

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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WF/lw

August 19, 2020

Cancellation No. 92073710

Aramark Services, Inc.

v.

Zume, Inc.

By the Trademark Trial and Appeal Board:

On June 22, 2020, the Board issued a judgment order granting the petition for cancellation based upon the misperceived failure to file a response to Petitioner's motion for default by Respondent. 7 TTABVUE. It has come to the attention of the Board that Respondent, in fact, filed a timely response to Petitioner's motion for default, which included an answer to the petition to cancel, on May 8, 2020.¹ 5 TTABVUE.

In view thereof, the judgment order of June 22, 2020 is hereby **vacated**.

Accordingly, this proceeding is now before the Board for consideration of Petitioner's motion for default judgment, filed April 29, 2020 (4 TTABVUE), and Respondent's cross motion to set aside the default judgment that also serves as Respondent's response to the aforementioned motion, filed on May 8, 2020 (5

¹ Respondent's request for reconsideration filed July 21, 2020 is noted, but will be given no consideration.

TTABVUE). Petitioner did not file a reply brief in support of the motion for default or a response to Respondent's motion to set aside the default judgment.

Pursuant to the Board's March 18, 2020 institution order, Respondent was required to file and serve an answer to Petitioner's petition for cancellation by April 27, 2020. 2 TTABVUE 3. Respondent did not file an answer or otherwise respond to the petition by the deadline.

The standard for determining whether default judgment should be issued against a defendant for failure to timely file an answer is found in 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).

Here, Respondent states that its failure to timely answer the notice of opposition was the result of Respondent either not being served with the petition for cancellation or failing to "appreciate [that] it had been served a Notice of Institution of the proceedings on April 27, 2020," but that it immediately apprised its counsel when Respondent became aware of the petition, on May 7, 2020. 5 TTABVUE 2. Accordingly, the Board does not find that Respondent's delay in filing its answer was the result of willful conduct or gross neglect.²

² To clarify, pursuant to Trademark Rule 2.113(c), it is the practice of the Board to only send notice of the commencement of Board cancellation proceedings to the listed registrant of

As to the question of prejudice, Respondent's delay in filing an answer was only a total of eleven days and 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). Additionally, the Board finds that Respondent has asserted a showing of a meritorious defense by filing an answer that denies the fundamental allegations in the notice of opposition.³ *See* TBMP § 312.02. Thus, it is of no consequence that Registrant failed to provide corroboration of when the photos, presumably offered to illustrate continued use of the mark, were taken. Moreover, it is well-established that a trial on the merits is favored over a default judgment. *See, e.g., Info. Sys. & Networks Corp. v. U.S.*, 994 F.2d 792, 795 (Fed. Cir. 1993).

In view of the foregoing, Petitioner's motion for default judgment is **DENIED** and Respondent's motion to accept its late-filed answer is **GRANTED**. Respondent's default is hereby set aside and its May 8, 2020 answer is accepted as the operative pleading in this proceeding.

Trial dates are reset as follows:

Deadline for Discovery Conference	September 21, 2020
Discovery opens	September 21, 2020
Initial Disclosures Due	October 21, 2020
Expert Disclosures Due	February 18, 2021

record. *See* Trademark Rule 2.113(c); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 117.03 (2019).

³ The showing of a meritorious defense in an inter partes proceeding 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, which, as noted above, Respondent has provided in its answer. *See DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000).

Discovery Closes	March 20, 2021
Petitioner's Pretrial Disclosures Due	May 4, 2021
Petitioner's 30-day Trial Period Ends	June 18, 2021
Respondent's Pretrial Disclosures Due	July 3, 2021
Respondent's 30-day Trial Period Ends	August 17, 2021
Petitioner's Rebuttal Disclosures Due	September 1, 2021
Petitioner's 15-day Rebuttal Period Ends	October 1, 2021
BRIEFS ARE DUE AS FOLLOWS:	
Petitioner's Main Brief Due	November 30, 2021
Respondent's Main Brief Due	December 30, 2021
Petitioner's Reply Brief Due	January 14, 2022
REQUEST FOR ORAL HEARING:	
Deadline to Request Oral Hearing (optional):	January 24, 2022

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, matters in evidence, the manner and timing of taking testimony, 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).

TIPS FOR FILING EVIDENCE, TESTIMONY, OR LARGE DOCUMENTS

The Board requires each submission to meet the following criteria before it will be considered: 1) pages must be legible and easily read on a computer screen; 2) page

orientation should be determined by its ease of viewing relevant text or evidence, for example, there should be no sideways or upside-down pages; 3) pages must appear in their proper order; 4) depositions and exhibits must be clearly labeled and numbered – use separator pages between exhibits and clearly label each exhibit using sequential letters or numbers; and 5) the entire submission should be text-searchable. Additionally, submissions must be compliant with Trademark Rules 2.119 and 2.126. Submissions failing to meet all of the criteria above may require re-filing. **Note:** Parties are strongly encouraged to check the entire document before filing.⁴ The Board will not extend or reset proceeding schedule dates or other deadlines to allow time to re-file documents. For more tips and helpful filing information, please visit the [ESTTA help](#) webpage.

⁴ To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.