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

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| Proceeding | 91235385 |
| Party | Defendant<br>American International Industries |
| Correspondence Address | MARK D. KREMER<br>CONKLE, KREMER & ENGEL, PLC<br>3130 WILSHIRE BLVD., SUITE 500<br>SANTA MONICA, CA 90403<br>Email: lp@conklelaw.com |
| Submission | Motion for Relief from entry of Default Judgment |
| Filer's Name | Aleen Tomassian |
| Filer's email | a.tomassian@conklelaw.com |
| Signature | /s/Aleen M. Tomassian /s/ |
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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| Aloe Vera of America, Inc.<br><br>Opposer,<br><br>v.<br><br>American International Industries<br><br>Applicant. | Opposition No. 91235385<br>Serial No. 87206884<br><br>**OPPOSITION TO OPPOSER'S MOTION TO STRIKE; MOTION TO ACCEPT LATE-FILED ANSWER; AND SHOWING OF GOOD CAUSE AGAINST ENTRY OF DEFAULT** |

**OPPOSITION TO OPPOSER'S MOTION TO STRIKE; APPLICANT'S MOTION TO ACCEPT LATE-FILED ANSWER; AND SHOWING OF GOOD CAUSE AGAINST ENTRY OF DEFAULT**

## I. INTRODUCTION

On July 5, 2017 Opposer Aloe Vera of America, Inc. ("AVA") filed an Opposition to Applicant American International Industries's ("Applicant") registration of the FOREVER KISSABLE mark, Serial No. 87/206,884 (the "Mark".) The Board's July 5, 2017 Order required Applicant to file an answer to the Notice of Opposition on August 14, 2017. Though Applicant's counsel received this Order, counsel inadvertently failed to calendar the response deadline (Tomassian Decl. ¶ 2,) and Applicant filed its Answer on August 16, 2017. Opposer filed a Motion to Strike Answer as Untimely on August 18, 2017, requesting that the Board hold Applicant in default.

Though Applicant admits that it filed its Answer to the Notice of Opposition late, it nevertheless submits that good cause exists for the Board to grant relief from default and accept Applicant's Answer. Applicant's failure to timely file an answer was not the result of willful conduct or gross neglect, Opposer will not suffer substantial prejudice if the Board does not enter a Notice of Default and does not strike Applicant's Answer, and Applicant has a meritorious

defense to the Opposition. For all these reasons, Applicant respectfully requests that the Board not grant a Notice of Default and not strike Applicant's Answer.

## II. LEGAL ARGUMENT

"[T]he showing which has consistently been required by the Board . . . to permit the late filing of an answer is that set forth in Rule 55(c), i.e., good cause, and not the excusable neglect required by Rule 6(b)(2)." *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc., d.b.a., Parfums Gianelli*, 21 U.S.P.Q.2d 1556, 1557 (T.T.A.B. 1991). *See also* TBMP § 312.02. Good cause is usually established if the party can show: "[1] the delay in filing is not the result of willful conduct or gross neglect on the part of the defendant; [2] if the delay will not result in substantial prejudice to the plaintiff; and [3] if the defendant has a meritorious defense." *Fred Hayman*, 21 U.S.P.Q.2d at 1557.

The decision to set aside a notice of default rests in the sound discretion of the Board. TBMP § 312.02; *Paolo's Associates Limited Partnership v. Bodo*, 21 U.S.P.Q.2d 1899, 1990 (Comm'r 1990). In determining whether a party can establish good cause for setting aside a notice of default, the Board should remain "mindful of the fact that it is the policy of the law to decide cases on their merits." TBMP § 312.02. *See also, Alpine Mortgage Corp.*, Opp. No. 91166379, 2006 WL 2401271, at *1 (Aug. 14, 2006) (non-precedential) ("The Board is mindful of its policy to decide cases on their merits."). Generally, the Board is "very reluctant to 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." TBMP § 312.02.

### A. DELAY IN FILING ANSWER TO OPPOSITION WAS NOT THE RESULT OF WILLFUL CONDUCT OR GROSS NEGLIGENCE

Where the failure to file a timely answer is "due to an inadvertence on the part of applicant's counsel," that failure is "not the result of any willful conduct or gross neglect." *Fred*

*Hayman*, 21 U.S.P.Q.2d at 1557. Even where a party takes a "lax" or "cavalier" approach to filing deadlines, it has not acted willfully or with gross neglect. *Advanced Commun. Design, Inc. v. Premier Retail Networks, Inc*., 46 Fed. Appx. 964, 972 (Fed. Cir. 2002).

In this case, Applicant's failure to file a timely answer to the Opposition was the result of a calendaring error. Upon receiving the Board's Scheduling Order, Applicant's counsel inadvertently failed to calendar the deadline for Applicant's response to the Opposition. (Tomassian Decl. ¶ 2) Such an inadvertent error does not amount to willful conduct or gross negligence. *See Paolo's Associates*, 21 U.S.P.Q.2d 1899 (finding that a failure to file an answer resulting from a purported error in defendant's counsel's docketing system did not amount to willful conduct or gross neglect). *See also*, *Kampfer v. Cuomo*, 993 F. Supp. 2d 188, 192 (N.D.N.Y. 2014); *Gamez v. Hosp. Klean of Texas, Inc.*, 2013 WL 1089040, at *2 (W.D. Tex. Mar. 14, 2013) ("inadvertent calendaring error" is not willful conduct, so good cause shown); *Katavola v. HRchitect, Inc.*, 2013 WL 375490, at *2 (E.D. Tex. Jan. 30, 2013) (holding the same).

As Applicant's failure to timely file an answer to the Opposition was not the product of willful conduct or gross neglect, this factor weighs in favor of a finding of good cause for not entering a Notice of Default and not striking Applicant's Answer. Opposer's protestations to the contrary are ill-founded. Counsel's correspondence with Opposer's Counsel prior to the Opposition being instituted has no bearing on the delay. Upon discovery of the calendaring error during a review of outstanding applications, Applicant plainly moved as swiftly as possible to remedy its Counsel's calendaring error. (Tomassian Decl. ¶ 2) Opposer is responsible for its decision to file a Motion to Strike and oppose the relief requested herein, which relief is regularly granted in these circumstances.

### B. OPPOSER WILL NOT BE SUBSTANTIALLY PREJUDICED BY THE DELAY

The Federal Circuit has given some guidance as to what kind of prejudice is relevant in determining good cause for setting aside a notice of default. In this context, "prejudice refers to more concrete and litigation-specific difficulties, such as loss of evidence, increased difficulties in discovery, or greater opportunities for fraud and collusion."*Advanced Commun. Design*, 46 Fed. Appx. at 973 (citing *Johnson v. Dayton Elec. Mfg. Co*., 140 F.3d 781, 785 (8th Cir. 1998)). But, "[a]s numerous decisions make clear, prejudice may not be found from delay alone or from the fact that the defaulting party will be permitted to defend on the merits." *Johnson*, 140 F.3d at 785.

Nothing about the present proceedings indicates that Opposer is at risk of loss of evidence, increased difficulties in discovery, or opportunities for fraud and collusion. Applicant's answer to the Opposition was due on August 14, 2016, and Applicant filed its Answer a mere 2 days later. Even if a delay in the proceedings on its own were sufficient to establish prejudice, the present delay of just two days would not warrant a finding of prejudice. The Board has repeatedly held that even longer delays are not sufficient to establish prejudice. *See Advanced Commun. Design*, 46 Fed. Appx. at 971-74 (finding good cause where plaintiff's answer was 37 days late); *DeLorme Publishing Company, Inc. v. Eartha's, Inc.*, 60 U.S.P.Q.2d 1222 (T.T.A.B. 2000) (six month delay not prejudicial, but finding no good cause on other grounds); *El Encanto, Inc. v. SOS Arana Alimentacion, S.A*, 2001 WL 531176 (T.T.A.B. May 18, 2001) (non-precedential) (three month delay not prejudicial, though no good cause where failure to answer was a tactical decision).

Granting relief from default and accepting Applicant's Answer would not prejudice Opposer in any cognizable fashion—the delay in these proceedings has been minimal, and no

other litigation-related prejudice is present here. This factor weighs in favor of finding good cause for not issuing a Notice of Default or striking Applicant's Answer.

### C. APPLICANT HAS A MERITORIOUS DEFENSE TO THE OPPOSITION

"By the submission of an answer which is not frivolous, [an] applicant [may] adequately shown that it has a meritorious defense." *Fred Hayman*, 21 USPQ2d at 1557. In this context, "a meritorious defense does not mean a defense that would indisputably compel a finding in the defaulting party's favor." *Advanced Commun. Design*, 46 Fed. Appx. at 973. "Rather, a meritorious defense means that the evidence or argument proffered by the defaulting party could reasonably lead to a finding in the defaulting party's favor." *Id. See also Delorme*, 60 U.S.P.Q.2d 1222 ("all that is necessary to establish a 'meritorious defense' in this context is a plausible response to the allegations contained in the notice of opposition").

Applicant filed an Answer on August 18, 2017. Moreover, Applicant's defense is meritorious because the Applicant's Mark and Opposer's registrations convey different commercial impressions such that there is no likelihood of confusion, and also numerous similar marks are registered for similar goods or services, such that a crowded field exists. (Tomassian Decl., ¶3) Thus, Applicant has submitted a plausible response to the allegations of the Opposition, and this factor favors relief from entry of default.

## III. CONCLUSION

Considering the policy of the law to decide cases on their merits, Applicant can clearly establish good cause for relief form default. The failure to timely file an answer was the result of an inadvertent calendaring error, not any willful conduct or gross neglect. Further, Opposer will suffer no cognizable prejudice if no Notice of Default is entered and Applicant's Answer is not

striken. And finally, Applicant has proffered a meritorious defense to the Opposition through the Answer it submitted. Applicant therefore respectfully requests that the Board deny Opposer's Motion to Strike, grant relief from default and accept Applicant's Answer .

Dated: August 18, 2017

By: */s/ Aleen M. Tomassian /s/*

Mark D. Kremer
Aleen M. Tomassian
Attorneys for Applicant American International Industries

CONKLE, KREMER & ENGEL
Professional Law Corporation
3130 Wilshire Boulevard, Suite 500
Santa Monica, California 90403-2351
Phone: (310) 998-9100
Fax: (310) 998-9109
*m.kremer@conklelaw.com*
*a.tomassian@conklelaw.com*
*tm@conklelaw.com*

**DECLARATION OF ALEEN M. TOMASSIAN**

I, Aleen M. Tomassian, hereby declare as follows:

1. I am an active member of the State Bar of California. I am a member of Conkle, Kremer & Engel, whose members are counsel of record for Applicant American International Industries. I make this declaration of facts known to me and, if called upon, I could and would testify competently to the facts stated herein.

2. Upon receiving notice of the Board's July 5, 2017 Order setting forth the schedule for this matter, my firm inadvertently failed to calendar the deadline for Applicant's Response to the Opposition. This calendaring error was not an intentional decision on either my firm or Applicant's part. We discovered the error upon a review of outstanding applications on August 16, 2017 and filed an answer that same day.

3. In written correspondence with Opposer's Counsel, Applicant raised defenses to Opposer's claim of a likelihood of confusion, including but not limited to a defense based on the different commercial impressions conveyed by Applicant's and Opposer's marks, and a defense based on the existence of a crowded field that are set forth in Applicant's Answer.

I declare under penalty of perjury under the laws of the State of California and United States of America that the foregoing facts are true and correct, and that this declaration was executed on August 18, 2017.

*/s/Aleen M. Tomassian/s/*
Aleen M. Tomassian