

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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EJW/tdc

July 14, 2021

Opposition No. 91265968

Nexus New Media Corp

v.

Bigfoot Ventures LLC

ELIZABETH J. WINTER, INTERLOCUTORY ATTORNEY:

The Board notes Applicant's response (filed January 22, 2021) to the Board's January 5, 2021 notice of default. 4-5 TTABVUE. Applicant explains that the delay in filing an answer was due to "the undersigned and sole legal representative of the Respondent being significantly impacted by the restrictions caused by the 'Covid Pandemic,' restricting travel and availability of office staff, resulting in severe delays of mail forwarding." 5 TTABVUE 2.¹ Additionally, Applicant states that its principal left the United States in May 2020 with his family, and is presently based in Taiwan Republic of China, without any international travel due to fear of being impacted by

¹ Citations to the record or briefs in this order include citations to the publicly available documents on the Trademark Trial and Appeal Board Inquiry System (TTABVUE), the Board's electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry. All citations to documents contained in the TTABVUE database are to the downloadable .pdf versions of the documents in the USPTO TTABVUE Case Viewer. Parties should use the same method to refer to the record in their submissions to the Board.

the deadly disease. 5 TTABVUE 2. For that reason, states Applicant, it only became aware of the notice of opposition in January 2021, and “needed some time to familiarize himself with the online systems and procedures to gain access to the proceedings.” *Id.*

As a general rule, the Board will find good cause to set aside a defendant’s default where the defendant’s delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where defendant has a meritorious defense. *See Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991). Moreover, because it is the policy of the Board to decide cases on their merits, the Board is reluctant to enter default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant. *See Paolo’s Associates Limited Partnership v. Paolo Bodo*, 21 USPQ2d 1899 (Comm’r 1990).

Here, the record does not show that Applicant’s failure to timely answer the notice of opposition was willful or in bad faith, or that Opposer will suffer prejudice given that this proceeding is in its early stages. Further, Applicant responded promptly to the notice of default, therefore, the delay occasioned by Applicant’s default was minimal.

However, Applicant did **not** submit an answer from which the Board could determine whether it has a meritorious or non-frivolous defense. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 312.02 (2021) (“The showing of a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint.”).

In view of the foregoing, Applicant's motion to set aside the notice of default is **DENIED without prejudice**. Nonetheless, although the notice of default remains pending, to the extent Applicant requests an extension of time to file an answer, said motion is **granted**.

Accordingly, **IT IS ORDERED** that Applicant is allowed until **AUGUST 16, 2021**, to submit an answer to Opposer's notice of opposition, 1 TTABVUE, **failing which default judgment may be entered against Applicant, the opposition may be sustained, and registration to Applicant refused**. See *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991) (the two other factors having been shown, applicant was allowed time to show meritorious defense by submission of answer). If Applicant submits a timely answer, the notice of default will likely be discharged.

Trial Schedule Reset

Applicant's answer² to the notice of opposition is due **August 16, 2021**. An answer must be filed through ESTTA, the Board's Electronic System for Trademark Trials and Appeals. See Trademark Rule 2.106(b)(1).

The answer due date, discovery conference, disclosure, discovery and trial dates are reset as follows:

Time to Answer	8/16/2021
Deadline for Discovery Conference	9/15/2021
Discovery Opens	9/15/2021

² Information regarding how to file an answer and other relevant information concerning Board proceedings may be found at the end of this order.

Initial Disclosures Due	10/15/2021
Expert Disclosures Due	2/12/2022
Discovery Closes	3/14/2022
Plaintiff's Pretrial Disclosures Due	4/28/2022
Plaintiff's 30-day Trial Period Ends	6/12/2022
Defendant's Pretrial Disclosures Due	6/27/2022
Defendant's 30-day Trial Period Ends	8/11/2022
Plaintiff's Rebuttal Disclosures Due	8/26/2022
Plaintiff's 15-day Rebuttal Period Ends	9/25/2022
Plaintiff's Opening Brief Due	11/24/2022
Defendant's Brief Due	12/24/2022
Plaintiff's Reply Brief Due	1/8/2023
Request for Oral Hearing (optional) Due	1/18/2023

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at

final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing. **Note:** Parties are strongly encouraged to check the entire document before filing.³ The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the [ESTTA help](#) webpage.

THE FOLLOWING INFORMATION ON BOARD PROCEEDINGS IS PROVIDED AS A COURTESY TO APPLICANT.

Nature of an Opposition Proceeding

An *inter partes* proceeding before the Board is similar to a civil action in a Federal district court. There are pleadings, a wide range of possible motions; discovery (a party's use of discovery depositions, interrogatories, requests for production of

³ To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.

documents and things, and requests for admission to ascertain the facts underlying its adversary's case), a trial, and briefs, followed by a decision on the case. The Board does not preside at the taking of testimony. Rather, all testimony is taken out of the presence of the Board during the assigned testimony, or trial, periods, and the written transcripts thereof, together with any exhibits thereto, are then filed with the Board. **No paper, document, or exhibit will be considered as evidence in the case unless it has been introduced in evidence in accordance with the applicable rules.**

Legal Representation Is Strongly Encouraged

It should also be noted that while Patent and Trademark Rule 10.14 permits any person to represent itself, or him or herself, it is generally advisable for a person (including an entity) who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition or cancellation proceeding to secure the services of an attorney who is familiar with such matters. The U.S. Patent and Trademark Office cannot aid in the selection of an attorney.

It is recommended that Applicant obtain a copy of the latest edition of Title 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice. These rules may be viewed at the USPTO's Trademarks page: <https://www.uspto.gov/trademark/laws-regulations>. The Board's main webpage, <https://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board>, includes information on the Trademark Rules applicable to Board proceedings, on the Board's online systems, Alternative Dispute Resolution (ADR), Frequently

Asked Questions about Board proceedings, and a web link to the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”).⁴ Further, all Board proceedings and other information regarding the Trademark Trial and Appeal Board may be accessed at the following URLs: <http://ttabvue.uspto.gov/ttabvue/> and <http://www.uspto.gov/trademarks/process/appeal/index.jsp>.

Form of Answer

Applicant must file an answer in response to the notice of opposition. Said answer must comply with Federal Rule of Civil Procedure 8(b). Fed. R. Civ. P. 8(b) provides, in part:

A party shall state in short and plain terms the party’s defenses to each claim asserted and shall **admit or deny** the averments upon which the adverse party relies. *If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial.* Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder.

The notice of opposition filed by Opposer herein consists of twelve (12) numbered paragraphs setting forth the bases of Opposer’s claim(s) of damage. In accordance with Federal Rule 8(b), Applicant must answer the notice of opposition by admitting or denying the allegations contained in each paragraph. Ordinarily, the applicant or respondent (the defending party) will use the same paragraph numbering format found in the complaint (notice of opposition or petition to cancel), *i.e.* in this case, 1-12. If Applicant is without sufficient knowledge or information on which to form a

⁴ The TBMP may be accessed at the following URL: <https://tbmp.uspto.gov/RDMS/TBMP/current#/current/tbmpd0e18.html>.

belief as to the truth of any one of the allegations, it should so state and this will have the effect of a denial.

Electronic Submissions to the Board

All submissions in Board proceedings must be made via ESTTA, the Electronic System for Trademark Trials and Appeals, and must be in compliance with Trademark Rules 2.126(a) and 2.126(b). *See* TBMP § 110.01. The ESTTA user manual, ESTTA forms, and instructions for their use are located at <http://estta.uspto.gov/>.

Requirement for Service on Adverse Party of All Papers Filed

Trademark Rules 2.119(a) and (b) require that every paper filed in the Patent and Trademark Office in a proceeding before the Board must be served upon the attorney for the other party, or on the party if there is no attorney, and proof of such service must be made before the paper will be considered by the Board. Consequently, copies of all papers which Applicant may file in this proceeding (including for Applicant, the answer required herein) must be accompanied by “proof of service” of a copy on the adverse party or the adverse party’s counsel if one is appointed.

“Proof of service” usually consists of a signed, dated statement attesting to the following matters: (1) the title or nature of the paper being served, (2) the method of service (*i.e.*, electronic mail), (3) the person being served and the email address used to effect service, and (4) the date of service. This written statement should take the form of a “certificate of service” which should read as follows:

The undersigned hereby certifies that a true and correct copy of the foregoing [insert title of document] was served upon Opposer by

forwarding said copy, via email to: [insert email address].

The certificate of service must be signed⁵ and dated.

References to TTABVUE⁶ in Board orders

Citations to the record or briefs in Board orders include citations to the publicly available documents on TTABVUE, the Board's electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry. All citations to documents contained in the TTABVUE database are to the downloadable .pdf versions of the documents in the USPTO TTABVUE Case Viewer.⁷

All Parties Must Comply with Board Deadlines

While it is true that the law favors judgments on the merits wherever possible, it is also true that the Patent and Trademark Office is justified in enforcing its procedural deadlines. *Hewlett-Packard v. Olympus*, 18 USPQ2d 1710 (Fed. Cir. 1991).

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel. *See Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020, at *1 (TTAB 2020) (quoting TBMP

⁵ An electronic signature comprises a forward slash, "/", placed before and after the typed name of the person actually signing the document. *See* Trademark Rule 2.193; *see also* TBMP §§ 106.02 and 106.03.

⁶ The Trademark Trial and Appeal Board Inquiry System.

⁷ Parties should use the same method to refer to the record in their submissions to the Board.

Section 114.01, and noting that compliance with the Trademark Rules of Practice, and where applicable, the Federal Rules of Civil Procedure and the Federal Rules of Evidence, is required of all parties even those who assume the responsibility and risk of representing themselves).

Applicant's Correspondence Address

Applicant is reminded that it is its responsibility to ensure that the Board⁸ has its current correspondence address, including email address and telephone number. *See* TBMP § 117.07 (If a party fails to notify the Board of a change of address, with the result that the Board is unable to serve correspondence on the party, default judgment may be entered against the party).

General Information on Discovery Conferences

Applicant is referred to the Board's institution order in this proceeding and to the following URL:

http://www.uspto.gov/trademarks/process/appeal/RULES08_01_07.pdf, see, e.g., pp. 42245, 42246, 42248 and 42252.

During the conference, the following topics must be discussed:

- (1) the nature of and basis for their respective claims and defenses;
- (2) the possibility of settling the case or at least narrowing the scope of claims or defenses, and;
- (3) arrangements relating to disclosures, discovery and introduction of evidence at trial, should the parties not agree to settle the case.

⁸ When an *inter partes* proceeding is not pending before the Board, the registrant must maintain a current address with the Trademark Office.

Either party may request the participation of the Board in the discovery conference.

See Trademark Rule 2.120(a)(2), 37 C.F.R. § 2.120(a)(2).

Information on Initial Disclosures

Applicant is referred to TBMP § 401.02 and to the following web addresses to obtain information regarding initial disclosures:

http://www.uspto.gov/trademarks/process/appeal/RULES08_01_07.pdf and to

<http://edocket.access.gpo.gov/2006/pdf/06-197.pdf> or to

http://www.uspto.gov/trademarks/process/appeal/RULES01_17_06.pdf. *See* Notice

of Final Rulemaking (“Miscellaneous Changes to Trademark Trial and Appeal

Board Rules”) in the Federal Register, 72 Fed. Reg. 147 (August 1, 2007) and 71

Fed. Reg. 10, 2501 (January 17, 2006).