

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

MW

Mailed: June 2, 2016

Opposition No. 91226815

Conopco, Inc.

v.

Advanced Polymer Inc.

Michael Webster, Interlocutory Attorney:

Answer was due in this case on April 19, 2016. On April 21, 2019, Opposer filed a motion for default judgment in light of Applicant's failure to file a timely answer or otherwise plead in response to Opposer's notice of opposition. On April 26, 2016, Applicant filed a response requesting an extension of time to file its answer. On April 28, 2016, Applicant re-filed the request for extension of time as well as a response to the notice of opposition. On May 24, 2016, Opposer filed a brief in response to Applicant's request for extension and in support Opposer's motion for default.¹

Pursuant to Trademark Rule 2.106(a), 37 C.F.R. 2.106(a), if the applicant in an opposition proceeding fails to file an answer within the time set by the Board, "the petition may be decided as in case of a default." Thus, an applicant who fails to timely

¹ Inasmuch as Applicant's motions failed to indicate proof of service on Opposer's counsel as required by Trademark Rule 2.119, the Board allowed Opposer twenty (20) days from the mailing date of its May 9, 2016 order in which to file a brief in response to Applicant's motions.

file an answer, is “in default” once the due date for the answer has passed. *See Paolo’s Associates L.P. v. Bodo*, 21 USPQ2d 1899, 1902-03 (Comm’r 1990).

In this case, the Board construes Applicant’s written response to the notice of opposition as its late answer. Because Applicant is already in default and Opposer has filed a motion for default judgment, Applicant’s motion dated April 28, 2016 will be treated as a response to Opposer’s motion for default judgment and a request to accept Applicant’s late answer. *See Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991).

The Board will set aside entry of default if a defendant who has failed to file a timely answer to the complaint responds to a notice of default by filing a satisfactory showing of good cause why default judgment should not be entered against it. *See Fed. R. Civ. P. 55(c); TBMP § 312.02 (2015)*. Good cause for discharging default is generally found if (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. *Id.* When considering these factors, the Board keeps in mind that the law strongly favors determination of cases on their merits. *Paolo’s Associates L.P. v. Bodo*, 21 USPQ2d 1899, 1902 (Comm’r Pat. 1990); *see also Int’l Painters and Allied Union and Indus. Pension Fund v. H.W. Ellis Painting Co., Inc.*, 288 F. Supp.2d 22, 25 (D.D.C. 2003).

Applicant’s response does not address the issue of whether good cause for discharging default exists. Therefore, default judgment is not set aside. However, because it is the policy of the Board to determine cases on their merits whenever

possible, *see, e.g., Paolo's Associates*, 21 USPQ2d at 1902, the Board, in its discretion, grants Applicant leave to address the good cause factors.

Accordingly, Applicant is allowed until THIRTY (30) DAYS from the mailing date of this order to address the following good cause factors:

- 1) Whether the delay in filing an answer was willful or the result of gross neglect;
- 2) Whether the delay will substantially prejudice Opposer; and
- 3) Whether Applicant has a meritorious defense.

See, e.g., Identicon Corp. v. Williams, 195 USPQ 447, 449 (Comm'r 1977) (in response to order to show cause applicant filed answer but no response to show cause order; applicant allowed time to show cause). In addition, Applicant must submit an amended answer to the notice of opposition that complies with Trademark Rule 2.106(b)(1). Applicant should either admit or deny each of the allegations in the 23 numbered paragraphs in the notice of opposition. If Applicant does not have sufficient information to admit or deny the allegation, Applicant should so state, and this statement will have the effect of a denial of the allegation. *See* TBMP § 311.02 (2015) (regarding the substance of the answer).

In the event that Applicant fails to file a response to this order or, in responding to this order, fails to address any of the good cause factors, **default judgment will be entered against it.**²

² Inasmuch as Applicant is in default, the parties' obligations to hold the discovery conference and to serve initial disclosures are effectively stayed. *See* TBMP § 312.01 (2015).

Applicant is reminded that any paper filed by Applicant in this proceeding must also be served on Opposer's counsel as previously explained in the Board's order dated May 9, 2016, and any such filing must be accompanied by a certificate of service as prima facie evidence of proof of service.³

The Board notes that Applicant is representing itself in this proceeding. Although Patent and Trademark Rule 11.14 permits an entity to represent itself, it is strongly advisable for a party who is not acquainted with the technicalities of the procedural and substantive law involved in inter partes proceedings before the Board to secure the services of an attorney who is familiar with such matters. The United States Patent and Trademark Office (USPTO) cannot aid in the selection of an attorney. As the impartial decision maker, the Board may not provide legal advice; it may provide information solely as to procedure.⁴

³ The Board will accept as prima facie proof of service indicating the date and manner in which such service was made. See TBMP § 113.03 (2015). To be accepted as prima facie proof of service, the statement, whether attached to or appearing on the paper when filed, must be signed and dated, and should take the form of a certificate of service as follows:

I hereby certify that a true and complete copy of the foregoing (insert title of submission) has been served on (insert name of opposing counsel or party) by mailing said copy on (insert date of mailing), via First Class Mail, postage prepaid (or insert other appropriate method of delivery) to: (set out name and address of opposing counsel or party).

Signature _____ Date _____

⁴ If Applicant has any questions regarding the Board's procedures in this proceeding, Applicant should telephone the assigned Board Interlocutory Attorney. The Board's manual of procedure (TBMP) can be found online at: <http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>.