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

Proceeding	91191649
Party	Defendant Tamara Yapp
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Submission	Response to Board Order/Inquiry
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Date	11/20/2009
Attachments	20091120 Motion to Reopen Time to Answer and Set Aside Default 1167-L0001.pdf ( 5 pages )(1216125 bytes )

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

12 PetAg Inc.,  
13 Opposer,

14 v.

15 Tamara Yapp,  
16 Applicant.

Opposition No. 91191649

In re Mark: FERMACTIVE, U.S. Serial  
No. 77/560,699

17 **APPLICANT'S MOTION TO REOPEN TIME TO FILE ANSWER AND**  
18 **SET ASIDE THE NOTICE OF DEFAULT**  
19 **AND MEMORANDUM IN SUPPORT THEREOF**

20 Applicant, Tamara Yapp ("Applicant"), hereby moves the Trademark Trial  
21 and Appeal Board in accordance with TBMP §509.01(b), to reopen the time for  
22 filing her answer to the Notice of Opposition to allow the filing of an Answer by  
23 Applicant to Opposer's Notice of Opposition, which was due on October 5, 2009,  
24 and set aside the Notice of Default dated October 21, 2009.

25 On August 26, 2009, Opposer, PetAg Inc. ("Opposer"), filed a Notice of  
26 Opposition against Applicant's application for FERMACTIVE, U.S. Serial No.  
27 77/560,699. We advised Applicant of the Opposition filed against the  
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1 FERMACTIVE application but did not receive word from the Applicant requesting  
2 that we work to resolve the matter until subsequent to the time within which the  
3 Answer was due. Applicant had been preoccupied with handling the start up of her  
4 new business ventures, related to the mark, and did not contact us with instructions  
5 to take action until after the date by which the Answer to the Opposition was due.  
6 The justification provided by Applicant was that one of the key decision makers  
7 for Applicant was traveling and not available to discuss the situation until  
8 subsequent to the date within which the Answer was due. Since receipt of the  
9 Trademark Trial and Appeal Board's (TTAB) October 21, 2009 Notice of Default,  
10 counsel for Applicant has attempted to contact Opposing party's counsel in an  
11 effort to settle this matter and avoid proceeding further with the Opposition  
12 proceedings.

13 In considering whether to open or set aside a default judgment, the TTAB  
14 has stated that "[t]he 'good and sufficient cause' standard, in the context of [37  
15 C.F.R. § 2.132(a)], is equivalent to the 'excusable neglect' standard which would  
16 have to be met by any motion under FRCP 6(b) to reopen the plaintiff's testimony  
17 period." HKG Indus., Inc. v. Perma-Pipe Inc., 49 USPQ2d 1156, 1157  
18 (T.T.A.B.1998). Thus Applicant's motion to reopen the time to file an Answer is  
19 made pursuant to that Rule. In analyzing excusable neglect, the TTAB has relied  
20 on the Supreme Court's discussion of excusable neglect in Pioneer Investment  
21 Services Co. v. Brunswick Associates Limited Partnership, 507 U.S. 380, 113 S.Ct.  
22 1489, 123 L.Ed.2d 74 (1993). See, e.g., Mattel, Inc. v. Henson, 88 Fed. Appx. 401  
23 (Fed. Cir. 2004) (confirming applicability of Pioneer factors to TTAB  
24 proceedings).

25 The Pioneer case dealt with a bankruptcy rule permitting a late filing if the  
26 movant's failure to comply with an earlier deadline 'was the result of excusable  
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1 neglect.” 507 U.S. at 382, 113 S.Ct. 1489. The Supreme Court defined the inquiry  
2 into excusable neglect as:

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4 at bottom an equitable one, taking account of all relevant circumstances  
5 surrounding the party's omission. These include . . . the danger of prejudice  
6 to the [non-moving party], the length of the delay and its potential impact on  
7 judicial proceedings, the reason for the delay, including whether it was  
8 within the reasonable control of the movant, and whether the movant acted  
9 in good faith.

10 Id. at 395, 113 S.Ct. 1489. In practice before this Board in particular, the TTAB  
11 “is lenient in accepting late-filed answers” when the delay is not excessive. See,  
12 Mattel, Inc. v. Henson, 88 Fed. Appx. at 401, n.1.

13 Under the circumstances, the Board has reason to employ its leniency and  
14 authorize the late filing of an Answer. The time lapse between October 5, 2009  
15 and now does not pose a danger of prejudice to Opposer. The reason the Applicant  
16 did not file a timely Answer was due to excusable neglect on the part of the  
17 Applicant. Counsel for Applicant then attempted to contact opposing counsel in an  
18 effort to resolve the matter prior to expiration of the deadline to reply to the  
19 TTAB’s Notice of Default dated October 21, 2009. There is no impact on other  
20 pending judicial proceedings. Nor is there any issue of bad faith.

21 Default judgment is an extreme sanction, and “a weapon of last, not first,  
22 resort.” Martin v. Coughlin, 895 F. Supp. 39 (N.D.N.Y. 1995). Ultimately, there  
23 is no reason in this situation to depart from the well-known preference in the  
24 federal courts that litigation disputes be resolved on their merits. See, Richardson  
25 v. Nassau County, 184 F.R.D. 497, 501 (E.D.N.Y. 1999).

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**CONCLUSION**

For the foregoing reasons, Applicant respectfully requests that the default entered in this matter be set aside, that leave be granted to file a late Answer

Respectfully Submitted,

November 20, 2009



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Daniel C. Cotman  
DALINA LAW GROUP, P.C.

Attorneys for Applicant,  
TAMARA YAPP

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPLICANT'S MOTION TO REOPEN TIME TO FILE ANSWER AND SET ASIDE NOTICE OF DEFAULT AND MEMORANDUM IN SUPPORT THEREOF has been served upon Robert E. Browne and Lara V. Klapper, Neal, Gerber & Eisenberg LLP, Two North LaSalle Street, Suite 1700, Chicago, Illinois 60602-3801, by first class mail, postage prepaid on this 20<sup>th</sup> day of November 2009.

November 20, 2009



Elaine Cruz, Paralegal  
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TAMARA YAPP