**UNITED STATES PATENT AND TRADEMARK OFFICE**
**Trademark Trial and Appeal Board**
**P.O. Box 1451**
**Alexandria, VA 22313-1451**
General Contact Number: 571-272-8500

Mailed: December 11, 2017

Cancellation No. 92066469

*Henry Johnson Family Trust*

*v.*

*Think Trading, Inc.*

**Geoffrey M. McNutt, Interlocutory Attorney:**

This case comes before the Board for consideration of Respondent's October 25, 2017, motion to set aside the Board's September 7, 2017, notice of default for failure to timely answer the petition for cancellation. The motion is fully briefed.

Respondent's answer to the petition for cancellation was due by August 28, 2017. *See* 2 TTABVUE 4. When Respondent did not file an answer by the deadline, the Board issued a notice of default (dated September 7, 2017) allowing Respondent until October 7, 2017, to show cause why judgment by default should not be entered against it in accordance with Fed. R. Civ. P. 55(b)(2). *See* 4 TTABVUE 2. On October 25, 2017, eighteen days after the allotted response time, Respondent filed the current motion to set aside the notice default and for acceptance of Respondent's late-filed answer, which Respondent filed contemporaneously with its motion. In its motion, Respondent maintains that its delay in filing the answer was the result of inadvertence and also partly the result of disruption caused by Hurricane Irma.

Specifically, Respondent's president, Gustav Mitchell, avers in his accompanying declaration that he "made a good-faith effort to retain counsel but was unable to do so until after the deadline to respond to the Petition for Cancellation had passed"; "[i]n part, preparation for and recovery from Hurricane Irma interfered with [his] ability to retain counsel, as Think Trading, Inc. lost all electricity and internet access for several days during September 2017"; and he "finally retained counsel on October 23, 2017." Declaration of Gustavo Mitchell ¶¶ 4–6 (5 TTABVUE 8). Respondent also points out that it filed the instant motion two days after it finally retained counsel.

In response, Petitioner argues that Respondent was aware of the August 29, 2017, deadline for answering the petition for cancellation, yet in its motion Respondent fails to explain why it was unable to retain counsel or answer the petition for cancellation prior to the deadline.

Default may be discharged upon a showing of good cause. Fed. R. Civ. P. 55(c). Good cause is established when it is shown that the late filing was not the result of willful conduct or gross neglect, that acceptance of the late answer would not prejudice the plaintiff, and that the defendant has a meritorious defense to the action. *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991).

The determination of whether default judgment should be entered against a party lies within the sound discretion of the Board. *See, e.g.*, *Identicon Corp. v. Williams*, 195 USPQ 447, 449 (Comm'r 1977) (fact that in response to order to show cause Respondent filed answer but no response to show cause order did not mandate entry

of default judgment; Respondent allowed time to show cause); *see also* TBMP § 312.02 (June 2017). In exercising its discretion, the Board is mindful of the law's preference for deciding cases on their merits. *See Paolo's Assocs. Ltd. P'ship v. Bodo,* 21 USPQ2d 1899, 1902 (Comm'r 1990); *see also DeLorme Publ'g Co., Inc. v. Eartha's, Inc.*, 60 USPQ2d 1222, 1223 (TTAB 2000). Accordingly, the Board is reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve doubt on the matter in favor of the defendant. *See Paolo's,* 21 USPQ2d at 1902; TBMP § 312.02.

Respondent's answer was due by August 28, 2017, and Respondent filed its motion and proposed answer on October 25, 2017. Although this delay of almost two months is not entirely insignificant, Petitioner has not asserted any specific prejudice to its ability to litigate the case.[1] Additionally, Respondent has demonstrated by its answer that it has a meritorious defense to the notice of opposition.[2] Finally, although Petitioner's explanation as to why it did not timely answer the petition for cancellation opposition is somewhat vague, the stated reasons for the delay –

[1] Mere delay, without more, does not establish prejudice *See, e.g.*, *DeLorme*, 60 USPQ2d at 1224 (no prejudice where plaintiff had not alleged that witnesses or evidence became unavailable due to the passage of time, or that it had suffered any other substantial prejudice); *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 U.S.P.Q.2d 1154, 1156 (TTAB 1991) (for purposes of deciding a motion for relief from judgment filed under Fed. R. Civ. P. 60(b), "delay alone is not a sufficient basis for establishing prejudice"); *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582, 1587 (TTAB 1997) (in the context of Fed. R. Civ. P. 6(b)(1)(B) motion to reopen the time for taking action based on excusable neglect, prejudice to the nonmovant must be more than the mere inconvenience, delay, or loss of any tactical advantage, but rather contemplates prejudice to nonmovant's ability to litigate the case due to, for example, the loss or unavailability of evidence or witnesses which otherwise would have been available to the nonmovant).

[2] A "meritorious defense" under the *Fred Hayman* analysis does not entail an inquiry into the merits of the underlying case, but merely a plausible response to the petition for cancellation and a willingness to defend the matter on its merits. *DeLorme*, 60 USPQ2d at 1224.

Respondent's efforts to retain counsel and the subsequent disruption of business activities as a result of Hurricane Irma – do not rise to the level of willful conduct or gross neglect.[3]

Respondent's motion therefore is **granted**, the notice of default is discharged, and Respondent's answer (*see* 7 TTABVUE 6–7) is accepted and entered as Respondent's operative pleading in this case.

Proceedings are resumed and disclosure, discovery, and trial dates are reset as follows.[4]

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| Deadline for Discovery Conference | **1/6/2018** |
| Discovery Opens | **1/6/2018** |
| Initial Disclosures Due | **2/5/2018** |
| Expert Disclosures Due | **6/5/2018** |
| Discovery Closes | **7/5/2018** |
| Plaintiff's Pretrial Disclosures | **8/19/2018** |
| Plaintiff's 30-day Trial Period Ends | **10/3/2018** |
| Defendant's Pretrial Disclosures | **10/18/2018** |
| Defendant's 30-day Trial Period Ends | **12/2/2018** |
| Plaintiff's Rebuttal Disclosures | **12/17/2018** |
| Plaintiff's 15-day Rebuttal Period Ends | **1/16/2019** |

The Federal Rules of Evidence generally apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many

[3] During the time Respondent was seeking to retain counsel, the better practice would have been for Respondent to have requested an extension of its time for answering the petition to cancel.

[4] The notice of appearance filed by Respondent's counsel on November 6, 2017, has been noted and entered. The Board has updated its records accordingly. The parties are reminded that under Trademark Rule 2.119(b), 37 C.F.R. § 2.119(b), service of submissions and other papers must be made by email, unless the parties stipulate to an alternative method of service. In the absence of a stipulation, service may be made by means other than email only under the limited circumstances and in a manner specified in Trademark Rule 2.119(b).

requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits, declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).