

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

December 17, 2020

Cancellation No. 92075385

HC Salon Brand Holdings, LLC

v.

The Bubble, LLC

By the Board:

In the December 7, 2020 order, the Board noted Respondent's December 2, 2020 submission which was timely filed after the Board issued a notice of default and show cause order on November 24, 2020. The Board allowed Respondent time to file its 1) response to the show cause order, and 2) answer to the petition to cancel.¹ 6 TTABVUE. In response to the December 7, 2020 order, Respondent filed, on December 8, 2020, a timely submission which sets forth various matters but does not include an answer. 7 TTABVUE. Although Respondent's time to answer has not expired, in view of the substance of its submissions, and to advance this proceeding, the Board exercises its discretion to construe Respondent's December 2, 2020 and December 8, 2020 submissions as its response to the notice of default show cause order, and to resolve the issue of default in the instant order.

¹ In the December 7, 2020 order, the Board did not specifically address Respondent's default.

Initially, the Board notes that, as with the December 2, 2020 submission, Respondent's December 8, 2020 submission does not include proof of service of a copy thereof on counsel for Petitioner, as required by Trademark Rule 2.119(b). In both the October 5, 2020 institution order, as well as the December 7, 2020 order, the Board explained the requirement for service of all submissions filed in this proceeding, and advised that the Board may decline to consider any submission which does not include proof of service. 2 TTABVUE 2; 6 TTABVUE 1. This is a strict requirement of all parties. The Board reiterates that it retains the discretion to not consider any non-compliant submission.

Respondent's Default

The standard for determining whether default judgment should be entered for failure to timely answer is as set forth in Fed. R. Civ. P. 55(c), namely, whether a defendant has shown good cause why judgment by default should not be entered against it. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") §§ 312.01-02 and 508 (June 2020). As a general rule, good cause to set aside a defendant's default will be found where 1) the defendant's delay has not been the result of willful conduct, gross neglect or bad faith, 2) the plaintiff will not be substantially prejudiced by the delay, and 3) the defendant has a meritorious defense to the action. *DeLorme Publ'g. Co. v. Eartha's, Inc.*, 60 USPQ2d 1222, 1223-24 (TTAB 2000); *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991).

The determination of whether default judgment should be entered against a party lies within the sound discretion of the Board. It is the policy of the law, and the preference of the Board, where appropriate, to decide *inter partes* cases on their merits rather than by default. TBMP § 312.02. Accordingly, in general the Board is reluctant to enter a default judgment for failure to file a timely answer. *Id.*

In her submissions, Respondent's representative acknowledges the petition to cancel, and sets forth various arguments that go to the merits of the petition; statements of position regarding the merits are premature at this point in the proceeding. Nonetheless, within the substance of its submissions, Respondent sets forth various business related matters which indicate that the business for which Respondent registered the subject mark is an ongoing concern. Respondent also states that it is a small business with limited resources. In the more recent submission, Respondent sets forth, generally, a partial answer to the petition to cancel, though it does not answer (*i.e.*, clearly admit or deny) each of the twenty-three paragraphs in the petition.

On this record, the Board finds that the delay to the proceeding that has been occasioned by Respondent's failure to file an answer has not been the result of willful conduct or bad faith on Respondent's part. Although the delay is wholly and solely attributable to Respondent's failure to file a timely answer, the delay appears to be a result of Respondent's lack of familiarity with Board proceedings, pleadings, and the litigation process. Moreover, Petitioner has not been substantially prejudiced by the delay, and the Board can prevent further delay by setting a time herein for

Respondent to file an answer that is in compliance with applicable authorities under Fed. R. Civ. P. 8(b).

Lastly, the business-related and personal circumstances that Respondent explains in its responses indicate that Respondent intends to set forth and pursue a meritorious defense to Petitioner's allegations. *Cf. Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991) (motion granted pending showing of meritorious defense where other two elements were established).

Having considered the record thus far, the Board finds that Respondent's submissions demonstrate the requisite good cause to set aside its default for failure to timely file an answer to the petition to cancel. Accordingly, the November 24, 2020 **notice of default is hereby set aside**, and judgment will not be entered against Respondent on the basis set forth therein.

Answer Due

Inasmuch as the Board has now set aside Respondent's default for failure to file an answer, the Board exercises its discretion to reinstate the time to file and serve an answer to the petition to cancel. Specifically, Respondent is allowed until **January 6, 2021** to file herein its answer to the petition to cancel, failing which the Board will issue a second notice of default pursuant to Fed. R. Civ. P. 55(a).²

Pursuant to Fed R. Civ. P. 8(b), which is made applicable to this proceeding by Trademark Rule 2.116(a), Respondent must answer each paragraph of the petition to cancel by specifically admitting or denying the allegations contained in each

² Respondent should note that, in adjudicating any future default for failure to file its answer, the Board may not show the same leniency on the issue that the Board has set forth herein.

paragraph. If Respondent is without sufficient knowledge or information on which to form a belief as to the truth of any one of the allegations, it should so state and this will have the effect of a denial. Trademark Rule 2.114(b)(2). Respondent may organize its admissions and denials, as appropriate, by setting forth a list, numbered 1 through 23, which corresponds to the paragraphs in the petition to cancel. 1 TTABVUE 5-12. For further guidance, Respondent is directed to TMBP § 311.01.

As the Board noted in the October 5, 2020 institution order, as well as the December 7, 2020 order, Respondent must file the answer through ESTTA, the Board's Electronic System for Trademark Trials and Appeals. Trademark Rule 2.114(b)(1). Instructions and forms for filing through ESTTA are available at <http://estta.uspto.gov>. All Board proceeding files can be viewed via TTABVUE at <http://ttabvue.uspto.gov>.

Respondent may also wish to review the October 5, 2020 institution order, which has a great deal of information regarding deadlines and how this proceeding will be conducted.

The parties shall note that except as provided in Trademark Rule 2.122 (d)(1), an exhibit attached to a pleading is not evidence on behalf of the party to whose pleading the exhibit is attached, and must be identified and introduced in evidence as an exhibit during the period for the taking of testimony. Trademark Rule 2.122(c); TBMP §§ 317 and 506.03.

The Board will apply a standard of proof in this cancellation proceeding. Specifically, the burden of proof remains with Petitioner, who must establish its case by a preponderance of the evidence. TBMP § 702.04(a).

The Board generally encourages parties to work toward settlement in *inter partes* proceedings. Indeed, possible settlement is a topic which the parties are required to discuss under Fed. R. Civ. P. 26 during their discovery conference pursuant to Trademark Rule 2.120(a)(2). TBMP § 408.01(a). However, the Board expects that the parties will, contemporaneous with any settlement communications, adhere to the deadlines for disclosure, discovery and trial, absent an extension or suspension of these date by way of the filing and granting of a motion to extend or suspend.

Lastly, in the event that the parties seek guidance regarding settlement of this matter, the Board draws the parties' attention to TBMP Chapter 600.

Schedule

Respondent's default tolled all deadlines, including the parties' obligation to conduct the required discovery conference, until resolution of the issue of default. Trademark Rule 2.114(a); TBMP §§ 312.01 and 508. Proceedings are now resumed, and conference, disclosure, discovery and trial dates are reset as follows:

Time to Answer	1/6/2021
Deadline for Required Discovery Conference	2/5/2021
Discovery Opens	2/5/2021
Initial Disclosures Due	3/7/2021
Expert Disclosures Due	7/5/2021
Discovery Closes	8/4/2021
Plaintiff's Pretrial Disclosures Due	9/18/2021
Plaintiff's 30-day Trial Period Ends	11/2/2021

Defendant's Pretrial Disclosures Due	11/17/2021
Defendant's 30-day Trial Period Ends	1/1/2022
Plaintiff's Rebuttal Disclosures Due	1/16/2022
Plaintiff's 15-day Rebuttal Period Ends	2/15/2022
Plaintiff's Opening Brief Due	4/16/2022
Defendant's Brief Due	5/16/2022
Plaintiff's Reply Brief Due	5/31/2022
Request for Oral Hearing (optional) Due	6/10/2022

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, 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).

It is the responsibility of each party to ensure that the Board has the party's current correspondence address, including an email address. TBMP § 117.07. The Board must be promptly notified of any address or email address changes for the parties or their attorneys.

Information for pro se Respondent

While Patent and Trademark Rule 11.14 permits any person to represent itself, it is strongly advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in *inter partes* proceedings before the Board to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney. TBMP § 114.02.

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is required of all parties, whether or not they are represented by counsel. *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, n.2 (TTAB 2006), *aff'd unpub'd*, 240 Fed. Appx.865 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1109 (2008).

As explained in the institution order, Trademark Rules 2.119(a) and (b) require that every submission filed in a proceeding before the Board **must** be served upon the other party or parties, and proper proof of such service must be made before the submission will be considered by the Board. All submissions filed in this proceeding **must** be accompanied by a statement, signed by the attorney or other authorized representative, attached to or appearing on the original submission when filed, clearly stating the date and manner in which service was made, the name of each party or person upon whom service was made, and the email address or address. TBMP § 113.03. Service must be made **by email** unless otherwise stipulated, or unless the filing party has satisfied the requirements for another method of service as set forth in Trademark Rule 2.119(b). The statement will be accepted as prima

facie proof of service, must be signed and dated, and should take the form of a Certificate of Service as follows:

I hereby certify that a true and complete copy of the foregoing (insert title of submission) has been served on (insert name of opposing counsel or party) by forwarding said copy on (insert date of mailing), via email (or insert other appropriate method of delivery) to: (set out name, address, and email address of opposing counsel or party).

Signature and Title _____
Date _____

It is recommended that any pro se party be familiar with the latest edition of Chapter 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice. Parties should also be familiar with the Trademark Trial and Appeal Board Manual of Procedure (TBMP), available at <http://www.uspto.gov/ttab>, the TTABVUE system for viewing the record for all Board proceedings, available at <http://ttabvue.uspto.gov/ttabvue/>. The parties are advised to adhere to all deadlines, including discovery and trial deadlines, and are expected to remain abreast of this proceeding through utilizing TTABVUE at <http://ttabvue.uspto.gov/ttabvue/>.

The parties should be familiar with, and are bound by, the Board's Standard Protective Order, which is available at <https://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/standard-documents-and-guidelines-0>.

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.³ 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.

³ To facilitate accuracy, ESTTA provides thumbnails to view each page before submitting.