

UNITED STATES PATENT AND TRADEMARK
OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451
General Contact Number: 571-272-8500

Mailed: May 2, 2015

Opposition No. 91218192

DSM IP Assets B.V.

v.

American Generic Laboratories LLC

**M. Catherine Faint,
Interlocutory Attorney:**

On October 29, 2014, the Board sent a notice of default to Applicant because Applicant failed to timely file an answer to the notice of opposition. The Board allowed Applicant time to show cause why judgment by default should not be entered against it.

On December 4, 2014, Applicant filed a response to the notice of default, albeit six days late, along with its answer stating neither Applicant nor its counsel received the notice of opposition via first class mail or electronic mail.¹ Counsel for Applicant submitted a declaration stating that his address of record was correct. Counsel also avers that he will “commit to regularly checking the Board’s website throughout the remainder of this case to make sure that I am current on all future Board communications in this case.”

¹ The Board notes the appearance of counsel filed December 4, 2014 and hereby updates its records accordingly.

Opposer filed an opposition to Applicant's response to the Board noting that Opposer's counsel did not receive Applicant's response, although it contains a certificate of service. While the Board has reviewed this response, the decision whether to enter default upon the Board's notice of default is within the Board's discretion. In exercising that discretion, the Board is mindful of its policy to decide cases on their merits where possible and therefore only reluctantly enters judgment by default for failure to timely answer. *See* TBMP § 312.02 (2014).

The standard for determining whether default judgment should be entered against a defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard, i.e., whether the defendant has shown good cause why default judgment should not be entered against it. As a general 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 Hayman Beverly Hills, Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991).

Inasmuch the Applicant has established good cause in counsel's averment that the notice of opposition was not received, there is no prejudice to Opposer at this early stage of the proceeding, and Applicant has set forth a meritorious defense by way of the denials set forth in its answer. Accordingly, Applicant's **default is set aside**.

The Board notes that counsel for both parties claim they have not received each other's filings, although each appear to have accompanied their filings with certificates of service with addresses of record. The Board **hereby orders** that each party must accompany every service with both a courtesy email copy to its adversary and a telephone message, and each party must acknowledge the telephone message within 24 hours. Anyone who has not received acknowledgment of their phone message should contact the Board. The Board may require courier service in the future if the parties cannot resolve the service delivery issues. Alternatively the Board may in the future order the parties to appear in person at the TTAB's Offices in Virginia is this case becomes overly litigious.

Applicant's answer is accepted and entered. Conferencing, discovery and trial dates, are reset as indicated below:

Deadline for Discovery Conference	5/30/2015
Discovery Opens	5/30/2015
Initial Disclosures Due	6/29/2015
Expert Disclosures Due	10/27/2015
Discovery Closes	11/26/2015
Plaintiff's Pretrial Disclosures	1/10/2016
Plaintiff's 30-day Trial Period Ends	2/24/2016
Defendant's Pretrial Disclosures	3/10/2016
Defendant's 30-day Trial Period Ends	4/24/2016
Plaintiff's Rebuttal Disclosures	5/9/2016
Plaintiff's 15-day Rebuttal Period Ends	6/8/2016

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.

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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.
