UNITED STATES PATENT AND TRADEMARK OFFICE
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WINTER

April 27, 2019

Cancellation No. 92069219

Giesswein Walkwaren AG

v.

Allbirds, Inc.

BY THE TRADEMARK TRIAL AND APPEAL BOARD:

This case now comes up for consideration of Respondent's fully briefed motion (filed December 21, 2018) for relief from default judgment under Fed. R. Civ. P. 60(b).

By way of background, the petition to cancel in this proceeding was filed on August 10, 2018, and the Board's institution order was mailed to Respondent's address of record on August 15, 2018. *See* Trademark Rule 2.113(c)(1). The Board did not receive its institution order returned by the U.S. Postal Service. In view thereof, when an answer was not timely filed, a notice of default issued on October 4, 2018; and when no response thereto was received, the Board entered judgment by default against Respondent and granted the cancellation (5 TTABVUE). The involved registration for the mark WOOL RUNNERS was cancelled on November 21, 2018 (6 TTABVUE).

Respondent requests that it be relieved from the default judgment against it because neither Respondent nor its counsel received notification of the filing of the petition, the notice of default, the order entering judgment against Respondent, or the order cancelling the registration. Respondent points out that Petitioner had communicated with Respondent's attorney on May 10, 2017, in connection with Petitioner's use of the designation MERINO RUNNERS, but that Petitioner's counsel did not send a courtesy copy of the notice of default to Respondent's counsel. Respondent also asserts that the entry of default judgment was a surprise, that Respondent filed the subject motion within ten days of its counsel discovering the cancellation of its registration, that had it received notice of the proceeding, it would have responded to it as Respondent did with respect to Cancellation No. 92067886, that its default was not willful, that Petitioner will not be prejudiced by the reinstatement of the registration and proceeding, and that Respondent has a meritorious defense. Respondent also submitted, *inter alia*, a proposed answer to the petition with its motion, as well as the declaration of Daniel Li, Head of Legal, for Allbirds, Inc., who discusses Respondent's correspondence address and the process for receiving and distributing mail from the USPTO (8 TTABVUE 12).

Petitioner argues that relief under Fed. R. Civ. P. 60(b) should not be granted because there is a presumption that Respondent received the mailed correspondence from the Board, Petitioner will be prejudiced by the reinstatement of the proceeding, and Respondent does not have a meritorious defense insofar as the involved

designation is merely descriptive or generic for Respondent's footwear made from wool.

In reply, Respondent argues, *inter alia*, that Petitioner cannot have been prejudiced when only a month passed from the date on which default judgment was entered and the date on which the subject motion was filed.

ANALYSIS AND ORDER

Fed. R. Civ. P. 60(b), made applicable to Board proceedings by Trademark Rule 2.116(a), states, in part: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;... or (6) any other reason justifying relief from the operation of the judgment." Further, Fed. R. Civ. P. 60(b) requires that any motion for relief from judgment be made within a "reasonable time," with a one year maximum limitation on motions made pursuant to the first three grounds for relief (mistake, inadvertence, surprise, excusable neglect; newly discovered evidence; or fraud). *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991). The determination of whether to grant a Fed. R. Civ. P. 60(b) motion is a matter largely within the discretion of the court, or in this instance, the Board. *See Case v. BASF Wyandotte*, 737 F.2d 1034, 222 USPQ 737 (Fed. Cir. 1984) (cited in *Djeredjian*, 21 USPQ2d at 1615). Among the factors to be considered in determining a Rule 60(b) motion to vacate a default judgment based on mistake are the following: (1) whether the non-defaulting party will be substantially prejudiced; (2) whether the default was willful; and (3) whether defendant has a meritorious defense. *See*

Djeredjian, 21 USPQ2d at 1615 (internal citations omitted). Nevertheless, because default judgments for failure to timely answer the complaint are not favored by the law, a motion under Fed. R. Civ. P. 55(c) or 60(b) seeking relief from such a judgment is generally treated with more liberality by the Board than are other motions under Fed. R. Civ. P. 60(b) for relief from other types of judgments, such as default judgments entered against plaintiffs for failure to prosecute the case. TBMP § 312.03 (2018); *see also Information Systems and Networks Corp. v. U.S.*, 994 F.2d 792, 795 (Fed. Cir. 1993) ("a trial on the merits is favored over default judgment"); 11 Fed. Prac. & Proc. Civ. §§ 2857 and 2858 (3d ed. April 2019 update).

Turning first to whether Petitioner will be prejudiced, Petitioner has not argued that it will have lost witnesses or evidence should relief be granted, thus, the Board finds no basis on which Petitioner could be substantially prejudiced should Respondent's motion be granted. *See Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154, 1156 (TTAB 1991). Similarly, there is no evidence in the record that the default was willful; and Respondent' answer is not frivolous and thus sets forth a meritorious defense.

The circumstances of this case show that Respondent's failure to respond to the petition to cancel may be due to an irregularity in delivery by the Postal Service to Respondent's address of record, which Respondent states is correct. Additionally, it is apparent that Petitioner's counsel knew of Respondent's counsel, but did not send counsel a copy of the petition to cancel. In view of the foregoing, the motion for relief

from default judgment entered on November 20, 2018, is **GRANTED**, the default judgment is set aside, and Respondent's registration will be reinstated in due course.

PROCEEDING RESUMED; TRIAL DATES RESET

Trial dates, including the answer due date, mandatory discovery conference, disclosure due dates, and the discovery period, are reset as shown in the following schedule:

Time to Answer	**5/28/2019**
Deadline for Discovery Conference	**6/27/2019**
Discovery Opens	**6/27/2019**
Initial Disclosures Due	**7/27/2019**
Expert Disclosures Due	**11/24/2019**
Discovery Closes	**12/24/2019**
Plaintiff's Pretrial Disclosures Due	**2/7/2020**
Plaintiff's 30-day Trial Period Ends	**3/23/2020**
Defendant's Pretrial Disclosures Due	**4/7/2020**
Defendant's 30-day Trial Period Ends	**5/22/2020**
Plaintiff's Rebuttal Disclosures Due	**6/6/2020**
Plaintiff's 15-day Rebuttal Period Ends	**7/6/2020**
Plaintiff's Opening Brief Due	**9/4/2020**
Defendant's Brief Due	**10/4/2020**
Plaintiff's Reply Brief Due	**10/19/2020**
Request for Oral Hearing (optional) Due	**10/29/2020**

Generally, the Federal Rules of Evidence 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 requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125, 37 C.F.R. §§ 2.121-2.125. 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), 37 C.F.R. §§ 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), 37 C.F.R. § 2.129(a).

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