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

Proceeding	91215114
Party	Plaintiff Upper Shirley Vineyards, LLC and Shirley Plantation LLC
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Submission	Motion for Default Judgment
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SHIRLEY PLANTATION, LLC,
UPPER SHIRLEY VINEYARDS, LLC,
and
CHARLES H. CARTER,

Opposers,

v.

STILLHOUSE VINEYARDS, LLC

Applicant.

Opposition No.: 91215114 (parent)
91216395
91218094

Application Nos.: 85/947562
85/121979
86/129686

Marks: SHIRLEY PLANTATION
SHIRLEY



OPPOSERS' MOTION FOR DEFAULT JUDGMENT

Pursuant to Federal Rules of Civil Procedure 55 and TBMP § 312.01, Opposers Shirley Plantation, LLC, Upper Shirley Vineyards, LLC, and Mr. Charles H. Carter (“Opposers”) seek a default judgment against Applicant, Stillhouse Vineyards, LLC (“Applicant”). Applicant has routinely and continuously failed to respond or otherwise defend throughout these opposition proceedings, resulting in significant delays which have prejudiced Opposers. Under Rule 55, the Board may enter a default judgment against an applicant that has failed to plead or otherwise defend. “The standard for determining whether default judgment should be entered against the defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard.” See TBMP § 312.01. Entry of a default judgment is appropriate if the applicant’s delay is the result of willful conduct or gross neglect, the delay results in substantial prejudice to the opposing party, and applicant doesn’t have a meritorious defense. See TBMP § 312.01.

I. BACKGROUND

1. On February 25, 2014, Opposers filed with the Trademark Trial and Appeal Board (the “Board”) and served on Applicant a Notice of Opposition against application Serial Number 85/947562 for SHIRLEY PLANTATION (Opposition No. 91215114).

2. On April 4, 2014, Applicant filed a Motion to Dismiss Opposition No. 91215114.

3. On April 21, 2014, Opposers responded to Applicant’s Motion to Dismiss.

4. On May 14, 2014, Opposers filed with the Board and served on Applicant a Notice of Opposition against application Serial Number 85/121979 for SHIRLEY (Opposition No. 91216395).

5. On May 22, 2014, Opposers filed a Motion to Consolidate Opposition Nos. 91215114 and 91216395.

6. On June 23, 2014, Applicant filed a Motion to Dismiss Opposition No. 91216395.

7. On July 7, 2014, Opposers responded to Applicant’s Motion to Dismiss.

8. On July 31, 2014, the Board issued an Order denying Applicant’s Motion to Dismiss Opposition No. 91215114 and resetting the calendar to allow Opposers’ to amend their pleadings and requiring Applicant to answer the Amended Pleadings.

9. On August 27, 2014, Opposers filed their Amended Pleadings for Opposition No. 91215114.

10. On August 28, 2014, Opposers filed with the Board and served on Applicant a Notice of Opposition (Opposition No. 91218094) against application Serial Number 86/129686 for coat of arms (the “Coat of Arms Mark”), as shown below:



11. On October 7, 2014, Applicant filed its Answer in Opposition No. 91218094.

12. On October 8, 2014, Applicant filed its Answer in Opposition No. 91215114.
13. On October 24, 2014, Opposers' filed a Motion to Strike paragraphs 49-61 of Applicant's Answer in Opposition No. 91218094.
14. On December 18, 2014, the Board issued an Order resetting the calendar to allow Opposers' to amend their pleadings and requiring Applicant to answer the Amended Pleadings in Opposition No. 91218094.
15. On October 24, 2014, the Board issued an Order denying Applicant's Motion to Dismiss Opposition No. 91216395 and resetting the calendar to allow Opposers' to amend their pleadings and requiring Applicant to answer the Amended Pleadings.
16. On October 31, 2014, Opposition No. 91215114 was suspended pending the Board's decision on Opposers' Motion to Consolidate.
17. On November 24, 2014, Opposers filed their Amended Pleadings in Opposition No. 91216395.
18. On December 18, 2014, Opposers filed their Amended Pleadings in Opposition No. 91218094.
19. On December 22, 2014, Applicant filed its Answer in Opposition No. 91216395.
20. On February 13, 2015, the Board issued an Order consolidating Opposition Nos. 91215114 and 91216395.
21. On February 20, 2015, Opposers filed a Motion for Default Judgment for Opposition No. 91218094 based on Applicant's failure to answer by the deadline of January 28, 2015 as established in the Board's order of November 24, 2014.
22. On March 11, 2015, Applicant sent Opposers a document called "Shirley Initial Disclosures" for Consolidated Opposition Nos. 91215114 and 91216395 that did not list or identify any persons, thereby failing to meet the standards set forth under the Federal Rules of Civil Procedure 26(a)(1) and TBMP § 401.02.

23. On March 12, 2015, Opposers sent their Initial Disclosures for Consolidated Opposition Nos. 91215114 and 91216395 to Applicant.

24. On March 13, 2015, Opposers sent a request to Applicant to provide Initial Disclosures for Consolidated Opposition Nos. 91215114 and 91216395 in compliance with the Federal Rules of Civil Procedure 26(a)(1) and the TBMP § 401.02.

25. On March 18, 2015, Applicant provided supplemented Initial Disclosures for Consolidated Opposition Nos. 91215114 and 91216395.

26. On March 20, 2015, Applicant filed with the Board its Amended Answer for Opposition No. 91218094, fifty-one (51) days past the deadline set by the Board's Order of November 24, 2014, and separately served to Opposers its Amended Answer along with a document captioned "Motion to Set Aside Default," which was not filed with the Board.

27. On March 23, 2015, Opposers served a First Request for Production of Documents and Things and First Set of Interrogatories on Applicant in Consolidated Opposition Nos. 91215114 and 91216395.

28. On April 3, 2015, Opposers filed a response to Applicant's Motion to Set Aside Default (this document was still not filed with the Board) for Opposition No. 91218094, stating that Applicant's Motion and Amended Answer were not only late but also failed to explain or provide reason for Applicant's delay. Further, Opposers' response requested that default judgment be entered based on Applicant's continued disregard for deadlines.

29. On April 10, 2015, Applicant filed with the Board its Motion to Set Aside Default for Opposition No. 91218094.

30. On April 21, 2015, without seeking a stipulation of an extension from Opposers, Applicant's counsel made a unilateral decision that the responses to discovery for Consolidated Opposition Nos. 91215114 and 91216395 would be delivered late and informed Opposers' counsel via email that responses would be delivered April 27, 2015.

31. In various emails from April 22, 2015 to April 28, 2015, Opposers' counsel expressed its objection to Applicant's counsel deviation from the rules.

32. In multiple emails on April 28 and 29, 2015, Applicant's counsel sent discovery responses for Consolidated Opposition Nos. 91215114 and 91216395 in various emails but never appropriately explained his departure from the Rules or the unilateral decision to grant an extension to respond. The responses sent were not only past the deadline set by TBMP § 403.03, but also past the extended deadline Applicant's counsel granted to itself.

33. On May 19, 2015, Opposers' counsel sent a letter detailing the various deficiencies of Applicant's discovery responses for Consolidated Opposition Nos. 91215114 and 91216395, including but not limited to incomplete responses, mislabeled or non-labelled documents, and unreadable or illegible documents, and requesting that Applicant correct and/or supplement the responses and production and resend.

34. On May 28, 2015, in an email addressing other items, Applicant's counsel indicated they were "currently working on addressing the discovery concerns" for Consolidated Opposition Nos. 91215114 and 91216395.

35. On or about June 4, 2015, Opposers' counsel attempted reach Applicant's counsel via phone to discuss multiple items including the expected updated and corrected discovery responses for Consolidated Opposition Nos. 91215114 and 91216395, but there was no answer or machine that picked-up. Opposers' counsel followed up with an email identifying the problem with the phone.

36. On June 15, 2015, the Board issued an order suspending Consolidated Opposition Nos. 91215114 and 91216395 in order for the parties to discuss the potential for utilizing the Accelerated Case Resolution procedure (ACR).

37. On July 9, 2015, the parties filed a stipulated motion and agreement to resolve Consolidated Opposition Nos. 91215114 and 91216395 using the TTAB's ACR procedure.

38. On July 17, 2015, the Board indicated in an email to the parties that a conference to discuss the stipulated motion and agreement to resolve Consolidated Opposition Nos. 91215114 and 91216395 using the TTAB's ACR procedure was unnecessary unless the parties required one.

39. On July 20, 2015, Applicant's counsel served Applicant's first discovery requests in Consolidated Opposition Nos. 91215114 and 91216395.

40. On July 22, 2015, four (4) months after the initial discovery requests in Consolidated Opposition Nos. 91215114 and 91216395 were served, Opposers' counsel sent yet another email inquiry in an effort to find out when updated and corrected responses could be expected.

41. On August 4, 2015, the Board entered an Order regarding ACR in Consolidated Opposition Nos. 91215114 and 91216395 and resetting of the discovery/briefing schedule.

42. On or about August 12, 2015, Opposers attempted to reach Applicant via phone and email to request an extension to respond to discovery requests in Consolidated Opposition Nos. 91215114 and 91216395.

43. On August 18, 2015, Opposers' filed a Motion for Extension to Respond to Discovery having received no response to their inquiry to Applicant for such an extension in Consolidated Opposition Nos. 91215114 and 91216395.

44. On August 19, 2015, Opposers' filed a Motion to Compel Discovery in Consolidated Opposition Nos. 91215114 and 91216395 having received no updated and corrected responses from Applicant to the discovery requests originally made on March 23, 2015.

45. On August 28, 2015, the parties filed a Stipulated Extension of Time for Opposers to Respond to Applicant's First Discovery Requests in Consolidated Opposition Nos. 91215114 and 91216395 agreeing to an extension until September 10, 2015 for Opposers to respond.

46. On September 1, 2015, Opposers filed a Motion to Disqualify Mr. Philip Carter Strother and all members of the Strother Law Offices, PLC based on Mr. Strother being identified numerous times in Applicant's Answers to Opposers' First Set of Interrogatories as knowledgeable about facts in dispute in Consolidated Opposition Nos. 91215114 and 91216395.

47. On September 8, 2015, the Board issued an Order suspending the proceedings pending disposition of Opposers' Motion to Disqualify in Consolidated Opposition Nos. 91215114 and 91216395.

48. On September 10, 2015, Opposers sent their Initial Disclosures in Opposition No. 91218094 to Applicant.

49. On September 18, 2015, Opposers filed a Motion to Disqualify Mr. Philip Carter Strother and all members of the Strother Law Offices, PLC based on Mr. Strother being identified numerous times in Applicant's Answers to Opposers' First Set of Interrogatories as knowledgeable about facts in dispute in these proceedings in Opposition No. 91218094.

50. On September 28, 2015, the Board issued an Order suspending the proceedings pending disposition of Opposers' Motion to Disqualify in Opposition No. 91218094.

51. On November 11, 2015, the Board issued an Order (the "Nov. 2015 Order") disqualifying Mr. Strother but not Strother Law Offices, PLC providing that Mr. Jarrod Thomas of Strother Law Offices, PLC can continue to represent Applicant provided the firm takes appropriate measures to screen Mr. Strother from information and documents obtained by the firm in connection with the proceedings. The Board also stated that the firm was to provide Opposers with information about what steps have been taken and put in place to so screen Mr. Strother. Further, the Board recognized that the firm is small and Applicant may need to retain separate counsel. Applicant was allowed twenty (20) days from the mailing date of the Order to comply. That twenty (20) day period expired December 8, 2015.

52. Additionally, the Nov. 2015 Order consolidated Opposition No. 91218094 with previously consolidated Opposition Nos. 91215114 and 91216395.

53. Further, the Nov. 2015 Order allowed Applicant twenty (20) days from the mailing date of the Order to serve and file a response to Opposers' Motion to Compel Discovery. That twenty (20) day period expired December 8, 2015.

54. On December 18, 2015, ten (10) days past Applicant's deadline to comply, Opposers' served and filed a Notice to the Board/Status Update informing the Board of Applicant's failure to comply with the Nov. 2015 Order and of Opposers' new information that Mr. Thomas was no longer an

attorney with Strother Law Offices, PLC leaving only Mr. Strother as an attorney with the firm. The Opposers stated that in the absence of another attorney, the firm cannot take steps to adequately screen Mr. Strother pursuant to the Nov. 2015 Order.

55. As of the date of this motion Applicant has not complied with the Nov. 2015 Order nor has it requested an extension or made any effort to comply with the Nov. 2015 Order.

II. APPLICANT'S DELAY PROVES WILLFUL CONDUCT AND/OR GROSS NEGLIGENCE

Default judgment should be entered against Applicant because on information and belief Applicant's delay was the result of willful conduct and/or gross neglect. The Board has held that such conduct, on its own, can justify entering default judgment against an applicant. *Delorme Publishing Company, Inc. v. Eartha's, Inc.*, 60 U.S.P.Q.2d 1222 (T.T.A.B. 2000) (granting opposer's motion for default).

In *Delorme*, the applicant stated that it was late in filing an answer because it believed the notice of opposition was "incomplete," but the Board noted that the applicant did nothing to resolve any of the alleged deficiencies within the notice. *Id.* It could have contacted the Board, contacted the opposer, or filed a motion to extend the time to respond, but instead it did nothing. *Id.* The Board held that such actions showed willful conduct and/or gross neglect: "While applicant may not have intended that the current proceeding be resolved against it by default, the facts here clearly indicate that applicant consciously chose to ignore the notice of opposition it received along with the Board's institution letter and trial order." *Id.* at 1224.

In the present proceeding, Applicant has consistently missed deadlines and failed to timely respond. Applicant currently stands more than four (4) months past a deadline to comply with the Board's order of November 18, 2015 requiring Applicant to remove Mr. Strother's email address from the correspondence address of record and as attorney of record and to serve and file a response to Opposers' Motion to Compel within twenty (20) days of the mailing date of the order. Applicant has done neither nor has Applicant requested an extension. Applicant has done nothing. Not just for a few days – it did

nothing for more than four months, and in the words of the Board in *Delorme*, "consciously chose to ignore" the dates and deadlines set by the Board. *Delorme*, 60 U.S.P.Q.2d at 1224. This shows willful conduct and/or gross neglect under the *Delorme* standard. *Id.* As a result, default judgment should be entered against Applicant.

III. OPPOSERS HAVE BEEN PREJUDICED BY APPLICANT'S DELAY

Applicant's continuous delays and failure to meet Board-established deadlines have prejudiced the Opposers. Applicant's failure to timely file papers, comply with Board orders, and respond properly to discovery requests affects calendar deadlines and shows complete disregard for these proceedings, for the Board, for the Opposers and for the Rules set forth in 37 CFR. Further, it unnecessarily extends the opposition proceedings, allows time for more consumer confusion to arise, and delays Opposer Upper Shirley Vineyards' trademark application process. Such delays are prejudicial to Opposers who seek to clear these clouds surrounding the parties' respective trademark rights. The timing is particularly critical, now more than ever, given Upper Shirley's use of the "Upper Shirley Vineyards" trademark in connection with making and selling wine bearing that trademark.

Upper Shirley's wine sales within the first eight (8) weeks of operation are upwards of \$154,000 and wine sales bearing the trademark "UPPER SHIRLEY VINEYARDS" and under the Upper Shirley label consist of half of Upper Shirley's revenue. See *Declaration of Tayloe Dameron*. Additionally, Upper Shirley has been featured in numerous articles and television programs. *Id.* The publicity of Upper Shirley has only increased as it has been featured in at least five articles in the last three months. *Id.* Moreover, Upper Shirley's press coverage and public awareness is expected to grow because Upper Shirley has recently hired a public relations firm to develop and grow its brand. *Id.*

Further, the Board has expressed a desire that proceedings move forward efficiently, even indicating its availability to achieve that goal. See *Board Order of November 24, 2014* at p. 5. However, Applicant's behavior is directly adverse to advancing the case efficiently and has the exact opposite effect. Opposers are further prejudiced now by having brought the motion for default a second time and

by having to submit the instant and additional briefing to demonstrate the lack of respect for the process as revealed by Applicant's conduct.

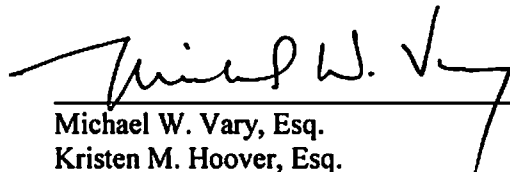
IV. CONCLUSION

Therefore Applicant's repeated failures to meet deadlines established by the Board's order, reflective of willful conduct and/or gross neglect, coupled with the resultant prejudice demonstrate that default judgment should be entered. The Opposers respectfully request that the Opposition be dismissed in favor of movant and the registrations of the applications be denied.

WHEREFORE it is requested that the Board enter a default judgment against Applicant.

Date: May 17, 2016

Respectfully submitted,



Michael W. Vary, Esq.
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Attorneys for Opposers

CERTIFICATE OF ELECTRONIC TRANSMISSION

The undersigned hereby certifies that on this 17th day of May 2016, the foregoing *OPPOSERS' MOTION FOR DEFAULT JUDGMENT* was deposited with the United States Patent and Trademark Office, Trademark Trial and Appeal Board via electronic filing through their website at <http://estta.uspto.gov/>.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 17th day of May 2016, the foregoing *OPPOSERS' MOTION FOR DEFAULT JUDGMENT* was served upon Applicant by delivering a true and correct copy of same to counsel for Applicant electronically and via first class mail, as follows:

STROTHER LAW OFFICES PLC
15 E FRANKLIN ST
RICHMOND, VA 23219
pstrother@strotherlaw.com

Date: May 17, 2016



Michael W. Vary, Esq.
One of the Counsel for Applicant
McCarthy, Lebit, Crystal & Liffman, Co., L.P.A.

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

SHIRLEY PLANTATION, LLC,
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CHARLES H. CARTER,

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STILLHOUSE VINEYARDS, LLC

Applicant.

Opposition No.: 91215114 (parent)
91216395
91218094

Application Nos.: 85/947562
85/121979
86/129686

Marks: SHIRLEY PLANTATION
SHIRLEY



DECLARATION OF TAYLOE DAMERON

IN SUPPORT OF OPPOSERS' MOTION FOR DEFAULT JUDGMENT

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the application or any resulting registration, declares that:

1. I am making this declaration in support of Opposers' Motion for Default Judgment.
2. I am the owner and operator of Upper Shirley Vineyards, LLC ("Upper Shirley"), and I have personal knowledge of the matters stated herein and am competent to testify thereto.

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3. Upper Shirley Plantation was added to the National Register of Historic Places in 1982.
4. On January 1, 2013, Upper Shirley ^{Vineyards LLC} was established on the historic site of Upper Shirley Plantation.
5. In 2013 Upper Shirley planted custom grafted grape vines to produce fruit for wine on the historic site of Upper Shirley Plantation.
6. On November 25, 2013, Upper Shirley filed with the United States Patent and Trademark Office its intent to use trademark application for the trademark "UPPER SHIRLEY VINEYARDS."
7. Upper Shirley's trademark application has been suspended since April 19, 2014 due to Applicant's application serial Nos. 86121979 and 85947562 and these opposition proceedings.
8. In 2014 Upper Shirley expanded its acreage on the historic site of Upper Shirley Plantation.
9. In 2015 Upper Shirley expanded its acreage again on the historic site of Upper Shirley Plantation.
10. On August 28th, 2014, Upper Shirley harvested its first grapes to produce wine under the Upper Shirley label.
11. In 2014, Upper Shirley began bottling wine bearing the trademark "UPPER SHIRLEY VINEYARDS" and under the Upper Shirley label.
12. On February 27, 2016, Upper Shirley began selling wine bearing the trademark "UPPER SHIRLEY VINEYARDS" and under the Upper Shirley label.
13. Within the first eight (8) weeks of operation, wine sales are upwards of \$154,000.
14. As of the date of this filing, wine sales bearing the trademark "UPPER SHIRLEY VINEYARDS" and under the Upper Shirley label consist of half of Upper Shirley's revenue.
15. Numerous articles and television programs have featured Upper Shirley.

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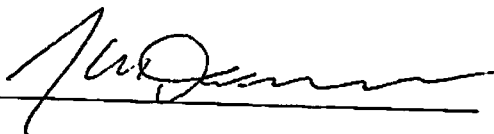
16. In the last three (3) months, there have been at least five articles featuring Upper Shirley.

17. Upper Shirley has recently enlisted the services of a public relations firm to further publicize and market Upper Shirley.

18. Considerable investment has been made by Upper Shirley to develop and grow its business and premium lifestyle brand, including, but not limited to, the planting, cultivation, harvest of grapes; the manufacture and product of wine; development and building of brick and mortar structures; the design and development of packaging materials (e.g. bottles, wine labels, corks, etc.); hiring a public relations firm to further market.

19. Applicant's delay throughout these proceedings has not only forced Opposers to incur unnecessary legal fees, but has further injured Upper Shirley in its business growth and development by preventing Upper Shirley from obtaining trademark protection on its growing brand for two years. This is particularly important at this time because our products bearing the trademark "UPPER SHIRLEY VINEYARDS" under the Upper Shirley label are growing in sales in the last few months and currently consist of half of Upper Shirley's revenue and are expected to keep growing.

EXECUTED this 16 day of May, 2016.

BY: 

Name: TAYLOE DAMERON