

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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RSC

May 12, 2022

Opposition No. 91273945

*Beeline GmbH*

*v.*

*Nanci Ceston, Michael G. Cestone, Michael J. Cestone, Frank Cestone and Gianna Cestone*

**Rebecca Stempien Coyle, Interlocutory Attorney:**

On March 4, 2022, the Board issued a notice of default to Applicants for failure to file an answer to the notice of opposition, or in the alternative, to file a motion to extend time to file an answer. (4 TTABVUE). On March 21, 2022, one of the Applicants, Michael J. Cestone, filed a response to the notice of default. (5 TTABVUE). On May 3, 2022, in response to the Board's order of May 2, 2022, all of the joint Applicants submitted a response to the notice of default, including a "response to opposition". (7 TTABVUE).

Default may be discharged upon a defendant's showing of good cause. Fed. R. Civ. P. 55(c). Good cause is established when it is shown that: (1) the late filing was not the result of willful conduct or gross neglect; (2) acceptance of the late answer would not prejudice the plaintiff; and (3) the defendant has a meritorious defense to the action. *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556,

1557 (TTAB 1991); *see also Delorme Publishing Co. Inc. v. Eartha's Inc.*, 60 USPQ2d 1222, 1223 (TTAB 2000); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 312.02 (2021).

The determination of whether default judgment should be entered against a party lies within the sound discretion of the Board. *See, e.g., Identicon Corp. v. Williams*, 195 USPQ 447, 449 (Comm'r 1977); *see also* TBMP § 312.02. In exercising its discretion, the Board is mindful of the law's preference for deciding cases on their merits. *See Paolo's Assocs. L.P. v. Bodo*, 21 USPQ2d 1899, 1902 (Comm'r 1990); *see also DeLorme Publ'g Co.*, 60 USPQ2d at 1223; *Thrifty Corp. v. Bomax Enters.*, 228 USPQ 62, 63 (TTAB 1985). Accordingly, the Board generally is reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve doubt on the matter in favor of the defendant. *See Paolo's*, 21 USPQ2d at 1902; TBMP § 312.02.

The delay in this case has been minimal. It seems extremely unlikely that any cognizable prejudice could have resulted therefrom. Additionally, Opposer has not responded to Applicants' response nor is there anything in the record indicating Opposer would be prejudiced.<sup>1</sup> Such a brief delay, by itself, also strongly suggests that the late filing was not the result of willful conduct or gross neglect, and, in fact, there is no evidence of willful conduct or gross neglect. In its response Applicants contend their delay was due to their lack of awareness of "what precise action to take" in responding and the need to take "ample time" to "contemplate each claim presented

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<sup>1</sup> Mere delay, without more, does not establish prejudice *See, e.g., DeLorme*, 60 USPQ2d at 1224 (no prejudice where plaintiff did not allege that witnesses or evidence became unavailable due to the passage of time, or that it had suffered any other substantial prejudice).

by Opposer”. (7 TTABVUE 2-3). Applicants’ explanation of the reason for their delay in filing an answer sufficiently establishes that Applicants’ delay was not the result of willful inattention or bad faith. Finally, Applicants’ have demonstrated by their answer that they have a meritorious defense to the notice of opposition.<sup>2</sup>

In view of the foregoing, Applicants have established good cause for discharging their default, and therefore the notice of default is **set aside**. Fed. R. Civ. P. 55(c).

Turning to Applicants’ answer, while the Board **accepts** the joint answer filed on May 3, 2022, (7 TTABVUE 4-9) it provides the following clarification. The Board construes Applicants’ assertions beginning with paragraph 15 of their answer (under the heading “Applicants’ Response: Appendix”) as affirmative defenses.<sup>3</sup>

Proceedings are **resumed**, and conference, disclosure, discovery and trial dates are reset on the following schedule:

Deadline for Discovery Conference	6/11/2022
Discovery Opens	6/11/2022
Initial Disclosures Due	7/11/2022
Expert Disclosures Due	11/8/2022
Discovery Closes	12/8/2022
Plaintiff’s Pretrial Disclosures Due	1/22/2023
Plaintiff’s 30-day Trial Period Ends	3/8/2023
Defendant’s Pretrial Disclosures Due	3/23/2023
Defendant’s 30-day Trial Period Ends	5/7/2023
Plaintiff’s Rebuttal Disclosures Due	5/22/2023
Plaintiff’s 15-day Rebuttal Period Ends	6/21/2023
Plaintiff’s Opening Brief Due	8/20/2023

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<sup>2</sup> 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. *DeLorme*, 60 USPQ2d at 1224.

<sup>3</sup> The notice of opposition filed by Opposer consists of fourteen (14) numbered paragraphs. Applicants have responded to each of these paragraphs by number.

Defendant's Brief Due	9/19/2023
Plaintiff's Reply Brief Due	10/4/2023
Request for Oral Hearing (optional) Due	10/14/2023

**❖ Information for Pro Se Litigants**

The Board notes that Applicants currently are representing themselves in this proceeding. While Patent and Trademark Rule 11.14 permits a party to represent itself, it is strongly advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in inter partes proceedings before the Board to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney. *See* TBMP § 114.02.

Trademark Rules 2.119(a) and (b) require that except for the original notice of opposition, every submission filed in a proceeding before the Board must be served upon the other party or parties, and proper proof of such service must be made before the submission will be considered by the Board. Accordingly, all submissions filed in this proceeding must be accompanied by a statement, signed by the attorney or other authorized representative, attached to or appearing on the original submission when filed, clearly stating the date and manner in which service was made, the name of each party or person upon whom service was made, and the email address or address. *See* TBMP § 113.03. Service must be made by email unless otherwise stipulated, or unless the filing party has satisfied the requirements for another method of service as set forth in Trademark Rule 2.119(b). The statement, which will be accepted as

prima facie proof of service, must be signed and dated, and should take the form of a Certificate of Service as follows:

I hereby certify that a true and complete copy of the foregoing (insert title of submission) has been served on (insert name of opposing counsel or party) by forwarding said copy on (insert date of mailing), via email (or insert other appropriate method of delivery) to: (set out name, address, and email address of opposing counsel or party).

Signature\_\_\_\_\_

Date\_\_\_\_\_

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 (b). *See* TBMP § 110.01. The ESTTA user manual, ESTTA forms, and instructions for their use are at <http://estta.uspto.gov/>.

It is recommended that any pro se party be familiar with the latest edition of Chapter 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice. Parties should also be familiar with the Trademark Trial and Appeal Board Manual of Procedure (TBMP), available at <http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>, the TTABVUE system for viewing the record for all Board proceedings, available at <http://ttabvue.uspto.gov/ttabvue/>, and the Standard Protective Order, available at [https://www.uspto.gov/sites/default/files/documents/Standard%20Protective%20Order\\_02052020.pdf](https://www.uspto.gov/sites/default/files/documents/Standard%20Protective%20Order_02052020.pdf).

**Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is required of all parties,**

**whether or not they are represented by counsel.** *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, n.2 (TTAB 2006), *aff'd unpub'd*, 240 Fed. Appx.865 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1109 (2008).

This inter partes proceeding is similar to a civil action in a federal district court. The parties file pleadings and a range of possible motions. This proceeding includes designated times for disclosures, discovery (discovery depositions, interrogatories, requests for production of documents and things, and requests for admission, to ascertain the facts underlying an adversary's case), a trial period, and the filing of briefs. Trademark Rules §§ 2.122–2.125 govern the trial evidence and testimony. The Board does not preside at the taking of testimony; 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. Additionally, the testimony of witnesses in inter partes cases may be submitted in the form of an affidavit or a declaration pursuant to 37 C.F.R. § 2.20 and in conformance with the Federal Rules of Evidence, filed during the proffering party's testimony period, subject to the right of any adverse party to elect to take and bear the expense of oral cross-examination of that witness. *See* Trademark Rule 2.123(a)(1), 37 C.F.R. § 2.123(a)(1). No paper, document, or exhibit will be considered as evidence unless it has been introduced in evidence in accordance with the applicable rules.

