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

Proceeding no.	91281739
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Attachments	2023.02.03 - Monkey Labs Motion to Set Aside Default Judgment.pdf(190749 bytes) 2023.02.03 - Declaration of N. Sheriff.pdf(108662 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

THE NEW YORK TIMES COMPANY, a New York corporation, Opposer, v. MONKEY LABS, INC., a Delaware corporation, Applicant.	Opposition No. 91281739 Re: **WORDLE** Application Serial No. 97208238 Filed January 7, 2022 Published November 8, 2022

MOTION TO SET ASIDE NOTICE OF DEFAULT

Applicant Monkey Labs, Inc. ("Monkey Labs" or "Applicant") respectfully requests that the Court set aside the Notice of Default entered on January 4, 2023 ("Notice of Default").

INTRODUCTION AND PROCEDURAL HISTORY

On January 7, 2022, Monkey Labs filed a trademark application for the mark, "Wordle." That application was published on November 8 and subsequently opposed by The New York Times Company ("New York Times" or "Opposer") on November 14, 2022, claiming that "it will be damaged if a registration issues[.]" (Notice of Opposition at 1.) Due to the difficulties of operating a small company – including debilitating, long-term illness suffered by the principal of Applicant – and in its attempts to procure counsel with expertise in defending trademark oppositions, Applicant was delayed in responding to the Notice of Opposition. The Trademark Trial and Appeal Board (the "Board") issued a Notice of Default on January 4, 2023, granting

Applicant thirty days "to show cause why judgment should not be entered against Applicant[.]" (Notice of Default at 1.) Applicant now responds to the Notice of Default and believes there is good cause to set aside the default.

ARGUMENT

I. The Board Sets Aside Default for "Good Cause," Which is Liberally Construed in Favor of Holding a Trial on the Merits

It is the policy of the Board to set aside notices of default so long as there is a "satisfactory showing of good cause[.]" Trademark Trial & App. Bd. Man. of Proc. 312.02 (citing Fed. R. Civ. Proc. 55(c), which allows a court to "set aside an entry of default for good cause"). This determination "lies within the sound discretion of the Board." *Id*. When determining whether to enter default judgment, "the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits" and is therefore "very reluctant to enter default judgment for failure to timely answer, and tends to resolve any doubt on the matter in favor of the defendant." *Id*.; *see also* C. Wright, A. Miller, & M. Kane, Fed. Prac. & Proc. § 2693 (stating that federal courts view default judgments "with disfavor . . . because they favor trials on the merits with full participation by all the parties"); *CTRL Sys. Inc. v. Ultraphonics of North America Inc.*, 52 U.S.P.Q.2d 1300, 1999 WL 959434, at *1 (T.T.A.B. 1999) ("The law favors determination of cases on the merits"). Given the Board's "reluctan[cy] to grant judgments by default and tend[ency] to resolve doubt in favor of setting aside default," a motion to set aside default "is usually granted" so long as there is good cause. *See Paolo's Assoc. Ltd. P'ship v. Bodo*, 21 U.S.P.Q.2d 1899, 1990 WL 358312, at *3 (T.T.A.B. 1990).

There are three elements that determine whether there is "good cause":

1. "the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant,"

2. "the plaintiff will not be substantially prejudiced by the delay," and
3. "the defendant has a meritorious defense to the action."

Id.

Under Prong 1 of the Good Cause Test, "failure to timely file the answer . . . due to inadvertence on the part of applicant's counsel" without evidence of "willful conduct or gross neglect" is enough to set aside default so long as there is "minimal prejudice" and a "meritorious defense." *See Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 U.S.P.Q.2d 1556, 1991 WL 332557, at *2 (T.T.A.B. 1991). In contrast, the Board refuses to set aside default only when there is "willful conduct and gross neglect," such as consciously choosing to ignore a notice of opposition by failing to respond for six months after receiving the notice of default. *See Delorme Publ'g Co. v. Eartha's Inc.*, 60 U.S.P.Q.2d 1222, 2000 WL 33321172, at *2 (T.T.A.B. 2000); *see also Gucci America, Inc. v. Gold Ctr. Jewelry*, 48 U.S.P.Q.2d 1371, 158 F.3d 631, 635 (2d Cir. 1998) (citing the district court's finding that defendants "made deliberate decisions not to respond" to support its decision to enter default judgment); *CTRL Sys. Inc.*, 1999 WL 959434, at *3–4 (stating that a trademark application opposer's failure to seek substitute counsel for months supported an entry of default against the opposer).

When assessing whether there is substantial prejudice under Prong 2, the Board considers whether the party claiming prejudiced has filed a motion for default judgment, whether witnesses or evidence is unavailable due to the passage of time, the length of the delay. *See Delorme Publ'g*, 2000 WL 33321172, at *2 (noting that the lack of a motion for default judgment and no claim that witnesses or evidence would be unavailable supporting a finding that there was no prejudice to the opposer); *Fred Hayman*, 1991 WL 332557, at *2 (stating that a nine-day delay would cause minimal prejudice to the opposer).

And under Prong 3, any "meritorious defense" need only be "a plausible response to the allegations contained in the notice of opposition[.]" *Delorme Publ'g*, 2000 WL 33321172, at *2. To be "meritorious," the answer need only be "not frivolous[.]" *Fred Hayman*, 1991 WL 332557, at *2. In general, whether a defense is meritorious "must be determined on a case-by-case basis and with an awareness of the policies behind default judgments and the circumstances under which they should be set aside." C. Wright, A. Miller, & M. Kane, Fed. Prac. & Proc. § 2697 (4th ed.).

II. Monkey Labs Meets the Board's Liberal "Good Cause" Standard

Applicant here meets the elements of the Good Cause Test because Monkey Labs did not deliberately delay its response to the Opposition, a delay of mere weeks could not possibly prejudice Opposers, and Monkey Labs' Answer is non-frivolous and contains valid defenses.

First, Applicant's lack of response to the Notice of Opposition is not due to willful conduct or gross neglect. Applicant is a small company with limited resources and required a significant amount of time to procure counsel with experience defending trademark oppositions. (i of N. Sheriff ¶¶ 1–2, 5.) In addition, the chronic pain and severe illness experienced by Mr. Sheriff, the [X] of Monkey Labs, made it difficult for Monkey Labs to obtain counsel and muster a response to the Opposition. (Declaration of N. Sheriff ¶¶ 3–5.) Crucially, the delay here was less than a month and was not an attempt to unnecessarily postpone these proceedings. This is not a case where the Applicant waited six whole months to response. *See Delorme Publ'g*, 2000 WL 33321172, at *3. Given Applicant's status as a small company, the personal physical ailments suffered by Mr. Sheriff, and the delays resulting from Applicant's attempts to procure counsel to defend this action, the Board should find that Applicant's late response is not due to willful conduct or gross neglect.

Second, Opposers will experience no prejudice if the Board sets aside the default. The

delay in this case was a matter of mere weeks, which is a drop in the bucket when compared to the ocean that is litigation. There is no reason to believe that Opposer incurred significant additional costs or will be unable to procure the necessary evidence or witnesses. Opposer has also not yet filed any Motion for Default Judgment, further indicating that they have not experienced prejudice as a result of Applicant's late Answer. Because there is no prejudice to Opposer, the Board should find good cause to set aside the Notice of Default.

Third, Applicant has multiple meritorious defenses against the New York Times' Opposition. For instance, Applicant's goods and services bearing the Mark are significantly different from the goods and services described in the Opposition and are distinctive enough as not to create a likelihood of confusion between the two products. In addition, Opposer's Opposition relies on incorrect factual and legal conclusions such as the lack of a "meaningful difference between a game played through a mobile application and a web-based game." (*See* Notice of Opposition ¶ 21.) Applicant's Answer should also be seen in light of the Board's easily-met standard for what is considered "meritorious." Applicant need only proffer a "non-frivolous" answer to Opposer's allegations. *See Fred Hayman*, 1991 WL 332557, at *2. Because Applicant's Answer meets this minimum standard, the Board should set aside the default.

Importantly, the Board is "very reluctant to enter default judgment for failure to timely answer, and tends to resolve any doubt on the matter in favor of the defendant" due to its preference to resolve cases on the merits rather than disposing of them procedurally. Trademark Trial & App. Bd. Man. of Proc. 312.02. The short delay in response in the present case as well as the lack of opportunity for Applicant to be heard should the default stand justify setting aside default in this case. Furthermore, a ruling upholding the default would be in opposition to the Board's own rules and the body of case law interpreting those rules.

CONCLUSION

Given the presence of good cause and the Board's clear policy of deciding cases on the merits, the Board should set aside its Notice of Default in this case.

Dated: February 3, 2023

Respectfully Submitted,

By: /Chad S. Pehrson/

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CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023, I filed the foregoing APPLICANT'S ANSWER AND AFFIRMATIVE DEFENSES TO NOTICE OF OPPOSITION via TTAB's ESTAA electronic filing system, which effectuated service on all counsel of record.

/Chad S. Pehrson/
Chad S. Pehrson

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DECLARATION OF NICHOLAS SHERIFF

I, Nicholas Sheriff, under penalty of perjury, declare and state as follows:

1. I am the owner and managing principal of Monkey Labs, Inc. ("Monkey Labs").

2. Monkey Labs is a small company with no other employees that can manage this trademark office proceeding.

3. I have been experiencing chronic pain resulting from skin cancer over the past nine years.

4. I have contracted COVID-19 three times in the past three years, which has exacerbated the effects of the cancer and the resulting pain.

5. These factors have made it extremely difficult to manage my responsibilities at Monkey Labs, including responding to The New York Times Company's ("New York Times") Notice of Opposition and procuring counsel to do the same.

6. I am committed to resolving this matter and will comply with future deadlines related to the Notice of Opposition.

Dated: February 3, 2023

/Nicholas Sheriff/
Nicholas Sheriff

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2023, I filed the foregoing DECLARATION OF NICHOLAS SHERIFF via TTAB's ESTAA electronic filing system, which effectuated service on all counsel of record.

/Chad S. Pehrson/
Chad S. Pehrson