposer has "built and maintained substantial goodwill and secondary meaning in the mark Buffalo Bill in connection with saloon and bar services." As to the remaining allegations contained therein, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein, and accordingly denies the allegations.

10. Answering paragraph ten of the Notice of Opposition, Applicant denies that Opposer has prior and superior common law trademark rights in Buffalo Bill in connection with saloon and bar services or that Opposer has prior and superior trademark rights in Buffalo Bill for beer under the doctrine of "natural expansion of business." As to the remaining allegations contained therein, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein, and accordingly denies the allegations.

11. Answering paragraph eleven of the Notice of Opposition, Applicant denies that Opposer has prior trademark rights in Buffalo Bill in connection with saloon and bar services or, *arguendo,* even if Opposer did, that such rights would extend to beer. Applicant further denies that beer and bar services are so naturally related that purchasers would expect them to emanate from the same source. As to the remaining allegations contained therein, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein, and accordingly denies the allegations.

12. Answering paragraph twelve of the Notice of Opposition, Applicant denies that Opposer has legally expanded its use of Buffalo Bill into beer or that Opposer legally began selling a Buffalo Bill beer in Cody, Wyoming on June 6, 2011. As to the remaining allegations contained therein, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein, and accordingly denies the allegations.

13. Answering paragraph thirteen of the Notice of Opposition, Applicant denies that Opposer made any use of Buffalo Bill that was analogous to trademark use or that Opposer has established a superior right in the mark Buffalo Bill for beer. As to the remaining allegations contained therein, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein, and accordingly denies the allegations.

14. Answering paragraph fourteen of the Notice of Opposition, Applicant denies that any of Opposer's advertisements or any other use of Buffalo Bill have created an association

between Opposer and beer, or that Opposer has "priority of rights in Buffalo Bill for beer over Applicant on the basis of natural expansion, actual expansion and analogous trademark use". As to the remaining allegations contained therein, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein, and accordingly denies the allegations.

15. Answering paragraph fifteen of the Notice of Opposition, Applicant denies the allegations contained therein

16. Answering paragraph sixteen of the Notice of Opposition, Applicant denies the allegations contained therein.

17. Answering paragraph seventeen of the Notice of Opposition, Applicant admits and alleges that the referenced litigation is ongoing, and that Applicant seeks an injunction preventing Opposer from using the mark "Buffalo Bill Beer" and monetary damages, among other relief, for Opposer's infringement of Applicant's mark "Buffalo Bill Cody Beer" and for Opposer's interference with Applicant's business. Applicant denies that Opposer has presented evidence of prior and superior rights. Applicant further denies that the Court in its decision found that Opposer "did have first use in commerce" as that is a legal issue that the court did not make findings on. Applicant also denies that the court's decision did not find that Applicant had not acquired superior common law rights, and denies all other allegations.

18. Answering paragraph eighteen of the Notice of Opposition, Applicant denies the allegations contained therein.

19. Answering paragraph nineteen of the Notice of Opposition, Applicant denies the allegations contained therein.

20. Answering paragraph twenty of the Notice of Opposition, Applicant denies the allegations contained therein.

21. Answering paragraph twenty one of the Notice of Opposition, Applicant denies that its mark is descriptive. As to the remaining allegations contained therein, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein, and accordingly denies the allegations.

AFFIRMATIVE DEFENSES

22. As the first Affirmative Defense, Applicant alleges that Opposer's claims are barred, in whole or in part, by the doctrine of unclean hands as Opposer's claimed use of Buffalo Bill in connection with beer was illegal.

23. As a second and further Affirmative Defense, Applicant alleges that by Opposer's conduct and omissions, it is equitably estopped to assert any claim for relief against Applicant with respect to the matters that are the subject of the Notice of Opposition.

24. As a third and further Affirmative Defense, Applicant alleges that by Opposer's conduct and omissions, it has waived, relinquished and or abandoned any claim for relief against Applicant with respect to the matters that are the subject of the Notice of Opposition.

25. As a fourth and further Affirmative Defense, Applicant alleges that Opposer has failed to adequately maintain, police or enforce any trademark or proprietary rights it may once have had in its alleged pleaded mark.

26. As a fifth and further Affirmative Defense, Applicant alleges that Opposer's alleged us of Buffalo Bill does not constitute trademark use.

27. As a sixth and further Affirmative Defense, Applicant alleges that Opposer's claims are precluded because the Opposer's mark has been abandoned.

WHEREFORE, Applicant Eric Bischoff prays that this Notice of Opposition be dismissed.

Dated: October 8, 2012 Respectfully submitted,

Eric Bischoff

_____/SH/_____
Scott M. Hervey, Attorney for Applicant
Weintraub Tobin Chediak Coleman Grodin law corporation
9665 Wilshire Boulevard, 9th Floor
Beverly Hills, CA 90212
shervey@weintraub.com; trademarks@weintraub.com

PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of Sacramento, California. My business address is 400 Capitol Mall, 11th Floor, Sacramento, California 95814. I am over the age of 18 years and not a party to, nor interested in, the within action. On this date, I caused to be served the following document:

MOTION TO SET ASIDE DEFAULT; [PROPOSED] ANSWER

_X___United States mail by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing mail in accordance with this office's practice whereby the mail is deposited in a United States mailbox after the close of the day's business.

_____By personally delivering, or causing to be delivered, a true copy thereof to the person and at the address set forth below.

___ Via overnight courier.

___ Via facsimile, original to follow by United States Mail

Todd P. Blakely
Sheridan Ross P.C.
1560 Broadway Suite 1200
Denver, CO 80202

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on October 8, 2012, at Sacramento, California.

_____/EI/_____
Ernesto Ibarra