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

Lykos

Mailed: August 20, 2007

Cancellation No. 92047568

A-Live Foods, Inc.

v.

Nature's Way Products, Inc.

Angela Lykos, Interlocutory Attorney

This case now comes up for consideration of petitioner's combined motion (filed July 16, 2007) (1) to strike respondent's answer as untimely, and for default judgment for respondent's failure to show cause why its answer was late; and (2) to strike respondent's fourth affirmative defense. The motion is fully briefed.[1]

I. *Petitioner's Motion For Default Judgment*

The standard for determining default judgment is found in Fed. R. Civ. P. 55(c), which reads in pertinent part:

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[1] Petitioner has submitted a reply brief which the Board has exercised its discretion to consider because it clarifies the issues herein. *See* Trademark Rule 2.127(a).

Respondent's responsive brief is construed as a cross-motion to accept its late-filed answer.

"for good cause shown the court may set aside an entry of default." 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 the defendant has a meritorious defense. *See Fred Hyman Beverly Hills, Inc. v. Jacques Bernier, Inc.,* 21 USPQ2d 1556 (TTAB 1991). Moreover, the Board is reluctant to grant judgments by default, since the law favors deciding cases on their merits. *See Paolo's Associates Limited Partnership v. Paolo Bodo,* 21 USPQ2d 1899 (Comm'r 1990).

In this instance, we find that respondent has shown cause sufficient to avoid a default judgment. First, there is no evidence that respondent's failure to timely answer the petition to cancel was either willful or the result of gross neglect. As stated in its responsive brief, respondent's answer was late due to a docketing error. Second, the Board can see no prejudice to petitioner, other than delay -- which the Board would not characterize as significant -- that would result from accepting respondent's late-filed answer. Respondent's answer is only four days late. Furthermore, discovery remains open, and by this order will be extended, giving the parties sufficient time to conduct any necessary fact-finding.

Finally, the Board finds that respondent has attempted to set forth a meritorious defense, by way of its answer. Whether respondent will prevail in this proceeding is, of course, a matter for trial.

In view of the foregoing, petitioner's combined motion to strike respondent's answer and enter default judgment against respondent is denied. Respondent's late-filed answer is hereby noted and accepted for the record.

II. *Petitioner's Motion to Strike Respondent's Fourth Affirmative Defense*

Petitioner has moved to strike respondent's fourth affirmative defense, contending that the Board will only consider geographic limitations within the context of a concurrent use proceeding.

Upon motion, the Board may order stricken from the pleadings any insufficient defense. *See* Fed. R. Civ. P. 12(f). Motions to strike are not favored, and matter will not be stricken, unless it clearly has no bearing upon the issues in the case. The primary purpose of pleadings, under the Federal Rules of Civil Procedure, is to give fair notice to the claims or defenses asserted. *See* TBMP §§ 309.03 and 311.02 (2d. ed. rev. 2004). Thus, the Board, in its discretion, may decline to strike even objectionable matter in pleadings, when its inclusion will not prejudice

the adverse party, but rather will provide fuller notice of the basis for a claim or defense. *See* TBMP § 506.01 (2d. ed. rev. 2004) and cases cited therein. A defense will not be stricken as insufficient if the insufficiency is not clearly apparent, or if it raises factual issues that should be determined on the merits. *See* Wright & Miller, Federal Practice and Procedure: Civil 2d § 1381 (1990).

Petitioner's motion to strike is well taken. The geographic extent of a party's use is irrelevant except in the context of a concurrent use proceeding. *See Pinocchio's Pizza Inc. v. Sandra, Inc.,* 11 USPQ2d 1227 (TTAB 1989). Indeed, as petitioner' points out in its reply brief, the case law respondent relies upon in support of its position pertains to concurrent use, not cancellation, proceedings.

In view thereof, petitioner's motion to strike is granted; respondent's fourth affirmative defense is hereby stricken from the answer.

III. *Stipulated Protective Agreement*

The stipulated protective agreement filed on July 19, 2007 is noted. The parties are referred, as appropriate, to TBMP §§ 412.03 (Signature of Protective Order), 412.04 (Filing Confidential Materials With Board), 412.05 (Handling of Confidential Materials by Board).

The parties are advised that only confidential or trade secret information should be filed pursuant to a stipulated protective agreement. Such an agreement may not be used as a means of circumventing paragraphs (d) and (e) of 37 CFR § 2.27, which provide, in essence, that the file of a published application or issued registration, and all proceedings relating thereto, should otherwise be available for public inspection.

IV. *Dates Reset*

Trial dates, including the closing date of discovery, are reset as follows:

THE PERIOD FOR DISCOVERY TO CLOSE:	1/12/08
30-day testimony period for party in position of plaintiff to close:	4/11/08
30-day testimony period for party in position of defendant to close:	6/10/08
15-day rebuttal testimony period for plaintiff to close:	7/25/08

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.l25.

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.l29.