

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

Mailed: October 23, 2009

Opposition No. 91190723

Boost Worldwide, Inc.

v.

Artificial Life, Inc.

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

This case now comes up on opposer's motion (filed August 17, 2009) for default judgment and to strike. The motion is fully briefed. The Board exercises its discretion to consider applicant's late-filed brief in opposition.¹ The Board notes that applicant included a "reply to the opposition notice" as an exhibit to its brief in opposition.

Motion for Default

The determination of whether default judgment should be entered against a party lies within the sound discretion of the Board. In exercising that discretion, the Board is mindful of the fact that it is the policy of the law to decide cases on their merits. Accordingly, the Board is reluctant to

¹ Applicant's brief was due by September 8, 2009, but was not filed with the Board until the following day (September 9, 2009). See Trademark Rules 2.119(c) and 2.196.

enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant. See TBMP Section 312.02 (2d ed. rev. 2004).

By its response to the motion for default, applicant states that it sent an answer (i.e., applicant's "reply to the opposition notice") to opposer, but failed to file the answer with the Board "due to an internal miscommunication" error.

Applicant's failure to timely file an answer to the notice of opposition does not appear to be unduly prejudicial to opposer. Moreover, without evaluating the merits of this case, the Board further finds that applicant's response contains a meritorious defense to the complaint inasmuch as it contains a plausible, though informal, response to opposer's allegations. In view thereof, the Board finds good cause to deny opposer's motion for default judgment. Fed. R. Civ. P. 55(c); *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556 (TTAB 1991). Accordingly, opposer's motion for default is denied.

Motion to Strike

It appears that applicant intended its "reply to the opposition notice" to be an answer to the notice of opposition. To the extent that applicant intended that the "reply to the opposition notice" serve as an answer, applicant is advised that such an "answer" is informal --it is argumentative and more in the nature of a brief on the case

than a responsive pleading to the notice of opposition. As such, it does not comply with Rule 8(b) of the Federal Rules of Civil Procedure, made applicable this proceeding by Trademark Rule 2.116(a). In view thereof, opposer's motion to strike the "reply to the opposition notice" is granted.

Applicant is allowed until **November 23, 2009** in which to file an answer that complies with Rule 8(b) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 8(b) provides, in part:

[A] party must state in short and plain terms its defenses to each claim asserted against it; and admit or deny the allegations asserted against it by an opposing party. A denial must fairly respond to the substance of the allegation. . . . A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial. An allegation . . . is admitted if a responsive pleading is required and the allegation is not denied.

The notice of opposition filed by opposer consists of twenty-two numbered paragraphs setting forth the basis of opposer's claim of damage. In accordance with Fed. R. Civ. P. 8(b) it is incumbent on applicant to answer the notice of opposition by admitting or denying the allegations contained in each paragraph. If applicant is without sufficient

knowledge or information on which to form a belief as to the truth of any one of the allegations, it should so state and this will have the effect of a denial. The admissions and denials should be made in numbered paragraphs corresponding to the numbered paragraphs in the notice of opposition.

Information Applicant, as an Unrepresented Party, Should Note

Applicant will be expected to comply with all applicable rules and Board practices during the remainder of this case. It should be noted that while Patent and Trademark Rule 11.14 permits a corporation to represent itself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in an opposition proceeding to secure the services of an attorney who is familiar with such matters.² The Patent and Trademark Office cannot aid in the selection of an attorney.

If applicant does not retain counsel, then applicant will have to familiarize itself with the rules governing these proceedings. 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 in the United

² Applicant (as a Delaware corporation with a correspondence address in Hong Kong) should note that there are strict limits on which foreign attorneys can represent a party to a proceeding before the Board. See 37 C.F.R. § 10.1(c), and TMEP § 602.03 et seq.

States 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 the Board's webpage. 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.

Applicant is encouraged to use ESTTA, the Board's electronic filing system (found at <http://estta.uspto.gov>) to file all future papers with the Board. Applicant is also encouraged to use TTABVUE, the Board's electronic file viewing system (found at <http://ttabvueint.uspto.gov/ttabvue>) to monitor filings by opposer and orders issued by the Board in this opposition proceeding.

If applicant does not appoint counsel or a domestic representative on which papers can be served, applicant itself will be responsible for keeping up-to-date on this proceeding. In view of the possible delay in papers being mailed to/from Hong Kong, applicant is strongly encouraged to use the Board's electronic systems and to discuss with opposer the possibility of service of papers by electronic means (e.g., e-mail). The Board notes that applicant's e-mail address (i.setzpfandt@artificial-life.com) is of record at the Board

and will be used by the Board to send courtesy copies of Board orders to applicant.

It is noted that opposer served its motion and reply on applicant "via first class international mail." Opposer is encouraged to discuss with applicant the possibility of service of papers by electronic means (e.g., e-mail) or overnight courier.

Schedule

Dates are reset on the following schedule.

Time to Answer	11/23/2009
Deadline for Discovery Conference	12/23/2009
Discovery Opens	12/23/2009
Initial Disclosures Due	1/22/2010
Expert Disclosures Due	5/22/2010
Discovery Closes	6/21/2010
Plaintiff's Pretrial Disclosures	8/5/2010
Plaintiff's 30-day Trial Period Ends	9/19/2010
Defendant's Pretrial Disclosures	10/4/2010
Defendant's 30-day Trial Period Ends	11/18/2010
Plaintiff's Rebuttal Disclosures	12/3/2010
Plaintiff's 15-day Rebuttal Period Ends	1/2/2011

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 Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129.