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

Proceeding	91247241
Party	Defendant Rockstar Industries LLC
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Submission	Motion for Relief from entry of Default Judgment
Filer's Name	Michael G. Atkins
Filer's email	mike@atkinsip.com
Signature	/Michael G. Atkins/
Date	06/17/2020
Attachments	Reply ISO Motion to Set Aside Order of Default ROCKSTAR.pdf(181984 bytes) Second Declaration of Michael Atkins re Default ROCKSTAR.pdf(91121 bytes)

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

Regarding the mark ROCKSTAR (Serial Nos. 88152501 and 88205171)

ROCKSTAR, INC.,	)	
	)	
Opposer,	)	Opposition No. 91247241
	)	
vs.	)	
	)	
ROCKSTAR INDUSTRIES LLC	)	
	)	
Applicant.	)	

APPLICANT'S REPLY BRIEF IN SUPPORT OF ITS

MOTION TO SET ASIDE DEFAULT

Opposer Rockstar, Inc. ("Opposer"), is playing an unfortunate game of "gotcha." It has no basis to oppose Applicant Rockstar Industries LLC's ("Applicant") motion to set aside the Board's default and proceed on the merits, but it does so anyway. Opposer cannot dispute that Applicant failed to timely file an answer to Opposer's amended notice of opposition due to an oversight; it does not claim that Opposer's twelve-day delay "substantially prejudiced" it in any way; and there is no basis to dispute that Applicant's proposed answer states meritorious defenses to Opposer's claims. As such, and given the "strong preference" for deciding cases on the merits, the Board should set aside Applicant's default and allow the case to continue as it has for more than one year.

1. Applicant's delay in filing its answer was not the result of willful conduct or gross neglect. Applicant's attorney testified that "Applicant's failure to timely answer was the result of an oversight."[1] Opposer offers nothing to dispute this testimony.[2] It claims that "[t]he Board has nothing to properly evaluate,"[3] but there isn't anything more that Applicant can say about its mistake, other than that it was not intentional, and Applicant regrets making it. But for

[1] *See* 12 TTABVUE 5 (at ¶ 1).

[2] *See* PepsiCo's Response to Applicant's Motion (15 TTABVUE); Decl. Michael Atkins at ¶ 1 (12 TTABVUE 5).

[3] 15 TTABVUE 4.

its error, Applicant would have filed its answer to Opposer's amended notice of opposition on time.[4] This is reflected in the undisputed facts that Applicant timely filed an answer to Opposer's original notice of opposition;[5] Applicant has already defended Opposer's opposition for more than 14 months;[6] and it filed the instant motion within hours after the Board brought the oversight to Applicant's attention.[7] For these reasons, the record demonstrates that Applicant's twelve-day delay was neither intentional nor the result of gross neglect.

2. Opposer will not be substantially prejudiced by Applicant's twelve-day delay. Opposer does not claim to have been prejudiced by Applicant's brief delay – let alone "substantially prejudiced."[8] Nor can it. *See*, *e.g.*, *DeLorme Publishing Co. v. Eartha's Inc*., 60 USPQ2d 1222, 1224 (TTAB 2000) (finding a six-month delay did not substantially prejudice the opposer, noting that "Opposer has not alleged that witnesses or evidence have become unavailable due to the passage of time, or that it has suffered any other substantial prejudice.") (citations omitted). Here, Opposer likewise does not claim that any witnesses or evidence disappeared during the twelve-day delay.[9] Therefore, there is no basis for the Board to conclude that Opposer has been "substantially prejudiced."

3. Applicant asserted meritorious defenses. Opposer does not dispute that, if sustained, Applicant's proposed answer to Opposer's amended notice of opposition would provide it complete relief.[10] Applicant denied both of Opposer's claims: priority and likelihood of confusion; and that it lacked the bona fide intent to use its mark at the time it filed its applications.[11]

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[4] Second Decl. Michael Atkins at ¶ 1 (filed herewith).

[5] *See* 12 TTABVUE 5 (at ¶ 2); 4 TTABVUE.

[6] *See* 1 TTABVUE.

[7] *See* 12 TTABVUE 5 (at ¶ 2); 10 TTABVUE; 12 TTABVUE.

[8] *See* 15 TTABVUE.

[9] *See id.*

[10] *See id.*

[11] *See* 11 TTABVUE.

This alone satisfies the "meritorious defense" requirement. *See Djeredjian v. Kashi Co*., 21 USPQ2d 1613, 1615 (TTAB 1991). Applicant even refuted Opposer's claim that the volume of Applicant's applications to register its mark for unrelated goods indicated that Applicant lacked a bona fide intent to use its mark by showing that Applicant had already begun using its mark with many of those goods. Indeed, the USPTO has registered Applicant's mark no less than 15 times.[12] This, too, goes beyond merely showing that Applicant's defense is "plausible," which is all that is needed to assert a "meritorious defense." *See DeLorme Publishing Co.*, 60 USPQ2d at 1224 (finding that a "meritorious defense" does not entail an inquiry into the merits of the underlying case; merely a "plausible" response to the notice of opposition and a willingness to defend the matter on its merits satisfies the requirement).

4. The Board should resolve all doubts in favor of setting aside the default. Opposer does not argue with the Board's "strong preference" for deciding cases on the merits, "rather than for a default triggered by a technical failure on the part of defendant."[13] *Plus Med., LLC v. United States*, No. 14-600C, 2014 WL 5446019, at *3 (Fed. Cl. Oct. 27, 2014), *citing Info. Sys. & Networks Corp. v. United States*, 994 F.2d 792, 795 (Fed. Cir. 1993). Given this "strong preference," the Board is "reluctant to grant judgments by default and tend[s] to resolve doubt in favor of setting aside a default. . . ." *Paolo's Assocs. Ltd. P'ship v. Bodo*, 21 USPQ2d 899 (Com'r Pat. & Trademarks 1990). As such, the Board should grant Applicant's motion and allow the case to proceed on the merits as it has for the last 14 months.

5. Applicant does not oppose Opposer's request for an extension of time. Lastly, Applicant does not oppose Opposer's request for an additional 120 days in discovery (assuming that the 120 days starts from the date the current suspension ends). Indeed, it would have consented to such an extension if Opposer had bothered to ask.

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[12] *See id*. at 3-4 (at ¶ 6).

[13] *See* 15 TTABVUE.

Dated: June 17, 2020

Respectfully submitted,

By /s/ Michael G. Atkins
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Attorneys for Applicant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on June 17, 2020, by email on:

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ROCKSTAR INDUSTRIES LLC	)	
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SECOND DECLARATION OF MICHAEL ATKINS

I, Michael G. Atkins, declare that I am attorney of record for Applicant Rockstar Industries LLC ("Applicant"), the applicant in the above-captioned case. I have personal knowledge of the following facts, and if called upon as a witness, I could and would competently testify thereto.

1. Applicant's failure to timely answer was the result of an oversight. There isn't anything more that I can say about this mistake, other than that it was not intentional, and I regret making it. But for this error, Applicant would have filed its answer to Opposer's amended notice of opposition on time.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on this 17th day of June, 2020.

Michael G. Atkins

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served on June 17, 2020, by email on:

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