

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

am/apb

Mailed: July 26, 2006

Opposition No. 91169856

SmithKline Beecham PLC

v.

Bio Therapeutics, Inc.

**Andrew P. Baxley, Interlocutory Attorney:**

On June 20, 2006, the Board sent a notice of default to applicant because no answer was of record.

In response thereto,<sup>1</sup> applicant contends that it was in the midst of efforts to finance its business and was not in a position to authorize its attorney to attend to its trademark matters. Accordingly, applicant asks that the Board set aside the notice of default.

Whether default judgment should be entered against a party is determined in accordance with Fed. R. Civ. P. 55(c), which reads in pertinent part: "for good cause shown the court may set aside an entry of default." As a general

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<sup>1</sup>Applicant captioned its response to the notice of default as a motion for leave to accept a late-filed answer. However, unlike a motion, a notice of default is essentially an *ex parte* matter that does not contemplate the filing of a brief in opposition thereto. Compare TBMP Sections 312.01 and 502.02(b) (2d ed. rev. 2004). As such, applicant should merely have responded to the notice of default.

rule, good cause to set aside a defendant's default will be found where the defendant's delay has not been willful or in bad faith, when prejudice to the plaintiff is lacking, and where defendant has a meritorious defense. See *Fred Hyman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991).

In this case, the Board finds that applicant has shown satisfactorily that the Board finds that applicant's failure to timely answer was not willful or in bad faith in that it was caused by applicant's pre-occupation with obtaining financing for its business.<sup>2</sup> The Board further finds that there is no evidence that opposer will be prejudiced by applicant's failure to timely answer and that, by filing an answer which denies the fundamental allegations in the notice of opposition, applicant has asserted a meritorious defense to this action.

In view thereof, the notice of default is hereby set aside. Applicant's late-filed answer is accepted and made of record.

Discovery and testimony periods are reset as follows.

DISCOVERY PERIOD TO CLOSE: **11/3/06**

Plaintiff's 30-day testimony period to close: **2/1/07**

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<sup>2</sup> The Board notes, however, that any further failure to comply with deadlines set by the Trademark Rules of Practice or Board orders will be viewed with disfavor.

Defendant's 30-day testimony period to close: **4/2/07**

Plaintiff's 15-day rebuttal testimony period to close: **5/17/07**

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 2.125.

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 2.129.