

ESTTA Tracking number: **ESTTA523026**

Filing date: **02/22/2013**

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

Proceeding	92056430
Party	Plaintiff Hewlett-Packard Development Company, L.P.
Correspondence Address	JAMES F STRUTHERS RICHARD LAW GROUP 8411 PRESTON ROAD , SUITE 890 DALLAS, TX 75225 UNITED STATES jim@richardlawgroup.com,clarissa@richardlawgroup.com
Submission	Opposition/Response to Motion
Filer's Name	James F. Struthers
Filer's e-mail	jim@richardlawgroup.com,clarissa@richardlawgroup.com
Signature	/James F. Struthers/
Date	02/22/2013
Attachments	HP's Response to Motion to Set Aside Entry of Default.pdf (4 pages)(23139 bytes)

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

HEWLETT-PACKARD	§	
DEVELOPMENT COMPANY, L.P.	§	
	§	
Petitioner,	§	Cancellation No. 92056430
vs.	§	
	§	Registration No. 3043918
ASSR, LLC	§	
	§	
Registrant.	§	

RESPONSE TO MOTION TO SET ASIDE ENTRY OF DEFAULT

Hewlett-Packard Development Company, L.P. (“HP”) files its Response to Registrant’s Motion to Set Aside Entry of Default and for good cause shows as follows:

REGISTRANT FAILS TO SHOW TO GOOD CAUSE UNDER RULE 55(C)

Federal Rule of Civil Procedure 55(c) authorizes the Board to set aside an entry of default only “for good cause.” Fed.R.Civ.P. 55(c). Although the rule does not define “good cause,” courts consider three factors in deciding a Rule 55(c) motion: (1) whether the default was willful; (2) whether the moving party has presented a meritorious defense; and (3) whether setting aside the default would prejudice the party to whom default was awarded. *See Enron Oil Corp. v. Diakuhara*, 10 F.3d 90, 96 (2d Cir.1993). Registrant ASSR, LLC (“ASSR”) has the burden of proof on each of these elements. *TCI Group Life Insurance Plan v. Knoebber*, 244 F.3d 691, 696 (10th Cir. 2001). As discussed below, ASSR has failed to make a proper showing of elements (1) and (2).

1. THE DEFAULT WAS WILLFUL

ASSR claims that it did not receive the Petition, despite HP having mailed the Petition to the correct address for ASSR. The Petition was not returned to HP, and HP did not receive any other notice of non-delivery. ASSR provides no possible explanation for how the Petition just

happened to get lost in the mail. Nor does ASSR assert or present any evidence to establish that it has regular interruptions in mail delivery by the United States Postal Service that might indicate that loss of mail is not an unusual occurrence. Finally, neither the Motion nor the Declaration set forth any facts to indicate that ASSR attempted to investigate how the Postal Service made this error. Instead, ASSR just says it “never received” the mailings. A bare assertion that the U.S. Postal Service is at fault does not constitute good cause under Rule 55(c).

2. ASSR FAILED TO PRESENT ANY EVIDENCE OF A MERITORIOUS DEFENSE.

In order to make a sufficient showing of a meritorious defense in connection with a motion to set aside a default, a defendant does not need to establish its defense conclusively, but it must present credible evidence of facts that would constitute a complete defense. *State Farm Mutual Automobile Insurance Co. v. Cohan*, 409 Fed. Appx. 453, 454 (2d Cir. 2011). ASSR has not presented any “evidence of facts” and thus fails to carry its burden on this element.

In *Cohan*, the defendant submitted an affidavit in which he swore that all medical procedures for which he sought reimbursement were “medically necessary” and “not fraudulent or misrepresentative” in any way, and that the statute of limitations had long expired. The district court found, and the Second Circuit agreed, that these conclusory statements – even though presented by affidavit -- were not sufficient evidence of a meritorious defense. *Id.* “[A] defendant ‘must present more than conclusory denials when attempting to show the existence of a meritorious defense.’” *Id.*

In this proceeding, HP asserts that ASSR has abandoned and is not using its mark in commerce. If the mark is in use in commerce, it should be straightforward for ASSR to present a sworn statement and documentation to this effect. Instead, in support of its allegedly meritorious defense, ASSR relies solely on unsupported and conclusory statements by counsel. *See* Motion ¶7. ASSR fails to provide even a single document evidencing use of the registered mark. ASSR takes

the trouble to submit a declaration under penalty of perjury from the manager of ASSR, but the declaration does not address the merits at all. Rather, the declarant simply parrots the statements in the Motion regarding the alleged lack of delivery of the Petition for Cancellation, receipt of the Board's entry of default, and its actions following receipt of the latter. ASSR knows it must make a showing of a meritorious defense, and yet consciously chose not to assert use in commerce in this declaration. This suggests that the declarant could not assert use in commerce under penalty of perjury, and that no meritorious defense exists.

In any event, counsel's unsworn assertions in the Motion and the proposed Answer do not rise to the level of "credible evidence of facts" required to support a showing of a meritorious defense under Rule 55(c). Thus, re-opening the proceeding is nothing more than a pointless delay, and is unwarranted in this case. *See Hawaii Carpenters' Trust Funds v. Stone*, 794 F.2d 508, 513 (9th Cir.1986). ASSR's failure to carry its burden on element (2) of the test warrants denial of its Motion.

CONCLUSION

ASSR decided to act in this proceeding only after the Board entered a default and issued a show cause order, and has not established good cause. Moreover, ASSR failed to present *any evidence* of facts to support a meritorious defense, despite the ease with which it could have done so if such a defense existed. While ASSR did not have the burden to show a substantial likelihood of success on the merits, ASSR did have the burden to show *some* evidence of such a defense. ASSR fails to carry its burden and so the Board should deny ASSR's Motion.

Respectfully submitted,

/James F. Struthers/

James F. Struthers
Molly Buck Richard
Elizann Carroll
Richard Law Group
8411 Preston Road, Suite 890
Dallas, Texas 75225
(214) 206-4300
(214) 206-4330 (Fax)

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2013, a true and complete copy of the foregoing document was served by first-class mail, postage prepaid, upon:

Catherine Ferguson
Kopelowitz Ostrow Law
200 SW 1st Street, Suite 1200
Fort Lauderdale, FL. 33301

/James F. Struthers/

James F. Struthers