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

Proceeding	92066578
Party	Defendant Noots Nutrition, LLC
Correspondence Address	NOOT NUTRITION LLC 9482 HITO CT SAN DIEGO, CA 92129 UNITED STATES Email: jimmy@ruckpack.com
Submission	Motion for Relief from entry of Default Judgment
Filer's Name	Allen F Bennett
Filer's email	docket@afbip.com, allen@afbip.com
Signature	/Allen F Bennett/
Date	10/26/2017
Attachments	REFIT Request To Set Aside Default.pdf(58212 bytes ) Ex A Refit CD.pdf(36890 bytes ) Ex B Letter re REFIT trademark 2-27-17.pdf(296489 bytes ) Ex C EWSdec.pdf(25025 bytes ) Ex D Answer to the Petition for Cancellation.pdf(25772 bytes )

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

Refit Revolution, LLC,	)	Cancellation No. 92066578
	)	
Petitioner,	)	
	)	
v.	)	Mark: <b>REFIT</b>
	)	Registration No.: 4,912,790
Noots Nutrition, LLC,	)	Registration Date: March 8, 2016
	)	
Respondent.	)	
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**REQUEST TO SET ASIDE NOTICE OF DEFAULT**

Pursuant to Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) Rule 502.02 and 312, Noots Nutrition, LLC (“Noots”) hereby files its Request to Set Aside Notice of Default (“Notice of Default”) and states as follows:

**INTRODUCTION**

The Notice of Default should be set aside. The TTAB favors deciding a case on the merits in lieu of a default. Moreover, Noots has shown good cause as to why its answer to the Petition for Cancellation was late. Refit Revolution, LLC (“RR”) will suffer no substantial prejudice from a delay of five (5) weeks, and Noots has a meritorious defense (see attached Answer and Affirmative Defenses). Respondent’s Request to Set Aside Notice of Default should be granted.

**FACTS**

1. On February 10, 2017, RR sent Noots a cease and desist letter (“C&D”) regarding its use of the REFIT mark on dietary supplements. See attached C&D as Exhibit “A.”
2. On February 27, 2017, Noots responded to the C&D (“Response”). See attached Response as Exhibit “B.” Noots heard nothing further from RR until the institution of this

proceeding, six (6) months later. Noots had understandably presumed that RR agreed with the assertions set forth in its Response and was not pursuing the matter further.

3. On August 7, 2017, RR filed a Petition for Cancellation of Noots' U.S. Trademark Registration No. 4,912,970 for REFIT in International Classes 005 for "Dietary beverage supplements for human consumption for promoting muscle and joint recovery after exertion; Nutraceuticals for use as a dietary supplement; Health food supplements; Dietary and nutritional supplements; Vitamin and mineral supplements; Nutritional supplements in the form of liquids and powder; Dietary supplements for focus, endurance, energy, and treating fatigue; Dietary and nutritional supplements for endurance sports; Amino acids for nutritional purposes; Nutritional supplements consisting primarily of electrolytes; Nutritional supplements containing choline" and International Class 032 for "Powders for making soft drinks; Powders used in the preparation of isotonic sports drinks and sports beverages; Concentrates, syrups or powders used in the preparation of sports and energy drinks; Soft drinks, namely, carbonated soft drinks; Sports drinks; Sports drinks containing electrolytes; Sports drinks enhanced with vitamins, minerals, nutrients, amino acids, and Nootropics; Sports drinks, namely, performance drinks; Sports drinks, namely, recovery drinks; Isotonic beverages."

4. On August 7, 2017, the TTAB issued an Order setting the deadline to respond to the Petition for Cancellation on September 16, 2017, which is a Saturday, making the deadline September 18, 2017.

5. In September, Noots' prior counsel fell ill and was ultimately hospitalized and failed to timely respond to the Petition for Cancellation. See Declaration of prior counsel, Erica W. Stump (Exhibit "C."). The undersigned counsel was recently retained and took over the file and is filing the instant Motion to Set Aside Default.

6. On September 26, 2017, the TTAB issued a Notice of Default ordering Noots to show cause why judgment by default should not be entered against Noots. Noots was given thirty (30) days from the mailing of the notice to show cause why judgment by default should not be entered.

### **MEMORANDUM OF LAW**

The standard for determining whether default should be entered for failure to timely respond to a Notice of Institution requires the Respondent to show good cause why default judgment should not be entered against it. TBMP §508; Fed.R.Civ.P. §55(c). Good cause for failure to file a timely answer is established when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action. TBMP §312.02. The determination of whether default judgment should be entered against a party lies within the sound discretion of the Board. *Vital Pharmaceuticals, Inc. v. Conrad J. Kornholm, Jr.*, Opposition No. 91181806 (2008 TTAB). In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. *Id.* Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer and tends to resolve any doubt on the matter in favor of the defendant. TBMP §312.02.

In the instant case, Noots has shown that its failure to timely answer was not the result of willful conduct or gross negligence, RR will not be prejudiced by the delay of thirty days, and Noots has a meritorious defense to the Petition for Cancellation (see attached Answer and Affirmative Defenses).

**I. Respondent's Delay was not the result of Willful Conduct or Gross Neglect on the Part of Defendant.**

Good cause to set aside a default is found where a party's delay is due to a mistake or unforeseen intervening circumstances. Examples of "good cause" include docketing errors and hardships suffered by counsel, e.g. a home fire. These are not the result of willful conduct or gross neglect. See *Paolo's Assoc. Ltd. Partnership v. Bodo*, 21 U.S.P.Q.2d 1899 (Comm'r Pat. 1990) (TTAB properly granted defendant's motion to accept a late-filed answer caused by docketing errors); *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991) (motion to accept late answer filed before notice of default issued); *Vital Pharmaceuticals*, Opposition No. 91181806 (good cause found where applicant's counsel had a home fire and was unfamiliar with TTAB practice); *Sopharma AD Corporation v. Western Holdings, LLC*, Opposition No 91161927 (TTAB 2004) (granting motion for default for docketing error); *H.J. Heinz Company v. The Taco Maker, Inc.*, 2001 TTAB LEXS 271 (TTAB 2001) (late filing due to docketing mix up, no prejudice in seventy four day delay)<sup>1</sup>; *Thrifty Corp. v. Bomax Enterprises*, 28 USPQ 62 (TTAB 1985) (no willful refusal to comply, no continued failure to respond to TTAB's orders and no prejudice in one week).

"Gross neglect" is only found when there has been a very long delay without justification. *DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224. In *Delorme*, the defendant delayed filing an answer for six (6) months and the only explanation proffered was unjustified belief that the notice "incomplete" and required no response. *Id.* In contrast, the delay here was the result of an unexpected illness befalling Noots' prior counsel. Noots did not intentionally ignore

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<sup>1</sup> Although the *Heinz* case is not citable, it is additional evidence of the TTAB's treatment of late-filed answers.

a TTAB Notice. Registrant's prior counsel fell ill and was hospitalized, resulting in the missed deadline. Just as in the *Vital Pharmaceuticals* Opposition, where counsel's office was destroyed by fire, this delay was due to an unforeseen hardship suffered by counsel. It does not justify forfeiture of Noots' trademark registration or denying Noots the opportunity to present a meritorious defense.

**II. Plaintiff will not be Substantially Prejudiced by the Delay.**

RR will not suffer substantial prejudice from a delay of five weeks. Noots responded to RR's Cease and Desist letter in February of 2017. RR waited until August of 2017, almost six (6) months, before filing its Petition to Cancel Noots' registration. Any prejudice to caused by the delay in filing Noots' Answer is overshadowed by the Petitioner's own much lengthier delay in bringing this action.

**III. The Defendant has a Meritorious Defense.**

Finally, Noots has a meritorious defense to the Petition for Cancellation (see attached Answer and Affirmative Defenses), which adequately meets the third factor. *See Fred Hayman*, 21 USPQ at 1557 (noting that submission of an answer which is not frivolous shows a defense). Noots' Answer fully responds to all of the allegations of the Petition, and asserts plausible affirmative defenses. See Exhibit D, Answer and Affirmative Defenses.

For all of these reasons, Noots' Request to Set Aside Notice of Default should be granted.

Date: October 26, 2017.

Respectfully submitted,

/Allen F. Bennett/  
Allen F. Bennett  
Bennett Intellectual Property  
4970 SW 8 Street  
Margate, FL 33068  
561-860-0654

allen@afbip.com  
docket@afbip.com

Counsel for Respondent Noots Nutrition LLC

**CERTIFICATE OF TRANSMISSION**

I HEREBY CERTIFY that a true and complete copy of the foregoing **REQUEST TO SET ASIDE NOTICE OF DEFAULT** has been served on Wendy C. Larson by forwarding said copy on October 26, 2017, via email to Wendy C. Larson at [wlarson@pirkeybarber.com](mailto:wlarson@pirkeybarber.com), [drausa@pirkeybaber.com](mailto:drausa@pirkeybaber.com), [tmcentral@pirkeybarber.com](mailto:tmcentral@pirkeybarber.com).

Signature: /Allen F. Bennett/

Date: October 26, 2017



Elizabeth Stafki, Associate  
(512) 322-5200  
estafki@pirkeybarber.com

February 10, 2017

VIA EMAIL: ERICA@ERICAWSTUMP.COM; TRADEMARKS@ERICAWSTUMP.COM  
VIA FEDEX

Erica W. Stump  
Erica W. Stump, P.A.  
110 E Broward Blvd., Ste. 1700  
Fort Lauderdale, FL 33301

Re: *Violation of the Trademark Rights of Refit Revolution*  
(Our Ref. REFI014)

Dear Ms. Stump:

This firm represents Refit Revolution, LLC in trademark and unfair competition matters. We write regarding your client Noots Nutrition, LLC's registration for the mark REFIT, U.S. Reg. No. 4,912,790 (the "Registration") in classes 5 and 32 and its related use of that mark.

Refit Revolution owns the mark REFIT and other related marks and uses them extensively in connection with its workout program offered nationwide. Refit Revolution's services include, for example: (1) local classes throughout the country offered by trained instructors; (2) nationwide training of instructors; (3) on-demand classes through the provision of online content; and (4) master classes offered nationally by the company's founders. Refit Revolution also offers products bearing the REFIT mark, including reusable to-go cups. For more information about the company and its offerings, please see [refitrev.com](http://refitrev.com).

In addition to its common law rights, Refit Revolution owns a federal registration for REFIT (No. 4,279,308) for "Counseling services in the field of physical fitness; Physical fitness conditioning classes; Physical fitness instruction; Physical fitness training services" in class 41 and "Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms" in class 25.

Because trademarks are very important symbols relied upon by consumers, a trademark owner has a responsibility to consumers to ensure that its trademark remains a reliable symbol for identifying the owner's goods and services, and for distinguishing those goods and services from those of others. Unauthorized uses of a trademark can cause consumers to be confused and can reduce the distinctiveness and reliability of the trademark as a symbol. For these reasons, trademark owners must take steps to eliminate unauthorized uses of their trademarks and confusingly similar names or marks.

It has come to our attention that your client has registered the mark REFIT and is using the mark in connection with sports drinks offered on its website at [ruckpack.com/refit-hydration-drink](http://ruckpack.com/refit-hydration-drink).

Your client's use and registration of the REFIT mark in connection with goods related to the goods and services of Refit Revolution is concerning to our client as it may cause consumers to mistakenly believe that there is a connection or affiliation between your client's offerings and Refit Revolution or its REFIT marks.

Accordingly, we insist that your client: (1) surrender the Registration and (2) cease from using the mark REFIT or any other mark confusingly similar to the REFIT mark.

We ask you to respond within ten days after your receipt of this letter giving us your assurance that your client will comply with the above demands.

Very truly yours,

  
Elizabeth Stafki

**Erica W. Stump, P.A.**

110 E. Broward Blvd., Suite 1700

Fort Lauderdale, FL 33301

[erica@ericawstump.com](mailto:erica@ericawstump.com)

(954) 828-2334

Fax (954) 278-8510



February 27, 2017

**Via email to: [estafki@pirkeybarber.com](mailto:estafki@pirkeybarber.com)**

Pirkey Barber PLLC

600 Congress Avenue, Suite 2120

Austin, TX 78701

Re: RuckPack Refit Products

Ms. Stafki:

It was a pleasure to speak to you on Monday, February 20, 2017. This letter is as a follow up to that call and in response to your letter dated February 10, 2017 regarding Refit Revolution, LLC's trademark regarding REFIT or REFIT REVOLUTION for fitness classes, related training services, athletic apparel and to-go cups.

As you are aware, I represent RuckPack, Inc (formerly Noots! Nutrition, LLC). RuckPack owns and uses the REFIT trademark for (1) dietary and nutritional supplements; and (2) sports drinks. RuckPack owns U.S. Registration No. 4,912,790 in International Class 005 for "Dietary beverage supplements for human consumption for promoting muscle and joint recovery after exertion; Nutraceuticals for use as a dietary supplement; Health food supplements; Dietary and nutritional supplements; Vitamin and mineral supplements; Nutritional supplements in the form of liquids and powder; Dietary supplements for focus, endurance, energy, and treating fatigue; Dietary and nutritional supplements for endurance sports; Amino acids for nutritional purposes; Nutritional supplements consisting primarily of electrolytes; Nutritional supplements containing choline" and International Class 032 for "Powders for making soft drinks; Powders used in the preparation of isotonic sports drinks and sports beverages; Concentrates, syrups or powders used in the preparation of sports and energy drinks; Soft drinks, namely, carbonated soft drinks; Sports drinks; Sports drinks containing electrolytes; Sports drinks enhanced with vitamins, minerals, nutrients, amino acids, and nootropics; Sports drinks, namely, performance drinks; Sports drinks, namely, recovery drinks; Isotonic beverages."

The founder and owner of RuckPack is in the U.S. Marines. In military circles, "refit" refers to the post battle phase of reconstituting all that was expended, spent, and damaged. RuckPack named its REFIT products as a play on the products ability to reconstitute everything a consumer needs after a tough day of fighting daily battles to recover and get back in the fight - hydration, joint support, proteins, etc.

There is no likelihood of confusion between your client's use of REFIT REVOLUTION for fitness classes, training services, and athletic clothing and my client's use of REFIT on dietary and nutritional supplements and sports drinks. One consideration is that RuckPack uses its RUCKPACK house mark as the primary mark on all products, with REFIT RECOVERY AID (or REFIT RECOVERY AID SERIES) being a sub-category to the primary RuckPack brand. As the subcategory of the larger RuckPack brand, Refit maintains a smaller footprint on labeling [Illustration (c)]. Furthermore, there are accompanying marks that help distinguish this product as a RuckPack entity. For instance, all RuckPack products display the distinctive RuckPack reticle [Illustration (a)], and the main REFIT series mark carries this reticle next to the word REFIT when it is not immediately beside the RUCKPACK mark. Aside from the Reticle, the word REFIT is also accompanied by the phrase RECOVERY AID [Illustration (b)] or RECOVERY AID SERIES. Finally, the distinct lettering of the word REFIT also identifies this as a unique product belonging to RuckPack.

Your client appears to use "revolution" along with "refit" so that consumers see it as REFIT REVOLUTION and not REFIT alone. The RUCKPACK REFIT mark is vastly different in appearance from your client's REFIT REVOLUTION trademark in sound and appearance.

(a)



(b)



(c)



Second, RuckPack's use is limited to dietary and nutritional supplements and sports drinks. RuckPack does not use its mark to offer fitness classes or any other services related thereto, nor does it use its mark on to-go cups or athletic clothing. RuckPack's target consumers are

bodybuilders, endurance athletes, fitness enthusiasts, and America's warfighters/first responders. Refit Revolutions consumers, on the other hand, appear to be people interested in working out in their own home as opposed to RuckPack's consumers, where fitness and athleticism is a part of the consumers' daily life and oftentimes consumers' livelihood.

Although both RuckPack's goods and your client's services and goods related thereto both pertain to the general category of overall health, there is no likelihood of confusion due to the difference in connotation and commercial impression of the marks as to applied to the different goods and services. REFIT, when used with the phrase RECOVERY AID on dietary and nutritional supplements and sports drinks connotes a nutrition product, not a fitness service. Also, the name itself, combined with the overall aesthetic and history of the company, along with the use of the reticle (net of fine lines in the eyepiece of a sighting device for aiming firearms) logo, implies that REFIT refers to the reconstituting of that which was lost, such as in battle, inferring the ability to reconstitute the body with needed nutrition after fighting one's daily battles (in life).

Moreover, the consumers of RuckPack products are sophisticated. As one court observed,

*These types of individuals are among the most sophisticated of consumers because they are conscientious in the nutrition choices they make and carefully read labels. Courts have acknowledged that consumers selecting products or treatments that "affect their physical appearance and health" are "likely to exercise a great deal of care." Bodybuilders, for whom physical health and appearance are central to their livelihood, are certain to be conscious of the products they are selecting for consumption.*

*Nature's Best, Inc. v. Ultimate Nutrition, Inc.*, 323 F. Supp. 2d 429, 434 (E.D.N.Y. 2004) (emphasis added, citations omitted). Thus, there is no likelihood of confusion.

In an effort to avoid litigation, RuckPack will agree to (1) not expand its use of the REFIT mark on products beyond its current use of dietary and nutritional supplements and sports drinks; (2) not use the REFIT mark on fitness classes, training services, athletic clothing, and to-go cups; (3) always use the RUCKPACK house mark on the REFIT products; (4) always use the RECOVERY AID slogan on the REFIT products when not directly adjacent to the RUCKPACK house mark; and (5) always use the distinctive RuckPack reticle logo on REFIT products.

RuckPack reserves all legal recourse.

Sincerely,

A handwritten signature in blue ink, appearing to read "Erica W. Stump". The signature is fluid and cursive, with a long horizontal stroke at the end.

Erica W. Stump, Esq.



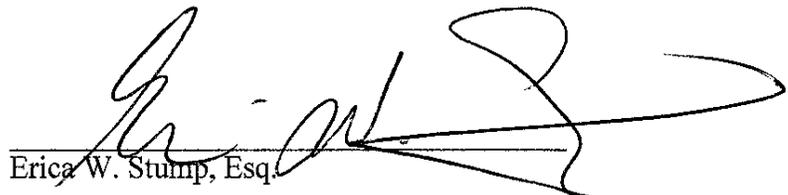
**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Refit Revolution, LLC,	)	Cancellation No. 92066578
	)	
Petitioner,	)	
	)	
v.	)	Mark: <b>REFIT</b>
	)	Registration No.: 4,912,790
Noots Nutrition, LLC,	)	Registration Date: March 8, 2016
	)	
Respondent.	)	
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**DECLARATION OF ERICA W. STUMP, ESQ.**

Comes now, Erica W. Stump, Esq. and pursuant to Title 28, United States Code, Section 1746, I certify under the penalty of perjury that the contents of the following declaration are true to the best of my knowledge, information and belief:

1. I am over the age of 18 and I have firsthand knowledge of the facts in this declaration.
2. I represented Noots Nutrition, LLC (“Noots”) in the instant action. I fell ill in mid-September 2017 and was hospitalized. As a result, I inadvertently missed the deadline to respond to the Petition to Cancel.
3. The delay in filing the answer was not willful or the result of gross negligence. Thus, Noots has shown good cause as to why its late filed answer should be accepted.
4. This 26 day of October 2017.

  
Erica W. Stump, Esq.

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

Refit Revolution, LLC,	)	Cancellation No. 92066578
	)	
Petitioner,	)	
	)	
v.	)	Mark: <b>REFIT</b>
	)	Registration No.: 4,912,790
Noots Nutrition, LLC,	)	Registration Date: March 8, 2016
	)	
Respondent.	)	

**ANSWER AND AFFIRMATIVE DEFENSES**

Noots Nutrition, LLC (“Noots”), by and through undersigned counsel, hereby files its Answer and Affirmative Defenses in the Petition for Cancellation and in response to Petitioner’s allegations states as follows:

**ANSWER**

1. Noots is without knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore denies the same.
2. Noots is without knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore denies the same.
3. Noots denies the allegations in this paragraph.
4. The allegations in this paragraph purport to characterize U.S. Trademark Registration No. 4,279,308, which speaks for itself and is the best evidence of its contents. Therefore, reference is hereby made to the same. Except as admitted, Defendants deny the allegations in this paragraph.
5. Noots admits the allegations in this paragraph.

6. Noots admits the allegations in this paragraph.

7. Noots is without knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore denies same.

8. Noots denies the allegations in this paragraph.

9. Noots denies the allegations in this paragraph.

10. Noots denies the allegations in this paragraph.

11. Noots is without knowledge or information sufficient to admit or deny the allegations in this paragraph and therefore denies same.

12. Noots denies the allegations in this paragraph.

Noots further denies all allegations not specifically, actually or constructively, admitted in the foregoing paragraphs of this Answer and Affirmative Defenses.

### **AFFIRMATIVE DEFENSES**

#### **FIRST DEFENSE**

Noots' REFIT trademark on dietary supplements and beverages (as set forth in more detail in Registration No. 4,912,790) is not confusingly similar to RR's REFIT trademark on clothing and physical fitness instruction (as set forth in more detail in Registration No. 4,279,308).

#### **SECOND DEFENSE**

Noots has used its REFIT trademarks on dietary supplements and beverages (as set forth in more detail in Registration No. 4,912,790) for over three (3) years during the same time that RR has used its REFIT trademark on clothing and physical fitness instruction (as set forth in more detail in Registration No. 4,279,308) without any instances of actual confusion. Since the Applicant's adoption of its registered mark, the mark has developed significant goodwill among the consuming public and consumer acceptance of the products offered by Noots. Such goodwill

and widespread use has caused Noots' mark to acquire distinctiveness with respect to the Applicant.

**THIRD DEFENSE**

RR is not entitled to relief by reason of laches.

**FOURTH DEFENSE**

RR is not entitled to relief by the doctrine of acquiescence.

**FIFTH DEFENSE**

RR is not entitled to relief by the doctrine of estoppel.

**SIXTH DEFENSE**

RR is not entitled to relief by the doctrine of unclean hands.

**SEVENTH DEFENSE**

RR is not entitled to relief by the doctrine of waiver.

**EIGHTH DEFENSE**

RR's trademarks are weak and entitled to only a narrow scope of protection.

**NINTH DEFENSE**

RR registration is unenforceable because RR has not continuously used its registered mark in interstate commerce since the dates of first use claimed in its registration.

Applicant hereby reserves the right to assert any additional defenses.

WHEREFORE, Noots prays that the Petition for Cancellation be dismissed.

Respectfully submitted,

Date: October 26, 2017

/Allen F. Bennett/  
Allen F. Bennett  
Bennett Intellectual Property

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Margate, FL 33068  
561-860-0654  
allen@afbip.com  
docket@afbip.com

Counsel for Noots Nutrition LLC

**CERTIFICATE OF TRANSMISSION**

I HEREBY CERTIFY that a true and complete copy of the foregoing **REQUEST TO SET ASIDE NOTICE OF DEFAULT** has been served on Wendy C. Larson by forwarding said copy on October 26, 2017, via email to Wendy C. Larson at [wlarson@pirkeybarber.com](mailto:wlarson@pirkeybarber.com), [drausa@pirkeybaber.com](mailto:drausa@pirkeybaber.com), [tmcentral@pirkeybarber.com](mailto:tmcentral@pirkeybarber.com).

Signature: /Allen F. Bennett/

Date: October 26, 2017