

ESTTA Tracking number: **ESTTA66810**

Filing date: **02/16/2006**

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

Proceeding	92043607
Party	Defendant TITA'S INC. TITA'S INC. 1445 Pennsylvania Ave. Miami Beach, FL 33139
Correspondence Address	SCOTT W. ROTHSTEIN, ESQ. ROTHSTEIN ROSENFELDT ADLER 300 S.E. 2ND STREET, SUITE 860 FORT LAUDERDALE, FL 33301
Submission	Opposition/Response to Motion
Filer's Name	Christina M. Kitterman
Filer's e-mail	ckitterman@rra-law.com
Signature	/Christina M. Kitterman/
Date	02/16/2006
Attachments	Response to Mtn Default.pdf (19 pages)

Case: TANTR-001M

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

In Re U.S. Registration No. 2,274,115

Tantra One LLC)	Cancellation No.: 92043607
)	
Petitioner,)	
)	
v.)	
)	
Tita's Inc.,)	
)	
Registrant.)	
)	
)	
)	

RESPONDENT'S RESPONSE TO PETITIONER'S RENEWED MOTION FOR ENTRY OF DEFAULT JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Respondent, TITA'S INC. ("Registrant"), by and through its undersigned counsel, files this, its Response to Petitioner's Renewed Motion for Entry of Default Judgment, and states:

1. It appears that on or about January 27, 2006, Petitioner's counsel served its Renewed Motion for Default. However, the Renewed Motion was never received by Respondent's counsel.
2. Petitioner's motion appears to be based on this Board's Order requiring Respondent to produce certain documents responsive to Petitioner's Request for Production.
3. As acknowledged by Petitioner in its motion, on or about December 27, 2005, Petitioner's counsel agreed to provide Respondent an extension up through and including January 20, 2006, to serve its responsive documents to Petitioner's counsel.
4. Upon granting Respondent's extension, Petitioner also requested an extension up through and including January 30, 2006, to serve **all** of its responses to Respondent's discovery,

which Respondent respectfully granted the extension without the necessity of the Board's intervention. It should be noted that Petitioner has not provided Respondent with any documents more than two weeks after they were due.

5. Apparently, Petitioner's counsel's assistant sent a confirming email correspondence to Respondent's counsel's assistant attempting to confirm the agreed upon due dates for both parties' discovery.¹

6. However, when Respondent's counsel assistant finally received the email correspondences they confusingly read as both parties having mutual extensions to the discovery allowing the "Opposer" until January 30, 2006, to respond to discovery. See correspondences attached hereto as Composite Exhibit "A" and incorporated herein by reference.

7. As such, in reviewing said email confirmations, Respondent's counsel's assistant reasonably believed both parties' discovery responses to be due on January 30, 2006, and calendared it as such.

8. On January 24, 2006, Petitioner's counsel sent the undersigned an email correspondence seeking Respondent's documents.

9. Once the undersigned received Petitioner's correspondence, she sent Petitioner's counsel notice that she believed the documents to be due by January 31, 2006. At such time, Respondent's counsel requested an extension.

10. Further, Respondent's counsel advised Petitioner's counsel that she would be willing to give Petitioner another extension to respond to discovery as she figured Petitioner was waiting to receive Respondent's documents before sending Petitioner's responses.

¹ The emails were not received by the undersigned's assistant until January 18, 2006, as they were automatically sent to her "Junk" email box and not her "Inbox."

11. Despite the undersigned's request for an extension and granting Petitioner another extension, Petitioner's counsel, once again and without conferring with the undersigned, stated he did not want an extension and would be filing a second motion for default due to Respondent's inability serve the documents.

12. In the meantime, Petitioner's counsel served responses to Respondent's discovery requests. However, Petitioner's responses are wholly inadequate as Petitioner did not serve any documents responsive to Respondent's requests. Petitioner simply states that "responsive documents will be provided." However, no documents have been forthcoming. Further, Petitioner responded to several requests with unsupported objections which will be the basis of Respondent's motion to compel.

13. Thus, Petitioner's has failed to fully comply with this Board's order in responding to Respondent's discovery.

14. On or about February 2, 2006, Respondent's counsel attempted to file its motion for enlargement of time to serve its discovery documents. However, Respondent's counsel just received its motion returned by the U.S. Post Office claiming that there was "no such number" as addressed on Respondent's envelope. However, the address is the same address Respondent has always used in sending correspondence to the Board. See Respondent's Motion and returned mail attached hereto as Composite Exhibit "B" and incorporated herein by reference.²

15. On February 15, 2006, Respondent's counsel reviewed the Trademark Trial and Appeal Board's on-line docket to determine the case status and discovered that Petitioner had

² Respondent has re-filed said motion via U.S. Mail and overnight delivery.

filed its Renewed Motion for Default as Respondent had yet to serve its documents responsive to Petitioner's discovery.³

16. Pursuant to Respondent's requested extension, Respondent's counsel has prepared two banker's boxes of discovery documents, which will be served upon Petitioner on February 17, 2006.

17. Despite the ongoing efforts of Respondent to comply with the Board's Order and Respondent's continuous communication with Petitioner, Petitioner's counsel once again deemed it necessary to file another motion for default. The Board should note that prior to Petitioner's first motion for default, Respondent offered to send the documents responsive to the discovery requests and **Petitioner's counsel refused to accept the documents since he would rather file a motion for default than have the action heard on the merits.**

18. Clearly, Petitioner has no intention of litigating the instant action on its merits and is seeking any means necessary to avoid same. In fact, this motion stems from Petitioner's counsel's refusal to grant Respondent's counsel the same professional courtesies that have been bestowed upon him.

19. Registrant will be unfairly prejudiced if this Court grants Petitioner's Renewed Motion for Default as Registrant will fully and adequately comply with this Board's Order by the requested extension date, February 17, 2006. Further, as Registrant is the rightful owner of the mark, it will be deprived of the rights bestowed upon it by the U.S. Congress simply based on Petitioner's lack of reciprocal cooperation and courtesy.

³ Immediately thereafter, Respondent's counsel emailed Petitioner's counsel to notify him that the Renewed Motion for Default had not been received by the undersigned and that Respondent may need an extension of time to respond. Petitioner's counsel has yet to respond.

20. Petitioner will not suffer any prejudice in continuing to litigate the instant cancellation proceeding.

MEMORANDUM OF LAW

“Whenever appropriate, the provisions of the Federal Rules of Civil Procedure relating to discovery shall apply in opposition, cancellation, interference and concurrent use registration proceedings...” 37 C.F.R. § 2.120(a). “Dismissal and default judgment are the harshest sanctions available under Rule 37 and are to be deployed ‘only in rare situations.’” S.E.C. v. Hasho, 134 F.R.D. 74, 76 (S.D.N.Y. 1991); see U.S. Freight Co. v. Penn Central Transp. Co., 716 F.2d 954, 955 (2d Cir.1983) (involving a “continuing saga of dilatory conduct”); Penthouse Int’l, Ltd. v. Playboy Enter., 663 F.2d 371, 388 (2d Cir.1981) (involving perjurious testimony and false representations of counsel against a background of prolonged and vexatious obstruction of discovery); Paine, Webber, Jackson & Curtis, Inc. v. Inmobiliaria Melia de Puerto Rico, Inc., 543 F.2d 3, 6 (2d Cir.1976) (involving willful failure to appear at a deposition for over seven months and failure to produce documents).

Petitioner has not set forth dilatory conduct on behalf of Registrant to warrant granting a default. In fact, Petitioner attaches Registrant’s email communications with Petitioner’s counsel evidencing confusion of due dates and continuous effort to work with Petitioner’s counsel to produce Respondent’s documents. Despite Registrant’s requests, Petitioner, once again, improperly seeks the harshest sanction of default judgment rather than litigate the action on the merits. Further, Petitioner itself has failed to properly respond to Respondent’s discovery. Thus, Petitioner’s contentions are clearly disingenuous and Petitioner should not be entitled to a default due to its own failure to abide by this Board’s order.

The situation in the instant action is akin to that in Hammond v. Lowe's Home Centers, Inc.,

216 F.R.D. 666, 669 - 70 (D. Kan. 2003). In Hammond, the Trial Court held:

The Court first addresses Plaintiffs' contention that Defendant has waived its objections to Plaintiffs' Interrogatories under Federal Rule of Civil Procedure 33(b). This rule provides that "[t]he party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories." Furthermore, "[a]ny ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown." Applying this rule, Defendant's answers and objections to Plaintiffs' First Set of Interrogatories appear untimely, and thus appear waived. Plaintiffs served their First Set of Interrogatories upon Defendant on March 4, 2003. Pursuant to Rule 33(b)(3), the deadline for Defendant to serve its answers and objections to the interrogatories would have been April 3, 2003. Defendant did not serve its answers and objections to Plaintiffs' Interrogatories until April 30, 2003, clearly after the Rule 33(b)(3) deadline for serving answers and objections to Plaintiffs' First Set of Interrogatories.

Defendant asserts that it has good cause for the delay in serving its answers and objections to Plaintiffs' First Set of Interrogatories. It argues that it has cooperated with Plaintiffs with respect to discovery in good faith, and Plaintiffs have no basis to claim that its discovery objections have been waived. **In addition, Defendant states it has worked extensively with Plaintiffs' counsel to cooperatively exchange discovery information in this case without strict adherence to time limitations, and it has not objected when Plaintiffs required additional time to respond to discovery.** It argues that it would be wholly inequitable for Plaintiffs to now claim that Defendant has lost its ability to assert objections to discovery requests by calling upon the strict time limitations in spite of the parties' cooperative efforts thus far in the case. Based upon the fact that neither party has strictly complied with the discovery deadlines in this case, **the Court finds that it would be inequitable to deem Defendant's answers and objections to Plaintiffs' First Set of Interrogatories as waived.** The Court therefore will excuse Defendant's failure to timely serve its objections for good cause shown and will consider Defendant's objections to Plaintiffs' First Set of Interrogatories.

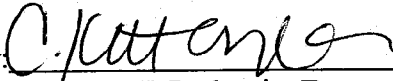
Id. at 669-70 (emphasis added). The facts in the instant case are analogous. Not only did Respondent allow Petitioner enlargements of time to respond to the discovery, but further, Respondent has taken several reasonable steps to work with Petitioner to limit the need for the Board's intervention on the discovery disputes.

Further, the only prejudice that would befall Petitioner if the Board does not enter a default against Respondent would have to be determine the case on the merits, whereas if this Board grants the default, Respondent as the rightful owner of the mark, will be deprived of the rights bestowed upon it by the United States Patent and Trademark Office and the U.S. Congress.

WHEREFORE Registrant respectfully requests that Petitioner's Renewed Motion for Default be **DENIED**.

Respectfully submitted,

Rothstein Rosenfeldt Adler
Counsel for Registrant
401 Las Olas Blvd., Suite 1650
Fort Lauderdale, Florida 33301
Tele: 954/522-3456
Fax: 954/527-8663

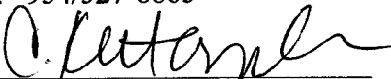
By: 

Scott W. Rothstein, Esq.
Florida Bar No: 765880
Christina M. Kitterman, Esq.
Florida Bar No: 595381

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Registrant's Motion to Reopen the Discovery Period as Set Forth in the Board's July 1, 2005 Order has been furnished by with sufficient postage as First Class mail, this 16th day of February, 2006, to: Box TTAB NO FEE, Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia 22313-1451, and Bruce B. Brunda, Esq., Stetina Brunda Garred & Prucker, Counsel for Petitioner, 75 Enterprise, Suite 250, Aliso Viejo, CA 92656.

Rothstein Rosenfeldt Adler
Counsel for Registrant
401 Las Olas Blvd., Suite 1650
Fort Lauderdale, Florida 33301
Tele: 954/522-3456
Fax: 954/527-8663

By: 

Scott W. Rothstein, Esq.
FBN: 765880
Christina M. Kitterman, Esq.
FBN: 595381

Christina Kitterman

From: Darah Rivera
Sent: Wednesday, January 18, 2006 6:01 PM
To: Christina Kitterman
Subject: FW: Tantra One, Inc. v. Tita's, Inc. / Our Ref: TANTR-001M / Your Ref: 04-8576

Found this email in my Junk emails

Darah I. Rivera
Legal Assistant to Les Stracher, Esquire ROTHSTEIN ROSENFELDT ADLER 300 Las Olas Place,
Suite 860 300 SE 2nd Street Fort Lauderdale, FL 33301

-----Original Message-----
From: Kim Carlsen [mailto:kcarlsen@stetinalaw.com]
Sent: Thursday, December 29, 2005 6:50 PM
To: Darah Rivera
Subject: Tantra One, Inc. v. Tita's, Inc. / Our Ref: TANTR-001M / Your Ref: 04-8576

Dear Darah:

We are in receipt of your correspondence confirming that Petitioner has granted Respondent up through and including January 20, 2006 (24 additional days), to serve the documents responsive to Petitioner's Document Requests. We would also like to confirm that Respondent has granted Petitioner up through and including January 30, 2006 (24 additional days) to serve it's responses to Respondent's discovery requests.

Please let me know if your client would be agreeable to this request.

Thank you,

Kimberly Carlsen

Litigation Paralegal

STETINA BRUNDA GARRED & BRUCKER

75 Enterprise, Suite 250

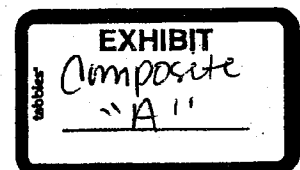
Aliso Viejo, CA 92656

Ph: 949-855-1246

Fx: 949-855-6371

Web: www.stetinalaw.com

Email: kcarlsen@stetinalaw.com



Christina Kitterman

From: Darah Rivera
Sent: Wednesday, January 18, 2006 6:02 PM
To: Christina Kitterman
Subject: FW: Tantra One, Inc. v. Tita's, Inc. / Our Ref: TANTR-001M / Your Ref: 04-8576

This was there too.

Darah I. Rivera
Legal Assistant to Les Stracher, Esquire ROTHSTEIN ROSENFELDT ADLER 300 Las Olas Place,
Suite 860 300 SE 2nd Street Fort Lauderdale, FL 33301

-----Original Message-----

From: Kim Carlsen [mailto:kcarlsen@stetinalaw.com]
Sent: Monday, January 09, 2006 3:02 PM
To: Darah Rivera
Cc: bbrunda@stetinalaw.com
Subject: Tantra One, Inc. v. Tita's, Inc. / Our Ref: TANTR-001M / Your Ref: 04-8576

Dear Darah:

This is a follow-up to my email of December 26, 2005 and voicemail message today regarding discovery responses in the above-referenced matter. Since, we have not heard from you otherwise, we will assume that the extension of time to serve discovery responses in this matter is mutual as detailed in my email of December 26, 2005. Unless we hear from you otherwise, today, Opposer will serve its discovery responses no later than January 30, 2006 (with the mutual 24 day extension of time).

Please let me contact me if you have any questions.

Thank you,

Kimberly Carlsen

Litigation Paralegal

STETINA BRUNDA GARRED & BRUCKER

75 Enterprise, Suite 250

Aliso Viejo, CA 92656

Ph: 949-855-1246

Fx: 949-855-6371

Web: www.stetinalaw.com

Email: kcarlsen@stetinalaw.com

04-8516

Case: TANTR-001M

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

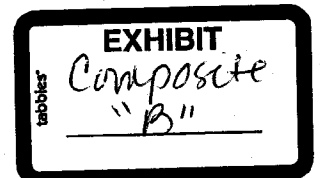
In Re U.S. Registration No. 2,274,115

Tantra One LLC)	Cancellation No.: 92043607
)	
Petitioner,)	
)	
v.)	
)	
Tita's Inc.,)	
)	
Registrant.)	
)	
)	

**RESPONDENT'S MOTION FOR ENLARGEMENT OF TIME TO PRODUCE
DOCUMENTS PURSUANT TO BOARD'S ORDER, DECEMBER 7, 2005**

Respondent, TITA'S INC. ("Respondent"), by and through its undersigned counsel, files this, its Motion for Enlargement of Time to Produce Documents Pursuant to Board's Order dated December 7, 2005, and states:

1. On December 7, 2005, this Board entered an Order requiring Respondent to produce certain documents responsive to Petitioner's Request for Production.
2. On or about December 27, 2005, Petitioner's counsel agreed to provide Respondent an extension up through and including January 20, 2006, to serve its responsive documents to Petitioner's counsel.
3. Upon granting Respondent's extension, Petitioner also requested an extension up through and including January 30, 2006, to serve all of its responses to Respondent's discovery, which Respondent respectfully granted the extension without the necessity of the Board's intervention.



4. Apparently, Petitioner's counsel's assistant sent a confirming email correspondence to Respondent's counsel's assistant attempting to confirm the agreed upon due dates for both parties' discovery.¹

5. However, when Respondent's counsel assistant finally received the email correspondences they confusingly read as both parties having mutual extensions to the discovery allowing the "Opposer" until January 30, 2006, to respond to discovery. See correspondences attached hereto as Composite Exhibit "A" and incorporated herein by reference.

6. As such, in reviewing said email confirmations, Respondent's counsel's assistant believed both parties' discovery responses to be due on January 30, 2006, and calendared it as such.

7. On January 24, 2006, Petitioner's counsel sent the undersigned an email correspondence seeking Respondent's documents.

8. Once the undersigned received Petitioner's correspondence, she sent Petitioner's counsel notice that the documents were supposed to be produced by January 30, 2006, as per Respondent's counsel's assistant's understanding of the email correspondences. At such time, Respondent's counsel requested an extension to send the documents as Respondent has been attempting to get the documents out of storage.

9. Further, Respondent's counsel advised Petitioner's counsel that she would be willing to give Petitioner another extension to respond to discovery as she figured Petitioner was waiting to receive Respondent's documents before sending Petitioner's responses.

10. Despite the undersigned's request for an extension and granting Petitioner another extension, Petitioner's counsel, once again, stated he filed a motion for default due to

¹ The emails were not received by the undersigned's assistant until January 18, 2006, as they were automatically sent to her "Junk" email box and not her "Inbox."

Respondent's inability serve the documents. As of the date of this motion, Respondent has not received such motion.

11. Further, while Petitioner's counsel has represented that its discovery responses have been sent, they too have not been served on Respondent's counsel, thus making Petitioner's discovery responses late.

12. Respondent simply requests additional time to retrieve documents from storage and copy said documents to serve to Petitioner's counsel's office. Equity would dictate that Petitioner's counsel should provide Respondent's counsel with the same courtesies that have been bestowed upon him.

13. However, that is not the case and Respondent is forced to seek this Board's approval for a minimal extension of time to serve documents responsive to Petitioner's Request for Production.

14. Respondent will be unfairly prejudiced if this Board denies Respondent's motion for an enlargement of time to serve its discovery responses. This motion is made in good faith and not for the purpose of causing unnecessary delay.

15. Petitioner will not suffer any prejudice with the extension and continuing to litigate the instant cancellation proceeding.

WHEREFORE, based upon the foregoing, Respondent respectfully requests that this Board enter an Order Granting Respondent's Motion to Enlarge Time to Produce Documents Pursuant to Board's Order, until and including February 17, 2006.

MEMORANDUM OF LAW

"Whenever appropriate, the provisions of the Federal Rules of Civil Procedure relating to discovery shall apply in opposition, cancellation, interference and concurrent use registration

proceedings...” 37 C.F.R. § 2.120(a). Pursuant to Rule 6(b) of the Federal Rules of Civil Procedure, this Board “for cause shown may at any time in its discretion” enlarge the time permitted for Respondent to serve its responses discovery. Respondent’s Motion for Enlargement of Time states a good faith basis for granting the requested enlargement up through and including February 17, 2006. Respondent is not engaging in any type of delay tactic that would warrant denial of this Motion, and there are currently no depositions or other proceedings scheduled before February 17, 2006, thereby minimizing any inconvenience to Petitioner in the event the enlargement of time is granted. Petitioner’s counsel’s inequitable and disingenuous behavior should not be rewarded. Respondent respectfully request that the Board exercise its discretion and permit the requested enlargement for the good cause stated herein.

WHEREFORE, based upon the foregoing, Respondent respectfully requests that this Board enter an Order Granting Respondent’s Motion to Enlarge Time to Produce Documents Pursuant to Board’s Order, until and including February 17, 2006.

Respectfully submitted,

Rothstein Rosenfeldt Adler
Counsel for Registrant
300 Las Olas Place, Suite 860
300 S.E. Second Street
Fort Lauderdale, Florida 33301
Tele: 954/522-3456
Fax: 954/527-8663

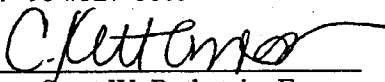
By: 

Scott W. Rothstein, Esq.
Florida Bar No: 765880
Christina M. Kitterman, Esq.
Florida Bar No: 595381

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Registrant's Motion to Reopen the Discovery Period as Set Forth in the Board's July 1, 2005 Order has been furnished by with sufficient postage as First Class mail, this 2nd day of February, 2006, to: Box TTAB NO FEE, Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia 22313-1451, and Bruce B. Brunda, Esq., Stetina Brunda Garred & Prucker, Counsel for Petitioner, 75 Enterprise, Suite 250, Aliso Viejo, CA 92656.

Rothstein Rosenfeldt Adler
Counsel for Registrant
300 Las Olas Place, Suite 860
300 S.E. Second Street
Fort Lauderdale, Florida 33301
Tele: 954/522-3456
Fax: 954/527-8663

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Account: 04-8576
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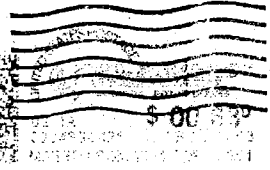
Special Instructions:

Sender Name: Christina M. Kitterman, Esq.
email: ckitterman@rra-law.com
Prepared By: Grace Agosto
Phone: (954) 315-7215

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ARB# 1.00 lb
Trk#89258219385

**ROTHSTEIN
ROSENFELDT
ADLER**

Attorneys at Law
300 Las Olas Place, Suite 860
300 S.E. 2nd Street
Ft. Lauderdale, FL 33301



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