

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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Baxley

August 3, 2019

Cancellation No. 92071449

LaRue Wines, Inc.

v.

Mack & Schuhle, Inc.

Andrew P. Baxley, Interlocutory Attorney:

In its response, 5 TTABVUE, to the notice of default that the Board issued on July 27, 2019, 4 TTABVUE, Respondent asserts that it failed to timely file an answer because its attorneys were not served with either the petition to cancel or the notice of default. Respondent further asserts that its attorneys only became aware of this proceeding on August 1, 2019 as a result of random review of Respondent's portfolio in USPTO records and that it responded to the notice of default immediately after so becoming aware. 5 TTABVUE 2-3. Accordingly, Respondent asks that the Board set aside the notice of default and accept its concurrently filed answer. 5 TTABVUE 10-13.

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 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 (2019).

The USPTO treats any representation of Respondent during *ex parte* prosecution of the underlying application for its involved registration as having expired upon issuance and receipt of that registration. *See* TBMP § 310.01. Accordingly, in keeping with the Board's long-standing practice, the Board correctly sent both the notice instituting this proceeding and the notice of default directly to Respondent, and not to the attorney who represented it during *ex parte* prosecution of the underlying application for its involved registration. *See id.* Respondent has not alleged that the copies of the institution notice and the notice of default that were properly sent directly to Respondent were not received, and neither have been returned as undeliverable by the Postal Service.

Nonetheless, in view of Respondent's prompt response to the notice of default and bearing in mind the Board's strong preference to decide cases on the merits (*see* TBMP § 312.02), the Board finds that Respondent's failure to timely answer was neither willful nor in bad faith, that there is no indication of any prejudice to Petitioner, and Respondent set forth a meritorious defense by way of the denials of

the salient allegations of the petition to cancel in its answer. Based on the foregoing, the notice of default is hereby set aside,¹ and Respondent's concurrently filed answer is accepted as the operative responsive pleading in this case.

Proceedings herein are resumed. Dates are reset as follows.

Deadline for Discovery Conference	9/2/2019
Discovery Opens	9/2/2019
Initial Disclosures Due	10/2/2019
Expert Disclosures Due	1/30/2020
Discovery Closes	2/29/2020
Plaintiff's Pretrial Disclosures Due	4/14/2020
Plaintiff's 30-day Trial Period Ends	5/29/2020
Defendant's Pretrial Disclosures Due	6/13/2020
Defendant's 30-day Trial Period Ends	7/28/2020
Plaintiff's Rebuttal Disclosures Due	8/12/2020
Plaintiff's 15-day Rebuttal Period Ends	9/11/2020
Plaintiff's Opening Brief Due	11/10/2020
Defendant's Brief Due	12/10/2020
Plaintiff's Reply Brief Due	12/25/2020
Request for Oral Hearing (optional) Due	1/4/2021

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,

¹ The Board may be less lenient regarding any further failure by Respondent to comply with deadlines set by the Board or operative rules.

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).