

THIS ORDER IS NOT A  
PRECEDENT OF THE  
TTAB

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

October 1, 2019

Cancellation No. 92071578

*UT Vapes, LLC*

*v.*

*We Sell Re Sell LLC*

**By the Trademark Trial and Appeal Board:**

Pursuant to the Board's June 24, 2019 institution order, Respondent's answer to the petition to cancel was due by August 3, 2019. Respondent did not file an answer to the petition to cancel by such date, nor did it file a timely motion to extend its time to answer. In view thereof, the Board issued a notice of default on August 13, 2019, requiring Respondent to show cause why judgment should not be entered against it. On September 7, 2019, Respondent filed a motion to set aside the notice of default and to accept its late-filed answer, which Respondent filed concurrently therewith.<sup>1</sup> The motion is fully briefed.

In support of its motion, Respondent contends that it did not receive actual notice of the petition to cancel until August 11, 2019, because Respondent was not living

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<sup>1</sup> Respondent's September 3, 2019 appearance of counsel is noted. Board records have been updated accordingly.

full-time at its address of record. 7 TTABVUE 3-4. Upon learning of the proceeding, Respondent sought counsel to represent it in this proceeding. *Id.* at 4.

In response, Petitioner argues that Respondent is a California Limited Liability Company, not an individual, and that Respondent's failure to "open up the mail at the address where [Respondent's] principal was evidently residing at least part time" constituted gross neglect. 8 TTABVUE 3. Petitioner also contends that Respondent has not set forth a meritorious defense. *Id.* at 4.

The standard for determining whether default judgment should be issued against a defendant for failure to timely file an answer is Fed. R. Civ. P. 55(c), which reads in pertinent part: "[t]he court may set aside an entry of default for good cause." Good cause is generally found to have been established if the defendant's delay was not the result of willful conduct or gross neglect, if the delay will not result in substantial prejudice to the plaintiff, and where the defendant has a meritorious defense. *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991).

The Board does not find that Respondent's delay in filing its answer was the result of willful conduct or gross neglect. Respondent contends that it did not receive actual notice of the petition to cancel until August 11, 2019. Although Respondent states that its principal lives part-time at the address of record, the fact that Respondent failed immediately to receive the petition to cancel is not indicative of gross neglect. There is no evidence of bad faith or willful conduct on the part of Respondent on the record. Moreover, the Board is very reluctant to enter default judgment for failure to

file a timely answer and tends to resolve any doubt on the matter in favor of the defendant. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 312.04 (2019).

As to the question of prejudice, an answer was due on August 3, 2019, a notice of default issued on August 13, 2019, and Respondent filed its motion to set aside the notice of default and accept its late-filed answer on September 7, 2019, a delay of little more than a month. There is nothing in the record to suggest that Petitioner has been substantially prejudiced by the resultant delay. *See Regatta Sport, Ltd. v. Telux-Pioneer, Inc.*, 20 USPQ2d 1154, 1156 (TTAB 1991) (delay alone is not a sufficient basis for establishing prejudice).

The Board also finds that Respondent has asserted a meritorious defense to the petition to cancel by filing an answer that denies the fundamental allegations in the petition to cancel.<sup>2</sup> *See* TBMP § 312.02. Finally, it is well-established that a trial on the merits is favored over a default judgment. *See, e.g., Information Sys. and Networks Corp. v. U.S.*, 994 F.2d 792, 795 (Fed. Cir. 1993).

In view of the foregoing, Respondent’s motion to set aside the notice of default and accept its late-filed answer is **granted**. The notice of default is hereby set aside and Respondent’s September 7, 2019 answer to the petition to cancel is noted and accepted as the operative pleading in this proceeding.

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<sup>2</sup> The showing of a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint. *See DeLorme Publishing Co. v. Eartha’s Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000).

As a final matter, Petitioner asks that if the Board grants Respondent's motion, the Board award Petitioner attorney's fees. 8 TTABVue 4. The Board does not award attorneys' fees or expenses to any party. Trademark Rule 2.127(f), 37 C.F.R. § 2.127(f).

Proceedings herein are resumed. Remaining dates are reset as follows:

Deadline for Discovery Conference	<b>10/31/2019</b>
Discovery Opens	<b>10/31/2019</b>
Initial Disclosures Due	<b>11/30/2019</b>
Expert Disclosures Due	<b>3/29/2020</b>
Discovery Closes	<b>4/28/2020</b>
Plaintiff's Pretrial Disclosures Due	<b>6/12/2020</b>
Plaintiff's 30-day Trial Period Ends	<b>7/27/2020</b>
Defendant's Pretrial Disclosures Due	<b>8/11/2020</b>
Defendant's 30-day Trial Period Ends	<b>9/25/2020</b>
Plaintiff's Rebuttal Disclosures Due	<b>10/10/2020</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>11/9/2020</b>
Plaintiff's Opening Brief Due	<b>1/8/2021</b>
Defendant's Brief Due	<b>2/7/2021</b>
Plaintiff's Reply Brief Due	<b>2/22/2021</b>
Request for Oral Hearing (optional) Due	<b>3/4/2021</b>

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

Cancellation No. 92071578

final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).