

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Baxley

Mailed: May 17, 2005

Cancellation No. **92032958**

TANGO CHIX PRODUCTIONS, INC.

v.

OLIVE INDUSTRIES, LTD.

Cancellation No. **92043001**

Cancellation No. **92043008**

OLIVE INDUSTRIES, LTD.

v.

TANGO CHIX PRODUCTIONS, INC.

**By the Trademark Trial and Appeal Board:**

On April 25, 2005, the Board issued an order wherein, among other things, it entered judgment by default against Tango Chix Productions, Inc. ("Tango Chix") in Cancellation No. 92043008. Tango Chix's timely filed response to the Board's February 17, 2005 notice of default and late filed answers to the amended petitions to cancel in Cancellation Nos. 92043001 and 92043008 subsequently became associated with the proceeding file.<sup>1</sup>

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<sup>1</sup> On or about May 4, 2005, Tango Chix's attorney contacted the Board attorney assigned to the above-captioned consolidated proceedings and stated that a response to the notice of default and answers to the amended petitions to cancel in Cancellation Nos. 92043001 and 92043008 were filed on March 18, 2005. At the

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Accordingly, entry of judgment in Cancellation No. 92043008 is hereby vacated. The Board will consider Tango Chix's response to the notice of default.

In response to the notice of default, Tango Chix contends that its failure to timely file answers to the amended petitions to cancel was the result of its attorney's docketing error which was caused by the fact that, while answers to the amended petitions to cancel were due in Cancellation Nos. 92043001 and 92043008, there were no pending deadlines in Cancellation No. 92032958, the parent case of these consolidated proceedings; that there is no evidence that Olive Industries Ltd. ("Olive") will be prejudiced by setting aside the notice of default; and that it has meritorious defenses by way of the denials set forth in its answers.

The standard for determining whether to set aside a notice of default for failure to timely answer is whether the defendant has shown good cause why default judgment should not be entered against it. See Fed. R. Civ. P. 55(c) *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). Good cause why default judgment should not be entered against a defendant, for failure to file a timely answer to the complaint, is usually

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request of the Board attorney, Tango Chix sent a copy of its March 18, 2005 filing to the Board by facsimile.

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found when the defendant shows that (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. See *Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 USPQ2d 1899, 1902-03 (Comm'r 1990).

The determination of whether default judgment should be entered against a party lies within the Board's sound discretion. In exercising that discretion, the Board is mindful of its policy to decide cases on their merits where possible. Accordingly, the Board only reluctantly enters judgment by default for failure to timely answer. See TBMP Section 312.02 (2d ed. rev. 2004).

After reviewing Tango Chix's response, the Board finds that Tango Chix's delay in filing answers to the amended petitions to cancel was inadvertent in that such delay was caused by its attorney's docketing error.<sup>2</sup> See *Paolo's Associates Limited Partnership v. Paolo Bodo, supra*.

Further, there is no evidence of any prejudice to Olive,

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<sup>2</sup> Nonetheless, contrary to Tango Chix's assertion, the fact that the docketing error was made by its attorney rather than Tango Chix is irrelevant in determining whether to set aside its default. Tango Chix and its attorney share a duty to remain diligent in defending this case. Communication between Tango Chix and its attorney is a two-way affair, and action, inaction or even neglect by Tango Chix's attorney will not excuse its inattention so as to yield it another day in court. See, e.g.,

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such as lost evidence or unavailable witnesses, caused by the late filing of Tango Chix's answers to the amended petitions to cancel. See *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997). In addition, Tango Chix has set forth meritorious defenses by way of the denials set forth in its answer. See *DeLorme Publishing Co v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000). Accordingly, the Board finds that Tango Chix has shown good cause why default judgment should not be entered against it.<sup>3</sup>

In view thereof, the notice of default is set aside. Tango Chix's answers to the amended petitions to cancel in Cancellation Nos. 92043001 and 92043008 are accepted and made of record.

Discovery and trial dates remain as last reset in the April 25, 2005 order.

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*Williams v. The Five Platters, Inc.*, 510 F.2d 963, 184 USPQ 744 (CCPA 1975), *aff'g* 181 USPQ 409 (TTAB 1974).

<sup>3</sup> Notwithstanding the foregoing, Tango Chix is advised that the Board will look with disfavor upon any further failure to comply with deadlines set by the Board or the Trademark Rules of Practice.