

ESTTA Tracking number: **ESTTA3281**

Filing date: **11/17/2003**

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

<b>Proceeding</b>	91155077
<b>Party</b>	Defendant JOAR OPHEIM Opheim, Joar 3040 Valencia Ave. Aptos, CA 95003
<b>Correspondence Address</b>	JOAR OPHEIM NORDIC NATURALS 5A HANGER WAY WATSONVILLE, CA 95076
<b>Submission</b>	Motion to Accept a Late Filed Answer
<b>Filer's Name</b>	Howard E. Lebowitz
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<b>Signature</b>	/Howard E. Lebowitz/
<b>Date</b>	11/17/2003
<b>Attachments</b>	Motion to Accept Late Filed Answer.pdf ( 3 pages )

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

Genetics Institute, LLC     )  
                                  v.                 )  
Joar Opheim                     )  
  )  
Opposition No.: 91155077     )

**Motion to Accept a Late Filed Answer (including embodied brief on the motion)**

The Applicant hereby moves the Board to accept its concurrently filed "Answer to Notice of Opposition" which was due on November 3, 2003, and not to hold Applicant in default for failing to file a timely answer.

The grounds for the motion is that there is good cause why default judgment should not be entered (Fed. R. Civ. P 55(c)). The showing of good cause will address the criteria specified in TBMP 312.02, that (1) the delay in filing the answer was not the result of willful conduct or gross neglect on the part of Applicant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the Applicant has a meritorious defense to the action.

Responding to the criteria in sequence:

1. On October 2, 2003 the Board issued an order requiring a proper Answer to Notice of Opposition within 30 days, thus the Answer was due on November 3 allowing for expiration of 30 days on a Saturday. Applicant has been filing trademark applications pro se, and had not previously encountered an opposition proceeding. Thus in spite of the clarity of the instructions contained in the order, applicant did not appreciate the difference between an opposition proceeding and office actions that had previously been handled informally. Also, Applicant was preoccupied with a move to a new place of business. As a result, Applicant delayed in obtaining counsel until a week after the Answer was due. It is submitted that this was a lack of understanding and poor judgement but not intentional conduct or gross negligence.
2. The Applicant does not now have registration of the mark, so it is difficult to see how Opposer is prejudiced by the delay.
3. The Applicant believes it has a meritorious defense to the opposition. Applicant's application is to register NOROMEGA as nutritional and dietary supplement (actual intended use is a fish oil), while Opposer's mark is NEUMEGA, a protein blood cell growth factor for injection or intravenous use. The goods have no proximity (relationship) since they are sold to a different class of purchasers (general purchaser vs. cancer patient), are different in use and function (oral consumption as a supplement vs. injection or intravenous) and are marketed in mutually exclusive forums (over the counter vs. physician's prescription). While there is some degree of similarity of the proposed mark to the Opposer's mark, the two are certainly distinct

in sight, sound and meaning. Some similarity can be tolerated when the goods are unrelated (see *AMF Inc. v. Sleekcraft Boats*, 599 F. 2d 341 (9th Cir. 1979)).

WHEREFORE, Applicant believes it has shown good cause why its Answer should be accepted and respectfully requests that it not be held to be in default.

Signed:



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Dated: November <sup>17</sup>, 2003

Certificate of Service

I hereby certify that a true and complete copy of the foregoing Answer has been served on Egon E. Berg, Attorney for Wyeth, by mailing said copy on Nov 17, 2003 by Express Mail Post Office to Addressee to Egon E. Berg, Esquire, Wyeth, Five Giralda Farms, Madison, New Jersey 07940.

