

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

wbc

Mailed: July 5, 2013

Opposition No. 91206921

Rich Products Corporation

v.

VegiPro Brands, LLC DBA
Exposure SMI

Wendy Boldt Cohen, Interlocutory Attorney:

On November 5, 2012, opposer filed a motion for default judgment because applicant's answer was filed four days late. The Board's order dated February 11, 2013 gave applicant twenty days to provide a showing of good cause for its default to be set aside and its late answer accepted. On March 4, 2013, applicant filed a response. Applicant's response indicates, *inter alia*, that its delay was a result of its attempt to find counsel.

Whether default judgment should be entered against a party is determined in accordance with Fed. R. Civ. P. 55(c), which reads in pertinent part: "for good cause shown the court may set aside an entry of default." As a general rule, good cause to set aside an applicant's default will be found where the applicant's delay has not been willful or in bad

faith, when prejudice to the opposer is lacking, and where the applicant 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. TBMP § 312.02 (2013). 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 *Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 USPQ2d 1899 (Comm'r 1990); *Id.*

Applicant's delay was due to its search for counsel to represent it in this opposition.¹ Bearing in mind the Board's policy of deciding cases on the merits where possible, the Board finds that such reason constitutes a sufficient showing of good cause why default judgment should not be entered against applicant. Accordingly, **the notice of default is set aside.**²

In the interest of narrowing the issues for discovery, the Board has reviewed the pleadings.

¹ The Board notes applicant's counsel filed a change of correspondence address at the time its answer was filed.

² Applicant is advised, however, that the Board will look with disfavor upon any further failure to comply with deadlines set by the Board or the Trademark Rules of Practice.

The ESTTA coversheet lists three grounds upon which opposer intends to base its opposition: (1) the mark is deceptive and (2) falsely suggests a connection under Trademark Act § 2(a), 15 U.S.C. § 1052(a); and (3) is likely to cause confusion under Trademark Act § 2(d), 15 U.S.C. 1052(d).³ Opposer's notice of opposition, however, fails to properly plead the grounds for § 2(a).

Trademark Act § 2(a) "prohibits registration of marks which lead a consumer to draw a false conclusion about the nature or quality of goods or services under circumstances where such a conclusion will be material to the consumer's deliberations regarding purchase of the goods or services" and requires an allegation of "facts from which it may be inferred that opposer has a reasonable belief that it would be damaged by use of applicant's allegedly deceptive mark and facts that, if proved, would establish that purchasers would be deceived in a way that would affect materially their decision to purchase applicant's goods." *Miller Brewing Co. v. Anheuser-Busch Inc.*, 27 USPQ2d 1711, 1712-13 (TTAB 1993). A deceptiveness claim under Section 2(a) is not an alternative means of raising a likelihood of confusion claim

³ Priority will not be an issue in this case if opposer properly makes of record status and title copies of its pleaded registrations. See Trademark Rule 2.122(d)(2); *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

under Trademark Act § 2(d), 15 U.S.C. § 1052(d). Rather, a mark is deceptive where: (1) the term in the mark is misdescriptive of the character, quality, function, composition or use of the services; (2) prospective purchasers likely to believe that the misdescription actually describes the services; and (3) the misdescription is likely to affect a significant portion of the relevant consumers' decision to purchase. See *In re Spirits Int'l, N.V.*, 563 F.3d 1347, 90 USPQ2d 1589 (Fed. Cir. 2009); TMEP § 1203.02(b). Because there would appear to be no basis for asserting that BETTER ON TOP! misdescribes "whipped topping," a deceptiveness claim would appear to be inappropriate herein.

To state a claim of false suggestion of a connection under Trademark Act § 2(a), opposer must allege facts from which it may be inferred (1) that applicant's mark points uniquely to opposer as an entity -- i.e., that applicant's mark is opposer's identity or "persona;" (2) that purchasers would assume that services rendered under applicant's mark are connected with opposer; and (3) either (a) that opposer was the prior user of applicant's mark, or the equivalent thereof, as a designation of its identity or "persona", or (b) that there was an association of the mark with opposer prior in time to applicant's use. See *Miller Brewing Co. v.*

Anheuser-Busch Inc., supra. Unless opposer can in good faith assert that BETTER ON TOP! points uniquely to itself as an entity, i.e., that BETTER ON TOP! is the identity or persona of opposer, there would appear to be no basis for a false suggestion claim herein.

Accordingly, the Board *sua sponte* strikes paragraphs 10-13 from the notice of opposition. See Fed. R. Civ. P. 12(f); TBMP § 506.01 (the Board can strike insufficient matter from the pleadings on its own initiative at any time). If opposer wants to pursue a deceptiveness or false suggestion of a connection claim, it may amend its notice of opposition within **twenty days** of the mailing of this order, failing which the notice of opposition will proceed solely on the ground of likelihood of confusion. See Fed. R. Civ. P. 15(a); TBMP § 507. In the event that opposer files an amended notice of opposition, applicant is allowed until **thirty days** from the date of service thereof to file an answer,⁴ or otherwise respond to the amended notice.

⁴ Applicant's answer purports to assert affirmative defenses. Affirmative defenses may include unclean hands, laches, estoppel, acquiescence, fraud, mistake, prior registration defense, prior judgment, or any other matter constituting an avoidance or affirmative defense. A pleading should include enough detail to give the plaintiff fair notice of the basis for the defense. See, e.g., *Fair Indigo LLC v. Style Conscience*, 85 USPQ2d 1536, 1538 (TTAB 2007) (elements of each claim should include enough detail to give fair notice of claim); *Ohio State University v. Ohio University*, 51 USPQ2d 1289, 1292 (TTAB 1999) (primary purpose of pleadings "is to give fair notice of the claims or defenses

Proceedings are resumed. Remaining dates are reset as follows:

Deadline for Discovery Conference	8/30/2013
Discovery Opens	8/30/2013
Initial Disclosures Due	9/29/2013
Expert Disclosures Due	1/27/2014
Discovery Closes	2/26/2014
Plaintiff's Pretrial Disclosures	4/12/2014
Plaintiff's 30-day Trial Period Ends	5/27/2014
Defendant's Pretrial Disclosures	6/11/2014
Defendant's 30-day Trial Period Ends	7/26/2014
Plaintiff's Rebuttal Disclosures	8/10/2014
Plaintiff's 15-day Rebuttal Period Ends	9/9/2014

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 Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.

asserted"); TBMP § 311.02(b). The parties are urged to review § 311.02(b) regarding the pleading of affirmative defenses.