

UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE DIRECTOR

**ARMIDA WINERY,**

Petitioner,

v.

**THE CUBAN, LLC, and POISON  
SPIRITS, INC.,**

Respondents

Decision on Second Request for  
Extension of Time to Appeal  
under 37 C.F.R. § 2.145(e)

Cancellation No. 92/065,105

MEMORANDUM AND ORDER

On December 3, 2018, Respondent Poison Spirits, Inc. (“Respondent”), filed a second request for an extension of time of sixty (60) days within which to seek judicial review of the Trademark Trial and Appeal Board’s August 1, 2018, decision entering summary judgment and granting the petition to cancel Respondent’s U.S. Trademark Reg. No. 5,110,000. The extension request is DENIED for the reasons set forth below. The Notice of Appeal to the U.S. Court of Appeals for the Federal Circuit, filed in the alternative and attached to the request, is accepted as timely filed with the USPTO, but to perfect the appeal Respondent must also comply with 37 C.F.R. § 2.145(a)(2)(iii), including filing a copy of the Notice of Appeal with the Court and paying the Court the requisite fee for the appeal. *See* Fed. Cir. R. 15(a).

## Background

This is Respondent's second request for an extension. In its first extension request, which Respondent filed *pro se*, Respondent expressed its desire to retain and confer with an attorney to consider and evaluate Respondent's options for obtaining further review of the Board's decision. Respondent averred that this process was delayed due to a death in the family of Respondent's authorized representative. Respondent also noted the existence of a related opposition proceeding before the Board (*Poison Spirits Inc. v. Armida Winery Inc.*, Opposition No. 91/240,537 (the "'537 Opposition'")) and stated that the requested extension would "enable[ ] the parties to be heard on a pending dispositive motion" in that related proceeding, thus potentially "avoid[ing] piecemeal appeals to the federal courts" and thus serving "judicial economy." Under those circumstances, the Director found good cause and therefore granted the request in an October 10, 2018, Order, extending the time to seek judicial review from October 3, 2018, until December 3, 2018.

Respondent filed this second request *pro se* as well, but this time included a protective Notice of Appeal in the alternative, which it asked to be considered as filed as of the time of this second request if the Director denies a further extension. Respondent avers that it has recently retained counsel, but that the firm it retained is small and was engaged in a trial in a California court which lasted from late November into early December. Respondent notes that, as a result, its counsel has not been yet able to "finalize and file its motion to modify or set aside the Board's August 1, 2018

decision” and that the additional time will allow the Board “time thereafter to rule on Respondent’s [future] motion before Respondent is required to appeal or commence a civil action.” The second request also refers to the ’537 Opposition, stating that the requested extension would “enable[ ] Respondent to be heard on a motion to set aside the judgment” in that separate proceeding.\*

### Discussion

Under 37 C.F.R. § 2.145(e)(1)(i), the Director may extend the time for seeking judicial review of a Board decision for good cause if the request is made in writing before the period for filing an appeal or commencing a civil action expires. The October 10, 2018 Order granting Respondent’s first extension request extended the time to seek judicial review to December 3, 2018. As this second request was filed on December 3, it is timely and therefore will be considered under the good cause standard.

Respondent’s primary stated reason for this second requested extension is to file a motion to modify or set aside the Board’s August 1, 2018 decision in this cancellation proceeding. The USPTO’s rules provide that a party may file a motion

---

\* By requesting time in part to move to set aside the judgment in the ’537 Opposition, Respondent’s second request suggests that the “dispositive motion” Respondent referred to in its first request has since been decided. The Director has checked the electronic docket for the ’537 Opposition and, indeed, it reflects that the Board entered summary judgment against Respondent (which is the opposer in the ’537 Opposition). *See* Board Order dated Nov. 11, 2018, in the ’537 Opposition (8 TTABVue). The Board’s November 11 order states that the Board entered summary judgment against Respondent in the ’537 Opposition because Respondent “failed to file and serve a timely response.” *Id.*

for reconsideration within one month after the date of the Board's decision. *See* 37 CFR § 2.129(c). While a timely-filed motion for reconsideration tolls the time for appeal, *see* 37 CFR § 2.145(d)(1), a motion to set aside the judgment does not. *See* Fed. R. Civ. P. 60(c)(2); Trademark Board Manual of Procedure (TBMP) § 544. Because the time to move for reconsideration has passed, any motion Respondent would file with the Board concerning the August 1, 2018 decision, would necessarily have to take the form of a motion for relief from judgment under Fed. R. Civ. P. 60(b). But the filing of a motion under Rule 60(b) is unrelated to the deadline for seeking review of a Board decision under 15 U.S.C. § 1071(a)(2) and 37 C.F.R. § 2.145(d). The filing of a Rule 60(b) motion neither tolls the deadline nor is necessary for seeking judicial review of a Board decision. Respondent's desire to file such a motion does not constitute good cause to further extend the time for seeking judicial review of the Board's August 1, 2018 decision.

The Director further notes that Respondent's desire to also move to set aside the judgment in the '537 Opposition does not constitute good cause for further extending the time to seek judicial review of the Board's decision in this separate proceeding. Although Respondent's first extension request noted that Respondent wanted an opportunity to be heard on the then-pending summary judgment motion in that related proceeding and avoid piecemeal appeals, the electronic docket in the '537 Opposition shows that Respondent, even after the Director granted the first request,

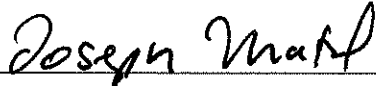
made no attempt to be heard and that the Board, on November 13, 2018, dismissed the '537 Opposition because of Respondent's failure to respond.

Conclusion

The request for a second extension is DENIED. The Director accepts the protective Notice of Appeal attached to the request and considers it to have been timely filed with the USPTO on December 3, 2018. Respondent should promptly file a copy of the Notice of Appeal with the United States Court of Appeals for the Federal Circuit and pay that Court the required fee. *See* 37 CFR § 2.145(a)(2)(iii); Fed. Cir. R. 15(a).

ANDREI IANCU,  
*Under Secretary of Commerce for Intellectual Property  
and Director of the United States Patent and  
Trademark Office*

Date: January 2, 2019

By:   
Joseph Matal  
Acting Deputy General Counsel for  
Intellectual Property Law and Acting Solicitor

Service via email to:

Kevin Harr (kevin\_m\_harr@yahoo.com)  
Grace R. Neibaron (grace@neibaronlaw.com)  
Christopher Clark (cevin@harvelles.com)  
Sharon Raminfard (sharon@novianlaw.com)