

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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General Contact Number: 571-272-8500

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Mailed: August 15, 2016

Cancellation No. 92063625

AdvoCare International, LP

v.

X Gym Ultimate Nutrition LLC

Michael Webster, Interlocutory Attorney:

An answer to the petition for cancellation was due in this proceeding on June 9, 2016. On June 19, 2016, the Board issued a Notice of Default against Respondent for failure to file an answer or a motion to extend time to file said answer by the deadline set in the Board's order dated April 30, 2016. Instead of filing a response to the Board's order, Respondent filed a consented motion for an extension of time to answer. The Board's automated filing system automatically generated an order, dated July 15, 2016, granting Respondent's motion to extend time. Respondent subsequently filed a consented motion to amend its registration.

Notice of Default

As an initial matter, the Board must address Respondent's response to the notice of default and the Board's July 15, 2016 order granting the motion to extend time. Notice of default will be set aside only if a defendant who has failed to file a timely answer files 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 (2016). The determination of whether default judgment should be entered against a party lies within the sound discretion of the Board. *See, e.g., Identicon Corp. v. Williams*, 195 USPQ 447, 449 (Comm'r 1977).

In view thereof, the Board's automatically-generated order granting Respondent's consented motion to extend time was issued in error. Accordingly, the Board's order dated July 15, 2016 is hereby **VACATED**. The motion for an extension of time to answer is **DENIED**. Respondent is allowed until TWENTY (20) DAYS from the mailing date of this order to show good cause why judgment by default should not be entered against Respondent. 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 plaintiff, and (3) the defendant has a meritorious defense. *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). In the event Respondent fails to file a response to this order or, in responding to this order, fails to address any of the good cause factors in its filing, default judgment will be entered against it.¹

Motion to Amend Registration

The Board turns next to Respondent's consented motion (filed August 8, 2016) to amend its Registration No. 4521485, with Petitioner's consent. In view of Respondent's failure to show good cause to set aside the notice of default and the

¹ In general, an answer to the petition for cancellation should be filed with a response to a notice of default. However, if the parties have settled or agreed to an extension of defendant's time to file the answer, it may not be necessary to submit the answer with the response. *See* TBMP § 312.01 (2016).

Boards decision, above, vacating the July 15, 2016 order, the motion to amend is **moot**. However, in order to prevent unnecessary future motions, the Board has reviewed the motion to amend and has found the proposed amendment unacceptable for the reasons stated below.

By the proposed amendment Respondent seeks to amend the identification of goods as follows:

From: Dietary and nutritional supplements; Liquid nutritional supplement; Nutritional and dietary supplements formed and packaged as bars; Nutritional supplement energy bars, in International Class 5.

To: Nut-based food bars, in International Class 29.

A proposed amendment to any application or registration which is the subject of an *inter partes* proceeding must also comply with all other applicable rules and statutory provisions, including Trademark Rules 2.71-2.75. *See* TBMP §§ 514.01 and 605.03(b). In particular, while an applicant or registrant may amend to clarify or limit the identification, adding to or broadening the scope of the identification is not permitted. *See* Trademark Rule 2.71(a); TMEP §§ 1402.06 *et seq.*, 1402.07.

In this case, the proposed amendment to the identification of goods not only broadens the scope of the original wording “Nutritional and dietary supplements formed and packaged as bars,” but it also changes the nature and purpose of the goods as is clear from the change in classification from Class 5 to Class 29. The specific purpose of nutritional supplement goods in Class 5 is to provide a conduit for vitamin and mineral supplements. The purpose of food bars in Class 32 is to satisfy hunger with sustenance or merely provide food. Further, the wording “nut-based food bars”

includes any nut-based snack bar that is not used for the limited purpose of a dietary or nutritional *supplement*. Accordingly, the proposed amendment is not acceptable because it is beyond the scope of the original wording.

Additionally, the amendment is not acceptable because it was (1) not accompanied by the proper fee under Trademark Rule 2.6; and/or (2) not verified or supported by a declaration under Trademark Rule 2.20. *See* Trademark Rules 2.6(a)(11), 2.133(a) and 2.173(b).

Proceedings are otherwise suspended pending Respondent's response to the order to show cause.