

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

Mailed: October 30, 2009

Opposition No. 91189624

Vita-Mix Corporation

v.

Royal Everest Inc.

**Robert H. Coggins,
Interlocutory Attorney:**

This case now comes up on opposer's motion to compel discovery. Before considering the motion to compel, the Board addresses the issue of applicant's technical default.

Default Discharged

Answer was due in this opposition proceeding on May 18, 2009, but applicant failed to file a timely answer. On May 19, 2009, applicant filed an answer without any explanation as to why the answer was (one day) late.¹ The Board construes applicant's answer as a motion to vacate applicant's technical

¹ Applicant filed its answer on paper via the U.S. mail. Although applicant dated the answer May 16, 2009, the answer was not received by the Board until May 19, 2009, and the answer did not contain a certificate of mailing. See Trademark Rule 2.197; and TBMP §§ 110 *et seq.* (2d ed. rev. 2004). For future filings, applicant is invited to use the Board's Electronic System for Trademark Trials and Appeals (ESTTA) available at <http://estta.uspto.gov/>. See Trademark Rules 2.2(g) and 2.126(b).

default and to accept the late-filed answer. Inasmuch as the answer was only one day late, opposer has not objected thereto, and the failure to file a timely answer does not appear willful or unduly prejudicial, the Board is persuaded that applicant has shown good cause to discharge the technical default and accept the late answer. *See Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556 (TTAB 1991). Accordingly, applicant's late answer is accepted.

Motion to Compel

The record showing no response by applicant to opposer's motion to compel (filed September 18, 2009), the motion to compel is hereby granted as conceded to the extent modified herein. *See Trademark Rules 2.120(e) and 2.127(a)*.

Applicant is permitted until **thirty days** from the mailing date of this order to provide (1) its initial disclosures to opposer, and (2) complete responses to opposer's interrogatories and document requests. Moreover, applicant's responses must be made without objection because applicant failed either to timely respond or to object to opposer's discovery requests. *See No Fear Inc. v. Rule*, 54 USPQ2d 1551 (TTAB 2000). In addition, applicant may not serve any discovery requests until it complies with this order. Trademark Rule 2.120(a)(3).

As opposer noted in its motion (at pp. 4-5) opposer's requests for admission are automatically admitted pursuant

to Fed. R. Civ. P. 36(a)(3) because applicant failed to respond thereto. TBMP § 407.03(a) (2d ed. rev. 2004).

Should applicant fail to provide the responses as ordered herein, then opposer's remedy will lie in a motion for entry of sanctions in the form of entry of judgment sustaining the opposition. See Trademark Rule 2.120(g).

Schedule

Proceedings are resumed. The schedule is reset as follows.

Applicant's Initial Disclosures and Discovery Responses Due	Thirty Days
Expert Disclosures Due	12/30/2009
Discovery Closes	1/29/2010
Plaintiff's Pretrial Disclosures	3/15/2010
Plaintiff's 30-day Trial Period Ends	4/29/2010
Defendant's Pretrial Disclosures	5/14/2010
Defendant's 30-day Trial Period Ends	6/28/2010
Plaintiff's Rebuttal Disclosures	7/13/2010
Plaintiff's 15-day Rebuttal Period Ends	8/12/2010

Pro Se Information for Applicant

As noted in the Board's May 22, 2009 order, Trademark Rules 2.119(a) and (b) require that every paper filed in the Patent and Trademark Office in a proceeding before the Board must be served upon the attorney for the other party, or on the party if there is no attorney, and proof of such service must be made before the paper will be considered by the Board. Consequently, copies of all papers which applicant may subsequently file in this proceeding must be accompanied by a

signed statement indicating the date and manner in which such service was made. The statement, whether attached to or appearing on the paper when filed, will be accepted as prima facie proof of service.

Applicant should note that although Patent and Trademark Rule 11.14 permits a corporation to represent itself in a Board proceeding, it is generally advisable for those unfamiliar with the applicable rules to secure the services of an attorney familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney.

If applicant chooses to represent itself, applicant will be expected to comply with all applicable rules and Board practices during the remainder of this case. The Trademark Rules of Practice, other Federal regulations governing practice before the Patent and Trademark Office, and many of the Federal Rules of Civil Procedure govern the conduct of this opposition proceeding.

If applicant does not retain counsel, then applicant will have to familiarize itself with the rules governing this proceeding. The Trademark Rules are codified in part two of Title 37 of the Code of Federal Regulations (also referred to as the CFR). The CFR and the Federal Rules of Civil Procedure are likely to be found at most law libraries and may be available at some public libraries. The Board's manual of procedure will also be helpful.

On the World Wide Web, applicant may access most of these materials by logging onto <http://www.uspto.gov> and making the connection to trademark materials.

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is expected of all parties before the Board, whether or not they are represented by counsel.