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

Proceeding	92069842
Party	Defendant Zohar Paz
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Attachments	19-03-26 - Reply Memo ISO Motion to Set Aside Default.pdf(259714 bytes) Declaration of Matthew D. Asbell 03-26-19 - Executed.pdf(109894 bytes) Supplemental Dec. of Zohar Paz.pdf(2849868 bytes) Exh C to Paz Supp Dec. - Founders Agreement (1).pdf(3318121 bytes) Exh D to Paz Supp Dec. - Service Agreement.pdf(348199 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PAI-SHAU LLC

Petitioner

v.

ZOHAR PAZ

Registrant

Case No.: 92069842
Registration No. 4,883,623

REGISTRANT'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO SET ASIDE DEFAULT JUDGMENT AND MOTION FOR LEAVE TO FILE A LATE ANSWER

Request for Telephonic Conference Pursuant to 502.06(a) of the Trademark Trial and Appeal Board Manual of Procedure

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contract Number: 571-272-8500

I. INTRODUCTION

In support of this Reply Memorandum, Paz submit the Declaration of Matthew Asbell of Ladas & Parry – a law firm which regularly practices before the Board. As a result, the law firm has strict policies and procedures regarding the service of pleadings by the Board to ensure that all matters receive the appropriate attention.

Mr. Asbell attests, under oath, that his law firm has no record of receiving the Petition for Cancellation or the Notice of Default. In addition, there is no record that the law firm was served with the Notice of Cancellation, putatively served on February 11, 2019; or Petitioner's Opposition. Yet, the address on file with the Board is accurate. There is a problem which counsel has been unable to identify.

Certainly, to enforce a default under these circumstances would be inequitable. Whatever the cause, the fact remains, Paz never receive notice of the pendency of the Petition or the Notice of Default. This, under the law, constitutes excusable neglect. He promptly moved the Board to set aside the default permit the filing of a late answer. This Reply Memorandum elaborates, with significant details and legal authorities, on the defenses presented in the moving papers. It will appear to this Board that Paz should prevail on the Petition and maintain the registration of the PAU-SHAU mark.

II. PAZ PROMPTLY MOVED FOR RELIEF FROM JUDGMENT.

Paz brought his motion to set aside the default 25 days after he first learned of the existence of the Petition for Cancellation. This amount of time is not inordinate. *See Bateman v. United States Postal Serv.,* 231 F.3d 1220, 1222, 1224-25 (9th Cir. 2000) (holding that in the context of Federal Rules of Civil Procedure, Rule 60((b)(1) a failure to contact the court for 24

days did not constitute a significant delay; the length of the delay and its potential impact on the judicial proceedings was negligible).

The Petitioner, however, offers three cases indicating that one month does constitute an excessive delay. Why the discrepancy? The Opposition does not appreciate that the amount of time is never analyzed in the abstract. That is, there is no magic number of days at which the lapse constitutes an unreasonable delay. Rather, delay must always be evaluated in the context of the facts. All three cases presented scenarios where the moving party failed to show a legitimate excuse for the delay – at all.

The Supreme Court has ruled that in order to determine whether such negligence is excusable, an equitable analysis would take into account *all relevant circumstances surrounding the party's omission*. *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). The Court stated that such an analysis should include the following factors: (1) the danger of prejudice to the opposing party; (2) "the length of the delay and its potential impact on judicial proceedings;" (3) "the reason for the delay, including whether it was within the reasonable control of the movant;"[3] and (4) "whether the movant acted in good faith." *Id.* The factors recited in Pioneer were not exclusive, but that they provide a framework with which to determine whether missing a filing deadline constitutes `excusable' neglect. *Briones v. Riviera Hotel & Casino,* 116 F.3d 379 (9th Cir.1997)

Thus, the courts, in the three cases cited by Petition in its Opposition, were unforgiving of the period of time because the moving parties failed to provide ***any*** legitimate excuse for failing to respond in a timely fashion. In *Sloss Indus. v.* Eurison, 488 F.3d 922 (11th Cir. 2007), the defendant "did not show a good reason for failing to respond to [the] complaint." `In *Speiser, Krause & Madole, P.C. v. Ortiz,* 271 F.3d 884, 886 (9th Cir. 2001), the moving party's attorney

argued excuse based on "his neglect to read and understand the pellucid command of Rule 81(c) regarding the time to answer the complaint." In *United States v. Topeka Livestock Exchange,* 392 F.Supp. 944, 950 (N.D. Ind. 1975), the court observed that "no excuse which is legally sufficient is even claimed with any specificity in the record now before the court."

In contrast, it is undisputed that here, prior to the entry of default, Paz did not have any awareness of either the Petition for Cancellation or the Notice of Default. The defendant's unawareness of the pendency of an action – even where "there is doubt" about the defendant's knowledge – is deemed a legitimate excuse justifying relief from a default. *Schwab v. Bullock's Inc.*, 508 F.2d 353, 355 (9th Cir. 1974). Indeed, the TMEP support this at Section 1712.02(b)(ii):

> "The failure to receive an Office action is considered an extraordinary situation that justifies a waiver of a rule. Therefore, if the registrant did not receive an Office action refusing to accept an affidavit or renewal application, but the registrant does not have proof that non-receipt was due to USPTO error (*see* TMEP §1712.02(a), paragraph 9), the registrant may file a formal petition under 37 C.F.R. §2.146."

See also Smart Inventions Inc. v. TMB Products LLC, 81 USPQ2d 1383, 1384 (TTAB 2006) (cancellation respondent's motion to set aside default judgment on ground that it never received actual or constructive notice of proceeding granted under Fed. R. Civ. P. 60(b)(4) where assignment of mark to respondent recorded before proceeding instituted but notification of proceeding sent to prior owner); 10A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE Civil § 2693 (4th ed. 2018).

Moreover, the Trademark Trial and Appeal Board Manual Procedure (TBMP) states: "Because default judgments for failure to timely answer the complaint are not favored by the law, a motion under Fed. R. Civ. P. 55(c) and Fed. R. Civ. P. 60(b) seeking relief from such a

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