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

Proceeding	91239465
Party	Plaintiff Hopkinton Ventures, LLC
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Attachments	Reply_in_Support_of_Default_for_Fit_Life.pdf(18734 bytes)

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

In the Matter of Application No. 87/540,548
Applicant: Maciel Esperanza
Application Date: July 24, 2017
Publication Date: December 12, 2017

HOPKINTON VENTURES, LLC, Opposer, v. MACIEL ESPERANZA, Applicant.	)	Opposition No. 91239465

REPLY IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT

Opposer's entitlement to a default judgment is clear. It timely filed a Notice of Opposition on February 12, 2018, which was mailed to Applicant at his correspondence address of record. Applicant's deadline to answer was March 24, 2018, and he failed to file any kind of response. Opposer then timely moved for a default judgment on March 29, 2018 and properly served Applicant with the motion. About a month later, Applicant then filed a response in opposition to default, as well as an answer and affirmative defenses. Applicant fails to bring forth sufficient good cause for responding to the Notice of Opposition over a month after his deadline and instead admits to timely receiving it and reading it. Opposer's Motion for Default Judgment should be granted.

Default judgment should be entered against Applicant because he failed to show good cause.

When Applicant did not file a timely answer to the Notice of Opposition, Opposer diligently filed a Motion for Default Judgment, which serves as a substitute for the Board's issuance of a notice of default. TBMP § 508. In order to prevent default judgment from being entered against Applicant, he must show good cause. *Id.* at § 312.

The first and primary factor examined in determining whether good cause exists is whether the delay in filing an answer was the result of willful conduct or gross neglect on the part of the defendant. *Id.* at §312.02. Despite this standard of "willful conduct" and "gross neglect," Applicant argues a "bad faith" standard and brings forth a few different reasons for his untimely filings. First, he states that "Opposer served Esperanza the Notice of Opposition at an address from which Esperanza has moved . . . delaying the delivery of the Notice of Opposition." Response at ¶ 8. This excuse rings hollow for more than one reason. In opposition proceedings, the opposer does not serve the applicant with the Notice of Opposition; rather, the Board sends the applicant notice of the proceeding, along with clear instructions on how to proceed, as well as a schedule of deadlines. The Board mails such notice to the applicant at its listed correspondence address for the applicable trademark, and the rules make clear that applicants have a "duty to maintain a current and accurate correspondence address." TMEP § 609.03. In addition, if changes occur in the correspondence address, the Trademark Office must be "promptly notified in writing." *Id.*

In this instance, Applicant's updated correspondence address was 1500 Bob Hope, Apartment #1409, El Paso, Texas 79936 and that is where the Board mailed the notice for the proceeding. The fact that Applicant apparently moved months before and did not update his

trademark records does not amount to good cause for his late answer, particularly given that it allegedly only delayed his receipt by "several days." Moreover, presumably when Applicant received the notice, he read it and saw the instructions and answer deadline, and he does not assert otherwise.

In addition to his move, Applicant asserts that he sent the notice on to his business partner who "mistakenly believed that the Opposer had filed too late and the opposition would be dismissed." Response at ¶ 8. The basis for that belief is unclear given that Mr. Ahumada admits reading the notice from the Board, which clearly states in bold letters on the front page that "**applicant must file an answer within forty (40) days from the mailing date of third order**." No other facts are provided by Applicant to attempt to demonstrate good cause other than Mr. Ahumada taking a business trip after he received and read the notice from the Board.

As demonstrated in *Delorme Publishing*, this is the exact type of negligence that the Board has not permitted to set aside a default. *Delorme Publishing Co., Inc. v. Eartha's, Inc.*, 60 U.S.P.Q.2d 1222 (TTAB 2000) (entering judgment by default). In that case, the Board was "puzzled" at the Applicant's excuse of receiving the order and notice of opposition but "viewing it as incomplete" and failing to timely respond. *Id.* As the Board explained, the notice and order are "unambiguous" and clearly state when the applicant's answer is due. *Id.* In addition, if the applicant viewed the notice of opposition as incomplete in some way, it could have "filed a motion to dismiss, a motion to strike, a motion for a more definite statement, a motion to extend the time to answer or, at the very least, could have contacted the Board or opposer by telephone or in writing to inquire as to whether the package it received was complete or if it would be supplemented in some fashion. Instead, applicant did nothing." *Id.* The Board found the

applicant's conduct constituted willful conduct and gross neglect and entered a default judgment despite finding minimal prejudice to the opposer from the applicant's delay. *Id.*

Applicant's conduct in this instance is very similar to that in *Delorme Publishing*. Applicant admits receipt of the order and notice of opposition, with he and his business partner both reading it, yet deciding to to ignore it and not to respond, claiming that they thought the proceeding was untimely in some way. There was no ambiguity in what Applicant received, and his deadline for responding was on the front page in bold print. It was only after Applicant received the Motion for Default Judgment that he finally decided to respond, and even then he waited another month. Moreover, arguably, the response to the Motion for Default Judgment was also untimely since a party has 20 days to file a response to motions before the Board, and Applicant's response was not filed for about a month. *See* TBMP § 502.02(b). Applicant's decision to ignore the Board's order and unambiguous deadline for responding constitutes willful conduct and gross neglect, and his later change of heart in choosing to defend the proceeding cannot suffice for good cause.

In addition to Applicant's willful conduct and gross neglect, Opposer will be prejudiced if a default judgment is not entered. The Notice of Opposition was filed nearly three months ago, and Opposer has incurred unnecessary attorneys' fees in pursuing the default when no real justification exists for the delay. Applicant's asserted defense is also unconvincing given that it seems to primarily rely on the fact that it has a different registration, not a part of this proceeding, for JUST FIT FOODS. Opposer is of course not required to challenge every mark at the same time and could and may seek to cancel that registration. The issue in this proceeding is whether Applicant is entitled to register Serial Number 87/540,548, which Opposer has opposed in a timely manner.

WHEREFORE, Opposer respectfully requests that its Motion for Default Judgment be granted and default judgment entered against Applicant.

Respectfully submitted,

/s/ Mindi M. Richter

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PROOF OF SERVICE

The undersigned hereby certifies that the foregoing Reply has been served upon Applicant through his counsel James M. Feuille, ScottHulse P.C., 1100 Chase Tower, 201 East Main Drive, P.O. Box 99123, El Paso, Texas 79999-9123, jfeu@scotthulse.com, as follows:

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on May 7, 2018.

/s/ Mindi M. Richter
Mindi M. Richter, Esq.