

ESTTA Tracking number: **ESTTA877634**

Filing date: **02/15/2018**

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

Proceeding	92066525
Party	Defendant Dean Thompson
Correspondence Address	DEAN THOMPSON SUITE 513 CONCORDIA PLAZA, 1 SCIENCE MUSEUM ROAD KOWLOON HONG KONG
Submission	Motion for Relief from entry of Default Judgment
Filer's Name	Pollie Gautsch
Filer's email	pollie@gandalegal.com
Signature	/polliegautsch/
Date	02/15/2018
Attachments	Hunter Fight petition to reinstate.pdf(1299227 bytes)

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

In re:

Mark: HUNTER FIGHT WEAR
Serial No.: 87199284
Reg. No.: 4771161
Cancellation No.: 92066525
Registrant: Dean Thompson

Mariana Travassos Miguel Pereira)
)
 Petitioner,)
)
 v.)
)
 Dean Thompson)
)
 Registrant.)
 _____)

Registrant’s Motion for Relief from Final Judgment

Pursuant to Fed. R. Civ. P. 60(b), TBMP 540, Registrant moves for an order granting relief from final judgment entered by the Board in this matter on the grounds that Registrant was unaware of the existence of the cancellation proceeding and therefore Registrant’s failure to file an answer was the result of mistake, inadvertence, surprise, or excusable neglect.

Memorandum in Support

Background

The petition to cancel was filed on July 25, 2017. At the time of filing, Registrant maintained a correspondence address in the United States as permitted by T.M.E.P. 603.01. Petitioner failed to serve Registrant at this correspondence address of record as required by Trademark Rule 2.111. According to the proceeding history, service by mail was only attempted at Registrant’s foreign address in Hong Kong, and was returned as undeliverable on September 5, 2017. At no time was service attempted on Registrant’s United States correspondence address. On September 12, 2017, the Board suspended proceedings pending service by publication, which was affected on October 10, 2017. On November 20,

2017, the Board granted the petition to cancel, and on December 1, 2017, the Commissioner entered an order cancelling the registration.

Throughout it all, Registrant had no knowledge of the pendency of the petition to cancel.

Legal Standard

The Board may relieve a party from final judgment under the grounds specified in Fed. R. Civ. P. 60(b). TBMP 544, 37 CFR § 2.116(a). Fed. R. Civ. P. 60(b)(1) specifies that “mistake, inadvertence, surprise, or excusable neglect” are grounds that justify relief from final judgement.

In this case, Registrant was unaware the petition had been filed. Following service by publication, the Board therefore entered a default judgment for failure to timely answer the complaint.

Because default judgments for failure to timely answer the complaint are not favored by the law, a motion under Fed. R. Civ. P. 60(b) seeking relief from such a judgment is generally treated with more liberality by the Board than are motions under Fed. R. Civ. P. 60(b) for relief from other types of judgments. Among the factors to be considered in determining a motion to vacate a default judgment for failure to answer the complaint are (1) whether the plaintiff will be prejudiced, (2) whether the default was willful, and (3) whether the defendant has a meritorious defense to the action. TBMP 544.

I. Plaintiff Will Not Be Prejudiced

Petitioner’s request was granted on November 20, 2017, three months before the date of this motion. Had Registrant been served at its proper correspondence address, or been aware of the service by publication, and been able to answer or enter another appearance prior to the November 10, 2017 deadline, the Board would have issued a new scheduling order and this matter would have still been in the very early stages of discovery. Accordingly, Petitioner cannot claim it will be prejudiced if Registrant is allowed to answer and defend at this stage.

II. The Default was Not Willful

Registrant did not receive service and was unaware the petition had been filed. Accordingly, the failure to file an answer was not willful. Registrant learned of the Petition to Cancel and the Board's order cancelling the registration in February 2018, and filed this Motion for Relief as promptly as possible thereafter. See Registrant's Declaration, **Exhibit A**.

III. Registrant Has Meritorious Defenses to the Action

Registrant has multiple meritorious defenses to the cancellation petition and deserves the opportunity to defend the registration. If allowed to answer and defend, Registrant intends to defend the registration as follows:

A. The Petition Fails to State a Claim on Which Relief May be Granted

The Petition to Cancel consists of an introductory paragraph, 16 numbered paragraphs, and a conclusory paragraph. While the ESTTA coversheet identifies the grounds as "Priority and likelihood of confusion" under "Trademark Act Sections 14(1) and 2(s)," "Abandonment" under "Trademark Act Section 14(3)," and "Fraud on the USPTO" under "Trademark Act Section 14(3)..." the petition fails to properly plead these claims. In particular, Petitioner fails to allege prior use of the mark in the United States. To establish priority, Petitioner must plead and prove prior use in commerce in the United States. Furthermore, Petitioner provides no basis for her claims of Abandonment or Fraud; they appear to be attempts to start a fishing expedition. Accordingly, Petitioner has failed to plead facts sufficient under any of the named causes of action.

The fact that Registrant can establish that the Petition should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted demonstrates that Registrant has a meritorious defense to the Petition to Cancel.

B. Registrant In Fact Has Priority In The United States

Registrant's statutory priority in its HUNTER FIGHT WEAR mark dates at least as early as the filing date of the application – August 29, 2013. Although the Petition alleges that Petitioner claims use as early as 1997, the December 1997 priority date provided in the complaint (paragraph 15) likely refers to

Petitioner's international priority, given the statement (paragraph 9) that the brand began in the 1990s. Petitioner has no provided unambiguous proof of use in the United States prior to its discovery of Registrant's use. Registrant's registration is prima facie evidence of its use in the United States, its present cancellation notwithstanding. All evidence available to Registrant clearly shows that Registrant has statutory priority in the United States; accordingly, Registrant has a meritorious defense to the petition to cancel.

C. Registrant Has Not Abandoned Its Mark

Abandonment of a trademark requires the deliberate cessation of use of the mark for a minimum of three years by the mark holder, with the intent to not resume use of the mark. Registrant has continually used its mark in commerce in the United States since its first use in commerce in August 2013, and has never indicated that it will cease use of the mark, either temporarily or permanently. *See* Registrant's Declaration, **Exhibit A**. Hence, Registrant has a meritorious defense to the petition to cancel.

D. The Registration was Not Fraudulently Obtained

Petitioner offers bare allegations that Registrant defrauded the USPTO by registering its HUNTER FIGHT WEAR mark for goods that Registrant did not offer. Registrant first notes that this claim is insufficiently pled; bare allegations do not meet the standard for notice pleading. Moreover, Registrant sells, and sold at the time of the Registration, the goods cited by Petitioner as having not been offered for sale (construing the fraud). As goods were sold in commerce as claimed, no fraud occurred. Accordingly, the Registrant has a meritorious defense to the petition to cancel.

E. Registrant Will Plead Additional Meritorious Affirmative Defenses

In addition to the above meritorious defenses which go to the heart of Petitioner's claims, Registrant will plead that the affirmative defense of laches entitles Registrant to judgment in this case. Registrant filed the application in 2013. Petitioner did not object, oppose, or otherwise bring action in this matter until

July 25, 2017. As an additional defense in this matter, Registrant will claim that the equitable defense of laches bars Petitioner's claim in this case.

WHEREFORE, Registrant respectfully requests that the Board enter an order granting Registrant relief from the judgment entered in this case and allow Registrant to file an answer and defend the registration.

Dated February 12, 2018

Respectfully Submitted

G&A Legal, a professional corporation

BY: 

Pollie A. Gautsch
665 San Rodolfo Dr. 123-209
(858) 345-1067
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing REGISTRANT'S MOTION FOR RELIEF FROM FINAL JUDGMENT on the Attorney of Record for the Petitioner by mailing it via First Class Mail postage prepaid, on the 13th day of February 2018, at the address indicated below:

Derek Simpson
The Law Offices of Derek A Simpson
555 S. Flower St. Ste. 3200
Los Angeles, CA 90071

BY: 

Pollie A. Gautsch
665 San Rodolfo Dr. 123-209
(858) 345-1067

Attorney for Registrant

EXHIBIT A

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

In re:

Mark: HUNTER FIGHT WEAR
Serial No.: 87199284
Reg. No.: 4771161
Cancellation No.: 92066525
Registrant: Dean Thompson

Mariana Travassos Miguel Pereira)	
)	
Petitioner,)	
)	
v.)	
)	
Dean Thompson)	
)	
<u>Registrant.</u>)	

Dean Thompson **DECLARATION OF** Dean Thompson

I, _____, having been warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, declare the following:

1. The facts stated in this declaration are based on my personal knowledge. I am over eighteen, of sound mind, and am competent to testify on the matters stated herein.
2. (State connection to) U.S. Reg. No. 4771161 for the mark HUNTER FIGHT WEAR.
3. U.S. Reg. No. 4771161 issued on July 14, 2015 to Dean Thompson
4. At the time of filing, HUNTER FIGHT WEAR was used in commerce on athletic apparel for use in martial arts, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms, beanies, fight shorts for mixed martial arts or grappling, hooded sweatshirts, martial arts uniforms, and track suits, all the aforementioned for use in martial arts.
5. On information and belief, U.S. Registration 4771161 HUNTER FIGHT WEAR has been used continuously in commerce for the above-mentioned goods since 2013.

1. The cancellation of U.S. Registration 4771161, HUNTER FIGHT WEAR has been
2. maintained in accordance with the above-mentioned goods since 2013.

3. On information and belief, Registrant has not abandoned the mark, nor does Registrant
4. intend to do so.

5. The address of record identified in the USPTO records is Suite 53, Concordia Plaza, 1
6. Seaside Museum Road, Kowloon, Hong Kong, which was the address of Dean Thompson at the
7. time of registration.

8. The correspondence address of record identified in the USPTO records was, at the time of
9. registration, 4240 Newhope St #127, Fountain Valley, CA 92708, which was the address of
10. Newhope Law, PC.

11. Clement Chang, an attorney at Newhope Law, PC, was authorized to conduct business
12. with the USPTO on behalf of U.S. Reg. No. 4771161.

13. On information and belief, all correspondence with the USPTO was to be directed to Mr.
14. Chang.

15. On information and belief, Mr. Chang received no notice of a cancellation proceeding
16. filed against U.S. Reg. No. 4771161.

17. (Chang, however, did not discover the cancellation). Only then was it discovered that a
18. cancellation proceeding had been filed and a cancellation order had been entered for U.S. Reg. No.

19. 4771161 (Chang, however, would have filed timely answer).

