

ESTTA Tracking number: **ESTTA762729**

Filing date: **08/05/2016**

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

Proceeding	91225007
Party	Defendant Neil Delves and Kevin Giufre
Correspondence Address	MATTHEW H SWYERS THE TRADEMARK COMPANY PLLC 344 MAPLE AVE W # 151 VIENNA, VA 22180-5612 UNITED STATES mswyers@thetrademarkcompany.com
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Date	08/05/2016
Attachments	Motion to Set Aside Default.pdf(136767 bytes )



4. On or about January 4, 2016 the Board entered an order granting the Motion for an Extension and resetting the deadline for Applicants to file its Answer to March 4, 2016.

5. On March 4, 2016 Applicants filed a Motion for an Extension with Consent requesting a 30 day extension while the parties engaged in settlement discussions.

6. On or about March 4, 2016 the Board entered an order granting the Motion for an Extension and resetting the deadline for Applicants to file its Answer to April 3, 2016.

7. On March 23, 2016 Applicants filed a Motion to Amend U.S. Application No. 86/376,134 seeking to amend the identification of services and seeking to amend the description of the mark.

8. On or about April 18, 2016 the Board entered an order granting in part and denying in part Applicants' Motion to Amend, namely the Board granted Applicants' request to amend the description but denied Applicants' request to amend the identification of services as the Board said the requested description was beyond the scope of the original description but gave Applicants thirty (30) days to file a revised Motion to Amend.

9. On or about June 6, 2016 the Board entered an order resuming the proceedings and resetting the deadline for Applicants to file its Answer to July 16, 2016.

10. Applicant inadvertently failed to timely file its Answer and Grounds of Defense.

11. The Board subsequently issued the Notice of Default at issue herein.

### **RESPONSE**

Good cause why default judgment should not be entered against a defendant, for failure to file a timely answer to the complaint, is usually found when the defendant shows that (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. TBMP § 312.02.

The determination of whether default judgment should be entered against a party lies within the sound discretion of the Board. In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant. TBMP § 312.02.

In the instant case Applicant inadvertently lost track of the deadline to file an answer in the instant matter and was not aware that the same had passed until the default notice. As such, it is submitted that good cause be established in this matter as to why the default should be set aside on the basis of Applicant's inadvertent lapse in not having the answer filed in a timely manner.

It is respectfully submitted that the instant oversight was not as a result of willful conduct or gross neglect on the part of the Applicant but rather a calendaring error. Moreover, it is submitted that the Opposer would not be prejudiced whatsoever by the instant setting aside of the default at issue as the simple delay at issue is not sufficient to warrant a finding of prejudice in this regard.

In regard to a meritorious defense, for the purposes of completeness the Applicant has attached a Motion to Amend U.S. Application No. 86/376,134 with Consent which it moves the Board to accept as late given the good cause shown herein. *See* Exhibit 1.

WHEREFORE for good cause considered, the Applicant, by counsel, respectfully requests that the Board set aside the Notice of Default in the instant case and accept the attached Motion to Amend in this matter.

Respectfully submitted this 5<sup>th</sup> day of August, 2016.

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Counsel for Applicant

## EXHIBIT 1



The Applicants' proposed amendment to U.S. Application Serial No. 86/376,134, as seen herein above, to restrict the identification of goods and services is proper according to 37 C.F.R. § 2.71 as it merely limits those goods and services found in the original identification. In view of the foregoing, approval of the amendment by the Board pursuant to 37 C.F.R. § 2.133(a) is believed appropriate. Opposer, NeverWet LLC has provided its consent to the instant amendment to Applicants' Mark as evidenced by Counsel for Opposer's signature below.

Respectfully submitted this 5<sup>th</sup> day of August, 2016.

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Date: August 4, 2016

