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

Application Serial No. 76/209,371: FUNKY GUNK
Published in the *Official Gazette* of August 21, 2001

JOHN FRIEDA PROFESSIONAL CARE, INC.	)	
	)	
Opposer,	)	
	)	Opp. No. 91151993
v.	)	
	)	
SALLY BEAUTY HOLDINGS, INC.	)	
	)	
Applicant.	)	11-20-2002
	)	U.S. Patent & TMOfc/TM Mail Rcpt Dt. #75
	)	

APPLICANT SALLY BEAUTY HOLDINGS, INC.'s MOTION TO SET ASIDE THE NOTICE OF DEFAULT

Applicant, Sally Beauty Holdings, Inc. ("Sally"), hereby moves to set aside the Notice of Default entered against it on October 29, 2002, and in support for its motion states as follows:

1. On November 1, 2002, Sally received notice that a Notice of Default had been entered against it in the above referenced opposition proceeding due to its failure to respond to the Opposer's Notice of Opposition.

2. As a general rule, the Trademark Trial and Appeal Board is very reluctant to grant a default judgment since it is the policy of the law to decide cases on their merits. *Thrifty Corp. v. Bomax Enter.*, 228 U.S.P.Q. 62 (T.T.A.B. 1985). Here, there are good reasons why a default judgment should not be entered.

3. Sally's failure to answer was due to its lack of knowledge that the subject opposition proceeding had been instituted against it, and not as a result of willful conduct or gross neglect. *See* Affid. of Patricia DeSimone, attached hereto as Exh. 1.

4. Since filing its Opposition, Opposer has filed no written discovery, motions or other papers on Sally and, therefore, has not expended substantial resources and efforts to prosecute this matter, and therefore, it will not be substantially prejudiced by the inadvertent delay caused by Sally. *See Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 U.S.P.Q.2d 1988 (Comm'r 1990).

5. Sally has a meritorious defense to this action, namely that its applied-for trademark is substantially different from the Opposer's trademark, and therefore not likely to cause confusion in the marketplace.

Based upon the foregoing, Sally Beauty Holdings, Inc. respectfully submits that the Notice of Default in the above action be set aside and that its Answer to John Frieda Professional Care, Inc.'s Notice of Opposition, as filed concurrently herewith, be accepted as part of the record.

Dated: Chicago, Illinois
November 20, 2002

Respectfully submitted,

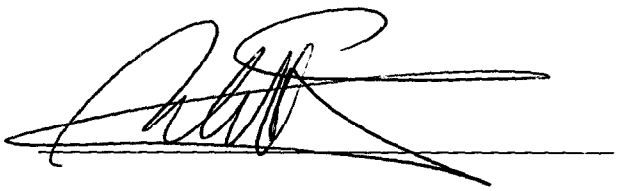
WILDMAN, HARROLD, ALLEN & DIXON

By

Craig S. Fochler
Mike M. Yaghmai
225 West Wacker Drive
Chicago, Illinois 60606-1229
Telephone No. (312) 201-2000
Facsimile No. (312) 201-2555

CERTIFICATE OF SERVICE

I, Mike M. Yaghmai, counsel for Applicant, hereby certify that a copy of Applicant's Motion to Set Aside the Notice of Default was served upon Marie Driscoll, c/o Fross Zelnick Lehrman & Zissu, P.C., 866 United Nations Plaza, New York, New York 10017, on November 20, 2002, by facsimile transmission and by first class mail, proper postage prepaid.



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JOHN FRIEDA PROFESSIONAL CARE, INC.

Opposer,

v.

SALLY BEAUTY HOLDINGS, INC.

Applicant.

Opp. No. 91151993

11-20-2002
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #75

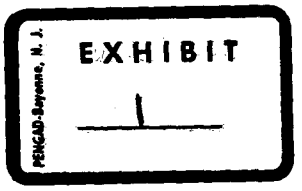
AFFIDAVIT OF PATRICIA DESIMONE

I, Patricia DeSimone, under penalty of perjury, do hereby state:

1. I am employed as an attorney by Alberto-Culver Company, Inc. ("Alberto"), a Delaware corporation, with its principal place of business at 2525 Armitage Avenue, Melrose Park, Illinois.

2. In my capacity as an Alberto attorney, I manage intellectual property matters for Alberto and its subsidiaries, including Sally Beauty Holdings, Inc. ("Sally").

3. On November 1, 2002, Sally received the notice attached hereto as Exhibit A, stating a Notice of Default had been entered against it by the Trademark Trial and Appeal Board ("Board") in the above referenced matter.



4. I have supervised an investigation of the files of Sally and determined that it never received a copy of the Board's letter notifying it that an opposition proceeding had been instituted against it by John Frieda Professional Care, Inc.

5. Specifically, Sally had no notice of when its Answer was due and that it was in default.

Date: 11/18/02

Patricia DeSimone, Esq.

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Wildman Harrold
Attorneys and Counselors

November 20, 2002

VIA EXPRESS MAIL

11-20-2002
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #75

BOX TTAB
Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3513

Re: ***John Frieda Professional Care, Inc. v. Sally Beauty Holdings, Inc.***
Opposition No. 91151993

Dear Sir or Madam:

Enclosed for filing please find Applicant Sally Beauty Holdings, Inc.'s Motion to Set Aside the Notice of Default which was entered against it in the above referenced matter, its Answer to John Frieda Professional Care, Inc.'s Notice of Opposition, and a stamped, self-addressed postcard which we request you return to us as confirmation that you have received the above-identified documents.

If you have any questions, please do not hesitate to contact me at the above number.

Very truly yours,

Mike M. Yaghmai

MMY:jmh

Enclosures

CERTIFICATE OF EXPRESS MAIL UNDER 37 CFR 1.10

"Express Mail" mailing label number: EL 738371858 US

Date of Deposit: Nov. 20, 2002

I hereby certify that this paper or fee is being deposited with the United States Postal Service "Express Mail Post Office to Addressee" service under 37 CFR 1.10 on the date indicated above and is addressed to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513.

Joleen Wimley

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