

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Mailed: June 19, 2014

Cancellation No. 92057500

Orbis Distribution, Inc.

v.

BeeNaturals, Inc.

***THIS ORDER REPLACES THE INCOMPLETE ORDER
WHICH INADVERTENTLY ISSUED JUNE 18, 2014***

By the Trademark Trial and Appeal Board:

This case comes up on respondent's combined response to the Board's May 9, 2014 show cause order and motion to accept its late response to the Board's March 31, 2014 order; respondent's supplement to its motion, filed January 5, 2014, to amend Registration No. 3197276 to correct the clerical error in respondent's name; and pending motions related to the pleadings in this case.

On July 12, 2013, Orbis Distribution, Inc. filed a petition to cancel Registration No. 3197276 with claims of abandonment based on the non-

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existence of the entity “Bee Naturals, Inc.” and BeeNatural Inc.’s corporate dissolution, and fraud related to allegations of use by a non-existent entity or one which was dissolved.

As noted in the Board’s December 16, 2013 order, respondent did not dispute that it identified itself incorrectly in the application which issued as Registration No. 3197276, listing its name as “Bee Naturals, Inc.” (space between first two words) instead of “BeeNaturals Inc.” (no space between first two words). Where a mistake in a registration occurs in good faith through the fault of the owner of the registration, the Director may correct the error upon written request and payment of the fee required by Trademark Rule 2.6. See Trademark Act Sec. 7(h). The Board allowed respondent time to request correction of its name.

In view of respondent’s deficient request filed January 5, 2014, the Board’s March 31, 2014 order allowed respondent time to supplement its request. On May 9, 2014, following respondent’s failure to respond, the Board ordered respondent to show cause why judgment default should not be entered based on its apparent loss of interest in the case.

SHOW CAUSE ORDER DISCHARGED

Respondent’s combined response and motion filed June 9, 2014 demonstrate that respondent has not lost interest in this case, but remains interested in defending its registration. Accordingly, the show cause order is discharged.

LATE RESPONSE ACCEPTED

Respondent's combined response and motion to accept its late response to the Board's March 31, 2014 order is accompanied by two declarations from employees of respondent's attorney averring that they handle the law firm's mail and docketing, and that the Board's March 31, 2014 order was never received. The present circumstances rebut the presumption that the Board's order reached respondent by mail. Absent circumstances which would cast doubt on the statement, the Board takes at face value a party's assertion that it did not receive a paper. *See Interpayment Svcs. Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1464 fn 1 (TTAB 2003) ("respondent moved to reopen ... on the basis that respondent did not receive a copy (despite the certificate of service shown thereon) ... Petitioners are ordered to send respondent a copy of petitioners' motion ..."); *Old Nutfield Brewing Co., v. Hudson Valley Brewing Co.*, 65 USPQ2d 1701, 1704 fn 8 (TTAB 2002) ("[W]e take petitioner at its word ... that no answer [with a certificate of service] was in fact received"); *Jack Lenor Larsen, Inc. v. Chas. O. Larson, Co.*, 44 USPQ2d 1950, 1954 (TTAB 1997) ("it would not be a great leap of faith to conclude that one of these orders was either not mailed or, if mailed, not delivered.").

The Board also notes that respondent has provided an email address. However, because the address apparently was not entered by the Board into the Board's electronic record, respondent has not been receiving the electronic copies of the Board's orders to which it is entitled. See Trademark

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Trial and Appeal Board Manual of Procedure (TBMP) §117.01 (3rd ed. 2013). The Board's records have been corrected, and respondent now will receive email copies of the Board orders.

The Board accepts respondent's late response to the Board's March 31, 2014 order, and will address the supplemented motion to amend the registration to correct the clerical error in respondent's name.

CORRECTION TO REGISTRATION GRANTED

On June 9, 2014, respondent filed a supplemental written request specifying that the attorney filing the underlying application which issued as Registration No. 3197276 made a typographical error which resulted in respondent's name appearing as three words instead of two words; that this error occurred in good faith; and that correction of the error by elimination of the space in respondent's name does not require republication of the mark.¹ Respondent has supported its request with the required declaration and the fee for amendment of the registration.

Inasmuch as the request for correction of the inadvertent error, as recently supplemented, complies with the requirements of Trademark Rule 2.175(b)(1), the correction is approved.

The correction has been entered in the Board's electronic records. If the registration survives the cancellation, the correction will be forwarded to the Post Registration Branch of this Office for further action.

¹ As explained in the Board's December 16, 2013 order, while such Sec. 7 requests usually are made to the USPTO Director, requests are not accepted while the registration is the subject of a cancellation proceeding before the Board.

AUTHORITY TO FILE ON BEHALF OF RESPONDENT

Petitioner has objected to the Board's consideration of various papers filed on behalf of respondent on the grounds that Bee Naturals, Inc. does not exist; that BeeNaturals Inc. no longer exists inasmuch as there was a corporate dissolution; and that the attorney filing the paper is not authorized to do so. With the correction of respondent's registration to omit the inadvertently-included space, the record now supports respondent's contention that BeeNaturals Inc. is the sole owner of the registration and is proper party to this proceeding. The Board will not consider further arguments regarding the clerical error which resulted in misidentification of "Bee Naturals, Inc." as a basis for refusing consideration of papers filed by respondent.

Petitioner's attachment of the page indicating the corporate dissolution of BeeNaturals Inc. is insufficient to support its argument that BeeNaturals Inc. does not exist and therefore no papers may be filed on its behalf. The Board has held that a corporation which has been suspended for failure to pay taxes and file returns may, upon revival, proceed with the prosecution or defense of a Board proceeding. *See WMA Group, Inc. v. Western International Media*, 29 USPQ2d 1478 (TTAB 1993). The Board does not find that such revival has occurred here, which remains a question for trial or decision on summary judgment. However, the Board will not consider further arguments

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that the evidence of corporate dissolution warrants denying consideration to any papers filed by BeeNaturals Inc.

Petitioner presents no support for its argument that the attorney filing papers on behalf of respondent is not the attorney of record. Signing a document on behalf of a party is sufficient for recognition as a legal representative. Trademark Rule 2.17(b)(2).

In sum, the Board rejects petitioner's arguments that papers filed on behalf of respondent must be denied consideration.

MOTION TO EXTEND TIME TO FILE ANSWER GRANTED

On August 21, 2013, the day the answer was due, respondent filed a motion for a 30-day extension of time in which to file its answer on the grounds that counsel had been retained recently; that counsel was busy with other business; and counsel required time to research and prepare the response. Notwithstanding petitioner's opposition alleging that respondent failed to demonstrate good cause, the Board finds that the press of other litigation matters may constitute good cause for granting an extension. *See Societa Per Azioni Chianti Ruffino Esportazione Vinicola Toscana v. Colli Spolentini Spoletoducale SCRL*, 59 USPQ2d 1383, 1384 (TTAB 2001). Accordingly, the motion to extend applicant's time to answer is granted.

MOTION TO STRIKE ANSWER DENIED

At the end of the requested extension period, respondent filed its answer. Respondent moves to strike the answer as untimely, and because it

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is not germane to the motion for default judgment. Inasmuch as the Board found good cause for extension, the answer is timely. Plainly, an answer is germane to the issue of default, and was not barred by the pending motion for default judgment. The motion to strike the answer is DENIED.

The answer is accepted.

MOTION TO ACCORD FILING DATE GRANTED

Respondent moves to accord the filing date of the date listed in the certificate of mailing for its response to the motion for default judgment, which apparently was lost in the mail, and its response to the motion to strike the answer, which was mailed October 23, 2013 but was not received by the Board until October 31, 2013.² In opposition, petitioner alleges that the certificate of mailing is false because defendant filed prior papers online and because “the documents in question could not possibly” take ten days to be delivered by mail. The certificate of mailing procedure is intended to create certainty as to filing dates, and petitioner has failed to demonstrate any reason not to allow the certificate of mailing procedure to serve its intended purpose. Respondent’s motion to accord a filing date is GRANTED. The responses to the motions are accepted as timely. Petitioner’s motion to strike those responses is DENIED.

² The certificate of mailing procedure permits certain types of correspondence to be sent to the Office by first-class mail, even on the due date for the correspondence, and still be considered timely, notwithstanding the fact that the mailed correspondence will not be received in the Office until after the due date. Trademark Rule 2.197(a); *In re LS Bedding*, 16 USPQ2d 1451, 1452-53 (Comm’r 1990) (certificate of mailing procedure is used to determine timeliness, while the actual receipt date is used for all other purposes, such as an application filing date).

MOTION FOR DEFAULT JUDGMENT IS DENIED

Inasmuch as the Board granted the extension of time to file the answer, the answer was timely filed.

Petitioner's motion for default judgment is DENIED.

MOTION FOR SUMMARY JUDGMENT IS PREMATURE

Pursuant to Trademark Rule 2.127(e)(1), "A party may not file a motion for summary judgment until the party has made its initial disclosures, except for a motion asserting claim or issue preclusion or lack of jurisdiction by the Trademark Trial and Appeal Board." Inasmuch as the pleadings are closed only with issuance of this order addressing the various motions and accepting respondent's answer, there is no reason to believe that the parties have conducted the required discovery conference or served initial disclosures. The motion for summary judgment does not state that initial disclosures were served.

Accordingly, respondent's motion for summary judgment is premature and will be given no consideration.

RESPONDENT'S TIME TO RESPOND TO MOTION FOR JUDGMENT ON THE PLEADINGS RESET

On June 10, 2014, respondent filed a motion for judgment on the pleadings seeking to have the fraud claims stricken as legally insufficient. As noted above, the pleadings are closed only with issuance of this order, and thus there may have been some question as to whether this motion was

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timely. The Board accepts the motion, but petitioner has until FIFTEEN DAYS from the mailing date of this order in which to file its response.

Proceedings herein are suspended pending the Board's disposition of the motion for judgment on the pleadings.