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

Proceeding	91212873
Party	Defendant Totis of Texas, LLC
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Submission	Motion for Default Judgment
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Date	01/01/2014
Attachments	TOTIS DONITAS - Motion for Default Judgment.pdf(232918 bytes )

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

In the Matter of Appl. Serial Nos. 85/671,580, 85/671,619, 85/671,627, and 85/671,640  
Published in the Official Gazette on June 11, 2013  
Mark: TOTIS DONITAS

INTEREX CORP.

Opposer,

v.

TOTIS OF TEXAS, LLC

Applicant.

Opposition No. 91212873

**MOTION FOR DEFAULT JUDGMENT FOR FAILURE TO ANSWER**

Applicant and counterclaimant Totis of Texas, LLC (“Applicant”) hereby moves the Trademark Trial and Appeal Board (the “Board”) pursuant to 37 C.F.R. § 2.114(a), Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) §§ 312 and 508, and Rule 55 of the Federal Rules of Civil Procedure to reject the submission filed by opposer and counterclaim defendant Interex Corp. (“Opposer”) under the designation “Answer to Counterclaim” and to enter default judgment for failure to answer.

On November 18, 2013, Applicant filed its Answer to Opposer’s Notice of Opposition and asserted a counterclaim for cancellation of U.S. Reg. No. 4,027,215. On November 20, 2013, the Board issued a Scheduling Order that set December 20, 2013 as Opposer’s deadline to file its Answer to Counterclaim. An answer must include admissions or denials of the allegations, and may include defenses to them. 37 C.F.R. § 2.106(b)(1); TBMP §§ 311.01(a), 311.02. An answer also must bear proof of service before it will be considered by the Board. TBMP §§ 110.9(d), 311.01(c). The Board permits electronic filing

of submissions, including answers, through the Electronic System for Trademark Trial and Appeals (“ESTTA”). For submissions filed through ESTTA, “[t]he filing date is the date on which the complete ESTTA filing (including any required fee) is received in the USPTO.” TBMP § 110.09. The rules plainly state that “[i]f no answer is filed within the time set, the [cancellation] may be decided as in case of default.” 37 C.F.R. § 2.114(a); TBMP § 313.06.

Based on the record available at the Board Web site, it appears that Opposer filed a submission through ESTTA on December 18, 2013. Although that submission is designated “Answer to Counterclaim,” it does not constitute an “answer” under any reading of the rules. Opposer’s December 18 submission consists solely of a cover page automatically generated by ESTTA, identifying the parties and the proceeding and containing the filer’s electronic signature, followed by blank pages. Opposer’s submission does not admit or deny the substantive allegations of the counterclaim, as an answer must. It does not contain any defenses. It does not include a certificate of service. It is devoid of content, cannot be construed as an answer and, accordingly, the Board should reject it on its face.

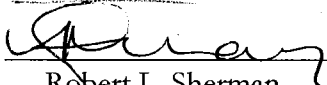
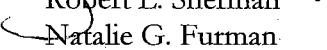
Although Applicant subsequently received a hardcopy Answer to Counterclaim that contains admissions and denials and a certificate of service stating that it was sent by U.S. Mail on December 18, 2013, that document was not delivered until December 30, 2013. In all events, the rules are unambiguous that an “answer to the counterclaim *must be filed*” prior to the deadline (37 C.F.R. § 2.114(b)(2)(iii), TBMP § 313.06 (emphasis added)) and that “[t]he filing date is the date on which the *complete* ESTTA filing ...is received in the USPTO” (TBMP § 110.09 (emphasis added)). Notwithstanding Opposer’s designation of its blank submission as an Answer to Counterclaim, Opposer failed to file a complete answer – indeed, failed to file any answer at all – with the Board by the December 20, 2013 deadline. Because “no answer [was] filed within the time set,” the Board should enter default

judgment for failure to answer pursuant to 37 C.F.R. § 2.114(a), TBMP §§ 313.06 and 508, and Fed. R. Civ. P. 55.

In view of the foregoing, Applicant respectfully moves the Board to reject Opposer's purported "Answer to Counterclaim" and to enter default judgment for failure to answer the counterclaim.

Respectfully submitted,

PAUL HASTINGS LLP

By:   
Robert L. Sherman  
  
Natalie G. Furman

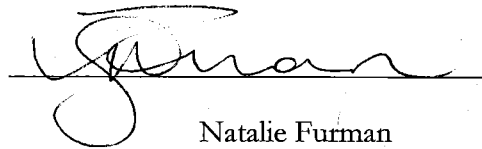
75 East 55th Street  
New York, NY 10022

Attorneys for Applicant

**CERTIFICATE OF SERVICE**

I hereby certify that on January 1, 2014, a true and complete copy of the foregoing  
MOTION FOR DEFAULT JUDGMENT FOR FAILURE TO ANSWER  
has been served on Opposer by mailing said copy, via U.S. Mail to:

Craig Carpenter  
Thompson & Knight LLP  
One Arts Plaza  
1722 Routh Street, Suite 1500  
Dallas, TX 75201  
UNITED STATES



Natalie Furman