ESTTA Tracking number: **ESTTA652984**
Filing date: **01/29/2015**

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

Proceeding	91218603
Party	Defendant Ark Sciences, Inc.
Correspondence Address	GRACE J FISHEL LAW OFFICES GRACE J FISHEL 2200 W PORT PLAZA DR , STE 202 SAINT LOUIS, MO 63146-3211 UNITED STATES
Submission	Other Motions/Papers
Filer's Name	Grace J. Fishel
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Signature	/Grace J. Fishel/
Date	01/29/2015
Attachments	MotionForReliefFromFinalJudgmentANDDeclarationOfGraceJFishel.pdf(141304 bytes)

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

ZEUTER INC.,	:	
	:	
Opposer,	:	Opposition No. 91218603
	:	Serial No. 86170911
v.	:	Mark: ZEUTERIN
	:	
ARK SCIENCES, INC.,	:	
	:	
Applicant.	:	

MOTION FOR RELIEF FROM FINAL JUDGMENT

Applicant, Ark Sciences, Inc., by and through its undersigned attorney, hereby moves for relief from final judgment under Fed. R. Civ. P. 55(c) and Fed. R. Civ. P. 60(b), as made applicable by 37 CFR § 2.116(a). By decision dated January 12, 2015, the Board entered judgment by default, sustained the opposition and refused registration to applicant. Applicant respectfully moves for the setting aside of the final Board judgment and the reopening of the proceeding.

A motion for relief from judgment must be made within a reasonable time. This motion is being made within three weeks after the judgment was entered and has been made within a reasonable time.

According to TBMP Section 544, because default judgments for failure to timely answer the complaint are not favored by the law, a motion under Fed. R. Civ. P. 55(c) and Fed. R. Civ. P. 60(b) seeking relief from such a judgment is generally treated with more liberality by the Board than are motions under Fed. R. Civ. P. 60(b) for relief under other types of judgments. See *Information Sys. and Networks Corp. v. United States*, 994 F.2d 792, 795 (Fed. Cir. 1993) ("Rule 60(b) is applied most liberally to judgments in default.") (quoting *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 403 (5th Cir. 1981). *Ruiz*

v. Quarterman, 504 F.3d 523,532 (5th Cir. 2007) ("This lesser standard of review has been applied most liberally to motions to re-open default judgments")

Among the factors to be considered in determining a motion to vacate a default judgment for failure to answer the complaint are (1) whether the plaintiff will be prejudiced, (2) whether the default was willful, and (3) whether the defendant has a meritorious defense to the action.

In the present situation, the plaintiff will not be prejudiced. Neither the applicant nor its attorney was served with copy of the notice of opposition. When one looks at the prosecution history for the subject proceeding, one will find that entry number 4 entitled "opposer's correspondence" is a copy of the filing receipt for the notice of opposition. It appears that the opposer sent the receipt to the attention of the Trademark Trial and Appeal Board and not to the applicant or its correspondence address.

As stated in the Declaration of Grace J. Fishel, which is attached to this motion, the only documents received by the applicant or its attorney of record subsequent to the issuance of the notice of publication were a postcard notifying the applicant's attorney that a request for extension of time to oppose had been filed and a postcard notifying the applicant's attorney that the application had been marked abandoned on January 12, 2015, less than three weeks ago.

Applicant, if it had received notification that a notice of opposition had been filed, was fully prepared to file a meritorious defense. Applicant never had a willful intention to allow the entry of default judgment. Furthermore, the vacating of the default judgment will not result in any hardship to third parties.

After carefully reviewing the indefinite and incomprehensible grounds set out in the notice of opposition, applicant firmly believes and states that the applied-for mark is not immoral or scandalous, it does not consist of a signature of a living individual and it does not consist of the name of an existing corporation. In addition, applicant firmly believes that there is no likelihood of confusion based on the differences in the marks or names set out in the complaint, the differences in the goods and/or services, the differences in the channels of trade. Moreover, the opposer has not established standing or priority.

Applicant respectfully requests the approval of this motion, the vacating of the default judgment and the re-opening of this proceeding.

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ZEUTER INC.,	:	
Opposer,	:	Opposition No. 91218603
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v.	:	Mark: ZEUTERIN
ARK SCIENCES, INC.,	:	
Applicant.	:	

DECLARATION OF GRACE J. FISHEL

I, Grace J. Fishel, hereby declare:

1. I have personal knowledge of the facts stated herein. I submit this Declaration in support of Applicant's Motion for Relief from Final Judgment.
2. I am the attorney of record for the applicant, Ark Sciences, Inc. I am a member of the bar of the States of Missouri and Illinois.
3. I received in the mail a postcard from the U.S. Patent and Trademark Office informing me that a request for extension of time to oppose was filed against the subject application.
4. Neither the applicant or my office received or was served with copy of the notice of opposition in this proceeding from the opposer.
5. I did not receive copy of the October 1, 2014 Board order instituting the subject opposition.
6. I did not receive copy of the November 28, 2014 notice of default.
7. I did not receive copy of the January 12, 2015 default judgment decision issued by the Board.

8. I did receive a notice of abandonment postcard dated January 12, 2015, from the U.S. Patent and Trademark Office notifying me that the subject application had been marked abandoned.

I declare that all statements made herein of my own knowledge are true and all statements made on information and belief are believed to be true; and further that the statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

Respectfully submitted,

Date: Jan. 29, 2015

Grace J. Fisher