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

TANGO CHIX PRODUCTIONS, INC.	:	
Petitioner,	:	
v.	:	**Cancellation No. 92032958**
	:	**(as consolidated w/ 92043001 and**
OLIVE INDUSTRIES, LTD.	:	**92043008**
Registrant.	:	

RESPONSE TO ORDER TO SHOW CAUSE

TANGO CHIX PRODUCTIONS, INC. ("Tango Chix"), files this response to the Board's Notice of Default and Order to Show Cause why judgment should not be entered against Tango Chix in accordance with Rule 55(b). As demonstrated in more detail below, there is good cause to set aside the default.

Background

The Board's Notice of Default pursuant to Rule 55(a) and Order to Show Cause ("Notice") is the last activity in a procedurally complicated set of related cancellation proceedings. The early history of the proceedings is set out in the Board's Order dated September 3, 2004 (to which the Board's attention is respectfully invited), which set aside the default which had been entered against Olive Industry, Ltd. ("Olive") in the original cancellation proceeding filed by Tango Chix against Olive's registration, Cancellation No. 92032958.

In addition to Tango Chix' original cancellation proceeding, Olive's filed two separate cancellation proceedings against two registrations owned by Tango Chix. These two proceedings, Nos. 92043001 and 92043008, were consolidated upon the Board's own initiative by Order dated September 7, 2004.

Thereafter, Olive separately (though simultaneously) moved to: (1) supplement its answer to the Tango Chix petition and for monetary sanctions; (2) to amend and supplement its petitions for cancellation and for monetary sanctions in the consolidated Olive-filed cancellation proceedings; and (3) consolidate all of the proceedings.

By a single Order dated December 14, 2004, the Board decided all three of Olive's separately filed motions. The Board granted the motions to amend and to consolidate, and the proceedings were consolidated under proceeding number 92032958 as the "parent" case - the first filed petition, filed by Tango Chix to cancel Olive's registration. Included in the December 14, 2004 Order was Tango Chix requirement to file answers to the amended petitions within 30 days of the Order. Tango Chix failed to timely answer.

Thus, by mailing dated February 17, 2005, the Board provided notice that no answers had been filed, entered notice of default under Rule 55(a), and allowed Tango Chix 30 days to show cause why default under Rule 55(b) should not be entered

Argument

THERE IS GOOD CAUSE TO SET ASIDE THE NOTICE OF DEFAULT

Under these circumstances, the standard for determining whether default should be entered is the Rule 55(c) "good cause" standard. Fed.R.Civ.P 55(c); Trademark Trial and Appeal Board Manual of Procedure ("TMBP") § 312.01, *citing cases.*

Good cause is usually found where the defendant shows that (1) the plaintiff will not be substantially prejudiced by the delay, (2) the defendant has a meritorious defense, and (3) the delay in filing an answer was not the result of willful conduct or gross neglect. TMBP § 312.02, *citing inter alia Paolo's Associates Ltd. Partnership v. Bodo* 21 U.S.P.Q.2d 1899 (Comm'r 1990). As a general rule, "the courts and the Board are reluctant to grant judgments by default and tend to resolve doubt in favor of setting aside a default, since the law favors deciding cases on their merits. *Id., citing Morris v. Charnin*, 85 F.R.D. 689 (S.D.N.Y. 1980); *Alopari v. O'Leary*, 154 F.Supp. 78 (E.D. Penn. 1957); *Thrifty Corporation v. Bomax Enterprises*, 228 USPQ 62 (TTAB 1985); *Regent Baby Products Corp. v. Dundee Mills, Inc.*, 199 USPQ 571 (TTAB 1978).

1. The plaintiff will not be substantially prejudiced

Tango Chix filed the first of the consolidated proceedings on May 16, 2002. Olive's filed its petitions on February 25, 2004. Following that, Olive's proceeding were suspended pending resolution of a motion to dismiss. The motion to dismiss was decided some six months later. The Board issued the Order which required answers to the amended and supplemental petitions on December 14, 2004.

Given the length of the proceedings to date and the relatively short delay Tango Chix' failure to timely answer has occasioned, there can be no prejudice to Olives. As the Board noted in granting Olive's motion to set aside its default, "prejudice cannot be found from the fact that the defaulting party will be permitted to defend on the merits." Order dated September 3, 2004, *citing Swink v. City of Pagedale*, 810 F.2d 791. Given the short delay and the fact that, regardless of the outcome of Olive's two cancellation proceedings Olive would be required

defend against Tango Chix' petition to cancel, there will be no "loss of evidence, increased difficulties in discovery, or greater opportunity for fraud or collusion," the type of prejudice necessary to deny a motion to set aside a default. Order dated September 3, 2004, *citing Berthelsen v. Kane*, 907 F.2d 617, 621 (6th Cir. 1990).

2. There are meritorious defenses to amended petitions

Olive amended its petitions to add the claim that Tango Chix obtained its registrations fraudulently. More specifically, Olive's alleges that Tango Chix actions leading to the cancellation of Olive's registration constitute fraud and that the Board's Order vacating the default judgment somehow evidences Tango Chix' fraud. In the Board's Order of December 14, 2004, however, the Board noted that "the Board did not find that [Tango Chix] misconduct was fraudulent" and "Olive's references to the vacating of the default judgment under Rule 60(b)(3) as 'the Fraud Determination' are in appropriate and should be avoided."

In any event, at this stage a meritorious defense can be shown by the submission of an answer which denies the salient allegations. *E.g., Fred Hayman Beverly Hills Inc. v. Jaques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991). Submitted simultaneously with this reposes are Tango Chix' answers denying the salient allegations. And as the Board, the courts, and leading scholars have all often commented, allegations of fraud are often please, but seldom proven. *E.g.*, *McCarthy on Trademarks*, § 31:68.

3. The default was not the result of willful conduct or gross neglect

There is simply no evidence from which the Board can conclude that the default was the result of either willfulness or gross neglect. There have been numerous motions and filings. Tango Chix has timely replied to all of its previous obligations and has actively participated in

the proceedings by filing its own motions. And as evidenced by this response and the accompanying answers, Tango Chix intends to continue to actively participate.

Counsel's failure to timely answer, though regrettable cannot be deemed gross neglect. As detailed above, this is a procedural complex proceeding, which is now a consolidation of a single proceeding commenced by Tango Chix and two additional proceeding commenced by Olive. The Board's Order, which established the obligation for the answers, granted Olive's request to consolidate and thus, was the first Order in the newly consolidated matter.

Tango Chix obligation to answer arose from the two consolidated Olive petition. Tango Chix's petition, however, was the first filed proceeding and the "parent" of the consolidation. As such, the consolidated proceedings use the proceeding number of the original Tango Chix proceeding.

It appears that the Board's Order, bearing the original Tango Chix proceeding number and setting the answer date, was matched to the original Tango Chix proceeding file. Olive filed an amended answer in that proceeding, to which no action was required by Tango Chix. Apparently, because no action was required in the original proceeding (the file for which the Board's Order had been matched) the answer date was not docketed. Indeed, the undersigned lead counsel for Tango Chix did not learn of the obligation to file the answers until receipt of the Notice.

Under similar circumstances and under the same standards controlling here, the Board determined that the conduct was not wilful, grossly negligent, or prejudicial. *Paolo's Associates Ltd. Partnership v. Bodo* 21 U.S.P.Q.2d 1899. As the Board explained in *Paolo:*

> Rather, it is entirely possible that the approved request would simply be associated with the file for the cancellation proceeding by a clerk in the office of registrant's

counsel without it ever having been reviewed by counsel, who may have relied on his docketing system to provide him with notice of the due date for his client's answer. Thus, while it may be reasonable to presume, for the sake of argument, that the Board followed its usual practice and mailed to registrant's counsel a copy of the approved extension request, and counsel's office may also be presumed to have received the copy, these presumptions do not necessarily establish actual notice to counsel of the due date for the answer.

And perhaps most importantly, a default would be a grave injustice to Tango Chix. Clearly, as the client, Tango Chix has no direct involvement in the preparation or filing of an answer. Yet, the default would punish Tango Chix. "Where it is the attorney rather than the party itself that is responsible for the failure to properly defend an action, as is true of the instant case, courts are likely to vacate a default." *Id., citing Trust Company Bank v. Tingen-Millford Drapery Company, Inc.*, 119 F.R.D. 21, 22 (E.D.N.C. Raleigh Div. 1987).

CONCLUSION

For the reasons stated, the Notice of default should be set aside.

Respectfully submitted,

Dated: March 18, 2005

LACKENBACH SIEGEL LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the enclosed Response to Order to Show Cause was served on counsel for Petitioner, this day, by first class mail, postage prepaid, addressed to Petitioner's attorneys, as follows:

Val D. Hornstein
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Dated: Westchester, New York
March 18, 2005

Robert B. Golden