

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

mc/kkr

Mailed: October 17, 2005

Opposition No. 91161178

PFIZER INC.

and

G.D SEARLE LLC

v.

ZelleRx Corporation

Karyn K. Ryan, Interlocutory Attorney
Trademark Trial and Appeal Board.

By the Board:

This case now comes up for consideration of several pending matters.

First, we consider the default issue. We observe that applicant's answer was due in this case on March 30, 2005;¹ however, applicant failed to file a timely answer. The Board on May 26, 2005 issued a notice of default, to which the parties jointly responded on June 13, 2005.

¹ An inaccurate deadline for answer was identified in the Board's May 26, 2005 notice of default. The notice of default is hereby modified to reflect the correct date of answer as set forth in this order. The error is regretted.

By that response, it is noted that applicant's failure to file its answer was inadvertent and due to the parties' exclusive focus on negotiations aimed at resolving this trademark dispute. Opposers expressly consent to setting aside the notice of default.

The standard to apply in order to permit the late filing of an answer is the "good cause" standard of Fed. R. Civ. P. 55(c). We find that the circumstances recounted by applicant constitute good cause not to enter judgment by default. See, e.g., *Perfect Film and Chemical Corporation v. The Society Ordinastral*, 172 USPQ 696 (TTAB 1972).

In view thereof, the notice of default is set hereby aside.

On May 26, 2005, the parties filed applicant's proposed amendment to its application Serial No. 78251079, with opposers' consent; however, portions of that submission were illegible. On October 6, 2005, opposers submitted a "Clarification of Amendment to Drawing."

Trademark Rule 2.133(a) provides, in pertinent part, that an application which is the subject of an inter partes proceeding may not be amended in substance except with the consent of the adverse party and the approval of the Board, or upon motion. However, the proposed amendment must also comply with all other rules and statutory provisions.

Trademark Rule 2.72(a) provides that amendments may not be made to the drawing of the mark if the character of the mark is materially altered.

By the proposed amendment, applicant seeks to change the mark's drawing from "ZELLEREX" in typed form to the following special form drawing:

ZelleRx

We find the proposed amendment does not materially alter the character of the existing mark as proscribed by Trademark Rule 2.72(a). Moreover, inasmuch as the proposed amendment is clearly limiting in nature as required by Trademark Rule 2.71(b), and because opposer consents thereto, it is approved and entered. See Trademark Rule 2.133(a).

A copy of this order and applicant's new drawing shall be sent to the Trademark Examining Operation for scanning and entry into the application file for Serial No. 78251079.

Turning back to the opposition now before us, it is not clear whether the amendment to applicant's mark has obviated opposers' desire to go forward with this opposition. Opposers accordingly are allowed **thirty** days from the mailing date set forth above the caption hereof to inform the Board whether they intend to go forward or to withdraw their notice of opposition.

Proceedings otherwise are suspended until further written notice of the Board. If opposers fail to respond in accordance with the foregoing or to withdraw the opposition,

the Board will presume that opposers intend to go forward on the subject application in its amended form and the Board will issue an order resuming this proceeding and reset the deadline for applicant's answer.

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Notice Regarding TTAB Electronic Resources and New Rules

- TTAB forms for electronic filing of extensions of time to oppose, notices of opposition, and inter partes filings are now available at <http://estta.uspto.gov>. Images of TTAB proceeding files can be viewed using TTABVue at <http://ttabvue.uspto.gov>.
- Parties should also be aware of changes in the rules affecting trademark matters, including rules of practice before the TTAB. See Rules of Practice for Trademark-Related Filings Under the Madrid Protocol Implementation Act, 68 Fed. R. 55,748 (September 26, 2003) (effective November 2, 2003) Reorganization of Correspondence and Other Provisions, 68 Fed. Reg. 48,286 (August 13, 2003) (effective September 12, 2003). Notices concerning the rules changes are available at www.uspto.gov.
- The second edition of the Trademark Trial and Appeal Board Manual of Procedure (TBMP) has been posted on the USPTO web site at www.uspto.gov/web/offices/dcom/ttab/tbmp/.