

ESTTA Tracking number: **ESTTA241187**

Filing date: **10/07/2008**

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

Proceeding	92049725
Party	Defendant Fujitec America, Inc.
Correspondence Address	Fujitec America, Inc. 401 Fujitec Drive Lebanon, OH 45036 UNITED STATES
Submission	Other Motions/Papers
Filer's Name	Charles H. Melville
Filer's e-mail	chmelville@strausstroy.com
Signature	/charles h melville/
Date	10/07/2008
Attachments	Answer of Default 92049725.pdf (7 pages)(3441554 bytes)

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

In the matter of Registration No. 2,743,343
Date of Issue: July 29, 2003

APEX, LLC,)
Petitioner)
v.)
FUJITEC AMERICA, INC.,)
Registrant)

Cancellation No. 92049725

ANSWER OF DEFAULT

Registrant respectfully moves the Trademark Trial and Appeal Board not to enter judgment by default, and accept the Answer of Cancellation in the above identified matter.

This Answer of Default is supported by the following Memorandum and the attached Affidavits of Darren L. Courtney, Esq. and Charles H. Melville, Esq.

SUPPORTING MEMORANDUM

The cases of *Paolo's Associates Ltd. Partnership v. Bodo*, 21 U.S.P.Q.2d 1899 (Com'r. 1990) and *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.* 21 U.S.P.Q.2d 1556 (TTAB 1991) both set out a three pronged test for finding "good cause" why a default judgment should not be entered against a defendant for failure to file a timely Answer. Each of those tests is analyzed below.

(1) The delay in filing was not the result of willful conduct or gross neglect on Registrant's part. The attached Affidavits of Darren L. Courtney and Charles H. Melville clearly establish that neither Registrant nor its trademark counsel received the communication from the

Trademark Trial and Appeal Board setting forth the Answer due date. In fact, it was the timely follow-up by Registrant's trademark counsel that discovered the problem.

(2) The Petitioner will not be prejudiced by accepting the Answer of Cancellation. If the Answer of Cancellation is granted, Registrant's trademark counsel will promptly arrange for a Discovery conference, and it is believed that all other dates set in the Notice of July 30 can be met.

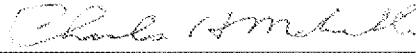
(3) It is respectfully submitted that Registrant has a meritorious defense. Petitioner has based its request for cancellation on eight U.S. Trademark Registrations, six of which include an additional word – e.g. APEX ADVANTAGE, none of which are in any way similar to Registrant's mark HSA-APEX. These registrations cover a wide range of goods and services, none of which are even remotely close to the “elevator systems and components therefore” recited by Registrant.

A search of the Office records developed 21 “live” references including the word APEX in International Class 007. Thus Petitioner's registrations must be construed rather narrowly.

CONCLUSION

Paraphrasing the Commissioner in the *Paolo* case (*supra*), the Board should be reluctant to grant judgment by default and tend to resolve doubt in favor of setting aside a default, since the law favors deciding cases on their merits. In the instant case, Registrant has clearly met the three pronged test set out in the cited cases, and acceptance of the Answer of Cancellation is respectfully requested.

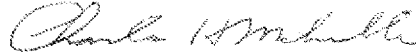
Respectfully submitted,



Charles H. Melville, Esq.
Strauss & Troy
The Federal Reserve Building
150 East Fourth Street
Cincinnati, Ohio 45202-4018
Attorney for Registrant, Fujitec America, Inc.

CERTIFICATE OF ELECTRONIC MAILING

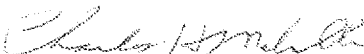
I hereby certify that the foregoing document is being submitted electronically to the United States Trademark Trial and Appeal Board through its Electronic System on this 7th day of October, 2008.



Charles H. Melville

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document is being served upon Andrew A. Gates, Manager of Apex, LLC, 100 Main Street, Pawtucket, Rhode Island 02860 via first class mail, this 7th day of October, 2008.



Charles H. Melville

1718405_1.DOC

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

In the matter of Registration No. 2,743,343
Date of Issue: July 29, 2003


-----		}	Cancellation No. 92049725
APEX, L.L.C.			
	Petitioner		
v.			
FUJITEC AMERICA, INC.,			
	Registrant	}	AFFIDAVIT OF DARREN L. COURTNEY, ESQ.

Darren L. Courtney, being duly sworn, deposes and states:

1. I am of legal age, under no disability, and have personal knowledge of the facts set forth in this Affidavit.
2. I am the Chief Legal Officer of Fujitec America, Inc. ("Fujitec"), 401 Fujitec Drive, Lebanon, OH 45036.
3. On or about August 14, 2008, I received a Petition for Cancellation of Fujitec's HSA-APEX trademark served on Fujitec by regular mail by Andrew A. Gates.
4. I immediately forwarded the Petition I received to Fujitec's trademark counsel, Charles H. Melville, Esq. of the firm of Strauss & Troy in Cincinnati, Ohio.
5. Mr. Melville, by letter dated August 19, 2008 advised me that, "... your time for response will be sent in a formal notice from the Trademark Trial and Appeal Board – normally, the time is 40 days from the date of the notice."

6. I have never received a Notice (or any other correspondence) from the Trademark Trial and Appeal Board or from anyone else giving Notice of the filing of the Petition for Cancellation and setting a time to Answer.

7. Further affiant sayeth naught.




 Darren L. Courtney, Esq.

State of Ohio)
) ss:
 County of Lorain)

The foregoing Affidavit was acknowledged before me this 7th day of October, 2008 by Darren L. Courtney, Esq.





 Notary Public

ROBERT LOUIS BUSSE
 NOTARY PUBLIC STATE OF OHIO
 MY COMMISSION DOES NOT EXPIRE

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

In the matter of Registration No. 2,743,343
Date of Issue: July 29, 2003

APEX, LLC,)	Cancellation No. 92049725
)	
Petitioner)	
)	
v.)	AFFIDAVIT OF
)	CHARLES H. MELVILLE, ESQ.
FUJITEC AMERICA, INC.,)	
)	
Registrant)	
)	

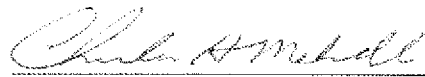
Charles H. Melville, Esq., being duly sworn, deposes and states as follows:

1. I am of legal age, under no disability, and have personal knowledge of the facts set forth in this Affidavit.
2. On or about August 14, 2008, I received an e-mail communication from Darren Courtney, Chief Legal Officer of Fujitec America, Inc. ("Fujitec"), advising me that he had received a Petition for Cancellation of Fujitec's Mark HSA APEX, and requested me to represent the company in this matter.
3. I responded by e-mail on or about August 19, 2008 advising Mr. Courtney that he would received a formal notification from the Trademark Trial and Appeal Board setting forth a date for filing an Answer, normally 40 days from the date of the notice.
4. On October 6, 2008, having heard absolutely nothing further from Mr. Courtney, I instructed my Assistant to check the records of the Trademark Trial and Appeal Board and find the current status of the Petition for Cancellation.

5. My Assistant reported to me that the notice had been mailed July 30, 2008, setting an Answer date of September 8, 2008.

6. I immediately contacted Mr. Courtney who confirmed that he had not received the Notice dated July 30, 2008.


7. Further affiant sayeth naught.



Charles H. Melville, Esq.

State of Ohio)
) ss:
County of Hamilton)

The foregoing Affidavit was acknowledged before me this 7th day of October, 2008 by Charles H. Melville, Esq.



Notary Public

PAUL BRENT CALICO, Attorney at Law
NOTARY PUBLIC - STATE OF OHIO
My Commission has no expiration
date. Section 142.03 O.R.C.

1718179_1.DOC