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

Proceeding	91249091
Party	Defendant Board of Supervisors of Louisiana State University and Agricultural and Mechanical College
Correspondence Address	ANDREW J MAAS 340 E PARKER BLVD SUITE 206 BATON ROUGE, LA 70808 UNITED STATES itc@lsu.edu, andrewm@lsu.edu, rjbrown@lsu.edu 225-578-2599
Submission	Motion for Relief from entry of Default Judgment
Filer's Name	Andrew Maas
Filer's email	andrewm@lsu.edu, rjbrown@lsu.edu, itc@lsu.edu
Signature	/Andrew Maas/
Date	01/31/2020
Attachments	2020-01-31 Motion to Set Aside Default J.pdf(243582 bytes)

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

INTUITIVE SURGICAL OPERATIONS, INC Opposer, v. BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY and AGRICULTURAL and MECHANICAL COLLEGE Applicant,	)	Opposition No.: 91249091 Serial No.: 88/113,962 Filed: September 12, 2018 Published: February 26, 2019 Mark: DaVinci Degree

TO: Commissioner for Trademarks
ATTN: Trademark Trial and Appeal Board
United States Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

APPLICANT'S MOTION TO SET ASIDE NOTICE OF DEFAULT

Applicant, BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE ("LSU" or "Applicant"), through their authorized representative of record, Andrew Maas, hereby moves the Board for entry of an Order to Set Aside the Notice of Default entered on January 18, 2020 pursuant to Fed. R. Civ. P. 55 (a) and Section TBMP §312.02.

1. The Board may set aside an entry of default for good cause shown. Fed. R. Civ. P. 55 (c); TBMP 312.02. "The standards for setting aside entry of default under Rule 55(c) are less rigorous than those for setting aside a default judgment." 10A Wright, Miller & Kane, Federal Practice & Procedure, §2696 at 142 (3d Edition 1998 ("a default entry may be set aside for reasons that would not be enough to open a default judgment.") *See also, Jackson v. Beech,* 636 F.2d 831, 835 (D.C. Cir. 1980) ("a default can be set side under Rule 55(c) for 'good cause shown' but default that has become final as a judgment can be set aside only under the stricter Rule 60(b) standard").
2. Applicant has good cause to set aside the entry of default as: (1) the delay in filing the Answer was not the result of willful conduct or gross neglect but rather a mere oversite and docketing mistake by Applicant; (2) Opposer will not be prejudiced by the delay, let alone substantially as a settlement is being negotiated and the Answer to the Amended Opposition remain identical to Applications Answer filed on and no new defenses or grounds were added; and (3) Applicant has a meritorious defense to the Opposition proceeding initiated by Opposer. *See* TBMP § 312.02.
3. **Applicant's delay in filing a timely Answer was by no means willful or grossly negligent**. Since November and shortly after the Pre-Trial Discovery Conference, Applicant and Opposer have been negotiated a settlement agreement to resolve this matter. The negotiations were wrapping up just before Applicant received the Notice of Default and Applicant is fully confident a settlement will be reached soon. As such, Applicant has no reason to intentionally or willfully not Answer the Amended Opposition and potentially jeopardize its Application for the Da Vinci Degree mark. Applicant's delay was merely a docketing oversite. It has previously been held that a docketing oversite is not sufficient in and of itself to justify entry of default judgement. "The "good cause shown" requirement in Rule 55(c) is broad in scope and includes 'mistake, inadvertence, surprise and excusable neglect' referred to in Rule 60(b)(1)." *Intermountain Lumber & Builders Supply, Inc. v. Glens Falls Ins. Co.,* 83 Nev. 126, 129, 424 P.2d 884, 886 (1967).

4. **Opposer will not be prejudiced, let alone "substantially" prejudiced by the Board's order to set aside the Notice of Default and delayed Answer to the Amended Opposition as there were new grounds for opposition added and the changes made in the Amended Opposition did not affect Applicant's Answer which remain essentially unchanged**. Further support for lack of prejudice to Opposer if the motion is granted, include, among other factors, that there will be no loss of available evidence; there is no fraud or collusion involved or that is claimed by Opposer nor is there any increased potential for fraud or collusion to develop by the delay; and Opposer cannot contend to have relied to its detriment on the Notice of Default as the parties are in the midst of finalizing a Settlement Agreement and the Notice of Default is not a final disposition on the matter.

5. **Applicant has meritorious and strong defenses to the action set forth in the Opposition.** While a mere showing of a "plausible defense" is sufficient to support setting aside the Board's entry of default, Applicant believes there is sufficient legal precedent and facts of record for the Board to find that Opposer is not likely to prevail in its Grounds for Opposition under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, and that, even after discovery, there are no issues or material fact and find Applicant entitled to judgment as a matter of law under Fed. R. Civ. P. 56. *See Delorme Publishing Co. v. Eartha's Inc.,* 60 USPQ2d 1222, 1224 (TTAB 2000); TBMP §312.02.

6. There is **no likelihood of confusion** among consumers for educational services through LSU's online Da Vinci Degree program and Opposer's consumers for highly advanced robotic surgical instruments for the following reasons, among others: (1) The marks are not sufficiently similar in terms of their appearance and overall commercial impression so that confusion as to the source of the goods/services offered under the respective marks is likely to result. *See In re Cook Med. Tech. LLC*, 105 USPQ2d 1377, 1381 (TTAB 2012); (2) There was unequivocally no intent to misappropriate the source of course materials as coming from Surgical Instruments or in using Da Vinci Degree in association with Opposer's Da Vinci surgical systems. Quite the contrary,

Applicant's use of Da Vinci Degree mark and the good will of LSU educational programs would be tarnished by such an association and thus Applicant would want to avoid any such association. Rather, Applicant's intention is to associate the Da Vinci Degree mark with one of the greatest innovators in history, Leonardo Da Vinci, hoping that it would attract more undergraduate students to its online programs; (3) Opposer has not claimed actual confusion nor has or will Opponent be able to show likelihood of confusion; (4) Opposer markets sophisticated surgical robotic instruments and it's mark are registered under Class 010 are very different from Applicant's use of the Da Vinci Degree mark under Class 041, in connection with providing courses of instruction at the college level for undergraduate students interested in seeking a college degree that "fuses together technical or business -related knowledge and skill sets with outcomes gained from the humanities, social sciences, fine and performing arts." See https://online.lsu.edu/online-degree-programs/davinci-degrees/ ; (5) Opposer's customers, highly skilled healthcare specialists, and Applicant's customers, post-traditional and non-traditional undergraduate students, are distinct and sophisticated enough to discern between Applicant's Da Vinci Degree mark and Opposer's Da Vinci marks and presume, quite obviously, that Da Vinci in Da Vinci Degree is meant to be a suggestion or reference to the great innovator, Leonardo Da Vinci, rather than presume LSU intended an association with a random surgical instruments company, Opposer being just one of many companies that rely on Da Vinci's namesake in their marks (Compare with FIU vs. FNU, 800 F.3d 1242 (11 Cir., 2016)(Finding that student's looking for college to attend are sophisticated enough because of the nature, importance and size of investment in college education and would be able to distinguish Florida International University's "FIU" mark and Florida National University's "FNU" marks).

7. There is **no dilution** of Opposer's marks or potential for dilution from Applicant's use of the Da Vinci Degree mark as (1) the marks are not similar despite the use of Da Vinci as they differ in sound, appearance, manner of use or placement; (2) Opposer's marks are not strong or distinctive, are not "famous" and thus should be afforded little weight as there are several registered marks

that are within Opposer's own Class 010 that include "Da Vinci" (See Reg. No. 4,265,114 "Da Vinci"), Reg. No. 4,486,656 "Da Vinci Facelift"), Reg. No. 3,751,705 ("Da Vinci") and there are numerous marks for educational services that also include "Da Vinci". (Active third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services). *See, e.g.*, *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015); (3) Opposer's use of Da Vinci has been exclusively related to its surgical and robotics instruments and any instructional materials Opposer provides are better characterized as User Guides for trained highly specialized surgeons and technicians on how to operate their machines; and (5) Applicant's intention is to associate Da Vinci Degree with the great innovator and artist Leonardo Da Vinci and not a random surgical instrument company. *See* 15 U.S.C. 1125(c)(2)(A) and (B).

8. **There is no false suggestion of connection with Opposer**. Opposer admits under Paragraph 32 of its Amended Opposition that there is no connection "in any way with Applicant or the proposed use by Applicant of the DaVinci Degree mark." Nevertheless, Opposer argues that the "fame a reputation of Opposer is such a nature that a connection with Opposer will be presumed when Applicant's Da Vinci Degree mark is used on or with or to promote educational services and that this would disparage Opposers by the false connection or bring Opposer into disrepute. Contrary to Opposer's position, its mark has not gained such distinction as to entitle it to such broad protection. There are several marks within Opposer's own classification that use Da Vinci in their marks (See Reg. No. 4,265,114 "Da Vinci"), Reg. No. 4,486,656 "Da Vinci Facelift"), Reg. No. 3,751,705 ("Da Vinci")). Opposer and Defendant provide completely different products and services and serve very different markets and customers. Opposer is a provider of digital robotic surgical instruments to highly skilled professionals including surgeons, nurses, and technicians with advanced degrees and training. By contrast, LSU is a state supported institution

of higher education. While Opponent's Da Vinci surgical systems are currently in use at several LSU medical campuses, those campuses do not offer undergraduate level courses and regardless, the Da Vinci Degree is being marketed for online education with course offerings designed for post-traditional and non-traditional undergraduate students. There is no basis to presume that LSU's customers and Opponents customers are the same, or that LSU target customers, undergraduate students, would be aware of the existence of Oppposer's Da Vinci surgical machines to make sure a connection with LSU's use of the Da Vinci Degree mark. (Compare with FIU vs. FNU, 830 F.3d 1242 (11th Cir. 2016)(Florida National Universities "FNU" mark did not infringe Florida International University's "FIU" mark, FNU students are mostly older students seeking associates degrees whereas FIU students are predominantly seeking undergraduate degrees are not so related as to cause confusion with sophisticated consumers). It is worth noting that while Opponent's provides instructional materials, these instructional materials are ancillary to its main products better characterized as "how to" manuals that educate physicians, nurses and technicians how to operate Opposer's specific devices rather than providing more generalized education on medical devices. Further, Opposer is not authorized to grant degrees and could not compete in Applicant's market; and as a state supported institution of higher education, Applicant does not engage in the types of commercial activity that Opposer does. LSU, on the other hand, is using and desires to continue using the Da Vinci Degree mark in connection with offering a variety of undergraduate level courses with a mixture of art and science, as exemplified by the great Leonardo Da Vinci.

WHEREFORE, Applicant, for good cause shown, respectfully moves this Board to set aside the entry of default against Applicant and allow the proceeding to continue on the merits, and to provide such other relief as the Board deems appropriate.

Dated: January 31, 2020

Respectfully submitted,

By /s/ Andrew Maas

Andrew Maas

Authorized Representative of Record for Applicant
BOARD OF SUPERVISORS OF
LOUISIANA STATE UNIVERSITY AND
AGRICULTURAL AND MECHANICAL COLLEGE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing APPLICANT'S ANSWER AND AFFIRMATIVE DEFENSES TO OPPOSER'S AMENDED NOTICE OF OPPOSITION has been served on INUITIVE SURGICAL, INC. by forwarding said copy on January 31, 2020, via email to: Michelle Kahn at the email addresses mkahn@sheppardmullin.com, pmarquez@sheppardmullin.com, sftmdocket@sheppardmullin.com, and a complete copy is being deposited with the United States Postal Service, postage prepaid, first class mail, in an envelope addressed to:

Michelle D. Kahn
Sheppard Mullin
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111

Signature: /s/Andrew Maas
Andrew Maas