

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

Mailed: April 19, 2006

Cancellation No. 92045238

Rexam Closures and
Containers, Inc.

v.

Berry Plastics Corporation

George C. Pologeorgis, Interlocutory Attorney:

This case now comes up for consideration of petitioner's motion for default judgment filed on February 2, 2006. The motion has been fully briefed.

Answer was due in this case on January 23, 2006. Respondent did not file an answer by such date nor did it file a timely motion to further extend its time to answer. In view thereof, petitioner filed a motion for default judgment on February 2, 2006 requesting the Board to enter judgment against respondent for failing to file a timely answer. On February 11, 2006, respondent filed a response to petitioner's motion for default judgment concurrently with its answer. In its response, respondent claims that it never received a copy of petitioner's petition to cancel and therefore was unaware of the instant proceeding. It was only until respondent received petitioner's motion for

default judgment that respondent became aware of this case. In view thereof, respondent asserts that under the aforementioned circumstances respondent was unable to provide a timely answer.

Whether default judgment should be entered against a party is determined in accordance with Fed. R. Civ. P. 55(c), which reads in pertinent part: "for good cause shown the court may set aside an entry of default." As a general rule, good cause to set aside a defendant's default will be found where the defendant's delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where defendant has a meritorious defense. See *Fred Hyman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991).

In this case, the Board finds that petitioner is not prejudiced by respondent's late filing and, by filing an answer which denies the fundamental allegations in the petition to cancel, respondent has asserted a meritorious defense to this action. Furthermore, the Board finds that respondent's delay in filing a timely answer was not willful or in bad faith, but unintentional and excusable. In view of the foregoing, petitioner's motion for default judgment is denied, the default is set aside, and respondent's answer is accepted.

The parties are allowed **THIRTY DAYS** from the mailing date of this order to serve responses to any outstanding

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discovery requests. Trial dates, including the close of discovery, are reset as follows:

DISCOVERY TO CLOSE:	July 19, 2006
Thirty-day testimony period for party in position of plaintiff to close:	October 17, 2006
Thirty-day testimony period for party in position of defendant to close:	December 12, 2006
Fifteen-day rebuttal testimony period to close	January 30, 2007

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.