

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

ORBIS DISTRIBUTION, INC.)

Plaintiff,)

v.)

BEE NATURALS, INC.)

Defendant.)

Cancellation No. 92057500

Reg. No. 3197276

DEFENDANT'S MOTION TO ACCORD A FILING DATE

Comes now Defendant Bee Naturals, Inc. through undersigned counsel and moves the Board to accord a filing date of September 11, 2013 to its Response to Plaintiff's Motion for Default Judgment, attached hereto.

On August 22, 2013, Defendant moved this court for default judgment. On September 11, 2013, Defendant timely filed the attached Response to Motion for Default Judgment with a certificate of mailing. On October 23, 2013, the undersigned became aware that a copy of Defendant's Response to Motion for Default was not listed on the ESTTA filing system and brought this present motion.

For the foregoing reasons, Defendant requests that this motion be granted.

Respectfully Submitted,

By: 

Nelson D. Nolte, Reg. No. 42,938
Polster, Lieder, Woodruff & Lucchesi, L.C.
12412 Powerscourt Drive, Suite 200
St. Louis, Missouri 63131
(314) 238-2400 Phone
(314) 238-2401 Fax
Attorneys for Defendant BEE NATURALS, INC.



10-31-2013

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Motion for Extension of Time is being served via first class U.S. mail, postage pre-paid this 23rd day of October 2013 upon the following:

John M Bolger
Bolger Legal Group LLC
P.O. Box 170616
Whitefish Bay, WI 53217
Attorney for Plaintiff



Nelson D. Nolte

CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to ATTN: Trademark Trial and Appeal Board, Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia 22313-1451 on October 23, 2013.



Nelson D. Nolte

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Plaintiff,)	
)	Cancellation No. 92057500
v.)	
)	Reg. No. 3197276
BEE NATURALS, INC.)	
)	
Defendant.)	

DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION FOR DEFAULT JUDGMENT

Comes now Defendant Bee Naturals, Inc. through undersigned counsel and submits this paper as its response to Plaintiff’s Motion for Default Judgment.

On July 12, 2013, Plaintiff filed a petition for cancellation alleging abandonment and fraud. The abandonment claims have two bases: 1) that the corporation BeeNaturals, Inc. has been administratively suspended by the Missouri Secretary of State and 2) that the present registration lists the owner as “Bee Naturals, Inc.” even though the Missouri corporate registration is for “BeeNaturals, Inc.” (that is, without a space between “Bee” and “Naturals”). The fraud claims are based upon these same issues.

On August 21, 2013, undersigned counsel contacted opposing counsel with a request for consent to a motion for a 30-day extension of time because counsel had recently been retained by Defendant for representation in this action. Plaintiff’s counsel never responded to the request, and Defendant filed a motion for a 30-day extension of time, upon which this Board has not yet ruled.

Despite a Motion for Extension of Time having been filed and not ruled upon by the Board, on August 22, 2013 Plaintiff filed a premature Motion for Default Judgment.

Default judgment is disfavored and the Board prefers to decide cases upon the merits. *DeLorme Publishing Co. v. Earthaís Inc.*, 60 U.S.P.Q.2d 1222 (T.T.A.B. 2001). In the present case Defendant has filed a motion for extension of time to answer the Petition and the Board has not yet ruled on that motion. Defendant submits that a motion for default judgment prior to the Board's ruling on the motion for extension of time is premature.

Regardless, a motion for default judgment is only grantable if it is shown that 1) the delay in filing was not the result of willful conduct or gross neglect, 2) the delay will not result in substantial prejudice to the other party, and 3) the defendant has a meritorious defense. *Id.*

As to the first point, the delay in filing is not willful conduct or gross neglect because it is not yet even known whether the deadline will be extended by the Board pursuant to Defendant's motion for extension of time. Therefore, it is unknown whether the Answer will even be deemed late.

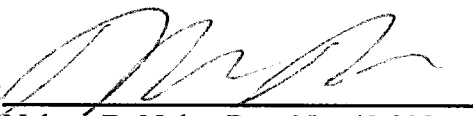
Second, a 30-day delay will not result in substantial prejudice to Plaintiff, *nor has Plaintiff made an allegation that a 30 day delay will result in substantial prejudice to it.*

Third, Defendant also submits that it has meritorious defenses. Specifically, Plaintiff has misinterpreted Missouri law by alleging that an administratively dissolved corporation ceases to exist. See RSMO 351.486. Moreover, Defendant has a defense that during the period of administrative dissolution, it existed as a *de facto* corporation or, alternatively, that the Defendant was an entity doing business as BeeNaturals, Inc.

For the foregoing reasons, Plaintiff's premature motion for default judgment should be denied.

Respectfully Submitted,

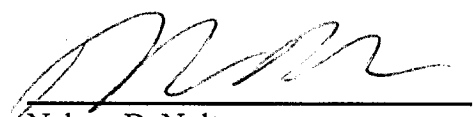
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St. Louis, Missouri 63131
(314) 238-2400 Phone
(314) 238-2401 Fax
Attorneys for Defendant BEE NATURALS, INC.

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I hereby certify that a true and correct copy of Defendant's Response to Plaintiff's Motion for Default Judgment is being served via first class U.S. mail, postage pre-paid this 11th day of September 2013 upon the following:

John M Bolger
Bolger Legal Group LLC
P.O. Box 170616
Whitefish Bay, WI 53217
Attorney for Plaintiff


Nelson D. Nolte

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BEE NATURALS, INC.)	
)	
Defendant.)	

DEFENDANT’S RESPONSE TO PLAINTIFF’S MOTION TO STRIKE

Comes now Defendant Bee Naturals, Inc. through undersigned counsel and submits this paper as its response to Plaintiff’s motion to strike.

I. Introduction

On July 12, 2013, Plaintiff filed a petition for cancellation alleging abandonment and fraud. The abandonment claims have two bases: 1) that the corporation BeeNaturals, Inc. has been administratively suspended by the Missouri Secretary of State and 2) that the present registration lists the owner as “Bee Naturals, Inc.” even though the Missouri corporate registration is for “BeeNaturals, Inc.” (that is, without a space between “Bee” and “Naturals”). The fraud claims are based upon these same issues.

On August 21, 2013, undersigned counsel contacted opposing counsel with a request for consent to a motion for a 30-day extension of time because counsel had recently been retained by Defendant for representation in this action. Plaintiff’s counsel never responded to the request, and Defendant filed a motion for a 30-day extension of time, upon which the Board has not yet ruled.

Despite a Motion for Extension of Time having been filed and not ruled upon by the Board, on August 22, 2013, Plaintiff filed a premature Motion for Default Judgment.

On September 20, 2013 (the date of the extension requested by the motion for extension of time), Defendant filed its Answer to the Petition for Cancellation. The Answer denies the allegations that an administratively dissolved corporation ceases to exist under Missouri law, as Plaintiff alleges, denies that the discrepancy of a space in the owner's name of the present registration and the records of the Missouri Secretary of State is a difference which invalidates the present registration or is uncorrectable, and denies that an administratively dissolved corporation cannot be retroactively reinstated *as of the dissolution date* under Missouri law. The Answer also posits meritorious Affirmative Defenses of de jure corporation and constructive transfer. As such, Defendant has a meritorious case and has indicated its intent to defend this action.

Motions to strike are disfavored under the Federal Rules of Civil Procedure and Board practice. See Fed.R.Cir.Proc. 12(f); T.B.M.P. § 506.01. ("Motions to strike are not favored, and matter will not be stricken unless it clearly has no bearing upon the issues in the case. ... [T]he Board, in its discretion, may decline to strike even objectionable pleadings where their inclusion will not prejudice the adverse party, but rather will provide fuller notice of the basis for a claim or defense. 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.).

Plaintiff posits several flawed reasons why its motion to strike should be granted which are addressed below.

II. Reasons I and II- That Defendant “does not exist now”, “has never existed”, and “no longer exists” and Should Not Be Allowed to File an Answer

Defendant submits that these arguments do not support a motion to strike. Plaintiff essentially argues that the Board must accept the allegations of the Petition (that Defendant does not exist) as true and that Defendant has no opportunity to file pleadings answering this allegation. Under Plaintiff’s reasoning, a Defendant could never defend against a claim of the type Defendant alleges in its petition. Plaintiff cites no case law in support.

This is an obvious *non sequitur* and will not support a motion to strike.

III. Reason III- That the Attorney Signing the Answer is Not An “Attorney of Record”

This argument represents a failure to understand the rules of the Board. Section 114.03 of the TBMP states: “An attorney, as defined in 37 CFR § 11.1, will be accepted as a representative of a party in a proceeding before the Board if the attorney (1) signs a document that is filed with the Office on behalf of the party and satisfactorily identifies himself or herself as an attorney...”

Therefore, this argument has no basis in the rules or the law.

IV. Reasons IV and V - That Defendant Failed to Cite Legitimate Grounds for an Extension of Time or That the Answer is Not Germane to Plaintiff’s Motion for Default.

Defendant submits that legitimate grounds were stated in its Motion for Extension of Time to File an Answer. However, these reasons put forth by Plaintiff are not reasons to grant a motion to strike a pleading, but instead is merely a second attempt to argue against the motion for extension of time to file an answer. Briefing for the motion to extend time is complete and the Board has yet to rule. In any event, Plaintiff’s belief that a different motion is not grantable is not a reason to strike a different pleading under Rule 12(f).

V. Reason VI- That Defendant Did Not Respond to the Motion for Default.

Defendant submits that it did respond to the motion for default and re-submits its response concurrently with this pleading. Defendant notes that its pleading is not found on the ESTTA filing system.

VI. Reasons VII and VIII- That Defendant Did Not Respond to the Motion for Default.

For reasons 7 and 8, Plaintiff again refers to the substance of its allegations found in its Petition-- that Defendant does not exist and therefore the person signing the original application and the section 8&15 declarations were not the owner of the subject application/registration. Plaintiff then concludes that the Answer to the Petition must be stricken.

Again, as with reasons 1 and 2, Plaintiff claims that no party is allowed to defend this action because Plaintiff claims that the Defendant does not exist. Such an argument is absurd and would require the Board to accept Plaintiff's arguments as correct without a chance for Defendant to respond and defend.

VII. Conclusion

For the foregoing reasons, Plaintiff's motion to strike should be denied.

Respectfully Submitted,


By: 

Nelson D. Nolte, Reg. No. 42,938
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