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

Proceeding	91271702
Party	Defendant GARCOA, INC.
Correspondence Address	MICHAEL A. PAINTER, ESQ. ISAACMAN, KAUFMAN, PAINTER, LOWY & ZUCKER 1100 GLENDON AVE 15TH FL LOS ANGELES, CA 90024 UNITED STATES Primary Email: painter@ikplaw.com Secondary Email(s): conaway@ikplaw.com 310-881-6800
Submission	Motion for Relief from entry of Default Judgment
Filer's Name	Michael A. Painter/
Filer's email	painter@ikplaw.com
Signature	/Michael A. Painter/
Date	11/08/2021
Attachments	DOC3064.2021.1.pdf(904005 bytes) DOC3065.2021.1.pdf(2888685 bytes)

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

ALL CLEAN NATURAL, LTD.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No.
	)	91/271,702
GARCOA, INC.,	)	
	)	
Applicant.	)	
	)	

APPLICANT'S OPPOSITION TO ENTRY OF DEFAULT

Applicant Garcoa, Inc. ("Applicant"), by and through its counsel, files this Opposition to the Notice of Default. By this Opposition, Applicant respectfully requests that the Trademark Trial and Appeal Board should discharge the entry of default and reset the time for filing an answer to the Notice of Opposition.

I

STATEMENT OF FACTS

On September 15, 2021, Opposer filed a Notice of Opposition to registration of the CLEAN N' NATURAL trademark. Because the issues raised by the opposition proceeding were already subject to litigation in federal court, on September 16, 2021, counsel for the parties agreed to the submission of a Stipulation to Stay Further Proceedings pending a decision in the litigation. Opposer's counsel represented that, after making any revisions required by Applicant's counsel, the Stipulation would be submitted to the Board. Opposer's counsel was advised no revisions were required. Relying on opposing counsel's representation, Applicant's counsel mistakenly believed the Stipulation had been in fact filed. Applicant's counsel did not discover that the Stipulation had not been filed until receipt of the Notice of Default. *Painter Declaration*, ¶¶ 1-5, inclusive; Exhibits 1, 2.

II

ARGUMENT AND AUTHORITIES

The determination of whether a default should be entered against a party lies within the sound discretion of the Board. *Indenticon Corp. v. Williams*, 195 USPQ 447, 449 (Comm'r 1977); TBMP §312.02. In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. TBMP §312.02. Accordingly, the Board is reluctant to enter a default for failure to file a timely answer and tends to resolve any doubts in the matter in favor of the defendant. *Id.*

If a defendant can show "good cause" to cure the matter, the Board will discharge a default. F.R.Civ.P. §55(c); TBMP §§312.02; 508. Good cause exists where the defendant shows that: (1) the delay in filing an answer was not the result of willful misconduct or gross negligence; (2) the plaintiff will not be substantially prejudiced by the delay; and (3) the defendant has a meritorious defense. TBMP §312.02; *DeLorme Publishing Co. V. Eartha's Inc.*, 60 U.S.P.Q.2d 1222, 1224 (T.T.A.B. 2000).

A. Applicant's Failure to Answer the Notice of Opposition Was Inadvertent.

Applicant only recently became aware that the Stipulation agreed to by the parties had not been submitted in accordance with the representations made by Plaintiff's counsel.

B. Setting Aside the Entry of Default Will Not Prejudice the Plaintiff.

The Stipulation to Stay Further Proceedings was prepared by Plaintiffs counsel. At this early stage of a proceeding, there is no measurable prejudice to the Plaintiff if the Entry of Default is discharged and further proceedings stayed pending a decision in the litigation between the parties. See *Feliciano v. Reliant Tooling Co.*, 691 F.2d 653, 656-57 (3d Cir. 1982).

C. Applicant Has a Meritorious Defense.

The showing of a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response. *DeLorme Publishing Co. V.*

Eartha's Inc., supra., 60 U.S.P.Q. 2nd at 1224. Applicant's defense is the failure of Plaintiff's counsel to submit the Stipulation to the Board as he represented that it would be. It is submitted that Applicant has demonstrated a meritorious defense to the Entry of Default.

III

CONCLUSION

Where, as here, a defendant has made a satisfactory showing of good cause in response to a Notice of Default. The entry of a default under Rule 55(c), F.R.Civ.P. should be discharged.

WHEREFORE, Applicant requests that the Entry of Default be discharged and that the Board either reset the date to respond to the Notice of Opposition or stay proceedings in accordance with the Stipulation that had been agreed to by the parties.

Respectfully submitted,

ISAACMAN, KAUFMAN, PAINTER,
LOWY & ZUCKER

By: _____
Michael A. Painter
Attorneys for Plaintiff

Dated: November 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing APPLICANT'S OPPOSITION TO ENTRY OF DEFAULT has been served on Opposer's counsel by forwarding said copy via first class mail, this 8th day of November, 2021 as follows:

Anton N. Handal
Adam M. Winokur
Murchison & Cumming, LLP
801 So. Grand Avenue
Ninth Floor
Los Angeles, California 90017

SHERYL R. CONAWAY

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

ALL CLEAN NATURAL, LTD.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No.
	)	91/271,702
GARCOA, INC.,	)	
	)	
Applicant.	)	
	)	

DECLARATION OF MICHAEL A. PAINTER

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, MICHAEL A. PAINTER, do hereby declare that:

1. I am the attorney of record for Garcoa, Inc., the defendant and Applicant in this matter.

2. I first became aware of the Notice of Opposition on September 15, 2021. The issues of the registrability and enforceability of Applicant's CLEAN N' NATURAL trademark were the subject of litigation entitled Garcoa, Inc. v. All Clean Natural, Ltd. in the United States District Court for the District of California, Case No. 2:20-cv-09827-VAP-SKx. On September 16, 2021 I forwarded email to Tony N. Handal, the supervisor of opposer's counsel, Adam M. Winokur, informing him that since the issues raised by the Notice of Opposition were already being litigated in federal court and are scheduled for trial on January 18, 2022, a Stipulation should be filed with the Trademark Trial & Appeal Board staying the opposition proceeding. In response, I received email from Mr. Winokur to which was attached a Stipulated Motion to Stay Further Proceedings in this matter, a copy of the email and Stipulated Motion being attached hereto as Exhibit 1.

3. I received the Notice of Default on November 8, 2021.

4. On September 17, 2021, I forwarded email to Mr. Winokur answering his inquiry and advising him that no revisions to the Stipulated Motion were required, a copy of my email being attached hereto as Exhibit 2. As a result, only after receiving the Notice of Default did I discover that the Stipulated Motion had never been filed by Mr. Winokur.

5. I did not respond to the Notice of Opposition because I had agreed to enter into a Stipulated Motion to Stay Further Proceedings and Mr. Winokur had represented the Stipulation would be submitted to the Board. Based on my agreement with Mr. Winokur and on his representations, the Entry of Default should be withdrawn.

6. The undersigned being hereby warned that willful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and that such willful false statements may jeopardize the validity of the application, any resulting registration or this opposition proceeding.

Executed this 8th day of November, 2021 at Los Angeles, California.

MICHAEL A. PAINTER

EXHIBIT 1

Michael Painter

From: Adam M. Winokur <AWinokur@murchisonlaw.com>
Sent: Thursday, September 16, 2021 6:18 PM
To: Michael Painter
Cc: Georgiana A. Nikias; Pamela C. Chalk; Tony N. Handal
Subject: RE: Garcoa, Inc. v. All Clean Natural/Objections to Discovery Responses
Attachments: Suspension of proceedings Brief in support of motion to suspend proceedings declaration.rtf

Mr. Painter,

Please find attached a Stipulated Motion to stay Opposition proceedings before the USPTO pending resolution of the District Court case. Please feel free to redline any changes you make, and please return it to me, so I may prepare it for submission.

Thank you,

Adam Winokur

MURCHISON & CUMMING LLP

LOS ANGELES
IRVINE
SAN DIEGO
NORTHERN CALIFORNIA
LAS VEGAS
ONTARIO

CELEBRATING 90 YEARS

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

ALL CLEAN NATURAL LTD., Opposer, v. Garcoa, Inc., Applicant	Opposition No.: 91271702 Serial No.: 90234966 Mark: CLEAN N' NATURAL Publication date: May 18, 2021

STIPULATED MOTION TO STAY FURTHER PROCEEDINGS

Pursuant to 37 C.F.R. § 2.117(a) and TBMP § 510.02(a), Applicant and Opposer, hereby jointly move that all further proceedings in this opposition be stayed, pending resolution of Civil Action No. 2:20-cv-09827-VAP-SK now pending in the United States District Court of the Central District of California. A copy of the Complaint and Answer in that action is attached to the accompanying Declaration of Adam M. Winokur.

As indicated by the contents of the Complaint in that matter, as well as the attached Declaration of Adam M. Winokur, the issues presented in the subject civil action largely overlap with those in this opposition. The matter has progressed substantially as discovery has been taken, dueling Motions for Summary Judgment are pending before the Court, and a trial date is firmly set for January 2022.

Accordingly, since resolution of this matter would appear to be almost complete in the United States District Court, and because the resolution there will resolve the issues before the Board, it is respectfully requested that all further proceedings in this opposition be stayed until the civil action is resolved.

PRELIMINARY STATEMENT

Opposer All Clean Natural LTD submits this stipulated motion to suspend the opposition proceedings herein pursuant to 37 C.F.R. § 2.117(a) and TBMP 510.02(a) in light of a civil action pending before the U.S. District Court for the Central District of California ("Parallel Action"). Declaration of Adam M. Winokur in support of Stipulated Motion to Stay Further Proceedings ("Winokur Decl."), ¶¶ 2, 3, Exhs A and B.

"Ordinarily, the Board will suspend proceedings in the case before it if the final determination of the other

proceeding will have a bearing on the issues before the Board." TBMP 510.02(a). Here, the outcome of the parties' civil action will have a direct bearing upon the outcome of this opposition proceeding. Both proceedings involve the same parties, the same mark, and the same issues.

Specifically, Applicant has filed a civil Complaint alleging trademark infringement, false designation of origin, and unfair competition in connection with Opposer's sale of hand sanitizers bearing the words "All Clean" and "All Clean Natural". Among the issues presented in the trademark civil action is an issue identical to the subject of this opposition proceeding: whether Applicant's mark is ineligible for registration as merely descriptive, or whether Applicant's mark has acquired distinctiveness.

In order to facilitate the resolution of these and related issues among the same parties and involving their respective rights in the asserted marks, Opposer and Applicant both respectfully request that this opposition proceeding be suspended pending the outcome of the adjudication of identical issues now before the U.S. District Court in California. This will prevent the needless duplication of proceedings and will consolidate for resolution in a single adjudication all issues presented in this opposition, together with related claims that are within the jurisdiction of a federal court but that exceed the jurisdiction of this Board. Accordingly, Opposer's and Applicant's stipulated motion to suspend this Opposition Proceeding should be granted pending the outcome of the civil action pending before the District Court in California.

STATEMENT OF FACTS

On September 15, 2021, Opposer All Clean Natural LTD filed a Notice of Opposition with the Trademark Trial and Appeal Board ("TTAB") opposing Applicant Garcoa, Inc.'s attempt to register the CLEAN N' NATURAL mark for use in connection with the sale of "hand-sanitizing preparations comprised of [sic] natural ingredients" in International Class 5. Winokur Decl., ¶ 3, Exh. C.

This Opposition Proceeding is based on Opposer's assertion that CLEAN N' NATURAL does not qualify to be registered as a trademark. Opposer alleges that the words "clean", "natural", and "clean [and] natural" are all merely descriptive and have not acquired distinctiveness as an indicator of the source of Applicant's products Winokur Decl., ¶ 3, Exh. C.

Further, this Opposition Proceeding is based on Opposer's assertion of its significant and valuable interest in its use of the terms "clean" and "natural" in describing its goods, which it uses in connection with the marketing and sale of an assortment of goods, including hand sanitizer.

Opposer filed a Complaint in the United States District Court for the Central District of California based on Applicant's sale of hand sanitizer featuring the word clean and including the word natural in the United States. Winokur Decl., ¶ 2, Exh. A. The Complaint alleges Trademark Infringement, False Designation of Origin, and Unfair Competition.

LEGAL ARGUMENT

THIS OPPOSITION PROCEEDING SHOULD BE SUSPENDED PENDING THE DISTRICT COURT'S RESOLUTION OF IDENTICAL DISPUTES ASSERTED IN BOTH PROCEEDINGS

A. This Opposition Proceeding Should Be Suspended Because the Civil Action Will Have a "Bearing On" and Be Dispositive of Registration Issues Presented Herein

This Board has the discretion to suspend its proceedings pending the final resolution of a civil action where the outcome of the civil action "may have a bearing on" issues presented in its proceedings. 37 C.F.R. § 2.117(a) (2007). TBMP 510.02(a) ("Ordinarily, the Board will suspend proceedings in the case before it if the final determination of the other proceeding will have a bearing on the issues before the Board."); *Other Tel. Co. v. Connecticut Nat'l Tel. Co.*, 181 U.S.P.Q. 125, 127 (T.T.A.B. 1974) (ruling for suspension when "the outcome of the civil action will have a bearing on the issues involved in the proceeding" *See also Kearns-Tribune, LLC v. Salt Lake Tribune Publishing Co.*, 2003 WL 22134916 at *3 (T.T.A.B. 2003) ("[s]uspension of a Board case is appropriate even if the civil case may not be dispositive of the Board case, so long as the ruling will have a bearing on the rights of the parties in the Board case."); *SoftBelly's Inc. v. Ty, Inc.*, 2002 WL 1844210 at *2 (T.T.A.B. 2002) ("[w]henever it shall come to the attention of the Trademark Trial and Appeal Board that a party or parties are engaged in a civil action ... which may have a bearing on the case, proceedings before the Board may be suspended until termination of the civil action."). Although these cases are not precedential, they are nevertheless persuasive examples of circumstances similar to those in this case in which the Board appropriately suspended its proceedings pending the outcome of separate civil actions.).

Here, each issue presented in this Opposition Proceeding is also before the District Court. Specifically, the District Court will determine whether the CLEAN N' NATURAL mark has acquired distinction, providing a secondary meaning, or whether the mark is ineligible for registration as merely descriptive. The resolution of this issue definitely will "have a bearing on the case" before the Board, and indeed will be "dispositive of the issues in this proceeding." *General Motors Corp. v. Cadillac Club Fashions, Inc.*, 22 U.S.P.Q.2d 1933, 1936 (T.T.A.B. 1992) (indicating that motion to suspend "well taken" since district court decision would be "dispositive" of the cancellation proceeding before Board).

In short, TTAB proceedings should be suspended where a court will resolve issues that overlap with and therefore have a "bearing on" the resolution of issues before the TTAB. *Whopper-Burger, Inc. v. Burger King Corp.*, 171 U.S.P.Q. 805, 807 (T.T.A.B. 1971) (granting suspension since the court's determination would "have a direct bearing on the question of the rights of the parties ... and may in fact completely resolve all the issues."); *Alfred Dunhill of London, Inc. v. Dunhill Tailored Clothes, Inc.*, 293 F.2d 685, 687 n.l (C.C.P.A. 1961), cert. denied, 369 U.S. 864 (1962) (noting that "[i]t appears to be the usual practice to stay registration proceedings pending the outcome of court actions between the same parties

involving related issues.") (citations omitted); McCarthy, Trademarks and Unfair Competition § 32.47 (2007) (indicating that "[i]t is standard procedure for the Trademark Board to stay administrative proceedings pending the outcome of court litigation between the same parties involving related issues.").

Accordingly, because the pending civil action "involves . . . the issues ... raised" before the Board, a suspension "can go a long way in resolving the problems relating to the issuance and existence of the registrations" at issue herein. *Miller v. B&H Foods, Inc.*, 209 U.S.P.Q. 357, 359 (T.T.A.B. 1981) (indicating that "under normal circumstances ... it is the practice to suspend the proceeding before the Board to await the outcome of the civil action and to determine its effect on the issues.").

For these reasons, Opposer's and Applicant's stipulated motion for a suspension of Board proceedings should be granted.

B. Suspension of TTAB Proceedings Will Avoid Duplicative Piecemeal Proceedings and Unnecessary Burden to the Parties and This Board

The TTAB's practice of favoring suspension of opposition proceedings pending the outcome of civil actions reflects a policy of favoring the efficient adjudication of all issues presented in a single forum, rather than in piecemeal adjudications that waste the resources of the parties and the TTAB itself. To further these goals, the TTAB has stated that "it is better policy to suspend proceedings ... until the civil suit has been finally concluded." *Tokaido v. Honda Associates*, 179 U.S.P.Q. 861, 862 (T.T.A.B. 1973). (*Accord Farah v. Topiclear Beauty Products, Inc.*, 2003 WL 22022077 at *5 (T.T.A.B. 2003) (although not precedential, reasoning that "[s]uspension would avoid the undesirable result of the parties litigating the same issue in two forums, with potentially inconsistent results and would minimize waste of both the parties' and the Board's resources.")

Efficient resolution of all disputes in a single forum is especially important whereas here a District Court has jurisdiction over all issues presented, and will be binding with respect to the resolution of the limited subset of registration and use issues before the TTAB. "The decision of the Federal district court is often binding upon the Board, while the decision of the Board is not binding upon the court." TBMP 510.02(a). See also Goya Foods Inc. v. Tropicana Products Inc., 846 F.2d 848, 853–854 (2d Cir.1988) (holding that the doctrine of primary jurisdiction is not appropriate "where, as in the pending case, a district court suit concerns infringement, [and] the interest in prompt adjudication far outweighs the value of having the views of the PTO.").

In short, a suspension of this Opposition Proceeding will avoid unnecessary duplication of proceedings on registration issues that will ultimately be subject to appeal and resolution by the District Court itself. Such issues are now pending before the Court and their resolution will have a direct bearing on the outcome of this Opposition Proceeding.

Accordingly, this Opposition Proceeding should be suspended to conserve the resources of the parties and this Board alike.

CONCLUSION

For the foregoing reasons, Opposer's and Applicant's stipulated motion to suspend this Opposition Proceeding pursuant to 37 C.F.R. § 2.117 and TBMP 510.02(a) pending the outcome and termination of the civil action now pending before the U.S. District Court for the Central District of California should be granted.

Dated: _____

Respectfully submitted,

_____	
Anton N. Handal, CA State Bar No. 113812 Adam M. Winokur, CA Bar No. 308501 Murchison & Cumming, LLP 801 S. Grand Avenue Ninth Floor Los Angeles, CA 90017 213.623.7400 thandal@murchisonlaw.com awinokur@murchisonlaw.com	Michael Painter, CA State Bar No. 43600 Isaacman Kaufman & Painter 1100 Glendon Ave, Fl 15 Los Angeles, CA 90024-3519 310-881-6800 painter@ikplaw.com

DECLARATION OF ADAM M. WINOKUR

I, Adam M. Winokur, declare and state:

I am an attorney-at-law licensed to practice in the State of California and I am an associate with Murchison & Cumming, LLP, counsel of record herein for All Clean Natural LTD. I am one of the attorneys at our firm responsible for handling this matter on behalf of All Clean Naturral LTD, and, on this basis, and upon such other bases set forth below, I have personal knowledge of the matters set forth in this Declaration, except where stated on information and belief, and could and would competently testify to them under oath if called as a witness.

1. Attached hereto and labeled exhibit A is a true and correct copy of Applicant Garcoa, Inc.'s, Complaint filed in the United States Federal District Court for the Central District of California, associated with Case No. 2:20-cv-09827-VAP-SK.

2. Attached hereto and labeled exhibit B is a true and correct copy of Opposer All Clean Natural LTD's Answer to Applicant Garcoa, Inc.'s, Complaint filed in the United States Federal District Court for the Central District of California, associated with Case No. 2:20-cv-09827-VAP-SK.

3. Attached hereto and labeled exhibit C is a true and correct copy of Opposer All Clean Natural LTD's Opposition to Applicant Garcoa, Inc.'s, application to register the mark CLEAN N' NATURAL in connection with "hand-sanitizing preparations comprised of [sic] natural ingredients" in International Class 5..

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 16th day of September, 2021, at Los Angeles, California.

_____

Adam M. Winokur

EXHIBIT 2

Michael Painter

From: Michael Painter
Sent: Friday, September 17, 2021 6:07 AM
To: Adam M. Winokur
Cc: Georgiana A. Nikias; Pamela C. Chalk; Tony N. Handal
Subject: RE: Garcoa, Inc. v. All Clean Natural/Objections to Discovery Responses

Adam,

The Stipulated Motion is fine. No revisions are required.

Very truly yours,

Michael

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing DECLARATION OF MICHAEL A. PAINTER has been served on Opposer's counsel by forwarding said copy via first class mail, this 8th day of November, 2021 as follows:

Anton N. Handal
Adam M. Winokur
Murchison & Cumming, LLP
801 So. Grand Avenue
Ninth Floor
Los Angeles, California 90017

SHERYL R. CONAWAY