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

Proceeding	92070611
Party	Defendant Schneider Electric USA, Inc.
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Date	08/05/2019
Attachments	Reply in Support of Motion for Relief from Default NEO NETWORK.pdf(25618 bytes) Exhibits to Reply in Support of Motion for Relief from Default NEO NETWORK.pdf(214968 bytes)

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

In the Matter of Registration No. 5,638,377
NEO NETWORK

THE WEIDT GROUP, INC.)	
)	
Petitioner,)	
)	
v.)	Cancellation No. 92070611
)	
SCHNEIDER ELECTRIC USA, INC.)	
)	
Respondent.)	
)	

**REPLY IN SUPPORT OF MOTION FOR
RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(B)**

Schneider Electric USA, Inc. ("Respondent") submits this reply in support of its motion for relief from judgment under Fed. R. Civ. P. 60(b).

A. Introduction

In response to Respondent's motion, The Weidt Group, Inc. ("Petitioner"), sets forth no arguments supported by Board precedent. Indeed, Petitioner does not cite a single case in its response to support any of its positions – because Board precedent and procedure favor Respondent on the facts here. The only prejudice Petitioner claims it would suffer is to proceed with an action it was prepared to litigate several months ago, *i.e.*, no prejudice at all, Respondent maintained accurate correspondent and domestic representative information, and Respondent has arguments on the merits as presented in its answer and its responses to the USPTO's refusal.

B. Petitioner's Failure to Present Any Cognizable Prejudice is Fatal to Its Opposition to Respondent's Motion.

Petitioner's only argument that it will be prejudiced by the Board setting aside default judgment against Respondent is that Petitioner will be forced to "spend even more time and

money on a proceeding." (Response, p.10) Thus, the purported "prejudice" to Petitioner is simply what it brought upon itself in initiating this cancellation. This failure to assert any argument beyond a short delay and that Petitioner will have to incur expense to litigate an action it filed is sufficient for Respondent to prevail on its motion. *See E. & J. Gallo Winery v. Biplane Adventures LLC*, Opp. No. 91244388, 2019 WL 224235 (T.T.A.B. Jan. 14, 2019) [non-precedential] (vacating default judgment when there was no indication that Opposer's ability to prosecute the case had been affected adversely beyond mere delay) (attached hereto as Exhibit A).

C. Respondent was not Served With the Petition for Cancellation Despite Maintaining Accurate Correspondence Information for its Registration.

Petitioner asserts that Respondent's failure to receive the Petition for Cancellation is its own fault because Respondent must not have maintained accurate contact information for its registration. However, as already demonstrated, Respondent maintained accurate and up-to-date contact information for the NEO NETWORK application and registration, but the USPTO did not notify Respondent through the information provided. Respondent listed both Nicole L. Linehan at Schneider Electric Intellectual Property Department, 38 Neponset Avenue, Foxboro, MA and nicole.linehan@schneider-electric.com as correspondent and Phillip Barengolts at pb@pattishall.com as domestic representative. Yet, neither of these individuals received any communication regarding this proceeding – by regular mail, email, or from counsel for Petitioner. If any notices or orders were sent to Respondent, it appears the USPTO only sent them to the address on file for the current owner, which was 800 Federal Street, Andover, MA. Respondent acknowledges that the internal mail delivery system in its Andover office is complex and not ideal, and as such Respondent was diligent in ensuring that the correspondent section for the NEO NETWORK application and registration specifically designated its Foxboro office, to

the attention of the appropriate person (Nicole L. Linehan), and even provided the precise department (Schneider Electric Intellectual Property Department). If notice had been sent to either the address on file for Respondent's correspondent or for Respondent's domestic representative, then Respondent would have received the notice and timely responded to the Petition for Cancellation.

Further, under 37 C.F.R. § 2.113(c)(1), if a respondent has appointed a domestic representative, then the Board *must* send the domestic representative notice by e-mail or at the representative's address of record. Petitioner mischaracterizes this rule as "permissive," but the regulation states that the Board "will" provide notice in these circumstances. Mr. Barengolts did not receive any communication from the Board despite Respondent listing a valid e-mail address on the NEO NETWORK registration record. It can thus be assumed that notice was not served as required.

Petitioner claims it was under no obligation to provide a courtesy copy to Respondent. In a recent decision, however, the Board granted a motion for relief from default judgment under nearly identical circumstances. *See Giesswein Walkwaren AG v. Allbirds, Inc.*, Cancellation No. 92069219 (T.T.A.B. Apr. 27, 2019) [non-precedential] (attached hereto as Exhibit B). There, the petitioner had communicated with the respondent's attorney over one year before the petitioner filed the cancellation. The Board nevertheless noted that "it is apparent that Petitioner's counsel knew of Respondent's counsel, but did not send counsel a copy of the petition to cancel" and granted the respondent's motion. *Id.*, at *4.

Here, Respondent sent a letter to Petitioner only *one month* before Petitioner filed the Petition for Cancellation. Yet, no copy was sent to Respondent or its counsel.

Indeed, Petitioner should have been suspicious when Respondent failed to answer the petition. As Petitioner fully details in its response, Respondent was recently engaged in frequent communications with the USPTO during the pendency of the NEO NETWORK application. Such communications were made by electronic means with Respondent's attorneys of record. As Respondent had previously been in communication with the USPTO, it had no reason to believe that the USPTO would suddenly use a different correspondence address once Petitioner filed this proceeding.

Finally, Respondent does not have a "pattern of disregard for deadlines." (Response, p.8) Respondent's petition to revive after the USPTO's first office action was filed only one day after the office action response deadline. Since then, Respondent shared numerous communications with the USPTO, including an *ex parte* appeal, and timely filed all necessary documents.¹ Petitioner's aspersions to the contrary have no bearing on this motion.

D. Respondent has a Meritorious Defense to the Cancellation Action.

Petitioner's position that it should prevail in this cancellation action is not a basis to deny Respondent's Motion. Rather, as Respondent noted in its opening brief, "all that is necessary to establish a 'meritorious defense' in this context is a plausible response to the allegations contained in the [petition for cancellation]." *DeLorme Publ'g Co. v. Eartha's Inc.*, 60 U.S.P.Q.2d 1222, 1224 (T.T.A.B. 2000). The Board is not required at this juncture to evaluate the merits of the proceeding. *Id.*

¹ This includes Respondent's appeal brief. The original deadline fell on Monday, January 15, 2018, which was a Federal holiday for the birthday of Dr. Martin Luther King, Jr. "Any action or fee that is due on a date falling on a Saturday, Sunday, or a Federal holiday . . . is considered timely if the action is received . . . on the following day." T.M.E.P. § 308. Thus, Respondent's appeal brief in its *ex parte* appeal was timely filed on January 16, 2018.

Here, Respondent submitted an answer to the Petition for Cancellation with its opening brief. Respondent argued around the likelihood of confusion asserted by the Examiner. This information alone establishes that Respondent has a meritorious defense.

Petitioner's subjective opinion that it is "hard-pressed to imagine facts under which Respondent could prevail" is unavailing. (Response, p.9) Petitioner cites no prior decisions whereby a motion for relief from default judgment was denied based on the opposing party's position in the case. In light of Respondent's continued opposition to the likelihood of confusion allegations, Petitioner's arguments on the merits of this action only establish that there are triable issues of law and fact that require the case to go forward. *See* T.B.M.P. § 312.02 (noting that the Board is reluctant to enter a default judgment for failure to file a timely answer because "it is the policy of the law to decide cases on their merits").

E. Conclusion.

For the reasons articulated herein and contained in its opening brief, Respondent respectfully requests that the Board vacate its order cancelling NEO NETWORK (Reg. No. 5,638,377) and reinstitute the Cancellation Action No. 92070611 to allow Respondent to answer the Petition for Cancellation.

Respectfully submitted,

PATTISHALL, McAULIFFE, NEWBURY,
HILLIARD & GERALDSON LLP

Dated: August 5, 2019

By: /Kristine Bergman/

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Attorneys for Respondent

CERTIFICATE OF SERVICE AND ELECTRONIC TRANSMISSION AND SERVICE

I, Kristine A. Bergman, certify that a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION FOR RELIEF FROM JUDGMENT UNDER FED. R. CIV. P. 60(B)** is being electronically transmitted to the United States Patent and Trademark Office, Trademark Trial and Appeal Board, this 5th day of August, 2019 and was served electronically on the following representatives for The Weidt Group, Inc.:

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EXHIBIT A

2019 WL 224235 (Trademark Tr. & App. Bd.)

Trademark Trial and Appeal Board

Patent and Trademark Office (P.T.O.)

E. & J. GALLO WINERY

v.

BIPLANE ADVENTURES LLC

Opposition No. 91244388

January 14, 2019

***1 Andrew P. Baxley, Interlocutory Attorney:**

On December 14, 2018, the Board issued a notice of default inasmuch as Applicant had not filed an answer in this case. In response, Applicant, on January 11, 2019, filed a motion to set aside the notice of default.¹ The Board elects to decide that motion now. *See Trademark Rule 2.127(a)*.

However the issue of failure to timely file an answer is raised, the standard for determining whether default judgment should be entered against a defendant for its failure to file a timely answer to the complaint is the *Fed. R. Civ. P. 55(c)* standard, i.e., whether the defendant has shown good cause why default judgment should not be entered against it. 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 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 tends to be liberal in addressing defaults, the Board finds that Applicant's failure to timely respond to the notice of opposition was unintentional and was caused by Applicant's preoccupation with business matters during its time to answer. *See Societa Per Azioni Chianti Ruffino Esportazione Vinicola Toscana v. Colli Spolentini Spoleto Ducale SCRL, 59 USPQ2d 1383, 1383-84 (TTAB 2001)*. Further, there is no indication of any prejudice to Opposer, i.e., that Opposer's ability to prosecute this case has not been adversely affected beyond mere delay. *See Pumpkin Ltd. v. The Seed Corps, 43 USPQ2d 1582, 1587 (TTAB 1997)*. In addition, Applicant has set forth a meritorious defense in its concurrently filed answer. *See Djeredjian v. Kashi Co., 21 USPQ2d 1613, 1615 (TTAB 1991)*. In view thereof, the motion to set aside Applicant's default is granted. Applicant's default is hereby set aside, and Applicant's concurrently filed answer is accepted and made of record.

Proceedings herein are resumed. Dates are reset as follows.

Deadline for Discovery Conference	2/13/2019
Discovery Opens	2/13/2019
Initial Disclosures Due	3/15/2019
Expert Disclosures Due	7/13/2019
Discovery Closes	8/12/2019
Plaintiff's Pretrial Disclosures Due	9/26/2019

Plaintiff's -day Trial Period Ends	11/10/2019
Defendant's Pretrial Disclosures Due	11/25/2019
Defendant's -day Trial Period Ends	1/9/2020
Plaintiff's Rebuttal Disclosures Due	1/24/2020
Plaintiff's 15-day Rebuttal Period Ends	2/23/2020
Plaintiff's Opening Brief Due	4/23/2020
Defendant's Brief Due	5/23/2020
Plaintiff's Reply Brief Due	6/7/2020
Request for Oral Hearing (optional) Due	6/17/2020

*2 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](#). 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 \(b\)](#). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by [Trademark Rule 2.129\(a\)](#).

Footnotes

- 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. *See* TBMP § 312.01 (2018). Therefore, a response to such notice should be captioned as a response and not as a motion. *Compare* TBMP § 312.01 *with* TBMP § 502.02(b). By captioning a response to a notice of default as a motion, Applicant invites full briefing, which is rarely useful and usually only delays resolution of the issue of default.

2019 WL 224235 (Trademark Tr. & App. Bd.)

EXHIBIT B

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500
General Email: TTABInfo@uspto.gov

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’s 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).

