

ESTTA Tracking number: **ESTTA336998**

Filing date: **03/12/2010**

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

Proceeding	91193377
Party	Defendant Arthur Andrew Medical, Inc.
Correspondence Address	Donna H. Catalfio Gallagher & Kennedy PA 2575 East Camelback Road Phoenix, AZ 85016 UNITED STATES donna.catalfio@gknet.com
Submission	Other Motions/Papers
Filer's Name	Donna H. Catalfio
Filer's e-mail	kka@gknet.com
Signature	/Donna H. Catalfio/
Date	03/12/2010
Attachments	DEVACOR Motion to Set Aside Default Notice.pdf (5 pages)(35746 bytes) DEVACOR Declaration to Motion to Set Aside.pdf (2 pages)(85638 bytes)

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

In the matter of:
DEVACOR (Application Serial No.77/730852)

Deva Nutrition LLC

Plaintiff/Opposer,

v.

Arthur Andrew Medical, Inc.

Defendant/Applicant.

Opposition No. 91193377

Box TTAB No Fee
Commissioner for Trademarks
2900 Crystal Drive
Arlington, Virginia 22202-3514

APPLICANT’S MOTION TO SET ASIDE DEFAULT NOTICE

Applicant Arthur Andrew Medical, Inc. (“Arthur Andrew”), through counsel, hereby moves the Trademark Trial and Appeal Board (the “Board”) to set aside the notice of default entered on March 11, 2010.

I. Analysis.

The Board may set aside a default notice when a defendant who has failed to file a timely answer to the complaint responds to the default notice by filing a satisfactory showing of good cause why default judgment should not be entered against it. TMBP §312.02. Good cause is 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.” *Id.* Arthur Andrew satisfactorily meets each of these requirements, which it shall address in turn.

...

...

A. Reason for Delay.

The subject application was filed by Arthur Andrew's previous attorney of record, Scott Hervey of Weintraub Genshlea Chediak ("Mr. Hervey"), on May 6, 2009. See Declaration of Donna H. Catalfio ¶ 2, attached as "Exhibit A" hereto. The present opposition was filed on January 13, 2010. *Id.* at ¶ 3. That same date, the Trademark Trial and Appeal Board (the "Board") directed its notice of the opposition, including the answer deadline and other deadlines, to Mr. Hervey, Arthur Andrew's attorney of record at the time. *Id.* at ¶ 4.

In February 2010, Arthur Andrew decided to transfer all responsibility for its trademark files to current counsel, Donna H. Catalfio, Gallagher & Kennedy, P.A. ("Ms. Catalfio"). *Id.* at ¶ 5. On February 2, 2010, Arthur Andrew filed a Revocation of Attorney and Appointment of Attorney with the United States Patent and Trademark Office ("PTO") appointing Ms. Catalfio as attorney of record for all of Arthur Andrew's registrations and pending applications, consisting of seven separate files. *Id.* at ¶ 6.

Shortly thereafter, Ms. Catalfio requested that a paralegal set up internal files for each of the seven registrations and pending applications. Ms. Catalfio did not receive any of Mr. Hervey's files for Arthur Andrew. The paralegal reviewed the "TDR" status of each registration and application and docketed deadlines. However, having no knowledge of any pending Board proceedings, neither Ms. Catalfio nor the paralegal conducted an independent check for any such proceedings. *Id.* at ¶ 7. Notably, Mr. Hervey never advised Arthur Andrew or Ms. Catalfio of the pending opposition or upcoming deadline. *Id.* at ¶ 8.

As a result, Ms. Catalfio was unaware that the current opposition had been filed and that an answer was due until she received the Board's default notice on March 11, 2010. Admittedly, Ms. Catalfio could have independently checked the "TTAB Status" of each registration and pending application to learn of the opposition. Failure to do so, however, was an innocent

oversight, not willful conduct or gross neglect. *Id.* at ¶ 9. Moreover, as soon as Ms. Catalfo received this notice, she promptly reviewed the record for this matter and filed the instant motion. *Id.* at ¶ 10.

B. Lack of Any Prejudice.

Opposer will not be prejudiced by any delay caused by Arthur Andrew's failure to file a timely answer. The deadline to answer Opposer's Complaint was February 22, 2010, two and a half weeks ago. As Arthur Andrew is filing this motion, counsel is also preparing its answer. Thus, should the Board grant the instant motion, Arthur Andrew can promptly file its answer. Accordingly, the delay in this case should amount to a handful of weeks, at best. This minimal delay will not prejudice Opposer.

C. Meritorious Defense.

Arthur Andrew has a meritorious defense to this opposition. If permitted to present its defense, Arthur Andrew will demonstrate that the overall sight and sound of the two marks at issue are quite distinct. Applicant's mark, DEVACOR, consists of three syllables and is distinct in sight and sound from Opposer's mark, DEVA. Moreover, Opposer's mark is a design mark that consists of the word DEVA inside a capsule shape. Opposer does not use any design features in connection with its mark DEVACOR.

Furthermore, the goods are distinct. Arthur Andrew seeks registration of its mark DEVACOR in connection with a dietary supplement, specifically, a digestive enzyme. Opposer's mark DEVA and design is used in connection with nutritional supplements and vitamins that contain vegan products. Opposer markets these goods to a very specific niche market – vegans or vegetarians. On the other hand, Arthur Andrew in no way limits its products to vegans, nor does it target vegans.

Arthur Andrew will also demonstrate that it has been prominently using the DEVACOR mark in connection with dietary supplements since 2007. During that time, there has not been a single instance of consumer confusion. Similarly, Arthur Andrew has not received a single complaint from Opposer about Arthur Andrew's prominent use of this mark.

In sum, Arthur Andrew has a strong and meritorious defense.

II. Conclusion.

As set forth in § 312.02 of the TBMP, "it is the policy of the law to decide cases on their merits." It is for this reason that the Board is "very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt in favor of the defendant." The facts of this case clearly illustrate that it should be decided on the merits and default should not be entered. Accordingly, Arthur Andrew respectfully requests that the Board set aside its March 11, 2010 default notice.

DATED this 12th day of March, 2010.

ARTHUR ANDREW MEDICAL, INC.


By: /Donna H. Catalfio/
Donna H. Catalfio
Counsel for Applicant Arthur Andrew Medical, Inc.
GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road, Suite 1100
Phoenix, Arizona 85016
(602) 530-8000

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant's Motion to Set Aside Default Notice is being deposited with the United States Postal Service this 12th day of March, 2010, for delivery via Express Mail addressed to:

Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Arlington, Virginia 22313-1451

Drew Alia
Alia Law Center
1218 S Broad Street
Philadelphia, PA 19146



DECLARATION OF DONNA H. CATALFIO

I, DONNA H. CATALFIO, declare as follows:

1. I am an attorney with the law firm of Gallagher & Kennedy, P.A., and I represent Arthur Andrew Medical, Inc. in connection with their intellectual property matters. I am attorney of record for Application Serial No. 77/730,852 for the mark DEVACOR. I have personal knowledge of the matters set forth below, and, if called to testify as a witness thereto, I could and would do so competently.

2. The record for the above-referenced trademark application demonstrates that the above-referenced application was filed by Arthur Andrew's previous attorney of record, Scott Hervey of Weintraub Genshlea Chediak ("Mr. Hervey"), on May 6, 2009.

3. According to the Board's record, Deva Nutrition LLC filed an opposition to this application, Opposition No. 91193377, on January 13, 2010.

4. The Board's record further indicates that on that same date, the Trademark Trial and Appeal Board (the "Board") directed its notice of the opposition, including the answer deadline and other deadlines, to Mr. Hervey, Arthur Andrew's attorney of record at the time.

5. In February 2010, Arthur Andrew decided to transfer all responsibility for its trademark files to me.

6. On February 2, 2010, Arthur Andrew filed a Revocation of Attorney and Appointment of Attorney with the United States Patent and Trademark Office ("PTO") appointing me as attorney of record for all of Arthur Andrew's registrations and pending applications, consisting of seven separate files.

7. Shortly thereafter, I requested that a paralegal set up internal files for each of the seven registrations and pending applications. Notably, I did not receive any of Mr. Hervey's

files for the client. The paralegal reviewed the "TDR" status of each registration and pending application and docketed deadlines. However, having no knowledge of any pending Board proceedings, neither I nor the paralegal conducted an independent check for any such proceedings.

8. Mr. Hervey never advised me that an opposition had been filed in this matter or that there was an upcoming deadline. Moreover, upon receipt of the Board's March 11, 2010 notice, that same day I spoke with Arthur Andrew and confirmed that Mr. Hervey never advised anyone at Arthur Andrew that an opposition had been filed or that there was a deadline, despite the fact that Mr. Hervey received notice of the opposition and answer deadline at least two weeks prior to Arthur Andrew's decision to engage new trademark counsel.

9. As a result, I was unaware that the current opposition had been file and that an answer was due until I received the Board's default notice on March 11, 2010. Admittedly, I could have independently checked the "TTAB Status" of each registration and pending application to learn of the opposition. Failure to do so, however, was an innocent oversight, not willful conduct or gross neglect.

10. As soon as I received this notice, I promptly reviewed the record in this matter and filed a Motion to Set Aside Default Notice.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of March, 2010, in Maricopa County, Arizona.


DONNA H. CATALFIO