

ESTTA Tracking number: **ESTTA63471**

Filing date: **01/25/2006**

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

Proceeding	92045191
Party	Plaintiff SmartBargains.com LP SmartBargains.com LP 10 Milk Street, 10th Floor Boston, MA 02108
Correspondence Address	DONALD F. FREI WOOD, HERRON & EVANS, L.L.P. 2700 CAREW TOWER 441 VINE STREET CINCINNATI, OH 45202
Submission	Motion for Default Judgment
Filer's Name	Theodore R. Remaklus
Filer's e-mail	tremaklus@whepatent.com
Signature	/theodore r remaklus/
Date	01/25/2006
Attachments	Default Judgment Motion.pdf (8 pages)

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

SmartBargains.com LP)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92045191
)	Reg. No. 1537609
Sue Goldstein)	
)	
Registrant.)	

PETITIONER'S MOTION FOR DEFAULT JUDGMENT

Petitioner, SmartBargains.com LP, hereby moves the TTAB for judgment by default in this cancellation proceeding. No answer has been received by Petitioner's counsel in this cancellation proceeding, no request for an extension of time for answering has been filed by Registrant with the TTAB or granted by Petitioner's counsel to Registrant, and the time period for filing Registrant's answer has now expired. Accordingly, Petitioner respectfully requests this cancellation proceeding be decided in its favor, and that Registrant's U.S. Registration No. 1,537,609 for the mark RETAIL NEVER PAY RETAIL! be cancelled.

MEMORANDUM

On November 25, 2005, Petitioner's Cancellation Petition was mailed by the TTAB to Registrant to Registrant. A copy of the TTAB's transmittal letter is attached as Exhibit A to the Affidavit of Theodore R. Remaklus ("Remaklus Aff.") submitted herewith. No answer to the Cancellation Petition has been received by Petitioner's counsel, no motion for an extension of time for answering has been filed by Registrant with the TTAB, and no time extension has been granted for answering by Petitioner's counsel to Registrant. See the Remaklus Aff.

This motion for default judgment is made in accord with 37 CFR § 2.114 which states:

- (a) If no answer is filed within the time set, the petition may be decided as in case of default.

It is also in accord with 37 CFR 2.119 which requires that:

- (a) Every paper filed in the Patent and Trademark Office in inter partes cases . . . must be served upon the other parties

Petitioner has received no answer filed by Registrant in this case. See the Remaklus Aff. This is confirmed by the records of the Trademark Trial and Appeal Board Inquiry System (TTABVUE) for the present Cancellation Proceeding attached as Exhibit B to the Remaklus Aff. Thus, no answer has been filed by Registration within the forty day time period set in the TTAB's November 25, 2005 letter informing Registrant Petitioner's Cancellation Petition, and Petitioner's counsel has received no answer to its Cancellation Petition.

As the PTO rules incorporate the Federal Rules of Civil Procedure in inter partes proceedings, see 37 § CFR 2.116, Petitioner SmartBargains.com LP also makes this motion in accord with and under FRCP 55.

Respectfully submitted,

Date: January 25, 2006



Donald F. Frei, Esq.
Sarah Otte Graber, Esq.
WOOD, HERRON & EVANS, L.L.P.
2700 Carew Tower
441 Vine Street
Cincinnati, Ohio 45202-2917
(513) 241-2324

Attorneys for Petitioner SmartBargains.com LP

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

SmartBargains.com LP)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92045191
)	Reg. No. 1537609
Sue Goldstein)	
)	
Registrant.)	

AFFIDAVIT OF THEODORE R. REMAKLUS

I, Theodore R. Remaklus, being duly sworn, depose and state:

1. I am counsel for Petitioner SmartBargains.com LP in this Cancellation proceeding, and I am a partner in the law firm of Wood, Herron & Evans, L.L.P. located in Cincinnati, Ohio.

2. Attached hereto as Exhibit A is a true and correct copy of a letter sent by the Trademark Trial and Appeal Board on November 25, 2005 to Registrant Sue Goldstein notifying the Registrant that she had forty days plus mailing time after November 25, 2005 in which to file an answer in the present Cancellation Proceeding. The deadline for filing an answer was January 9, 2005.

3. No answer to the opposition notice has been received as of this date from either Registrant or counsel for Registrant. Neither Petitioner nor its counsel has received a request for an extension of time for answering the Cancellation Petition as of this date from either Registrant or Registrant's counsel, and accordingly none has been granted.

4. Attached hereto as Exhibit B is a true and correct copy of the printout from the Trademark Trial and Appeal Board Inquiry System (TTABVUE) for the present Cancellation Proceeding as of this date.

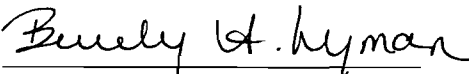
Further, affiant sayeth naught.



Theodore R. Remaklus

State of Ohio)
) ss.
County of Hamilton)

Sworn to and subscribed before me this 25th day of January, 2006.



Notary Public

BEVERLY ANN LYMAN
Attorney At Law
Notary Public, State of Ohio
My Commission Has No Expiration Date
Section 147.03 R.C.

EXHIBIT A

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

Mailed: November 25, 2005

SUE GOLDSTEIN
1508 E. BELTLINE ROAD, SUITE 101
CARROLLTON, TX 75006

Cancellation No. 92045191

Reg. No. 1537609

DONALD F. FREI
WOOD, HERRON & EVANS, L.L.P.
2700 CAREW TOWER 441 VINE STREET
CINCINNATI, OH 45202

SmartBargains.com LP

V.

WINKELHORN, KARIN M.

Tamika Whitsey, Legal Assistant:

A petition, a copy of which is attached, has been filed to cancel the above-identified registration.

Proceedings will be conducted in accordance with the Trademark Rules of Practice.

ANSWER IS DUE FORTY DAYS after the mailing date hereof. (See Trademark Rule 2.196 for expiration date falling on Saturday, Sunday or a holiday).

Proceedings will be conducted in accordance with the Trademark Rules of Practice, set forth in Title 37, part 2, of the Code of Federal Regulations. The parties are reminded of the recent amendments to the Trademark Rules that affect the rules of practice before the TTAB. See Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act, 68 Fed. R. 55,748 (September 26, 2003) (effective November 2, 2003); Reorganization of Correspondence and Other Provisions, 68 Fed. Reg. 48,286 (August 13, 2003) (effective September 12, 2003). Notices concerning the rules changes, as well as the Trademark Trial and Appeal Board Manual of Procedure (TBMP), are available at www.uspto.gov/web/offices/dcom/ttab/.

The parties are particularly referred to Trademark Rule 2.126 pertaining to the form of submissions. Paper submissions, including but not limited to exhibits and depositions, not filed in accordance with Trademark Rule 2.126 may not be given consideration or entered into the case file.

Discovery and testimony periods are set as follows:

Discovery period to open: December 15, 2005

Discovery period to close: June 13, 2006

30-day testimony period for party
in position of plaintiff to close: September 11, 2006

30-day testimony period for party
in position of defendant to close: November 10, 2006

15-day rebuttal testimony period
for plaintiff to close: December 25, 2006

A party must serve on the adverse party a copy of the transcript of any testimony taken during the party's testimony period, together with copies of documentary exhibits, within 30 days after completion of the taking of such testimony. See Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

NOTE: The Board allows parties to utilize telephone conferences to discuss or resolve many interlocutory matters that arise in inter partes cases. See the Official Gazette notice titled "Permanent Expansion of Telephone Conferencing on Interlocutory Matters in Inter Partes Cases Before the Trademark Trial and Appeal Board," 1235 TMOG 68 (June 20, 2000). The notice is available at <http://www.uspto.gov>. Interlocutory matters which the Board agrees to discuss or decide by phone conference may be decided adversely to any party which fails to participate.

If the parties to this proceeding are also parties to other Board proceedings involving related marks or, during the pendency of this proceeding, they become parties to such proceedings, they should notify the Board immediately, so that the Board can consider consolidation of proceedings.

New Developments at the Trademark Trial and Appeal Board

TTAB forms for electronic filing of extensions of time to oppose, notices of opposition, and inter partes filings are now available at <http://estta.uspto.gov>. Images of TTAB proceeding files can be viewed using TTABVue at <http://ttabvue.uspto.gov>.

EXHIBIT B



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TTABVUE. Trademark Trial and Appeal Board Inquiry System

Cancellation

Number: 92045191

Filing Date: 11/03/2005

Status: Pending

Status Date: 11/25/2005

Interlocutory Attorney: CHERYL A BUTLER

Defendant

Name: WINKELHORN, KARIN M.

Correspondence: SUE GOLDSTEIN
1508 E. BELTLINE ROAD, SUITE 101
CARROLLTON, TX 75006

Serial #: 73727701

Registration #: 1537609

Application Status: Cancellation Pending

Mark: RETAIL NEVER PAY RETAIL!

Plaintiff

Name: SmartBargains.com LP

Correspondence: DONALD F. FREI
WOOD, HERRON & EVANS, L.L.P.
2700 CAREW TOWER 441 VINE STREET
CINCINNATI, OH 45202

Serial #: 76613566

Application Status: Suspension Letter - Mailed

Mark: NEVER PAY RETAIL

Prosecution History

#	Date	History Text	Due Date
3	11/25/2005	PENDING, INSTITUTED	
2	11/25/2005	<u>NOTICE AND TRIAL DATES SENT; ANSWER DUE:</u>	01/04/2006
1	11/03/2005	<u>FILED AND FEE</u>	

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CERTIFICATE OF SERVICE

I, Theodore R. Remaklus, hereby certify that a copy of the foregoing **Petitioner's Motion for Default Judgment** was served on Ms. Sue Goldstein, 1508 E. Beltline Road, Suite 101, Carrollton, Texas 75006 by first class mail, postage prepaid, this 25th day of January, 2006.



Theodore R. Remaklus
Theodore R. Remaklus