

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

MBA

Mailed: July 15, 2011

Opposition No. 91194536

Cytosport, Inc.

v.

California Physicians
Supplements

**Before Grendel, Mermelstein and Lykos, Administrative
Trademark Judges.**

By the Board:

Applicant seeks registration of BONE MILK, in standard characters and with BONE disclaimed, for "Vitamin supplements."¹ Opposer has opposed registration on the ground that applicant's applied-for mark so resembles opposer's previously used and registered MILK marks for nutritional supplements, fortified food and related products that it is likely to cause confusion, mistake, or deceive prospective consumers under Section 2(d) of the Trademark Act.

On June 4, 2010, the Board suspended proceedings to allow the parties time to pursue settlement negotiations, and reset applicant's time to answer the notice of

¹ Application Serial No. 77564534, filed September 8, 2008, based on an intent to use the mark in commerce.

opposition to January 12, 2011, in the event the parties were unable to reach agreement. On January 31, 2011, the Board issued a notice of default for applicant's failure to timely answer the notice of opposition. Insofar as the record showed no response thereto, on March 22, 2011, the Board entered default judgment against applicant pursuant to Fed. R. Civ. P. 55(b) and sustained the opposition.

This case now comes up for consideration of pro se applicant's motion for relief from judgment, under Fed. R. Civ. P. 60(b), filed April 7, 2011.² Opposer contests the motion.³

Applicant claims that it has "been in communications with [opposer] for over two years," and indeed on May 25, 2010, opposer filed a "joint motion" to suspend this proceeding for settlement negotiations which the Board granted. However, according to applicant, opposer's attorneys "have been trying to get in touch with their client for over a 1 ½ [sic] with no response from them." Applicant's letter is signed by Diane Keurajian, who is

² Information for pro se parties is included at the end of this order.

³ Applicant's "motion" is in the form of a letter, and indicates that a copy thereof was sent to an attorney with opposer's law firm, but the letter does not include a certificate of service, in violation of Trademark Rule 2.119. To expedite matters, on April 19, 2011, the Board forwarded a copy of applicant's communication to opposer's attorney. We have therefore exercised our discretion to consider both applicant's motion and opposer's response thereto. However, any future communications from applicant which fail to comply with Trademark Rule 2.119 will not be considered.

identified in the subject application as applicant's president. Ms. Keurajian indicates that "in January/February of 2011 I had pneumonia and was unable to attend to this important matter." Finally, applicant claims that as late as March 30, 2011, i.e. after the Board entered default judgment, opposer's attorney indicated that he had still not heard from opposer, presumably with respect to the parties' settlement negotiations, and that applicant should "touch base with him again next week." Applicant requests that the Board "reinstate this mark and application for approval," and that this proceeding be reopened.

In its opposition to the motion, opposer does not dispute that it failed to communicate with its attorneys about the parties' settlement discussions after the parties filed their joint motion in May 2010 or after proceedings were suspended on June 4, 2010. Rather, opposer simply claims that "[s]ettlement discussions did not result in an agreement between the parties." Opposer points out that applicant has not supported its claims with any evidence, such as a declaration; that applicant "fails to explain why its legal counsel was not capable of responding to the Board's many orders;" and that applicant still has not filed a proposed answer to the notice of opposition. Opposer argues that it would be prejudiced if the default judgment is vacated, because it "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." Finally, opposer argues the merits of this proceeding and claims that because it would be able to prove its claims, applicant does not have a meritorious defense.

While a notice of default may be set aside for good cause, "once default judgment has actually been entered against a defendant pursuant to Fed. R. Civ. P. 55(b), the judgment may be set aside only in accordance with Fed. R. Civ. P. 60(b), which governs motions for relief from final judgment." TBMP § 312.03 (3d ed. rev. 2011). In this case, while applicant does not cite to Fed. R. Civ. P. 60(b), it is clear from its motion that it seeks relief from judgment under Fed. R. Civ. P. 60(b)(1), which provides that a final judgment may be vacated for "mistake, inadvertence, surprise, or excusable neglect."

Rule 60(b) generally sets forth a stricter standard for setting aside a judgment than the standard set out in Fed. R. Civ. P. 55(c) for setting aside a default. However, cases such as this, where the judgment is based on a default, are treated more liberally than when the request is to vacate other types of judgments.

Because default judgments for failure to timely answer the complaint are not

avored by the law, a motion under Fed. R. Civ. P. 55(c) and Fed. R. Civ. P. 60(b) seeking relief from such a judgment is generally treated with more liberality by the Board than are motions under Fed. R. Civ. P. 60(b) for relief from other types of judgments. See TBMP § 312.02. Among the factors to be considered in determining a motion to vacate a default judgment for failure to answer the complaint are (1) whether the plaintiff will be prejudiced, (2) whether the default was willful, and (3) whether the defendant has a meritorious defense to the action.

TBMP § 544. See also, Information Systems and Networks Corp. v. United States, 994 F.2d 792, 795 (Fed. Cir. 1993); Djeredjian v. Kashi Co., 21 USPQ2d 1613, 1615 (TTAB 1991).

Turning first to the question of whether opposer would be prejudiced if the judgment is vacated, we are unpersuaded by opposer's claim of prejudice. Indeed, applicant filed its motion for relief from the default judgment less than three weeks after it issued, a very short period of time, especially here, where opposer's pleaded registrations indicate that opposer has used its marks for many years. A three week period of moving forward with unspecified "marketing plans and promotional activities," which opposer chooses, but is not required, to halt, is relatively insignificant given opposer's claim that it owns a family of

longstanding MILK marks, which it has presumably promoted for years.⁴

Turning next to whether the default was willful, while we do not condone applicant's failure to timely file an answer, it appears that Ms. Keurajian has been responsible for handling this dispute on applicant's behalf. Indeed, opposer served the parties' joint motion to suspend on her, which belies opposer's claim that applicant was represented by counsel who could have timely filed an answer on applicant's behalf. Furthermore, there is simply no basis upon which to doubt Ms. Keurajian's claim that a serious illness prevented her from taking action prior to the January 12, 2011, deadline to file an answer. In fact, applicant's claim that Ms. Keurajian had a serious illness in January 2011 is supported by applicant's filing of its motion for relief from the default judgment less than three weeks after it issued. And default judgment "for marginal failure to comply with the time requirements imposed by the [Federal] Rules ... must be distinguished from dismissals or other sanctions imposed ... for willful violation of court rules and orders, contumacious conduct or intentional delay," and applicant's failure in this case "is not willful

⁴ While opposer may choose to stop its marketing plans and promotional activities based on the existence of a pending application, there is no requirement that it do so, and there is no indication that applicant has challenged opposer's use of its marks.

conduct which merits default judgment as punishment.”

Information Systems and Networks, 994 F.2d at 797 (citations omitted).

Finally, while opposer focuses on the ultimate merits of the parties' positions, that is not the correct standard for determining whether applicant has a meritorious defense. Indeed, applicant may establish that it has a meritorious defense merely “by the submission of an answer which is not frivolous.” Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc., 21 USPQ2d 1556, 1557 (TTAB 1991).

For all of these reasons, applicant's motion for relief from the default judgment and, implicitly, to reopen its time to answer, is hereby **GRANTED**. However, applicant is hereby warned that any future failure to comply with Board rules, procedures or deadlines may result in adverse consequences, potentially including entry of judgment against it. Answer, conferencing, disclosure, discovery, trial and other dates are hereby reset as follows:

Time to Answer	August 15, 2011
Deadline for Discovery Conference	September 14, 2011
Discovery Opens	September 14, 2011
Initial Disclosures Due	October 14, 2011
Expert Disclosures Due	February 11, 2012
Discovery Closes	March 12, 2012
Plaintiff's Pretrial Disclosures	April 26, 2012

Plaintiff's 30-day Trial Period Ends	June 10, 2012
Defendant's Pretrial Disclosures	June 25, 2012
Defendant's 30-day Trial Period Ends	August 9, 2012
Plaintiff's Rebuttal Disclosures	August 24, 2012
Plaintiff's 15-day Rebuttal Period Ends	September 23, 2012

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.

Pro Se Information

Applicant is reminded that it will be expected to comply with all applicable rules and Board practices during the remainder of this case. The Trademark Rules of Practice, other federal regulations governing practice before the Patent and Trademark Office, and many of the Federal Rules of Civil Procedure govern the conduct of this opposition proceeding. Applicant should note that Patent and Trademark Rule 10.14 permits any person or legal entity to represent itself in a Board proceeding, though it is generally advisable for those unfamiliar with the applicable

rules to secure the services of an attorney familiar with such matters.

If applicant does not retain counsel, then it will have to familiarize itself with the rules governing this proceeding. The Trademark Rules are codified in part two of Title 37 of the Code of Federal Regulations (also referred to as the CFR). The CFR and the Federal Rules of Civil Procedure are likely to be found at most law libraries, and may be available at some public libraries. Finally, the Board's manual of procedure will be helpful.

On the World Wide Web, applicant may access most of these materials by logging onto <http://www.uspto.gov/> and making the connection to trademark materials.

Applicant must pay particular attention to Trademark Rule 2.119. That rule requires a party filing any paper with the Board during the course of a proceeding to serve a copy on its adversary, unless the adversary is represented by counsel, in which case, the copy must be served on the adversary's counsel. The party filing the paper must include "proof of service" of the copy. "Proof of service" usually consists of a signed, dated statement attesting to the following matters: (1) the nature of the paper being served; (2) the method of service (e.g., e-mail, first class mail); (3) the person being served and the address used to effect service; and (4) the date of service. Also,

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applicant should note that any paper it is required to file herein must be received by the Patent and Trademark Office by the due date, unless one of the filing procedures set forth in Trademark Rules 2.197 or 2.198 is utilized. These rules are in part two of Title 37 of the previously discussed Code of Federal Regulations.

Files of TTAB proceedings can now be examined using TTABVue, accessible at <http://ttabvue.uspto.gov/ttabvue/v>. After entering the 8-digit proceeding number, click on any entry in the prosecution history to view that paper in PDF format.

The third edition of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) has been posted on the USPTO web site at:
http://www.uspto.gov/trademarks/process/appeal/Preface_TBMP.jsp.
