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

Proceeding	92067609
Party	Defendant Theatrical Stage Employees Union Local No. 2 of the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artist and Allied Crafts of the United States and Canada
Correspondence Address	THEATRICAL STAGE EMPLOYEES UNION LOCAL #2 EL AL 216 SOUTH JEFFERSON ST STE 400 CHICAGO, IL 60661 UNITED STATES
Submission	Motion for Relief from entry of Default Judgment
Filer's Name	Robert S. Rigg
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Signature	/Robert S. Rigg/
Date	03/13/2018
Attachments	Motion_to_Set_Aside_Notice_of_Default_and_for_Leave_to_File_Answer.pdf(124854 bytes)

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

David B. Eaves and Chicago Stagehand, LLC, Petitioners, v. Theatrical Stage Employees Union Local No. 2 of the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Respondent.	Cancellation No.: 92067609 Mark: CHICAGO STAGEHANDS Registration No.: 4,303,933

MOTION TO SET ASIDE NOTICE OF DEFAULT AND FOR LEAVE TO FILE ANSWER

Respondent, Theatrical Stage Employees Union Local No. 2 of the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada ("Respondent"), the owner of and registrant named in U.S. Registration No. 4,303,933 for the mark CHICAGO STAGEHANDS ("Respondent's Mark"), by and through its undersigned counsel, moves to set aside the Notice of Default issued by the Trademark Trial and Appeal Board (the "Board") on February 15, 2018 pursuant to FED. R. CIV. P. 55(c) and for leave to file the attached answer and motion to dismiss in response to the Petition for Cancellation filed in the instant proceeding.[1]

[1] The Board previously entered judgment by default on February 27, 2018; however, the Board vacated this order on February 28, 2018 and suspended proceedings pending Respondent's response to the show cause order issued February 15, 2018. (*See* Dkt. No. 6.) As stated in the Notice of Default issued on February 15, 2018, Respondent "is allowed until thirty days from the date of this order to show cause why judgment by default should not be entered against Respondent in accordance with FED. R. CIV. P. 55(b)(2)" (i.e., until March 17, 2018).

I. STANDARD OF REVIEW

If a registrant fails to timely answer a complaint, the Board will set aside the notice of default upon a showing by the registrant of good cause why default judgment should not be entered. TBMP § 312.02; FED. R. CIV. P. 55(c).

Good cause "is usually found 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. All that is necessary to demonstrate a meritorious defense is a plausible response to the allegations in the complaint (which may be shown, for example, by submitting a copy of the proposed answer to the complaint). *Id.*

A motion to set aside a default "is usually granted when no substantial prejudice will result to the plaintiff and [when] the defendant, not being guilty of gross neglect, claims the existence of a meritorious defense." *Paolo Assocs. Ltd. P'ship v. Bodo*, 21 U.S.P.Q.2d 1899, 1904 (Comm'r 1990) (quoting *Kulakowich v. A/S Borgestad*, 36 F.R.D. 185, 186 (E.D. Penn. 1964)); *see also DeLorme Publ'g Co. v. Eartha's Inc.*, 60 U.S.P.Q.2d 1222, 1223 ("[T]he law strongly favors determination of cases on their merits.").

II. STATEMENT OF RELEVANT FACTS

Upon information and belief, Respondent did not receive the copy of the Petition mailed by the Board. (*See* Carlson Aff. Ex. A, ¶ 3.) As a result, Respondent did not notify Respondent's attorneys that the Petition had been filed.

On or around February 26, 2018, Respondent received the notice of default and forwarded it to Respondent's counsel. Upon being notified that the Petition was filed and the Board had issued a notice of default, Respondent's counsel promptly prepared and filed the

attached answer and motion to dismiss the Petition, along with the instant motion to set aside the Notice of Default.

At the time Petitioner filed its Petition to Cancel on December 21, 2017 (the "Petition"), Petitioner had good reason to believe that Respondent was represented by the undersigned counsel. First, this is not the first dispute between these parties. Petitioner's attorneys represented Petitioner (as respondent) in Cancelation No. 92055242, which was terminated on June 28, 2017 and was filed by Respondent. The undersigned counsel represented Respondent in that proceeding. Second, Respondent's attorneys were identified in the Trademark Status & Document Retrieval ("TSDR") records for the subject registration.

Despite this, Petitioner did not notify the Board that Respondent was likely represented by counsel,[2] did not notify Respondent's attorneys that the Petition had been filed and did not serve a copy of the Petition on Respondent's attorneys.

III. ARGUMENT

Respondent's delay in acting in this case was caused by mistake, inadvertence or excusable neglect and was not willful. As averred by Respondent's business manager, Respondent did not receive the Petition or the Notice of Institution. (Carlson Aff. Ex. A, ¶ 3.)

To the extent the Petition or Notice of Institution were received by one of Respondent's employees, they were not properly routed to Respondent's business manager for review and action. (Carlson Aff. Ex. A, ¶ 3.) Such failure to follow procedure for routing correspondence addressed to Respondent constitutes mistake or excusable neglect, not willful or grossly negligent conduct.

[2] "[P]laintiffs are encouraged to provide current contact information for attorneys . . . which may not be in the Office's TSDR database." TBMP § 310.01.

Because Respondent was unaware of the instant proceeding, Respondent did not instruct its counsel to act in this case until receiving the Notice of Default on or around February 26, 2018, at which time Respondent acted promptly in instructing its counsel to act immediately upon the Notice of Default. *Id.* ¶ 4; *see, e.g., Djeredjian v. Kashi Co.*, 21 U.S.P.Q.2d 1613, 1615 (T.T.A.B. 1991). Further, as evidenced by Respondent's vigorous defense of its rights in the mark CHICAGO STAGEHANDS in Cancelation No. 92055242 between these parties, Respondent has no desire to forego its rights in the present mark. Respondent's delay in answering the Petition was neither willful nor the result of gross neglect.

Respondent's answer was due on February 5, only thirty-six (36) days before the filing of the instant Motion and the attached answer and motion to dismiss.[3] As noted by the Commissioner of Patents and Trademarks, courts have found that delayed satisfaction of a plaintiff's claim and the costs incurred in responding to a motion to set aside default are not a "substantial, let alone prejudicial, injury." *Paolo Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1904 (Comm'r 1990) (*quoting General Tire & Rubber Company v. Olympic Gardens, Inc.*, 85 F.R.D. 66, 70 (E.D. Penn. 1979)). Petitioner will not be substantially prejudiced if the Board sets aside the Notice of Default due to the minimal delay.

As demonstrated by the attached Answer and Motion to Dismiss, Respondent has a meritorious defense to the action.

IV. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Board set aside the Notice of Default and allow Respondent to file the attached Answer and Motion to Dismiss.

[3] *See also Advanced Commc'n Design, Inc. v. Premier Retail Networks, Inc.*, 46 Fed. App'x 964 (Fed. Cir. 2002) (while applying Eight Circuit precedent, finding that entry of default judgment following defendant's 37-day delay in filing an answer was abuse of discretion). The instant motion is also timely as it was filed within the thirty (30) day period for response provided by the Board in the Notice of Default. (*See* Dkt. No. 4.)

Respectfully submitted,

Theatrical Stage Employees Union Local No. 2 of the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada

By: /s/Robert S. Rigg
One of Its Attorneys

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Dated: March 13, 2018

EXHIBIT A

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

David B. Eaves and Chicago Stagehand, LLC, Petitioners, v. Theatrical Stage Employees Union Local No. 2 of the International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada, Respondent.	Cancellation No.: 92067609 Mark: CHICAGO STAGEHANDS Registration No.: 4,303,933

DECLARATION OF CRAIG CARLSON

I, Craig Carlson, hereby declare as follows:

1. I am the business manager of Theatrical Stage Employees Union Local No. 2 of the International Alliance of Stage Employees ("Chicago Stagehands Local No. 2"). My office is located at 216 S. Jefferson St., Suite 400, Chicago, IL 60661 (the "Local No. 2 Office"). I am responsible for managing the intellectual property portfolio of Chicago Stagehands Local No. 2.

2. I have been advised that a Petition to Cancel Chicago Stagehands Local No. 2's U.S. Trademark Registration No. 4,303,933 was filed with the Trademark Trial and Appeal Board (the "Board") on or around December 21, 2017 and that the Board mailed a copy of the Petition to Cancel, along with a Notice of Institution, to the Local No. 2 Office on or around December 27, 2017.

3. I did not receive either the Petition to Cancel or the Notice of Institution and, to the best of my knowledge, neither did any other employee of Chicago Stagehands Local No. 2 working at the Local No. 2 Office. Neither I nor any of our employees working at the Local No. 2 Office recall receiving either the Petition to Cancel or the Notice of Institution.

4. Had an employee of Chicago Stagehands Local No. 2 received either the Petition to Cancel or the Notice of Institution, he or she should have promptly provided such document(s) to me for review.

5. Over the last several months, numerous advertisements and solicitations from third party entities have been sent to the Local No. 2 Office regarding Chicago Stagehands Local No. 2 various trademark applications and registrations. When such solicitations are received, they are generally discarded after being reviewed. It is possible that, if the Petition to Cancel or the Notice of Institution were received at the Local No. 2 Office, they were mistaken for solicitations and inadvertently discarded.

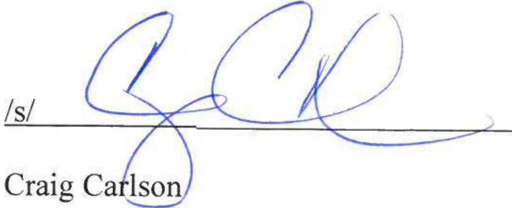
4. On or around February 26, 2018, I received the Notice of Default mailed by the Board and forwarded it to our outside intellectual property counsel. Prior to that time, I was unaware that this proceeding had been filed or that any response was required from Chicago Stagehands Local No. 2. Upon learning of this proceeding, I instructed our outside intellectual property counsel to promptly respond to the Petition to Cancel, as Chicago Stagehands Local No. 2 desires to maintain its registration for the mark CHICAGO STAGEHANDS that is the subject of this proceeding.

5. Chicago Stagehands Local No. 2's failure to timely respond to the Petition to Cancel was inadvertent and unintentional.

6. I hereby declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true and, further, that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

FURTHER, AFFIANT SAYETH NOT.

Date: March 13, 2018

/s/ 

Craig Carlson

CHICAGO/#3106075

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on March 13, 2018, the foregoing document(s) were caused to be served on the person(s) listed below via electronic mail.

Catherine Simmons-Gill
Offices of Catherine Simmons-Gill, LLC
111 West Washington St., Ste. 1110
Chicago, IL 60602
United States
simmonsgill@gmail.com, fraczekp@gmail.com

/s/Robert S. Rigg
Robert S. Rigg