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

Proceeding	91169856
Party	Plaintiff SmithKline Beecham PLC ,
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 78/301,767
Published in the Official Gazette: November 1, 2005

SMITHKLINE BEECHAM PLC Opposer, v. **BIO THERAPEUTICS, INC.** Applicant.	Mark: PHYLODERM Opposition No.: 91169856

MOTION FOR DEFAULT JUDGMENT

Opposer, by and through the undersigned counsel, hereby moves the Board to deny Applicant's Motion for Leave to File Late Answer filed on July 20, 2006 and grant Opposer's present Motion for Default Judgment, as Applicant has not established good cause for discharging its default and accepting its late answer.

On February 28, 2006, Opposer timely filed a Notice of Opposition. On March 3, 2006, Opposer mailed a letter along with a copy of the Notice of Opposition, as filed, to Applicant to notify Applicant of the filing of the Notice of Opposition and to attempt to resolve the present matter. No response from Applicant was ever received. The Opposition was instituted and a copy of the Notice of Opposition was sent to both parties on March 20, 2006. Pursuant to Trademark Rule 2.105, the Board informed Applicant by its trial order that an answer to the Notice of Opposition was due April 29, 2006, forty days after the mailing date of the order.

On April 19, 2006, Opposer, through a routine check of the TTAB website, recognized that the trial order mailed on March 20, 2006 contained errors in the Opposer's address. Accordingly, Opposer filed a Change of Correspondence Address with the TTAB to correct the errors. It is noted that no errors were made in the trial order with respect to the Applicant's information. It is further noted that Applicant had Opposer's correct contact information from the Notice of Opposition and from the letter

sent on March 3, 2006. Also, on April 19, 2006, Opposer mailed a second letter to Applicant noting that no response had been received to the earlier letter and again attempted to engage in discussions to resolve the present Opposition. Again, no response was received. Due to the errors made in the original trial order, the Board mailed a new trial order on April 20, 2006 resetting the trial dates. In the order, the Board notified Applicant that an answer to the Notice of Opposition was due May 20, 2006, thirty days from the mailing date of the order. During the week of May 20, 2006, Opposer contacted Mr. Andrew Baxley, the interlocutory attorney in charge of the present case at the TTAB to inquire about a Notice of Default. Mr. Baxley responded that a Notice of Default would be sent one month after the Answer due date. A Notice of Default was then mailed on June 20, 2006. Applicant filed its Answer and a Motion for Leave to File Late Answer on July 20, 2006. Thus, Applicant's Answer was not filed until nearly five months from the date Opposer first notified Applicant of the filing of the Notice of Opposition and four months from the date Applicant was notified by the Board of the Notice of Opposition. No response was received from Applicant by Opposer or by the Board until July 20, 2006.

Good cause for discharging a 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 substantial prejudice to the opposing party, and (3) the defendant has a meritorious defense. *Fred Hyman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991). In the present case, it is clear that Applicant's delay in filing an Answer to the Notice of Opposition was the result of Applicant's willful conduct and gross neglect. Almost five months passed since Applicant was first made aware of the filing of the Notice of Opposition. During this time, Applicant intentionally chose to take no action. In its Motion for Leave to File Late Answer, Applicant contends that it was not in a financial position to authorize its counsel to fully respond or progress the current matter. However, Applicant further states that funding for the current matter merely "appears imminent". In other words, as of the date of filing Applicant's Motion, Applicant had not received any more funding for the current matter than Applicant already had available when the Answer was originally due. Thus, since Applicant had enough funding to file a response after receiving the Notice of Default without the "imminent" funding, Applicant

must have been financially able to file an Answer in response to the Notice of Opposition on or before the due date set by the Board. Thus, Applicant's decision not to file a timely Answer was both willful and inexcusable.

Applicant further contends that its failure to respond was "exacerbated by considerable confusion raised by the original notice from the Board, which included several errors and was later revised, requiring the setting of new dates." This argument also fails. The original trial order mailed by the Board on March 20, 2006 only included minor spelling errors in Opposer's name (Opposer was identified as Skithkline Beecham PLC rather than Smithkline Beecham PLC) and in Opposer's correspondence address. None of these errors affected proper service of the Notice of Opposition upon the Applicant. Further, as stated above, Applicant already had in its possession a letter from Opposer, the correspondence address of which Applicant could have compared and verified with the correspondence address listed on the Notice of Opposition. The resetting of the trial dates and response date only served to benefit Applicant.

It is also noted that no effort was made by Applicant to contact the Board to request an extension of time to answer the Notice of Opposition. Nor was any effort made by Applicant to contact the Opposer to discuss alternate resolutions to the present case, despite efforts made to do so on behalf of the Opposer. For at least these reasons, it is clear that Applicant intentionally made the decision not to respond to the Notice of Opposition; thereby making the delay in filing the result of Applicant's willful conduct and gross neglect. See *Delorme Publishing Co., Inc. v. Eartha's, Inc.*, 2000 WL 33321172 (Trademark Tr. & App. Bd.) 60 USPQ2d 1222 (2000), in which the Board held that Applicant's intentional choice not to respond in any way for nearly six months evidences an objective intent not to defend the opposition, or at the very least, amounts to gross neglect.

In addition to Applicant's willful conduct and gross neglect, Applicant's delay in filing has caused substantial prejudice to Opposer. The discovery period began to run on April 9, 2006 and, as a result, Opposer has been deprived of valuable time to conduct and develop its case. Further, Applicant's delay and their failure to respond to Opposer's efforts to resolve the matter have given the Applicant still further time to prepare to use

its mark, which if commenced, will significantly damage Opposer due to confusing similarity.

Further still, Applicant's motion does not allege a meritorious defense on its face. Simply denying the allegations in the opposition is not a meritorious defense. Nor have Applicants even attempted to allege any facts that could be construed as such. For the reasons set forth in the Notice of Opposition, the marks are virtually identical in sound and appearance on virtually identical goods to Opposer's mark, which has been in use since 1944. Given the striking similarity in marks and goods, one can only conclude that the Applicant's mark was adopted with the intention of trading on the good will and fame associated with Opposer's mark.

Because Applicant is in default for failure to answer Opposer's Notice of Opposition and Applicant has failed to show good cause as to why the default should be discharged, Opposer now moves the Board for a default judgment in its favor.

Respectfully submitted,

/Una L. Lauricia/_____

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Date: July 31, 2006

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being submitted electronically through the ESTTA website established by the U.S. Trademark Trial and Appeal Board on the date shown below.

_____Una L. Lauricia_____
Typed or printed name of person signing certificate

/Una L. Lauricia/_____July 31, 2006
Signature Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Default Judgment was served on Attorney for Applicant as follows by First Class Mail to, Philip M. Goldman, Fredrikson & Byron, P.A., Suite 4000, 200 Sixth Street South, Minneapolis, MN 55402-1425 on this 31st day of July, 2006.

/Una L. Lauricia/
Una L. Lauricia