ESTTA Tracking number: **ESTTA298586**

Filing date: **07/31/2009**

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

Proceeding	91181945
Party	Defendant Doolittle Gardens, LLC
Correspondence Address	JEFFREY D. MYERS PEACOCK MYERS, P.C. PO BOX 26927 ALBUQUERQUE, NM 87125-6927 UNITED STATES jmyers@peacocklaw.com
Submission	Opposition/Response to Motion
Filer's Name	Roger E. Michener
Filer's e-mail	info@Peacocklaw.com
Signature	/Roger M. Michener/
Date	07/31/2009
Attachments	SignedAppltResponseOpposerMotionStrike7-31-09.pdf (6 pages)(136527 bytes)

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

In re Application Serial No.: 78/882,509 For the mark: THERE'S NO PLACE LIKE OHM Published on: September 18, 2007	Opposition No. 91181945
Kairos Institute of Sound Healing, LLC, OPPOSER, vs. Doolittle Gardens, LLC, APPLICANT.	

APPLICANT'S RESPONSE TO OPPOSER'S MOTION TO STRIKE

Applicant, Doolittle Gardens LLC, by and through counsel of record, respectfully requests that the Board deny Opposer's motion to strike Applicant's response to Opposer's motion for summary judgment.

Opposer moves to strike Applicant's response to Opposer's motion for summary judgment, pursuant to 37 C.F.R. § 2.127(e)(1), because Applicant inadvertently filed its response one day late. The standard for determining whether to strike an untimely response is substantially equivalent to the standard for granting a default judgment.

The decision to enter default judgment (or grant a motion to strike) against a party resides entirely within the sound discretion of the Board. *see* TBMP § 312 *and e.g.* Identicon Corp. v. Williams, 195 U.S.P.Q. 447 (Comm'r 1977). TBMP § 312.02 clearly states:

> The Board, in exercising that discretion, shoud be mindful of its policy to decide cases on their merits as often as possible. Accordingly, the Board

> should be hesitant to enter default judgment for failure to file a timely response and instead resolve the case on its merits.

The Board may set aside the entry of default for good cause. *see* Fed. R. Civ. P. 55(c) *and* TBMP § 312. Good cause is usually found by the Board 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. Djeredjian v. Kashi Co., 21 U.S.P.Q. 2d 1613 (TTAB 1991). *also see* TBMP § 312 *and* Fed. R. Civ. P. 55(c).

If the defendant provides a meritorious defense to the opposition by filing a non-frivolous response and meets the first and second criteria expressed above, the Board will set aside default. Djeredjian v. Kashi Co., 21 U.S.P.Q. 2d 1613 (TTAB 1991); Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc., 21 U.S.P.Q. 2d 1556 (TTAB 1991). Furthermore, the Board may also consider other criteria in deciding whether or not to set aside default, such as whether entry of a default would produce a harsh or unfair result. Fed. R. Civ. P. 55(c). Since the delay in filing a response to Opposer's motion for summary judgment was not the result of willful conduct or gross neglect on the part of Applicant; and Opposer will not be prejudiced by the delay; and Applicant has a meritorious defense to the motion for summary judgment; and granting the motion to stike will produce a harsh and unfair result, the motion to strike should be denied and the Board should proceed to decide the pending summary judgment motion on its merits.

A One-Day Delay in Filing the Response was not Willful Conduct or Gross Neglect

In counting the thirty-five day period to respond to the motion for summary judgment (thirty days to respond to the motion plus an additional five days for mailing),

Applicant's docketing system inadvertently construed the month of May to have 30 days instead of 31 days and made a mistake in counting. By this inadvertent error, Applicant believed the response was due on June 30th instead of June 29th. Accordingly, Applicant filed its response to Opposer's motion for Summary Judgment on June 30th, believing the response to be timely. Since Applicant's response was only one day late, Applicant's filing does not constitute gross neglect. Further, Applicant's late submission was not the result of willful conduct, but instead the result of a docketing error. S.E.C. v. McNulty, 137 F.3d 732, 738 (2d Cir. 1998), cert. denied, 525 U.S. 931 (1998), 119 S. Ct. 340, 142 L. Ed. 2d. 281 (1998).

Opposer is not Prejudiced by the One-Day Delay in Filing

Opposer suffered no prejudice by the one-day delay in Applicant's filing of its response to Opposer's motion for summary judgment. Applicant notes that the Board has found longer delays not prejudicial to the opposing party. Fred Hayman. 21 U.S.P.Q. 2d at 1557 (nine day delay causes minimal prejudice). Of greater significance, Opposer's motion papers do not recite it has been prejudiced by the one-day delay, much less state any factual grounds or basis for prejudice. Since Opposer does not allege any prejudice, either to its cause or to the pending summary judgment motion, it is apparent that the motion to strike is merely a procedural maneuver and the one-day filing delay has not and will not cause prejudice to Opposer.

Applicant Povided a Meritorious Defense to the Motion for Summary Judgment.

In submission of its response to Opposer's motion for summary judgment, Applicant provided a meritorious defense to Opposer's motion that addressed the substance of the case by providing relevant material facts as well as factually refuting all allegations of fraud and rights to the mark in question by Opposer. Applicant's response brief constitutes a complete defense to Opposer's motion for summary judgment, a meritorious defense, and should be considered by the Board.

Granting the motion to Strike would be Inequitable and Prejudicial to Applicant

The consequences of striking Applicant's response to Opposer's motion for summary judgment would be unduly harsh. Applicant stands to have its registration of the mark THERE'S NO PLACE LIKE OHM cancelled if summary judgment is granted. Applicant provided a meritorious defense to the motion for summary judgment and should not be prevented from defending itself against Opposer's allegations strictly because Applicant made a clerical error that resulted in filing a response one day late.

Conclusion

Applicant's one-day delay in filing a response to Opposer's motion for summary judgment (1) was not the product of willful conduct or gross negligence, (2) did not prejudice Opposer and Opposer alleges no prejudice, (3) Applicant's response brief provided a meritorious defense to Opposer's motion for summary judgment and (4) it would be inequitable and prejudicial to Applicant by producing a harsh and unfair result if the motion to strike were granted;

Accordingly, Applicant requests the Board to deny Opposer's motion to strike and proceed to consider the pending motion for summary judgment on its merits.

Respectfully submitted,

PEACOCK MYERS, P.C.

Roger E. Michener
Post Office Box 26927
Albuquerque, NM 87125-6927
Telephone: (505) 998-1500

CERTIFICATE OF TRANSMISSION

I hereby certify that this Applicant's Response to Opposer's Motion to Strike is being deposited under 37 CFR 1.6(a)(4) as an electronic filing via Electronic System for Trademark Trials and Appeals (ESTTA) addressed to: Commissioner for Trademarks, Trademark Trial and Appeal Board, USPTO, on July 31, 2009.

Michael C. Houck
Paralegal
Peacock Myers, P.C.
Attorneys for Applicant

July 31, 2009
(Date Signed)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing Applicant's Response to Opposer's Motion to Strike has been served on Opposer, Kairos Institute of Sound Healing, LLC, by and through its attorney of record, Victor N. King, Speckman Law Group, PLLC, 1201 Third Avenue, Suite 330, Seattle, WA 98101, by mailing a copy with the United States Postal Service on July 31, 2009 via First Class Mail, postage prepaid, to said Attorneys for Opposer at said address.

Roger E. Michener
Peacock Myers, P.C.
Attorneys for Applicant

July 31, 2009
(Date Signed)