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

Proceeding	91194536
Party	Plaintiff Cytosport, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

<p>CytoSport, Inc.  Opposer,  v.  California Physicians Supplements  Applicant.</p>	<p>Opposition No. 91194536</p>
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**MEMORANDUM IN OPPOSITION TO REQUEST TO SET ASIDE DEFAULT**

CytoSport, Inc. (“Opposer”) hereby submits its memorandum in opposition to the request submitted by California Physicians Supplements (“Applicant”) to reopen the above-referenced opposition.

**BACKGROUND and FACTS**

On or about April 15, 2010, CytoSport, Inc. filed a Notice of Opposition against U.S. Serial No. 77/564,534 for the mark BONE MILK for use in connection with vitamin

supplements in International Class 5. In an effort to facilitate settlement negotiations, the parties stipulated to a suspension of the opposition proceeding for a period of six months. On June 4, 2010, the Trademark Trial and Appeal Board (“Board”) entered the suspension and reset dates accordingly. In particular, the Board reset Applicant’s time to file an Answer to CytoSport’s Notice of Opposition for January 12, 2011. At various points in time, counsel for Opposer has spoken with different entities representing the Applicant as well as Ms. Diane Keurajian, presumably the owner of Applicant, California Physicians Supplements. Settlement discussions did not result in an agreement between the parties.

On January 31, 2011, the Board sent a notice of default to Applicant because no answer had been filed. Applicant was allowed 30 days to respond to the notice of default. On March 22, 2011, nearly two months after Applicant was put on notice of its failure to file an answer to the Notice of Opposition, the Board entered judgment in favor of Opposer by default, sustaining the opposition and refusing registration of the application.

On April 7, 2011, the Board provided notice to CytoSport of correspondence from Applicant requesting that the opposition be reopened. Notably, Applicant does not dispute that it received notice of all of the above-referenced deadlines. Rather, it alleges (without any supporting documentation) that because of an illness during the months of January and February of 2011, it was unable to respond to the Board’s notice. Applicant fails to explain why its legal counsel was not capable of responding to the Board’s many orders. Notably, Applicant still has not filed an Answer to the Notice of Opposition and has failed to indicate to the Board that it has any meritorious defense to the action. Applicant’s request to reopen the opposition should be denied.

## ARGUMENT

### A. Applicant's Request Fails to Satisfy the Burdens of Fed. R. Civ. P. 60(b)

Assuming Applicant's letter request is a motion to set aside the Board's final judgment, Opposer notes that Applicant has failed to satisfy the strict burdens imposed by Fed. R. Civ. P. 60(b). While a simple notice of default may be set aside upon a showing of good cause, one default judgment has actually been entered against a defendant pursuant to Fed. R. Civ. P. 55(b), the judgment may only be set aside by the stricter rule set forth in accordance with Fed. R. Civ. P. 60(b). See *Jack Lenor Larsen, Inc. v. Chas. O. Larson Co.*, 1997 TTAB LEXIS 59, 44 USPQ2d (BNA) 1950. The Board has noted that relief from final judgment is an extraordinary remedy to be granted only in exceptional circumstances. *Thomas Anderson v. Andrea Fischer*, 2006 TTAB LEXIS 494 \*2. Put plainly, once the court [or Board] has entered judgment, the discretion to vacate that judgment is circumscribed by public policy favoring finality of judgments and termination of litigation. *Waiferson, Ltd. Inc., v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992). Moreover, where the adverse party has not consented to the motion for relief from final judgment, the moving party must show, preferably by affidavits, declarations or other documentary evidence, that the relief sought is warranted under Rule 60(b). *Thomas Anderson v. Andrea Fischer*, 2006 TTAB LEXIS 494 \*2.

Factors to be considered for granting relief pursuant to Fed. R. Civ. P. 60(b) include (1) whether culpable conduct of the defendant led to the default, (2) whether the defendant has a meritorious defense, and (3) whether the plaintiff will be prejudiced. *Jack Djeredjian v. Kashi Co.*, 1991 TTAB LEXIS 61; 21 USPQ2d (BNA) 1613.

**(1) Applicant's Own Conduct Led to the Default.**

Here, Applicant has failed to provide any affidavits, declaration, or other documentary evidence that her culpable conduct did not lead to the default. Applicant does not contend that she or her counsel did not receive the notices from the Board regarding the dates required to answer the Notice of Opposition or the order to show cause why final judgment should not be sustained against her. Rather, Applicant provides a letter with unsupported statements that she was sick for two months precluding a response to any of the Board's orders. Applicant fails to point out that on several occasions different legal counsel were involved in settlement discussions and were therefore equally aware of the deadlines in the subject proceeding. Applicant fails to provide any explanation as to why those entities were unable to respond on Applicant's behalf if she was in fact too sick to provide a response or even ask for an extension of time. See, e.g., *CTRL Systems, Inc. v. Ultraphonics of North America, Inc.*, 52 USPQ2d 1300 (TTAB 1999) ("It is well settled that the client and the attorney share a duty to remain diligent in prosecuting or defending the client's case; that communication between the client and attorney is a two-way affair; and that action, inaction, or even neglect by the client's chosen attorney will not excuse the inattention of the client so as to yield the client another day in court.").

It is incumbent upon the Applicant to show that her inaction was the result of unavoidable events or circumstances which could not have been prevented by reasonable diligence. *Marriot Corp. v. Pappy's Enterprises, Inc.*, 192 USPQ 735 (TTAB 1976). Applicant has failed to do so and her request to reopen the opposition should be denied.

**(2) CytoSport Will Be Prejudiced.**

In response to the Board's order granting final judgment, CytoSport has moved forward

with its many different marketing plans and promotional activities related to its family of “Milk” trademarks, taking into account the absence of Applicant’s mark from the list of potential trademarks that may or may not appear on the federal register. Accordingly, CytoSport’s reliance upon the Board’s decision and Applicant’s inaction warrant denial of Applicant’s request.

**(3) Applicant Has No Meritorious Defense.**

Applicant fails to provide any evidence or argument that it has a meritorious defense to CytoSport’s opposition. The marks at issue involve CytoSport’s famous family of “Milk” trademarks (e.g., Muscle Milk, Mighty Milk, Monster Milk, Power Milk, etc.) each of which have corresponding registrations and/or applications for nutritional supplement related products in International Class 5. While Applicant contends that her products are different from those offered by CytoSport, there can be no question that Applicant’s proposed identification of goods (i.e., vitamin supplements) and CytoSport’s identification of goods (i.e., nutritional supplements) are closely related if not virtually identical.

Moreover, it is well established that where there is no limitation to the channels of trade in an identification of goods, related products presumably travel in similar channels. *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.2d 1352, 1361, 56 USPQ2d 1351 (Fed. Cir. 2000) (where goods identified in the applications and the cited registration are highly related and there are no limitations in either the applications or the registration, the respective goods are assumed to travel in all normal channels of trade to all usual consumers for these goods). Accordingly, Applicant’s goods and Opposer’s goods are all presumed to travel in the same channels of trade.

Furthermore, CytoSport’s Muscle Milk marks and Applicant’s Bone Milk mark each

comprise a two-word composite mark with the suffix “milk” and a prefix related to major components of the human body...“muscle” and “bone,” respectively. The similarities between the goods, channels of trade, and the marks themselves strongly suggest a likelihood of confusion. Applicant cannot provide a reasonable meritorious defense because it has none.

### CONCLUSION

For all of the foregoing, Applicant’s request to reopen the opposition proceeding should be denied.

DATED this 16th day of May, 2011.

Respectfully submitted,

/Jed Hansen/  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing  
OPPOSITION TO REQUEST TO SET ASIDE DEFAULT was served upon Applicant by the  
method(s) indicated:

Diane Keurajian  
California Physicians Supplements  
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Newport Coast, California 92657

Hand Delivery  
 United States Mail  
 First Class, Postage Pre-Paid  
 Overnight Delivery  
 Fax Transmission  
 Electronic Mail

on this 14 day of May, 2011.

