

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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Goodman

Mailed: September 2, 2014

Opposition No. 91215751

BB Pharmaceuticals, Inc. dba  
FARMAESTHETICS

v.

Skinny Pineapple, Inc.

**Before the Trademark Trial and Appeal Board:**

This case now comes up on the following motions:

- 1) applicant's motion, filed June 13, 2014, to extend time to answer;
- 2) opposer's motion, filed June 16, 2014, for entry of default judgment.

The Board turns first to the motion to extend.

Applicant's basis for extension is that it "only just learned on June 13, 2014" of the Board's June 12, 2014 grant of its prior extension request and counsel was unable to respond on 24 hours notice as co-counsel was in Spain. Applicant seeks an extension until June 27, 2014.

In response, opposer argues that the matter has been going on since "December 16, 2013" and applicant had ample notice of time to respond.<sup>1</sup> Opposer complains about applicant's failure to file its answer by the time

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<sup>1</sup> Although opposer argues that applicant had six months to prepare for filing an answer, this proceeding did not commence until April 4, 2014.

granted by the prior May 2014 extension request and that applicant has “no justification for failing to answer in a timely manner.”

In reply, applicant states that new counsel took over on May 12, 2014 before the prior deadline to answer and required an extension of time to answer. On June 9, 2014, new counsel left for an eight day trip to Spain and while in Spain, on June 13, 2014, learned of the extension. Counsel was not able to get in touch with her client or co-counsel “under the circumstances” and sought an additional extension of time on the basis.<sup>2</sup>

The standard for granting an extension of time is good cause. See Fed. R Civ. P. 6(b) and TBMP § 509.01(a) (2014) and authorities cited therein. A motion to extend time must set forth the facts in sufficient detail to establish good cause for an extension. *Id.*

Although this is the second extension request, the Board finds good cause for extension. Accordingly, the motion to extend is granted through June 27, 2014. However, applicant did not timely file its answer by June 27, 2014. A late answer was filed on July 7, 2014. Therefore, applicant was technically in default at the time the late answer was filed.

Accordingly, the Board will consider opposer’s motion for default judgment, filed on June 16, 2014, (based on applicant’s failure to answer by the previously granted extension request) in the context of the applicant’s now filed late answer.

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<sup>2</sup> Opposer’s additional arguments related to the extension in its reply to its motion for default judgment (filed July 22, 2014) will not be considered as they would constitute an improper surreply. Trademark Rule 2.127(a).

Opposer argues that applicant “failed to file an Answer in the time set by the Board and requested by the Applicant” and that applicant “has not shown good cause why default judgment should not be entered against it.”

The standard for setting aside default for a late answer is good cause. See Fed. R. Civ. P. 55(c). Good cause is established when it is shown that the late filing was not the result of willful conduct or gross neglect, that acceptance of the late answer would not prejudice the opposer, and that the applicant has a meritorious defense to the action. *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991). In analyzing the above factors, the Board keeps in mind that the law strongly favors determination of cases on their merits. *Paolo's Associates Ltd. Partnership v. Bodo*, 21 USPQ2d 1899, 1902 (Comm’r Pats. 1990).

The Board will now consider the factors and whether they establish good cause.

#### Meritorious Defense

Applicant argues that the filing of its answer is “satisfactory evidence of a meritorious defense.”

In reply, opposer argues that applicant “has not asserted any meritorious defense” to any of the claims for opposition.

All that is required for a meritorious defense is a plausible response to the allegations. *DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000). *See also, Mathon v. Marine Midland Bank, N.A.*, 875 F.

Supp. 986, 993 (E.D.N.Y. 1995) (“A meritorious defense is established by Rule 55 standards by setting forth denials and defenses in an answer”).

Here, applicant has set forth denials and defenses in its answer. Accordingly, the Board finds that applicant has put forward a meritorious defense.

### Prejudice

With regard to the question of prejudice, substantial prejudice within the meaning of Rule 55(c) does not result from delay alone. Rather, the plaintiff must demonstrate that the default caused some actual harm to its ability to litigate the case, such as diminishing the amount of available evidence, increased difficulties of discovery, or the thwarting of plaintiff’s recovery or remedy. 10 C. Wright, A. Miller, M. Kane & R. Marcus, Federal Practice and Procedure Civil 3d Section 2699 (2013). Mere delay in satisfying a claim or obtaining recovery does not constitute substantial prejudice. *Id.* Merely being forced to litigate on the merits cannot be considered prejudicial for purposes of setting aside a default judgment. For had there been no default, the plaintiff would of course have had to litigate the merits of the case, incurring the costs of doing so.

With respect to the question of prejudice, applicant argues that the delay in filing an answer has not prejudiced opposer and opposer’s argument that applicant had “6 months to prepare an Answer has no merit” and “does not amount to substantial prejudice.”

In reply, opposer argues that “[t]he continuance of this proceeding and delay is unfairly prejudicing the Opposer . . . from moving forward with its business plans and daily operations.” Opposer also complains about the needless time and money spent as a result of applicant’s delay.

The burdens that opposer cites in its opposition with regard to prejudice, namely incurring money and costs, or the uncertainty regarding the resolution of this matter or the inability to move forward with its business do not constitute substantial prejudice. *See e.g., Capital Yacht Club v. Vessel AVIVA*, 228 F.R.D. 389, 394 (D.D.C. 2005) (It is well established, however, that “delay and legal costs are part and parcel of litigation and typically do not constitute prejudice for the purposes of Rule 55(c)”).

As there is no indication there will be some actual harm to opposer’s ability to litigate its case, the Board finds no prejudice to opposer if the Board were to accept applicant’s late answer.

Willfulness

Applicant argues that default was not willful nor the result of gross neglect but was inadvertent “and due, in part, to the Board’s delay” in granting the initial extension to answer. Applicant submits that its attorneys did not have adequate time to respond as a result of the extension being granted on June 12, 2014 when answer was due on June 13, 2014.

In reply, opposer argues that default was willful because of applicant's failure to contact opposer or opposer's counsel prior to filing requests to extend, its failure to provide proper service to opposer of papers filed with the Board, and its disregard of deadlines for answer.

The Board finds that applicant's failure to file an answer by the deadline as extended was not willful. Applicant's co-counsel's actions evidence neglect but do not rise to the level of gross neglect. Co-counsel could have prepared the answer based on the prior extension request (even though not granted at the time) so that they would have been in a position to file the answer on June 13, 2014, even though co-counsel was in Spain. Co-counsel also could have prepared and filed the answer at least by June 27, 2014, based on the second extension request, even though not granted at the time.

However, nothing in the record evidences a deliberate choice by applicant not to respond so as to constitute willfulness or gross neglect, considering that co-counsel sought extensions twice to answer. *See DeLorme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000) (willfulness or at least gross neglect found from deliberate and intentional choice not to respond). *See also Curtis v. Pataki*, 1997 WL 614285 (N.D.N.Y., October 1, 1997) (although counsel did not meet deadlines, default not willful where counsel requested two extensions of time); *American Alliance Insurance Co. v. Eagle Insurance Co.*, 92 F.3d 57, 60 (2d Cir. 1996) (to

determine whether default was willful, when default is the result of attorney error or neglect, court looks to whether the facts indicate bad faith, or at least something more than mere negligence).

Therefore, the Board finds neither willfulness nor gross neglect from applicant's failure to file an answer by June 27, 2014.

Inasmuch as the Board finds that the factors for good cause are in applicant's favor, and because the Board favors deciding cases on their merits rather than on the basis of a technical default, opposer's motion for default judgment is denied. Default is set aside and applicant's late answer is accepted.

Dates are reset as follows:

Deadline for Discovery Conference	<b>9/29/2014</b>
Discovery Opens	<b>9/29/2014</b>
Initial Disclosures Due	<b>10/29/2014</b>
Expert Disclosures Due	<b>2/26/2015</b>
Discovery Closes	<b>3/28/2015</b>
Plaintiff's Pretrial Disclosures	<b>5/12/2015</b>
Plaintiff's 30-day Trial Period Ends	<b>6/26/2015</b>
Defendant's Pretrial Disclosures	<b>7/11/2015</b>
Defendant's 30-day Trial Period Ends	<b>8/25/2015</b>
Plaintiff's Rebuttal Disclosures Due	<b>9/9/2015</b>
Plaintiff's 15-day Rebuttal Period Ends	<b>10/9/2015</b>

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.

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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.