

ESTTA Tracking number: **ESTTA896102**

Filing date: **05/11/2018**

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

| | |
|------------------------|---|
| Proceeding | 91237743 |
| Party | Defendant Vino & Vinyl LLC |
| Correspondence Address | CHRISTINA SAUNDERS SPARKMAN FOOTE LLP 1616 17TH ST STE 568 DENVER, CO 80202-1278 UNITED STATES Email: saunders@sparkmanfoote.com |
| Submission | Other Motions/Papers |
| Filer's Name | Keval Patel |
| Filer's email | kpatel@patel-law.com |
| Signature | /keval patel/ |
| Date | 05/11/2018 |
| Attachments | Vino and Vinyl Motion to vacate.pdf(29263 bytes) Vino and Vinyl Exhibit A.pdf(86565 bytes) |

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

| | | |
|--|---|--------------------------------|
| In re: matter of Application No. 86/772641 | § | |
| For the mark: VINO & VINYL in Class 42 | § | |
| | § | |
| HRHH IP, LLC | § | Opposition No. <u>91237743</u> |
| Opposer | § | |
| | § | |
| Vs. | § | |
| | § | |
| | § | |
| | § | |
| Vino & Vinyl, LLC | § | |
| Applicant | § | |

Box TTAB
Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

**MOTION TO SET ASIDE DEFAULT
AND MOTION FOR LEAVE TO FILE A LATE ANSWER**

Applicant VINO and VINYL, LLC, by its undersigned attorneys, submits the herein pursuant to 37 C.F.R. § 2.116(a) and Fed. R. Civ. P. 6(b) asking the board to vacate the default judgment and Leave to file a late Answer in this Opposition. moves on the same grounds for leave to file a late Answer in the within Opposition proceeding.

I. STATEMENT OF FACTS

Applicant VINO & VINYL, LLC is a limited liability corporation organized under the laws of the State of Texas with its principal place of business in Sugar Land, Texas. Applicant has filed Application Number 86/772,461 in Class 43 regarding a trademark for their business. HRHH IP, LLC filed its opposition to this registration on October 11, 2017 based on the fact that VINO's mark

would cause a likelihood of confusion and likelihood of dilution. VINO's answer was due on December 23, 2017 at which time the undersigned filed a request for additional time.

During the time that the opposition was filed until current, the Parties have been engaging in settlement negotiations with the intent to resolve the differences through a mutually agreeable Co-Existence Agreement. In furtherance of these negotiations, the Opposer was in agreement and even encouraged VINO to continue extending its deadline for filing an answer while the Parties discussed resolution of the Opposition. However, due to the fact that the undersigned was not receiving notices from the Board, the undersigned failed to file a timely extension on or about January 2018 and the board issued a Default Judgment two months later. The error amounts to "excusable neglect" as defined herein and should be accepted as such thereby allowing VINO to file an untimely answer and have the Default Judgment vacated.

The undersigned will be updating the records of the TTAB in order ensure the undersigned is receiving all correspondence as it relates to this issue. VINO's previous counsel has been receiving all correspondence related to this opposition but has not forwarded to the undersigned or the client VINO. Thus, the reason the default was entered was due to pure human error.

II. LEGAL ARGUMENT

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). Thus, VINO's motion to reopen the opposition proceeding is made pursuant to that Rule.

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). See, 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 [non-moving 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. 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 in vacating the Default Judgment and authorizing the late filing of an Answer. It is difficult to imagine that the Opposer has been prejudiced in any manner due to this delay. In fact, the Parties were working towards settling the matter and had come to an agreement on the basic terms. However, Vino requested an additional item to be included in the Co-Existence Agreement, which is all that remained with regards to the settlement. Thus, it is unlikely that the Opposer intended to pursue this opposition any further especially considering the Parties were finalizing the settlement. Therefore, it is unlikely they will be prejudiced in any manner if the Default is vacated and Vino is allowed to file a late answer. Furthermore, there was no urgency to move forward with this

Opposition considering the Opposer was unopposed to all of the motions for extension of time despite the fact that Vino indicated they were unsure of the Opposer's position. (See Exhibits A)

Additionally, the length of any delay is not significant in this context. There will be no significant impact on these proceedings or other judicial proceedings. The reason for the delay is honest error on behalf of Vino's counsel. Vino changed counsel prior to the filing of the opposition but did not update the contact information with the TTAB and thus was not receiving the board notices or correspondence. Vino's current counsel was filing each motion for extension but not receiving any board correspondence. Additionally, Vino's prior counsel was receiving all correspondence from the board but not informing the undersigned or even the client. Furthermore, the only reason that the undersigned found out about the default was through the Opposer's counsel on May 9, 2018, when the undersigned inquired about the settlement. The true reason for any delay was honest error and not bad faith. Vino should not be prejudiced by a default due to error on behalf of their counsel.

Furthermore, Default judgment is an extreme sanction, and "a weapon of last, not first, resort." *Martin v. Coughlin*, 895 F. Supp. 39 (N.D.N.Y. 1995). Ultimately, there is no reason in this situation to depart from the well-known preference in the federal courts that litigation disputes be resolved on their merits. *See, Richardson v. Nassau County*, 184 F.R.D. 497, 501 (E.D.N.Y. 1999).

Respectfully submitted,
Law Office of Keval Patel, PC

/s/ Keval Patel
Keval Patel
19855 Southwest Freeway, Suite 330
Sugar Land, Texas 77479
(281) 313-5300
(281) 313-5305
kpatel@patel-law.com
State Bar No. 24052895
Attorney for Applicant

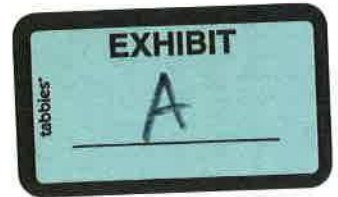
Certificate of Service

I hereby certify that Motion to Vacate Default is being transmitted electronically to Commissioner of Trademarks, Attn: Trademark Trial and Appeal Board through ESTTA pursuant to 37 C.F.R. § 2.195(a) on this 11TH day of May 2018.

/s/ Keval Patel
Keval Patel

Keval Patel

From: Michael Wilburn <mwilburn@sheppardmullin.com>
Sent: Tuesday, December 26, 2017 12:25 PM
To: Keval Patel; Jill Pietrini
Cc: Ben Aigboboh
Subject: RE: HRHH v. Vino & Vinyl



Hi Keval,

Hope you had a great holiday. **We do not oppose a 30-day extension.**

Michael Wilburn | Associate
SheppardMullin | Los Angeles
424.288.5301 | ext. 15301

From: Keval Patel [mailto:kpatel@patel-law.com]
Sent: Tuesday, December 26, 2017 8:40 AM
To: Jill Pietrini <JPietrini@sheppardmullin.com>
Cc: Michael Wilburn <mwilburn@sheppardmullin.com>; Ben Aigboboh <baigboboh@sheppardmullin.com>
Subject: RE: HRHH v. Vino & Vinyl

Hi Jill,

I am not sure if you are working or not but I wanted to reach out regarding my answer. It is currently due today so was wondering if you would oppose an extension. I suspect you have no issues since we are simply fine tuning our resolution. Please let me know if this incorrect. Otherwise, I intend to plead that we are currently working to settle our issues and believe that you are not opposed.

Regards,

Keval Patel
Attorney at Law
19855 Southwest Freeway, Suite 330
Sugar Land, Texas 77479
(p) 281-313-5300
(f) 281-313-5305
www.patel-law.com

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Keval Patel

From: Michael Wilburn <mwilburn@sheppardmullin.com>
Sent: Wednesday, February 28, 2018 6:54 PM
To: kpatel@patel-law.com
Subject: Proposed Coexistence Agreement and today's deadline to answer.

Hi Keval,

Any updates? I haven't heard from you since Jill sent the Coexistence Agreement last week. I noticed that your response deadline is today, and we consent to a 30-day extension if you need it.

Best,

Michael Wilburn | Associate
SheppardMullin | Los Angeles
424.288.5301 | ext. 15301

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