

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

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Mailed: March 26, 2014

Opposition No. 91212553

Whole Foods Market IP, L.P.

v.

365 Laboratories, LLC

**Yong Oh (Richard) Kim, Interlocutory Attorney:**

Per the Board's institution order of September 18, 2013, an answer was due on October 28, 2013. As neither an answer nor an extension of time to file an answer was filed by applicant by that deadline, the Board issued a notice of default on November 14, 2013. On December 3, 2013, applicant filed a motion to set aside the notice of default as well as a putative answer to the notice of opposition.<sup>1</sup> Opposer filed a response thereto on December 16, 2013.

The standard for determining whether default judgment should be entered against applicant for its failure to file a timely answer to the notice of opposition is found in Fed.

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<sup>1</sup> It is noted that all of applicant's filings have been served on opposer via email. Applicant should note that service by electronic transmission is permitted only when mutually agreed upon by the parties. See Trademark Rule 2.119(b)(6). As there is no indication in the record that any such agreement is in place, any future filings reflecting email as the sole method of

R. Civ. P. 55(c) which states that "[t]he court may set aside an entry of default for good cause." Good cause is generally found where "(1) the delay in filing is not the result of willful conduct or gross neglect, (2) the delay will not result in substantial prejudice to the opposing party, and (3) the defendant has a meritorious defense." *DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1223 (TTAB 2000).

Taking each of these points in reverse order, the showing of a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint. See TBMP § 312.02 (2013). Here, by filing an answer denying the salient allegations of the notice of opposition, applicant has shown its intent to defend itself in this opposition and that it has a meritorious defense to opposer's claims. See *DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d at 1224.

As to the question of prejudice, an answer was due on October 28, 2013, a notice of default issued on November 14, 2013, and an answer was filed on December 3, 2013. Applicant's delay in filing its answer is less than two months and there is nothing in the record to suggest that

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service will not be considered absent an indication that the parties have agreed to service by email.

opposer has been substantially prejudiced by the resultant delay.

Finally, the Board does not find that applicant's delay in filing its answer was the result of willful conduct or gross negligence. Applicant believed, albeit erroneously, "that as settlement discussions were underway, the pending deadlines ... were being tolled during settlement discussions [and] that an extension to file Applicant's Answer was entered between the Parties." *Affidavit of Craig S. Kirsch*, ¶¶ 7-8. While the Board agrees with opposer that such a mistaken belief would not constitute excusable neglect, such is not the standard to discharge a notice of default. See Fed. R. Civ. P. 55(c) (good cause standard).

Further, because the law favors deciding cases on their merits, the Board is reluctant to grant judgments of default and tends to resolve all doubts by setting aside default, particularly when a proceeding is at such an early stage as is the case here. See *Paolo's Associates Limited Partnership v. Paolo Boda*, 21 USPQ2d 1899 (Comm'r 1990).

In view thereof, applicant's motion is **GRANTED** and the notice of default is hereby **SET ASIDE**. Applicant's proposed answer is **ACCEPTED** and is now applicant's operative pleading herein. Dates are **RESET** as follows:

Deadline for Discovery Conference  
Discovery Opens

4/25/2014  
4/25/2014

Initial Disclosures Due	5/25/2014
Expert Disclosures Due	9/22/2014
Discovery Closes	10/22/2014
Plaintiff's Pretrial Disclosures Due	12/6/2014
Plaintiff's 30-day Trial Period Ends	1/20/2015
Defendant's Pretrial Disclosures Due	2/4/2015
Defendant's 30-day Trial Period Ends	3/21/2015
Plaintiff's Rebuttal Disclosures Due	4/5/2015
Plaintiff's 15-day Rebuttal Period Ends	5/5/2015

**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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