

UNITED STATES PATENT AND TRADEMARK OFFICE
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KGC/WBC

September 28, 2021

Cancellation No. 92077125

ASKM Inc.

v.

Lettuce Entertain You Enterprises, Inc

By the Trademark Trial and Appeal Board:

This matter is before the Board to consider Respondent's motion to reopen time to answer (5 TTABVUE), which the Board construes as a motion to set aside Respondent's technical default and accept Respondent's late-filed answer (4 TTABVUE),¹ which was filed contemporaneously with the motion, and Petitioner's motion to correct a scrivener's error (11 TTABVUE). Respondent's motion is fully briefed.²

¹ Although the Board had not yet mailed a notice of default, as of the answer deadline, Respondent was in technical default. The issue of whether default judgment should be entered against a defendant when it fails to timely answer a complaint may be raised by multiple means, including, by motion from defendant asking that its late-filed answer be accepted. *See* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 508 (2021). However the issue is raised, the standard for determining whether default judgment should be entered against the defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard, which requires that the defendant show good cause why default judgment should not be entered against it.

² The Board has considered the parties' submissions and presumes the parties' familiarity with the factual bases for the motion, and does not recount the facts or arguments here,

Scrivener's Error

Petitioner submits a motion to correct a scrivener's error asserting it failed to append the declaration of its president, Mr. Ahmed Qureshi. 11 TTABVUE 2. Inasmuch as Petitioner's motion to correct a scrivener's error is uncontested, it is **granted** as conceded, Trademark Rule 2.127(a). The Board will consider the Qureshi declaration attached thereto.³ 11 TTABVUE 7

Motion to Set Aside Default and Accept Late-Filed Answer

The decision whether to enter default judgment is within the Board's discretion. *See Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). 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 Paolo's Assocs. Ltd. P'ship v. Bodo*, 21 USPQ2d 1899, 1902 (Comm'r 1990); TBMP § 312.02.

The Board will set aside default if a defendant who has failed to file a timely answer to the complaint files a satisfactory showing of good cause⁴ why default judgment should not be entered against it. *See Fed. R. Civ. P. 55(c)*; *see also* TBMP § 312.02. Good cause for discharging default is generally found if (1) the delay in filing is not the result of willful conduct or gross neglect, (2) the delay will not result in

except as necessary to explain the Board's order. *See Guess? IP Holder L.P. v. Knowluxe LLC*, 116 USPQ2d 2018, 2019 (TTAB 2015).

³ The declaration was referenced in, but not attached to, the brief. 10 TTABVUE 1-2.

⁴ Petitioner's reference to excusable neglect as the appropriate standard by which to adjudicate the instant motion is incorrect. 10 TTABVUE 8.

substantial prejudice to the opposing party, and (3) the defendant has a meritorious defense. *Fred Hayman*, 21 USPQ2d at 1557.

With respect to the first factor, Respondent's delay in filing its answer resulted from the petition to cancel being sent to Respondent's corporate office rather than counsel of record. 5 TTABVUE 2. Contrary to Respondent's assertions regarding service of the petition to cancel, the Board serves the petition to cancel on the current owner of the registration sought to be cancelled. Trademark Rule 2.113; TBMP § 310.01. Though this delay was solely within Respondent's control, given the minimal threshold required to set aside a notice of default, there is no evidence of record that persuades the Board that Respondent's delay was willful or in bad faith. *See Fred Hayman*, 21 USPQ2d at 1557.

Turning to the second factor, Petitioner appears to allege prejudice on the basis that its "president relied on the closing notices he read on Respondent's website in deciding to file a trademark application and this Petition to Cancel." 10 TTABVUE 3; 11 TTABVUE 7, ¶¶ 4-5, 7. In view of the nine-day delay between when Respondent's answer was due and when it was filed, the Board is not persuaded that this delay has impacted Petitioner's ability to litigate this case. *See, e.g., Pumpkin Ltd. v. Seed Corps*, 43 USPQ2d 1582, 1587 (TTAB 1997) (determining prejudice in the context of excusable neglect from the ability of nonmovant to prosecute its case); *Fred Hayman*, 21 USPQ2d at 1557 ("Moreover, the nine day delay in the filing of the answer will cause minimal prejudice to opposer."). Thus, this factor weighs in favor of finding good cause.

Lastly, inasmuch as Respondent, in its answer, denies the salient allegations in Petitioner's petition to cancel, this is indicative of a meritorious defense and, therefore, favors a finding of good cause. *See DeLorme Publ'g Co. v. Eartha's, Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000) (meritorious defense under *Fred Hayman* analysis does not entail inquiry into merits of underlying case, but merely plausible response to notice of opposition and willingness to defend matter on its merits).

Decision

On balance and considering all of the pertinent factors, Respondent has shown the requisite good cause. Therefore, Respondent's motion to accept its late-filed answer is **granted**. Any resulting default is hereby discharged. Respondent's answer at 4 TTABVUE is accepted as its operative pleading.

Schedule

Proceedings are resumed, and dates are reset as follows:

Deadline for Discovery Conference	October 27, 2021
Discovery Opens	October 27, 2021
Initial Disclosures Due	November 26, 2021
Expert Disclosures Due	March 26, 2022
Discovery Closes	April 25, 2022
Plaintiff's Pretrial Disclosures Due	June 9, 2022
Plaintiff's 30-day Trial Period Ends	July 24, 2022
Defendant's Pretrial Disclosures Due	August 8, 2022
Defendant's 30-day Trial Period Ends	September 22, 2022
Plaintiff's Rebuttal Disclosures Due	October 7, 2022
Plaintiff's 15-day Rebuttal Period Ends	November 6, 2022
BRIEFS SHALL BE DUE AS FOLLOWS:	
Plaintiff's Main Brief Due	January 5, 2023
Defendant's Main Brief Due	February 4, 2023
Plaintiff's Reply Brief Due	February 19, 2023

General Information

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).