

ESTTA Tracking number: **ESTTA576759**

Filing date: **12/16/2013**

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

Proceeding	91212553
Party	Plaintiff Whole Foods Market IP, L.P.
Correspondence Address	JERED E MATTHYSSE PIRKEY BARBER PLLC 600 CONGRESS AVENUE , SUITE 2120 AUSTIN, TX 78701 UNITED STATES jmatthysse@pirkeybarber.com, smeleen@pirkeybarber.com, cgraff@pirkeybarber.com, drausa@pirkeybarber.com, tmcentral@pirkeybarber.com
Submission	Other Motions/Papers
Filer's Name	Jered E. Matthysse
Filer's e-mail	jmatthysse@pirkeybarber.com, cgraff@pirkeybarber.com, smeleen@pirkeybarber.com, drausa@pirkeybarber.com, tmcentral@pirkeybarber.com
Signature	/JEM/
Date	12/16/2013
Attachments	Opposer's Objection to Applicant's Motion to Set Aside Default (WFMV5602).pdf(435620 bytes )

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

Whole Foods Market IP, L.P.,	)	
	)	
Opposer,	)	Opposition No. 91212553
	)	
v.	)	
	)	
365 Laboratories, LLC,	)	
	)	
Applicant.	)	

**OPPOSER’S OBJECTION TO APPLICANT’S MOTION TO SET ASIDE DEFAULT**

Opposer Whole Foods Market IP, L.P. (“WFM”) opposes the Motion to Set Aside Default filed December 3, 2013 by 365 Laboratories, LLC (“Applicant”).

**I. INTRODUCTION**

WFM initially sent Applicant a demand letter regarding its application for the mark NATURE365 (stylized) on August 26, 2013. Because the Applicant responded just one day before the opposition deadline, WFM filed a Notice of Opposition on September 18, 2013. Following this filing, WFM and Applicant began preliminary discussions on settlement, but those discussions were not fruitful. When the Applicant failed to answer the Notice of Opposition by the October 28 deadline (or respond to WFM’s counter-proposal), the TTAB issued a Notice of Default on November 14. Applicant subsequently filed a Motion to Set Aside Default on December 3, well over a month after the Applicant’s answer deadline.

**II. ARGUMENT**

Defendant has not demonstrated good cause to set aside the entry of default. “The standard for determining whether default judgment should be entered against the defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard, that is, whether the defendant has shown good cause why default judgment should not be entered against

it.” Trademark Trial and Appeal Board Manual of Procedure § 312.01. Good cause for why default judgment should not be entered is usually found where the Applicant shows the following: “(1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action.” *Id.* § 312.02.

In its Motion to Set Aside Default, Applicant does not provide a valid reason for its failure to answer, nor for how Applicant’s delay was not the result of gross neglect. Applicant argues in its Motion that it “was operating under the mistaken belief that a extension [*sic*] had been filed and that the dates as stated in the Trial Order dated September 18, 2013 had actually been reset.” Applicant’s Motion at 2. Applicant elaborates: “The reason for the delay is fairly characterized as honest error resulting from a miscommunication between the Parties’ attorney’s [*sic*] at a point when the Parties were engaged in good faith settlement negotiations as such, there is not an issue of bad faith.” *Id.* at 5.

Opposer challenges Applicant’s “mistaken belief,” as well as its vague assertion that there was a “miscommunication” between the parties. Rather, the parties never discussed Applicant’s answer deadline, or an extension/suspension of the deadlines in this proceeding. Applicant fails to explain the reason for its allegedly “mistaken belief” that an extension had been filed, instead using vague phrases like “a miscommunication between the Parties’ attorney’s [*sic*].” Applicant’s only explanation is that Applicant’s counsel and Opposer’s counsel were in communication, without any further explanation for Applicant’s “mistaken belief.” Applicant’s failure to file a timely answer because of a failure to ensure that an extension had in fact been filed—and subsequent failure to take any action whatsoever for another 33 days—does not constitute excusable neglect. *See, e.g., Williams v. Five Platters, Inc.,*

510 F.2d 963 (CCPA 1975) (affirming that the Appellant’s “carelessness and inattention,” including attorney’s absence from his office, the pressure of other work on the attorney, and omission of the matter from attorney’s docket, did not constitute excusable neglect to file an answer to a motion for summary judgment); *see also CTRL Systems, Inc. v. Ultrasonics of North Am., Inc.*, 52 U.S.P.Q.2d 1300 (T.T.A.B. 1999) (finding no excusable neglect where opposer failed to communicate with his attorney and counsel failed to prosecute the case; “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”).

In addition, a mistaken belief that an extension has been filed does not constitute good cause. *See, e.g., Polyjohn Enterprises Corp. v. 1-800-Toilets, Inc.*, 61 U.S.P.Q.2d 1860 (T.T.A.B. 2002) (finding that the petitioner’s failure to take testimony during the testimony period due to a “mistaken belief” that the parties’ agreement to extend petitioner’s time to respond to discovery requests extended the testimony period did not constitute excusable neglect). In *Polyjohn*, the Board found that the petitioner had “no basis for relying on its counsel’s understanding that discovery and testimony periods had been reset as a result of the parties’ agreements to extend petitioner’s time to serve discovery responses.” *Id.* As in *Polyjohn*, the Applicant in this proceeding does not contend that it was ever unaware of the answer deadline, or that it was prevented from filing an extension. Applicant had no basis whatsoever to rely on its counsel’s alleged understanding that its answer deadline had been extended as a result of the parties’ communications.

Finally, WFM notes that Applicant’s affidavit provides what appears to be a wholly different—and contradictory—reason for Applicant’s failure to answer, stating: “During the settlement discussions Affiant believed that as settlement discussions were underway, the

pending deadlines as set forth in the Board’s Trial Order dated September 18, 2013 were being tolled during settlement discussions.” Applicant’s Motion, Affidavit of Craig S. Kirsch ¶ 7. This explanation contradicts Applicant’s previous representation that it believed that an extension had been filed. Further, an applicant’s misapprehension of the Board’s rules and practice such as this does not constitute good cause for failure to timely answer. *See, e.g., Polyjohn*, 61 U.S.P.Q.2d 1860 (emphasizing that the Board has an interest in deterring motions that come before the Board “solely as a result of one party’s failure to understand a clear and straightforward rule”).

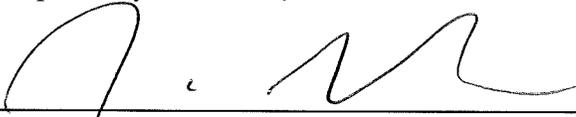
None of the reasons provided by Applicant in its Motion constitute “good cause” as required under TTAB practice, and no good cause exists to excuse Applicant’s failure to timely answer.

### III. CONCLUSION

For these reasons, Applicant’s Motion to Set Aside Default—filed 33 days after Applicant’s answer deadline—should be denied.

Respectfully submitted,

Dated: 12/16/13



Stephen P. Meleen  
Christopher L. Graff  
Jered E. Matthyse  
PIRKEY BARBER PLLC  
600 Congress Avenue, Suite 2120  
Austin, TX 78701  
(512) 322-5200  
(512) 322-5201 (Fax)

ATTORNEYS FOR OPPOSER

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing OPPOSER'S OBJECTION TO APPLICANT'S MOTION TO SET ASIDE DEFAULT was served via first-class mail, postage prepaid, on December 16, 2013 on Applicant's attorney of record at the address listed below:

Craig S. Kirsch  
Kirsch Law Firm  
40 NE 1 Avenue, Suite 602  
Miami, FL 33132

A handwritten signature in cursive script, reading "Quiana D. Kausa", is written over a horizontal line.