

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Baxley

Mailed: April 2, 2010

Opposition No. 91193249

Precise Nutrition Int'l, Inc.

v.

Innovative Formulas, LLC

Andrew P. Baxley, Interlocutory Attorney:

On March 2, 2010, the Board issued a notice of default under Fed. R. Civ. P. 55(a) inasmuch as no answer was of record.

In response,¹ applicant contends that applicant's attorney, who has represented applicant since the filing of its involved application, did not receive a service copy of the notice of opposition and did not receive a copy of the Board notice instituting this proceeding by either regular mail or e-mail.² Applicant further contends that it was unaware of this proceeding until its attorney received the notice of default on March 8, 2010. Applicant's response is

¹ Applicant's response to the notice of default is captioned as a motion. A notice of default is essentially an *ex parte* matter between the Board and a defendant which, unlike a motion, does not contemplate full briefing by the parties. Compare TBMP Sections 312.01 and 502.02(b) (2d ed. rev. 2004). Accordingly, a response to a notice of default should not be captioned as a motion.

supported by declarations from applicant's attorney and the docket clerk for applicant's attorney.

The standard for determining whether 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, i.e., whether the defendant has shown good cause why default judgment should not be entered against it. As a general rule, good cause to set aside a defendant's default will be found where the defendant's delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where defendant has a meritorious defense. See *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991). The determination of whether default judgment should be entered against a party lies within the Board's sound discretion. In exercising that discretion, the Board is mindful of its policy to decide cases on their merits where possible and therefore only reluctantly enters judgment by default for failure to timely answer. See TBMP Section 312.02 (2d ed. rev. 2004).

The Board, keeping in mind its policy of deciding cases on the merits where possible, finds that applicant's failure to respond to the notice of opposition was caused by

² The application file does not include an e-mail address for applicant. Applicant did not provide an e-mail address until it filed its response to the notice of default.

applicant's nonreceipt of the service copy of the notice of opposition and the Board's notice instituting this proceeding. Further, there is no evidence of any prejudice to opposer, and applicant intends to defend this opposition on the merits.

Accordingly, the notice of default is hereby set aside.³ Dates herein are reset as follows.

Time to Answer	5/3/10
Deadline for Discovery Conference	6/2/10
Discovery Opens	6/2/10
Initial Disclosures Due	7/2/10
Expert Disclosures Due	10/30/10
Discovery Closes	11/29/10
Plaintiff's Pretrial Disclosures	1/13/11
Plaintiff's 30-day Trial Period Ends	2/27/11
Defendant's Pretrial Disclosures	3/14/11
Defendant's 30-day Trial Period Ends	4/28/11
Plaintiff's Rebuttal Disclosures	5/13/11
Plaintiff's 15-day Rebuttal Period Ends	6/12/11

In each instance, a copy of the transcript of testimony together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125.

Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

³ If applicant did not obtain copies of the notice of opposition and/or the institution notice, it can obtain copies online at <http://ttabvueint.uspto.gov/ttabvue/>.

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If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.