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

Mailed: June 25, 2012

Opposition No. 91204288

NetApp, Inc.

v.

Appneta, Inc.

M. Catherine Faint,
Interlocutory Attorney:

Applicant responded to the Board's May 7, 2012 notice of default by filing an entry of appearance for counsel (May 24, 2012) and a motion for leave to file a late answer, together with its answer, which included a single affirmative defense (May 25, 2012). Opposer filed (June 8, 2012) a response in opposition to the motion for leave, and moved to strike applicant's affirmative defense. By its reply brief, (June 13, 2012), applicant agreed to strike its affirmative defense.

Entry of Appearance

Appearance of applicant's counsel is noted and made of record.

Motion for Leave to File Late Answer/Strike Affirmative Defense

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, 1557 (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 (3d ed. rev. 2012).

By its motion for leave to file a late answer, applicant asserts that its former counsel notified it of a conflict in representation, and that while seeking to retain new counsel, applicant inadvertently overlooked the due date for the answer until it received the Board's notice of default. The certificate of service for the notice of opposition shows that it was served on applicant's former counsel, and the Board's institution order was mailed to

that same address.[1] The Board finds that applicant's failure to answer was not willful or in bad faith. Further, there is no indication that opposer was prejudiced by applicant's failure to timely answer, and applicant has set forth a meritorious defense by way of the denials set forth in its answer. Accordingly, the notice of default is hereby set aside.

Applicant's motion for leave to file a late answer is hereby granted, and the concurrently filed answer is accepted and made of record.

Applicant has consented to striking its affirmative defense, and it is hereby stricken.

Disclosure, conferencing, discovery and trial dates are reset as follows.

Deadline for Discovery Conference	**7/26/2012**
Discovery Opens	**7/26/2012**
Initial Disclosures Due	**8/25/2012**
Expert Disclosures Due	**12/23/2012**
Discovery Closes	**1/22/2013**
Plaintiff's Pretrial Disclosures Due	**3/8/2013**
Plaintiff's 30-day Trial Period Ends	**4/22/2013**
Defendant's Pretrial Disclosures Due	**5/7/2013**
Defendant's 30-day Trial Period Ends	**6/21/2013**
Plaintiff's Rebuttal Disclosures Due	**7/6/2013**
Plaintiff's 15-day Rebuttal Period Ends	**8/5/2013**

[1] Applicant's former counsel never filed a motion to withdraw. The Board would normally suspend these proceedings for 30 days after termination of representation, while applicant retained new counsel. *See* Trademark Rules 2.19 & 2.101(b); see also, TBMP §§ 116 & 309.02(c)(1).

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.

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