

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

Baxley

Mailed: June 29, 2018

Cancellation No. 92068079

Productos Lacteos Tocumbo S.A. De C.V.

v.

*Jose Gomez, Jr. and Yuliana Gomez dba La
Michoacana 100% Tradicional*

By the Trademark Trial and Appeal Board:

On May 16, 2018, the Board issued a notice of default inasmuch as no answer was of record herein. After Respondents filed a timely response thereto, Petitioner filed a brief in opposition thereto.¹

The determination of whether default judgment should be entered against a party is made in accordance with Fed. R. Civ. P. 55(c), which reads in pertinent part: “for good cause shown the court may set aside an entry of default.” As a general rule, good cause to set aside a defendant’s default will be found where the defendant’s delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where defendant has a meritorious defense. *See Fred Hayman Beverly Hills, Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991). The determination of whether default

¹ A notice of default is essentially an *ex parte* matter between the Board and a defendant that does not contemplate full briefing by the parties. *Compare* TBMP § 312.01 to TBMP § 502.02(b) (June 2017).

judgment should be entered against a party lies within the Board's sound discretion. In exercising that discretion, the Board is mindful of its policy to decide cases on their merits where possible and therefore only reluctantly enters judgment by default for failure to timely answer. *See* TBMP § 312.02.

Bearing in mind that the Board rarely enters default judgment after a defendant responds to a notice of default, the Board finds that Respondents' failure to timely respond was neither willful nor in bad faith. Rather, such failure was caused both by their being Spanish speakers with a limited understanding of English, their unfamiliarity with litigation procedure, and their being "overwhelmed" by their involvement in the above-captioned proceeding and two other civil actions.² 7 TTABVUE 4.

Further, there is no indication that Petitioner was prejudiced by the delay. That is, there is no indication of any lost evidence or unavailable witnesses caused by Respondents' delay. *See Pumpkin Ltd. v. Seed Corps*, 43 USPQ2d 1582, 1587 (TTAB 1997).

However, while Respondents prematurely argue the merits of portions of the petition to cancel, they have not set forth a meritorious defense by way of denials set

² In their response, Respondents contend that they did not receive a copy of the petition to cancel. The Board no longer requires petitioners to serve the petition to cancel, and the Board does not send a copy of the petition to cancel as part of its institution notice. Rather, service of the petition to cancel is provided by way of the link to the Board's TTABVUE database that is included in the institution notice. 2 TTABVUE 1. Respondents can obtain a copy of the petition to cancel from TTABVUE.

Respondents are advised that the Board may be less lenient regarding any further failure to comply with applicable deadlines.

forth in an answer.³ *See Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991). Accordingly, the Board declines to set aside the notice of default at this time.

In keeping with Board practice, Respondents are allowed until **twenty days** from the mailing date set forth in this order to file an answer. In addition, Respondents are allowed until **twenty days** from the mailing date set forth in this order to file copies of the pleadings in the civil actions referenced in their response so that the Board can determine whether suspension of this proceeding under Trademark Rule 2.117(a) is warranted. *See* TBMP § 510.02.

Except as noted, proceedings herein remain suspended. Any submission that is not germane to the foregoing will receive no consideration.

³ To the extent that Respondents intend to assert that any of the claims set forth in the petition to cancel are insufficient, those assertions should be raised in an appropriate motion. *See* TBMP §§ 503, 505, and 506.