ESTTA Tracking number: **ESTTA769837**

Filing date: **09/09/2016**

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

Proceeding	91228607
Party	Defendant General Vision Services LLC
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Submission	Motion for Relief from entry of Default Judgment
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Date	09/09/2016
Attachments	86862595 TTAB Motion for Relief to file late Answer.pdf(37454 bytes)

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

In re:

Mark: GVS GENERAL VISION SERVICES
Serial No.: 86862595
TTAB No.: 91228607
Applicant: GENERAL VISION SERVICES LLC

VISION SERVICE PLAN

Opposer,

v.

GENERAL VISION SERVICES LLC**,**

Applicant.

Motion to Set Aside Entry of Default and Request to Accept Late Filed Answer

Pursuant to Fed. R. Civ. P. 55(c) and Fed. R. Civ. P. 60(b), Applicant moves for an order setting aside the entry of default entered in this case and requests that the Board accept Applicant's Answer, filed concurrently herewith. Applicant is entitled to the relief requested because Applicant's failure to timely file an answer was the result of mistake, inadvertence, surprise, or excusable neglect.

Memorandum in Support

Background

The opposition was filed on June 23, 2016, and Applicant's answer was due on August 2, 2016. Applicant's CEO, who has responsibility for these matters, had numerous scheduling constraints and unrelated work and family demands during the months of July and August that prevented Applicant from attending to and timely filing an Answer. During July and August, Applicant's CEO had a particularly challenging period, from both the business and personal side, requiring much travel and time out of the office. The combined effect of these scheduling conflicts prevented Applicant from dealing with the Opposition on a timely basis.

Legal Standard

Under Fed. R. Civ. P. 55(c), the Board may set aside the entry of default for good cause. In considering whether to open or set aside a default judgment, the TTAB has stated that "[t]he 'good and sufficient cause' standard, in the context of [37 C.F.R. § 2.132(a)], is equivalent to the 'excusable neglect' standard which would have to be met by any motion under FRCP 6(b) to reopen the plaintiff's testimony period." *HKG Indus., Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156, 1157 (T.T.A.B.1998). In analyzing excusable neglect, the TTAB has relied on the Supreme Court's discussion of excusable neglect in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). S*ee, e.g.,*

Mattel, Inc. v. Henson, 88 Fed. Appx. 401 (Fed. Cir. 2004) (confirming applicability of Pioneer factors to TTAB proceedings).

The Pioneer case dealt with a bankruptcy rule permitting a late filing if the movant's failure to comply with an earlier deadline 'was the result of excusable neglect.'" 507 U.S. at 382, 113 S.Ct. 1489. The Supreme Court defined the inquiry into excusable neglect as:

> at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the [nonmoving party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395, 113 S.Ct. 1489.

Because default judgments for failure to timely answer the complaint are not favored by the law, a motion under Fed. R. Civ. P. 60(b) seeking relief from such a judgment is generally treated with more liberality by the Board than are motions under Fed. R. Civ. P. 60(b) for relief from other types of judgments. Among the factors to be considered are (1) whether the plaintiff will be prejudiced, (2) whether the default was willful, and (3) whether the defendant has a meritorious defense to the action.

In practice before this Board in particular, the TTAB "is lenient in accepting late-filed answers when the delay is not excessive. *See, Mattel, Inc. v. Henson*, 88 Fed. Appx. at 401, n.1. Under the circumstances, the Board has ample reason to employ its leniency and authorize the late filing of an Answer.

I. Plaintiff Will Not Be Prejudiced.

Applicant's Answer was due on August 2, 2016. It is hard to imagine how Opposer could have been prejudiced in the time between August 2, 2016 and now – less than forty (40) days after the answer was due. Indeed, had Applicant been able to timely file an answer, initial disclosures would not yet be due under the Board's original scheduling order in this case. Therefore, this matter would still be in its very early stages. Accordingly, Opposer cannot claim it will be prejudiced if Applicant is allowed to answer and defend at this stage.

II. The Default was Not Willful.

As discussed above, Applicant had numerous scheduling constraints and unrelated work and family demands during the months of July and August that prevented Applicant from attending to and timely filing an Answer. The Applicant's CEO who has responsibility for these matters, had a particularly challenging period, from both the business and personal side, requiring much travel and time out of the office. Although this situation was certainly less than ideal, coupled with the extra complication of support staff summer vacations, correspondence and messages regarding the details of the response dates in this proceeding was overlooked, lost, and/or never received. Accordingly, Applicant's failure was not willful.

III. Applicant Has a Meritorious Defense to the Action.

Applicant has multiple meritorious defenses to the opposition petition and deserves the opportunity to defend the registration. Specifically, if allowed to answer and defend, Applicant

intends to defend the opposition by establishing that Applicant's mark is not confusingly similar to any of Opposer's marks.

The Opposer alleges that Applicant's proposed GVS GENERAL VISION SERVICES mark is confusingly similar to its previously registered marks. This claim is without merit. Applicant's mark consists of a logo in the following format:

Opposer's has not alleged any mark that starts with a "G", contains the word "GENERAL" or has any element similar to "GVS." On the basis of similarity of the marks alone, Applicant believes the Board will conclude the opposition is without merit.

WHEREFORE, Applicant respectfully requests that the Board enter an order setting aside the notice of default and accepting the Answer filed concurrently herewith.

Dated September 9, 2016.

/Christopher J. Day/

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CERTIFICATE OF SERVICE

I hereby certify that this correspondence is being deposited on September 9, 2016, in the U.S. mail, first class postage pre-paid, addressed to counsel for Opposer at the following address:

Kyle M. Globerman
Brient Globerman LLC
1175 Grimes Bridge Road, Suite 100
Roswell, GA 30075

/Christopher J. Day/
Christopher J. Day