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

Proceeding no.	92080106
Party	Defendant OMAS Srl.
Correspondence address	BROOKS R. BRUNEAU FISHERBROYLES, LLP 100 OVERLOOK CENTER SECOND FLOOR PRINCETON, NJ 08540 UNITED STATES Primary email: brooks.bruneau@fisherbroyles.com Secondary email(s): docketing@fisherbroyles.com, denise.mcculloch@fisherbroyles.com 609-454-6772
Submission	Reply in Support of Motion
Filer's name	Jason DeFrancesco
Filer's email	jasond@defrancesco.law
Signature	/jd/
Date	07/12/2023
Attachments	Reply.pdf(313052 bytes)

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

UNIBRANDS CORPORATION, Petitioner, v. ANCORA PENS DISTRIBUTION CO LTD., Registrant.	Cancellation No.: 92080106

REGISTRANT'S REPLY ISO
MOTION TO SET ASIDE JUDGMENT

ANCORA PENS DISTRIBUTION CO LTD, ("ANCORA PENS") purchased the instant, Cancelled mark in U.S. Trademark Registration No. 2802290, OMAS (stylized, for related pen goods)(the "Registration") from its second owner, Liquidator of OMAS Srl. IN LIQUIDIZAIONE. At the time of purchase, the Registration was LIVE and maintenance for the Second Renewal was coming due on January 6, 2023. While seeking U.S. counsel to attend to the Second Renewal, ANCORA PENS discovered the Registration had been cancelled by Petitioner via default on the first owner, "OMAS Srl.," who Petitioner knew was liquidated, did not exist and did not own the Registration.

ANCORA PENS never received notice of the Cancellation from anyone, including not from the Petitioner, its agents, its counsel, the first owner of the Registration, the second owner of the Registration, the Liquidator, successors, fiduciaries, or counsel thereof. Since however becoming notified, ANCORA PENS filed its proposed Answer and Affirmative Defenses (11 TTABVUE, 9) and requested the Registration be reinstated for the default being void (lack of notice, due process and bad faith) or in that default judgments are not favored and, therefore

according to a motion under Rule 60(b) which relief is treated with more liberality. Petitioner opposes the motion (12 TTABVUE, "Opp."), notably arguing,

That (A) ANCORA PENS' failure to answer is inexcusable and that "***Petitioner Unibrands (emphasis added)***" does not have a duty to inform the USPTO of an ownership change (Opp., p. 9) [and (C) Petitioner has not acted in bad faith]; that (B) ANCORA PENS does not have a defense (*id*., p. 10); and/or (D) that Petitioner would be Prejudiced based on "significant investment" (*id*., pp. 4, 17) according to "finality of the [underlying] cancellation" (*id*., 17). ANCORA PENS requests the Board set aside the cancellation, in further view of its Reply and reasons in support thereof as,

A. Petitioner provides no case law or support that identifies a failure to update records is a *per se* cancellation by default and incurable under Rule 60(b).

Petitioner does not provide evidence or support to suggest Petitioner, its counsel or any others have ever communicated the cancellation to ANCORA PENS. Instead, Petitioner states ANCORA PENS' is the party to bear blame, as its failure to update was "particularly egregious" and "Ancora is supposedly a sophisticated trademark owner with properties worldwide and undoubtably knows its duty to the USPTO" (Opp., p. 8). Neither ANCORA PENS nor its owner ever alleged to be a "sophisticated trademark owner." While the instant situation is unfortunate, ANCORA PENS' owner has had only one past, prior registration in the U.S. (No. 3427055, cancelled), and neither ANCORA PENS nor its owner has otherwise had or held any other trademark applications or registrations in the U.S.

Petitioner on the other hand, has more applications and experience at the USPTO, yet it filed the underlying cancellation against "OMAS Srl.," who Petitioner confirmed did not exist on July 11, 2022. See Opp., Decl. Frank Zhang, ¶ 3; see also, Opp., p. 2 (Petitioner knowingly

purchased assets "manufacturing equipment was purchased by Mr. Emmanuel Caltagirone [Petitioner] July 11, 2016" from OMAS Srl IN LIQUIDAZIONE which "entered liquidation in or about 2015.").

Petitioner, who was set to make $100,000 in 4 months (Opp., p. 18), argues it was correct to identify "OMAS Srl." (not OMAS Srl. IN LIQUIDAZIONE) as owner of the Registration in the cancellation proceeding because this is what is stated on the USPTO record, and it can solely rely on records "publicly available at the USPTO" (Opp., p. 14). And above all, notwithstanding whether others had a duty to notify ANCORA PENS of this proceeding, but did not, "***Petitioner Unibrands (emphasis added)***" denies it has the duty to inform the Board otherwise (Opp., p. 9, emphasis added). This conclusion is fatal to Petitioner's opposition.

When Petitioner filed this proceeding, it was prompted the below screen, which would have contained "OMAS Srl." details as "Registrant" etc.,

Registration

Please verify that the information appearing below correctly identifies the registration to which this action applies.

Registrant	
Registration no.	
Register	
Registration date	
Mark	
International classes	

☐ Check here if you are aware of a name, address or email address that differs from what is shown

The Petitioner is required to verify whether "you are aware of a name…that differs from what is shown." Upon reasonable belief, and what appears to be true, is that Petitioner acted [C] in Bad Faith by knowingly not identifying OMAS Srl. IN LIQUIDAZIONE or check the box that could have led ANCORA PENS to receive notice.

B. Petitioner argues ultimate conclusions of disputed facts, not whether ANCORA PENS' defense, Proposed Answer and Affirmative Defenses are "meritorious" and not frivolous.

Petitioner argues that ANCORA PENS' use and/or efforts thereof are insufficient to avoid abandonment (Opp., pp. 10 – 11, e.g., "extremely small volume") but does not state in general, beyond doubt or certify otherwise by guess or by expert what is or should be considered commercially accepted use, quantity, or volume, for the underlying mark as to nibs and other goods to constitute non-abandonment.

ANCORA PENS has a meritorious defense and standing in that it alleged use, intent and ownership of the Registration in its proposed Answer and Affirmative Defenses against abandonment (11 TTABVUE, p. 9). It filed the purchase agreement for U.S. Trademark Registration No. 2802290 from the second owner, Liquidator of OMAS Srl. IN LIQUIDIZAIONE and updated the chain of title in ETAS (see, 10 TTABVUE attachments).

Petitioner does not deny ANCORA PENS purchased the OMAS mark, and beyond alleged abandonment, does not argue that ANCORA PENS' pleading is frivolous. *See, Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc*., 21 USPQ2d 1556, 1557 (TTAB 1991) ("By the submission of an answer which is not frivolous, applicant has adequately shown that it has a meritorious defense.") To the extent there is doubt, then according to *O'Connor v. Nevada*, 27 F.3d 357, 364 (9th. Cir. 1994) "[w]here timely relief is sought from a default . . . and the

movant has a meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the default so that cases may be decided on their merits."

D. Petitioner's reliance on the default creating a quasi-freedom to use is not reasonable. Petitioner does not have an incontestable registration, let alone a registration, to feel insulated from challenge based on its unauthorized use.

Petitioner has a confusingly similar mark pending registration for OMAS (Ser. No. 97489405). The operative date of notice of Petitioner's ownership of the confusingly similar mark does not begin when ANCORA PENS' Registration is cancelled, but the date of registration of the mark to Petitioner (especially when ANCORA PENS' had no notice). *Teledyne Technologies, Inc. v. Western Skyways, Inc*., 78 USPQ2d 1203, 1210 (TTAB 2006). Because Petitioner does not have a registration, it cannot rely on being insulated from a challenge adverse to ANCORA PENS (or another *unnoticed* third-party as to registrability before the TTAB, and/or as to an unauthorized use in Federal Court, etc.).

Furthermore, because the Cancellation terminated October 17, 2022, and Rule 60(b) allows a year to seek relief to set aside a judgment (i.e., by October 17, 2023), Petitioner cannot state it was insulated from a challenge by ANCORA PENS, especially when it cannot be shown or suggested that ANCORA PENS ever received notice of unauthorized use by Petitioner, or notice of the Cancellation by Petitioner, or anyone else.

Petitioner's use beginning February 2023 (Opp., pp. 3, 17, 18) was eight months before the Rule 60(b) deadline would expire, and therefore this use is an unreasonable indicator of freedom to continue use or registrability, let alone an unreasonable indicator to bet the farm. Although Petitioner alleges "significant investment" "significant legal fees" "significant goodwill" (Opp., p. 17) and "further invested significantly in tooling, packing, marketing,

advertising…" (Opp., p. 18), Petitioner has no registration and produces no actual evidence, records or numbers.[1] Without actual evidence and "sums", it is impossible to assess alleged prejudice — which argument therefore should fail, especially because Petitioner unreasonably acted to its detriment on the reliance of ANCORA PENS to not challenge a default within the authorized year that is allowable under Rule 60. See, *Charrette Corp. v. Bowater Commc'n Papers Inc*., 13 USPQ2d 2040, 2043 (TTAB 1989) (no prejudice demonstrated where "registrant has submitted no evidence to show that it acted to its detriment in reliance on petitioner's failure to act more promptly")("[W]e do not believe that fourteen months is an unreasonable period." Id.); *Hornby v. TJX Cos*., 87 USPQ2d 1411, 1419 (TTAB 2008) (unsupported claim that investment was made in a mark not credited); *see also Alfacell Corp. v. Anticancer, Inc*., 71 USPQ2d 1301, 1308 (TTAB 2004) (evidence of prejudice insufficiently specific because "it is difficult to gauge, in the absence of dollar amounts or other specific information relative to its promotional efforts, the degree to which there has been any detriment").

Notwithstanding lack of evidence, Petitioner's alleged four months' use that includes $100,000 in sales (Opp., p. 18) falls short to implicate a suggestion of prejudice. S*ee, Cf. Ava Ruha Corp*., 113 USPQ2d 1577, 1583(TTAB 2015)(prejudice based on showing of tens of millions of dollars spent growing the business, adding at least 15 stores, and spending over $ 7 million promoting its marks); *Turner v. Hops Grill & Bar Inc*., 52 USPQ2d 1310, 1313 (TTAB 1999) (finding prejudice from delay where evidence demonstrated additional

[1] Petitioner highlighted ANCORA PENS use of "significant" for it having no "disclosed sum," (see Opp. p. 7, "notwithstanding this purported 'significant' (but undisclosed) sum"…) yet Petitioner alleges same "significant" as to itself without any sums either at the Opp., p. 17 references.

restaurants and growth of sales from $ 7 million to $ 58 million); *Bridgestone/Firestone*, 58 USPQ2d at 1462-3 (economic prejudice may arise from investment in and development of a trademark, as well as the continued commercial use and economic promotion of a mark over a prolonged period).

Rule 60(b) contemplates a year to seek relief to set aside a judgment (i.e., by October 17, 2023). Petitioner knew or had reason to know in February 2023 or when it "significantly" invested, that the cancellation it brought naming "OMAS Srl." not OMAS Srl. IN LIQUIDAZIONE was subject to being challenged and especially could, by ANCORA PENS who had no notice (and was not included in receiving a chance to be noticed).

WHEREFORE, ANCORA PENS DISTRIBUTION CO LTD respectfully requests the Board set aside the Judgment, reinstate the Registration, accept the attached Answer and Affirmative Defenses as the prevailing pleading, and enter a Trial Calendar Schedule for the underlying dispute.

Respectfully submitted,
The DeFrancesco Law Firm PLLC

Dated: July 12, 2023

By: / Jason DeFrancesco /
Jason DeFrancesco
110 Dungannon Blvd., Ste 101
Wilmington, NC 28403
(910) 833-5428
jasond@defrancesco.law

Attorney for Registrant,
ANCORA PENS DISTRIBUTION CO LTD.

CERTIFICATE OF SERVICE

hereby certify that a true and correct copy of the foregoing was served via e–mail on MARK MELASKY <mmelasky@iplawconsulting.com, apacifici@iplawconsulting.com, creid@iplawconsulting.com > on July 12, 2023.

By: / Jason DeFrancesco /
Jason DeFrancesco