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

Proceeding	92074009
Party	Defendant Franklin Square Holdings, L.P.
Correspondence Address	FRANKLIN SQUARE HOLDINGS LP 201 ROUSE BOULEVARD PHILADELPHIA, PA 19112 UNITED STATES no email provided no phone number provided
Submission	Motion for Relief from entry of Default Judgment
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Signature	/Camille M. Miller/
Date	06/25/2020
Attachments	FS INVESTMENT SOLUTIONS Response to Notice of Default.pdf(406259 bytes)

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

GROWMARK,)	
)	
<i>Petitioner,</i>)	Cancellation No. 92074009
)	Reg. No. 5102059
v.)	Mark: FS INVESTMENT SOLUTIONS
)	
FRANKLIN SQUARE HOLDINGS, L.P.)	
)	
<i>Respondent.</i>)	

**FRANKLIN SQUARE HOLDINGS, L.P.’S,
RESPONSE TO NOTICE OF DEFAULT**

Respondent, **FRANKLIN SQUARE HOLDINGS, L.P.** (“Respondent” or “Franklin Square”), by and through its undersigned counsel, and pursuant to TBMP § 312.02, files this Response to the Notice of Default filed on June 11, 2020 in connection with the Petition for Cancellation filed by Petitioner, **GROWMARK** (“Petitioner” or “Growmark”), on April 20, 2020 and requests this Board set aside the Notice of Default for the following reasons:

1. On April 20, 2020, Petitioner filed a Petition for Cancellation of Franklin Square’s FS INVESTMENT SOLUTIONS trademark registration (Reg. No. 5102059).
2. On April 22, 2020, the Board sent a Notice of Institution to Franklin Square’s business address and to the office of Growmark’s counsel setting this matter for trial and ordering Franklin Square to file an Answer to the Petition for Cancellation by June 1, 2020.
3. On June 11, 2020, the Board filed a Notice of Default under Fed. R. Civ. P. 55(a) because the time for Franklin Square to file the Answer had expired.
4. TBMP Rule 312.02 states that, “If a defendant who has failed to file a timely

answer to the complaint responds to a notice of default by filing a satisfactory showing of good cause why default judgment should not be entered against it, **the Board will set aside the notice of default**” (emphasis added).

5. TBMP Rule 312.02 explains that a satisfactory showing of good cause occurs when, “the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action. 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.”

4. Franklin Square requests the Board exercise its discretion by setting aside the Notice of Default in accordance with the applicable rules and as a matter of public policy.¹

5. Franklin Square’s inability to file a timely Answer was neither due to any willful conduct nor gross negligence. Rather, failure to timely file an Answer was due to Franklin Square never receiving notice of the Petition for Cancellation due to the shutdown order issued by the Governor of the Commonwealth of Pennsylvania, where Franklin Square’s office is located, due to the COVID-19 pandemic.²

6. Franklin Square’s business address, 201 Rouse Boulevard, Philadelphia, PA 19112, is the correspondence address listed for Franklin Square on its FS INVESTMENT SOLUTIONS registration and is where the Board sent the April 22, 2020 Notice of Institution of Petitioner’s Petition for Cancellation against Franklin Square’s FS INVESTMENT SOLUTIONS

¹ “In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant.” TBMP § 312.02.

² Governor of Pennsylvania, Tom Wolf, issued an order on March 19, 2020 for the closure of all businesses that are not life sustaining due to COVID-19. Please see the following link for his order: <https://www.governor.pa.gov/wp-content/uploads/2020/03/20200319-TWW-COVID-19-business-closure-order.pdf>.

registration and also where the Board sent the Notice of Default.

7. On April 22, 2020, when the Board served the Board's Notice of Institution of Petitioner's Petition for Cancellation on Franklin Square by mailing it to 201 Rouse Boulevard, Philadelphia, PA 19112, Franklin Square's office was closed in accordance with the Commonwealth of Pennsylvania's ordered shutdown of certain businesses that are not life sustaining, which includes Franklin Square's business. Therefore, Franklin Square never received the Board's Notice of Institution of Petitioner's Petition for Cancellation. See Declaration of Stephen Sypherd attached hereto as Exhibit 1 at ¶¶ 7-9.

8. On June 11, 2020, when the Board served the Notice of Default on Franklin Square by mailing it to 201 Rouse Boulevard, Philadelphia, PA 19112, Franklin Square's office was still closed in accordance with the Commonwealth of Pennsylvania's ordered shutdown of certain businesses that are not life sustaining, which includes Franklin Square's business. Therefore, Franklin Square never received the Notice of Default. Id. at ¶¶ 8-9.

9. Franklin Square's business at 201 Rouse Boulevard, Philadelphia, PA 19112 remains closed as of the date of this response due to the City of Philadelphia still requiring that certain businesses, including Respondent's business, remain closed due to the COVID-19 pandemic. Id. at ¶ 11.

10. Franklin Square only became aware of Petitioner's Petition for Cancellation against its FS INVESTMENT SOLUTIONS registration upon Franklin Square's counsel receiving an office action refusal on June 20, 2020 in connection with a Section 15 trademark filing for the FS INVESTMENTS registration in which the Examining Attorney advised on a cancellation proceeding filed against the FS INVESTMENTS registration as the basis for refusal of the Section 15 filing. Franklin Square's counsel then became aware of this cancellation

proceeding as well. Upon being notified of the cancellation proceeding, Franklin Square's counsel immediately notified Franklin Square and prepared this response and the Answer to the Petition for Cancellation filed contemporaneously with this response. Id. at ¶ 10.

11. Due to the unavoidable circumstances above and never receiving notice of the Petition for Cancellation, Franklin Square inadvertently missed its deadline to file its Answer. Franklin Square's actions and delay were not the result of willful conduct or gross neglect by Franklin Square and Franklin Square would have met its deadline if it had received the Notice of Institution sent to 201 Rouse Boulevard, Philadelphia, PA 19112. Id. at ¶ 13.

12. Further, the Board granted additional relief to deadlines impacted by COVID-19, including in situations that should be considered analogous to the situation at hand where the delay in filing the answer to the Petition for Cancellation is due to COVID-19 outbreak as employees at Franklin Square were personally affected by the COV-19 outbreak, including, without limitation, through office closures, such that the outbreak materially interfered with timely filing of the answer as stated in the Board's "Relief Available to Patent and Trademark Applicants, Patentees and Trademark Owners Affected by the Coronavirus Outbreak" because "[t]he United States Patent and Trademark Office (USPTO) considers the effects of the Coronavirus outbreak that began in approximately January 2020 to be an 'extraordinary situation' within the meaning of 37 CFR 1.183 and 37 CFR 2.146 for affected patent and trademark applicants, patentees, reexamination parties, and trademark owners." See https://www.uspto.gov/sites/default/files/documents/coronavirus_relief_ognotice_03162020.pdf.

13. Respondent has filed this response, along with its Answer to Petitioner's Petition for Cancellation filed contemporaneously with this response, within the allowed thirty-day deadline from the date of the Board's order to show cause why judgment by default should not

be entered against Respondent in accordance with Fed. R. Civ. P. 55(b) (2) and this delay does not substantially prejudice the Petitioner.³ Paolo's Associates L.P. v. Bodo, 21 USPQ2d 1899, 1903-04 (Comm'r 1990) (no evidence that failure was willful; costs incurred in preparing and filing motion not sufficient to support finding of prejudice).

14. The setting aside of the Notice of Default is in accordance with the applicable rules of this Board and similar standards under federal law. See Fed. R. Civ. P. 55(c) (good cause); Fed. R. Civ. P. 6(b) (excusable neglect); and Fed. R. Civ. P. 60(b) (mistake, inadvertence, surprise, or excusable neglect).

WHEREFORE, Respondent, **FRANKLIN SQUARE HOLDINGS L.P.**, requests this Board set aside the Notice of Default filed on June 11, 2020 and allow proceedings in this matter to continue.

Respectfully submitted,



Date: June 25, 2020

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Attorneys for Franklin Square Holdings, L.P.

³ In the present case, the failure to timely file the answer was clearly due to the Commonwealth of Pennsylvania's order for certain business closures as a result of the COVID-19 pandemic and not the result of any willful conduct or gross neglect. Moreover, Franklin Square's delay in the filing of the answer will cause minimal prejudice to Growmark, if any, and was still filed within the requested 30-day period from the Notice of Default to show good cause. Finally, by the submission of an answer which is not frivolous, applicant has adequately shown that it has a meritorious defense.

EXHIBIT 1

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

GROWMARK,)	
)	
<i>Petitioner,</i>)	Cancellation No. 92074011
)	Reg. No. 4723056
v.)	Mark: FS INVESTMENTS
)	
FRANKLIN SQUARE)	
HOLDINGS, L.P.)	
)	
<i>Respondent.</i>)	

DECLARATION OF STEPHEN SYPHERD

The undersigned, being hereby warned that willful false statements and the like so made are punishable by fine, or imprisonment, or both, under 18 U.S.C. 1001, declares that he is properly authorized to execute this declaration on behalf of Franklin Square; and all statements made of his own knowledge are true and all statements made on information and belief are believed to be true. I, Stephen Sypherd, do hereby declare under penalty of perjury as follows:

1. My name is Stephen Sypherd, I am over the age of eighteen, and I have personal knowledge of the matters and facts set forth herein.
2. I am a Managing Director and General Counsel at FS Investments.
3. Franklin Square Holdings, L.P. (“Franklin Square”), the Respondent in this proceeding, is doing business as FS Investments.
4. Franklin Square is an asset manager dedicated to helping individuals, financial professionals, and institutions design better portfolios. The firm provides access to

alternative sources of income and growth, and focuses on setting industry standards for investor protection, education, and transparency.

5. Franklin Square is headquartered in Philadelphia, PA, with a business address at 201 Rouse Blvd., Philadelphia, PA 19112.
6. Franklin Square receives its mail related to business operations, including information on Franklin Square's trademark applications and registrations, at 201 Rouse Blvd., Philadelphia, PA 19112.
7. In compliance with a March 19, 2020 order issued by the Governor of Pennsylvania (the "Order") that all businesses that are not life sustaining close due to COVID-19, Franklin Square closed its Philadelphia office location at 201 Rouse Blvd., Philadelphia, PA 19112 and employees began working from home.
8. Franklin Square's Philadelphia office was closed at the 201 Rouse Blvd. location due to the Order on April 22, 2020 and June 11, 2020, the dates the Board mailed the Notice of Institution of the Petition for Cancellation filed by Growmark, Inc. ("Notice of Institution") and the Notice of Default to 201 Rouse Blvd., Philadelphia, PA 19112 in attempts to notify Franklin Square of Growmark's Petitions for Cancellation, and this office location is still closed as of the date of the execution of this Declaration, and employees are still working from home.
9. I never saw either the April 22, 2020 Notice of Institution or the June 11, 2020 Notice of Default, or any other notices from the Board, mailed by the Board to the office at 201 Rouse Blvd., Philadelphia, PA 19112 since the time Franklin Square closed its 201 Rouse Blvd. office location to comply with the Order.

10. I only became aware of the above-captioned cancellation proceeding and the Board's June 11, 2020 Notice of Default on June 22, 2020 when our counsel, Cozen O'Connor, notified me of the cancellation action.
11. Franklin Square's Philadelphia office located at 201 Rouse Blvd. remains closed as of the date of this declaration, and the employees are still working from home.
12. Franklin Square still uses its FS INVESTMENTS (Reg. No. 4723056), FS INVESTMENTS and Design (Reg. No. 4989475), and FS INVESTMENT SOLUTIONS (Reg. No. 5102059) marks in commerce and never had any intention to abandon its rights in these trademark registrations.
13. Franklin Square would have timely contacted its trademark counsel to timely file Answers to Growmark's Petitions for Cancellation in April of 2020 if it received the Notice of Institution of the Petition to Cancel filed by Growmark, Inc. from the Board in April 2020 or otherwise became aware of Growmark's Petitions for Cancellation before I first became aware of the Notice of Institution of the Petition to Cancel filed by Growmark, Inc. and the Notice of Default on June 22, 2020.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. I declare that all statements made herein are of my own knowledge and are true and all statements made on information and belief are true and further that these statements were made with the knowledge that willful false statements and the like are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Executed by me on this 25th day of June, 2020.



Stephen Sypherd

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the foregoing Response to Notice of Default and Answer to Petition for Cancellation has been served on Jamie Nafziger by forwarding said copy on June 25, 2020, via email and first class mail to: Jamie Nafziger, Dorsey & Whitney LLP, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402, counsel for Petitioner, at nafziger.jamie@dorsey.com and ip.docket@dorsey.com.

Signature: /s/ Camille M. Miller

Date: June 25, 2020