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Filing date: **09/18/2006**

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

Proceeding	91171425
Party	Defendant Michael Foods, Inc. Michael Foods, Inc. Suite 400 301 Carlson Parkway Minnetonka, MN 553055370
Correspondence Address	STEPHEN R. BERGERSON FREDRIKSON & BYRON, P.A. SUITE 4000 200 SOUTH SIXTH STREET MINNEAPOLIS, MN 55402-1425
Submission	Answer
Filer's Name	Dean R. Karau
Filer's e-mail	ip@fredlaw.com, dkarau@fredlaw.com
Signature	/Dean R. Karau/
Date	09/18/2006
Attachments	Michael Foods ALL WHITES PLUS.pdf (9 pages)(132953 bytes)

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

PPC Marketing, Ltd. ,)	Opposition No. 91171425
)	Serial No. 78/544,603
Opposer,)	Mark: ALL WHITES PLUS
)	
v.)	
)	
Michael Foods, Inc. ,)	
)	
Applicant,)	
)	
)	
)	
)	

United States Patent And Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

**MOTION FOR LEAVE TO FILE LATE ANSWER OR OTHERWISE
RESPOND TO THE NOTICE OF OPPOSITION**

On September 1, 2006, the Board issued a Notice of Default against Applicant, Michael Foods, Inc., and allowed Applicant thirty days from the mailing date of its order to show cause why judgment by default should not be entered against Applicant.

As good cause why judgment by default should not be entered against Applicant, Applicant respectfully submits the following information and requests leave to file a late answer or otherwise respond to the Notice of Opposition.

While Applicant is technically in default, the standard for determining whether a default judgment should be entered against a defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard – that is, whether the defendant has shown good cause why default judgment should not be entered against it. *See* TBMP § 312.02 (2d ed. June 2003). Good cause why default judgment should not be entered against a defendant, for failure

to file a timely answer to the complaint, is usually found when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action. *See Paolo's Associates Limited Partnership v Paolo Bodo*, 21 USPQ2d 1899, 1903-04 (Comm'r 1990) and *Fred Haman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1557, 1557 (TTAB 1991). The TTAB tends to resolve any doubt on the issue of default in the defendant's favor. *See* TBMP § 312.02.

In this case, it appears that the Notice of Opposition became lost within the office of Applicant's attorney of record and, despite investigation, Applicant's attorney has been unable to determine as of this date why. Nevertheless, Applicant's failure to timely file an answer was not the result of willful conduct or gross neglect on the part of Applicant, and will be filed less than two months late. Further, there is no indication that Opposer will be prejudiced in any way by the late filing. In addition, Applicant has set forth a meritorious defense by way of the denials set forth in its answer.

Therefore, Applicant respectfully requests the Board to set aside the notice of default and grant it leave to file a late answer or otherwise respond to the Notice of Opposition.

Respectfully submitted,

Dated: September 18, 2006

/Dean R. Karau/
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the MOTION FOR LEAVE TO FILE LATE ANSWER OR OTHERWISE RESPOND TO THE NOTICE OF OPPOSITION was served by United States mail on the attorney of record for Opposer in this action, Nancy Navarro, Navarro Law Office, P.C., P.O. Box 166851, Irving, TX 75016, by mailing it to her address of record by first class mail, postage prepaid, this 18th day of September, 2006.

_____/Dean R. Karau/
Dean R. Karau

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ANSWER TO NOTICE OF OPPOSITION

Applicant, Michael Foods, Inc., for its answer to the Notice of Opposition filed by Opposer, PPC Marketing, Ltd., states and alleges as follows:

1. Applicant is admits the allegations contained in Paragraph 1 of the Notice of Opposition.
2. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 2 of the Notice of Opposition and therefore denies same.
3. Applicant denies that Registration No. 2,975,706, issued on July 26, 2005, is incontestable pursuant to 15 U.S.C. §1065, that it is conclusive evidence of the validity of the registration of the mark in that registration, Opposer's ownership of the mark, and to Opposer's exclusive right to use the mark in connection with the goods specified in the registration, and

puts Opposer to its strict burden of proof of same; and Applicant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 3 of the Notice of Opposition and therefore denies same.

4. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 4 of the Notice of Opposition and therefore denies same.

5. Applicant denies the allegations contained in Paragraph 5 of the Notice of Opposition.

6. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the Notice of Opposition and therefore denies same.

7. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Notice of Opposition and therefore denies same.

8. Applicant denies the allegations contained in Paragraph 8 of the Notice of Opposition.

9. Applicant denies the allegations contained in Paragraph 9 of the Notice of Opposition.

10. Applicant denies the allegations contained in Paragraph 10 of the Notice of Opposition.

11. Applicant denies the allegations contained in Paragraph 11 of the Notice of Opposition.

12. Applicant denies the allegations contained in Paragraph 12 of the Notice of

Opposition.

13. Applicant admits the allegations contained in Paragraph 13 of the Notice of Opposition, and Applicant states that it required no license, authorization or permission of Opposer.

14. Applicant denies the allegations contained in Paragraph 14 of the Notice of Opposition.

15. Applicant denies the allegations contained in Paragraph 15 of the Notice of Opposition.

16. Except as expressly admitted or otherwise answered, Applicant denies each and every allegation contained in Opposer's Notice of Opposition.

SEPARATE DEFENSES

1. Opposer fails to state a claim upon which relief may be granted.

2. Upon information and belief, Opposer has abandoned the mark in Registration No. 2,164,616.

3. Upon information and belief, Opposer has unclean hands and/or has committed fraud in connection with Application Serial No. 75/167,047, by fraudulently declaring on or about September 12, 1996, that it was using or intended to use the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application, when in fact it was using another mark.

4. Upon information and belief, Opposer has unclean hands and/or has committed fraud in connection with Registration No. 2,164,616, by fraudulently declaring on or about April 20, 2004, that it was using the mark depicted in the registration in commerce on or in connection with the goods/services identified in the registration; that the mark had been in continuous use in

commerce for five consecutive years after the date of registration, or the date of publication under Section 12(c), and was still in use in commerce on or in connection with all goods and/or services as identified above, when in fact it was using another mark.

5. Upon information and belief, Opposer has abandoned the mark in Registration No. 2,401,500.

6. Upon information and belief, Opposer has unclean hands and/or has committed fraud in connection with Application Serial No. 75/677,036, by fraudulently declaring on or about April 7, 1999, that it was using or intended to use the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application, when in fact it was using another mark.

7. Upon information and belief, Opposer has abandoned the mark in Registration No. 2,975,706.

8. Upon information and belief, Opposer has unclean hands and/or has committed fraud in connection with Application Serial No. 78/285,704, by fraudulently declaring on or about August 11, 2003, that Applicant was using the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application at least as early as January 3, 1997, and was using the mark as depicted in the drawing in the application in commerce on or in connection with the goods in the application as of the date of the application, when in fact it was using another mark.

9. Upon information and belief, Opposer has unclean hands and/or has committed fraud in connection with Application Serial No. 78/285,704, by fraudulently stating on or about December 23, 2004, that Registration No. 2,164,616 is for the mark EGGSPPLUS, when in fact the registration is for EGGSP PLUS.

10. Opposer's mark in U.S. Registration No. 2,975,706 was merely descriptive and lacked secondary meaning at time of registration.

11. Opposer failed to use the alleged mark in Registration No. 2,975,706 as trademark prior to application or registration.

12. Opposer's alleged mark in Registration No. 2,975,706 has not become distinctive of the Opposer's goods and services in commerce and no customer recognition of said term as a valid mark identifying only Opposer has been achieved.

13. In Cancellation Proceeding No. 91171426, Applicant has petitioned to cancel Opposer's Registration Nos. 2,164,616, 2,401,500, and 2,975,706, and, if the registrations are cancelled, then Opposer cannot rely upon those registrations in this proceeding.

Please address all communication to Dean R. Karau, Fredrikson & Byron, P.A., Suite 4000, 200 South Sixth Street, Minneapolis, Minnesota, 55402-1425.

WHEREFORE,

1. Applicant respectfully requests that the Opposer's Opposition be dismissed with prejudice; and

Dated: September 18, 2006

Respectfully submitted,

_____/Dean R. Karau/
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