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

Baxley

Mailed: May 31, 2005

Opposition No. **91162932**

Mars, Incorporated

v.

Walter Williams, Jr.

By the Trademark Trial and Appeal Board:

The Board issued a notice of default under Fed. R. Civ. P. 55(a) on March 1, 2005 inasmuch as no answer was of record herein.

In response thereto, applicant filed a motion to set aside the notice of default and concurrently filed his answer on March 11, 2005.[1] Opposer filed a brief in opposition to applicant's motion on March 24, 2005.

In support of his motion, applicant contends that he had communication difficulties with his attorney after he

[1] Inasmuch as applicant's filing was in response to the Board's notice of default, applicant should not have filed a motion to set aside the notice of default. The better practice would have been to merely respond to the notice of default without framing such response as a motion and concurrently filed his answer. See TBMP Section 312.02 (2d ed. rev. 2004). The Board notes that a notice of default is essentially an *ex parte* matter between the Board and a defendant and that the Trademark Rules of Practice do not provide for the filing of a brief in opposition thereto. See Trademark Rules 2.106(a) and 2.114(a); TBMP Section 312 (2d ed. rev. 2004). On the other hand, a motion is an *inter partes* matter that contemplates full briefing by the parties. See Trademark Rule 2.127(a); TBMP Section 502.02(b) (2d ed. rev. 2004).

moved from Tuskegee, Alabama to Montgomery, Alabama for medical reasons following a hotel fall and that he recently underwent two major surgeries from which he is recovering. As an exhibit to his motion, applicant included a January 14, 2005 letter that he sent to his attorney in which he indicated that, on August 23, 2004, he underwent surgery to repair a "massive" rotator cuff tear; that, on January 7, 2005, he underwent a triple diskectomy/anterior cervical fusion; that he was having difficulty functioning due to pain and discomfort following the rotator cuff surgery; that he is wearing a bone growth stimulator at all times until he heals; that he is undergoing physical therapy to rehabilitate from his surgeries; and that he is taking pain medication every four to six hours. Applicant also included as exhibits doctors' reports in connection with his two surgeries that were sent to his attorney with his January 14, 2005 letter. Accordingly, applicant asks that the Board set aside the notice of default and accept his concurrently filed answer.

In opposition thereto, opposer contends that applicant has not shown good cause to set aside the notice of default and that his alleged communication difficulties with his attorney are irrelevant because he was represented by an attorney who could have timely filed his answer. Opposer further contends that applicant has failed to respond to

written discovery requests that opposer served upon applicant's counsel on December 6, 2004. Accordingly, opposer asks that applicant's motion be denied and that the opposition be sustained.

The standard for determining whether to set aside a notice of default is the Fed. R. Civ. P. 55(c) standard, i.e., whether the defendant has shown good cause why default judgment should not be entered against it. See *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). Good cause why default judgment should not be entered against a defendant, for failure to file a timely answer to the complaint, is usually found when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action. See *Paolo's Associates Limited Partnership v. Paolo Bodo*, 21 USPQ2d 1899, 1902-03 (Comm'r 1990).

The determination of whether default judgment should be entered against a party lies within the Board's sound discretion. In exercising that discretion, the Board is mindful of its policy to decide cases on their merits where possible and is reluctant to enter judgment by default for

failure to timely answer. See TBMP Section 312.02 (2d ed. rev. 2004).

After reviewing the parties' arguments and supporting papers, the Board finds that applicant's delay in filing its answer was inadvertent in that it was caused by communication difficulties with his attorney due to his having moved from Tuskegee, Alabama to Montgomery, Alabama to obtain better medical care, by applicant's having undergone two major surgeries near the time during which his answer was due, by his experiencing "chronic" pain that led to such surgeries, and applicant's experiencing pain and discomfort following such surgeries.[2] Further, there is no evidence of any prejudice to opposer, such as lost evidence or unavailable witnesses, caused by the late filing of applicant's answer. See *Pratt v. Philbrook*, 109 F.3d 18 (1st Cir. 1997). In addition, applicant has set forth a meritorious defense by way of the denials set forth in his answer. See *DeLorme Publishing Co v. Eartha's Inc.,* 60 USPQ2d 1222, 1224 (TTAB 2000). Accordingly, the Board finds

[2] Opposer has cited no case law which supports its argument that, because applicant is represented by counsel, applicant's attorney should have filed an answer even if the attorney was unable to communicate with applicant. As such, that argument is not well-taken. Rather, each admission, denial, and statement that applicant lacks knowledge or information in applicant's answer is based on applicant's knowledge or information, not that of his attorney. See Fed. R. Civ. P. 8(b); TBMP Sections 311.01 and 311.02 (2d ed. rev. 2004).

that applicant has shown good cause why default judgment should not be entered against him.

In view thereof, the motion to set aside the notice of default is hereby granted. The notice of default is set aside. Applicant's answer is accepted and made of record.

To the extent that opposer's allegation regarding applicant's failure to serve responses to its discovery requests is construed as a motion to compel discovery, the record does not include a statement or other indicia that opposer made a good faith effort to resolve the parties' discovery dispute prior to seeking Board intervention. See Trademark Rule 2.120(e)(1); TBMP Section 523.02 (2d ed. rev. 2004). Accordingly, opposer's motion to compel is hereby denied.

To the extent that opposer's allegation regarding applicant's failure to serve responses to its discovery requests is construed as a motion for entry of judgment as a discovery sanction for applicant's failure to respond to such written discovery requests, the Board notes that no motion to compel has been granted herein and that the record does not indicate that applicant has affirmatively stated that he will not respond to opposer's written discovery requests. See Trademark Rule 2.120(g); TBMP Section 527.01(a)-(b) (2d ed. rev. 2004). Accordingly, opposer's

motion for entry of judgment as a discovery sanction is hereby denied.

Applicant is allowed until thirty days from the mailing date of this order to serve upon opposer responses to any outstanding written discovery requests.

In view of applicant's late filing of his answer, the Board deems it appropriate to extend the discovery period by roughly the amount of time that applicant was late in filing his answer. Accordingly, discovery and trial dates are hereby reset as follows:

DISCOVERY PERIOD TO CLOSE:	**08/19/05**
Plaintiff's 30-day testimony period to close:	**11/17/05**
Defendant's 30-day testimony period to close:	**01/16/06**
15-day rebuttal testimony period to close:	**03/02/06**

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.l25.

Briefs shall be filed in accordance with Trademark Rule 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.l29.