

THIS ORDER IS NOT A
PRECEDENT OF THE
TTAB

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: April 3, 2017

Opposition No. 91221928
Cancellation No. 92062086

VDF Futureceuticals, Inc.

v.

Owen Ryan

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

On September 15, 2016, the Board entered Opposer/Petitioner's ("VDF") first amended pleadings in each of the Opposition and Cancellation into the record and allowed Applicant/Respondent ("Mr. Ryan") time to file amended answers. On October 26, 2016, no amended answers or other responses were of record and the Board entered notice of default for Mr. Ryan's failure to file amended answers.

Mr. Ryan timely responded to the Board's notice of default on November 26, 2016, arguing his failure to file amended answers was not willful but he was unable to file an answer due to severe illness for himself and his wife.

VDF responded arguing Mr. Ryan's lack of attention to these matters does not justify setting aside default, and during the same time period Mr. Ryan filed a motion for summary judgment in an unrelated Board proceeding. Such action, VDF argues, shows willful and/or gross neglect by "picking and choosing" in which Board

proceedings to act, cause prejudice due to delay for VDF, and Mr. Ryan did not show a meritorious defense because he did not include an amended answer to the new claims.

Technical Default Discharged

However the issue of a defendant's failure to file a timely answer is raised, the standard for determining whether default judgment should be entered based on such failure 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). The determination of whether default judgment should be entered against a party lies within the Board's sound 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.

The Board finds (1) Mr. Ryan has pleaded a meritorious defense by way of his denials asserted in his previous answer, (2) there is no evidence that Mr. Ryan's delay in responding was the result of willful conduct, gross negligence or bad faith, or that his piecemeal approach to multiple Board proceedings is somehow at odds with problems caused by illness, and (3) there is no prejudice to VDF as the mere passage of time is generally not considered prejudicial.

Accordingly, the Board **discharges technical default**.

Mr. Ryan has until TWENTY (20) DAYS from the mailing date of this order to submit amended answers to the amended notice of opposition and amended petition to cancel as construed herein below.

First Amended Notice of Opposition and First Amended Petition to Cancel

The Board next exercises its discretion to review the pleadings to help keep this case on track. VDF seeks to add “Claim II” of nonuse and “false declaration,” and “Claim III” the application was filed in the name of the wrong applicant and is void ab initio, to each of its pleadings.

As to Claim II, there is no statutory claim based on “false declaration.” A claim that the application was submitted or the registration “was obtained fraudulently” requires more than a false representation; it requires, inter alia, that the false representation be accompanied by deceptive intent. *DaimlerChrysler Corp. and Chrysler, LLC v. Am. Motors Corp.*, 94 USPQ2d 1086, 1089 (TTAB 2010) (citing *In re Bose Corp.*, 580 F3d 1240, 91 USPQ2d 1938 1942 (Fed. Cir. 2009) (noting there is no fraud if false misrepresentation is occasioned by honest misunderstanding or inadvertence without willful intent to deceive). VDF’s proposed claims of “false declaration” therefore fail to state a claim and are hereby **stricken** from both the amended notice opposition and the amended petition to cancel. The Board construes Claim II solely as one based on nonuse.

Pro Se Information

It is noted that Mr. Ryan intends to represent himself in this proceeding. While Patent and Trademark Rule 11.14 permits any person to represent himself, it is strongly advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in *inter partes* proceedings before the Board to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney. *See* TBMP § 114.02.

Trademark Rules 2.119(a) and (b) require that every submission filed in a proceeding before the Board must be served upon the other party or parties via email, and proper proof of such service must be made before the submission will be considered by the Board. Accordingly, all submissions filed in this proceeding must be accompanied by a statement, signed by the attorney or other authorized representative, attached to or appearing on the original submission when filed, clearly stating the date and manner in which service was made, the name of each party or person upon whom service was made, and the email address or other address. *See* TBMP § 113.03. Service must be made by email unless otherwise stipulated, or unless the filing party has satisfied the requirements for another method of service as set forth in Trademark Rule 2.119(b). The statement will be accepted as prima facie proof of service, must be signed and dated, and should take the form of a Certificate of Service as follows:

I hereby certify that a true and complete copy of the foregoing (insert title of submission) has been served on (insert name of opposing counsel or party) by forwarding said copy on (insert date of emailing), via email (or insert other

appropriate method of delivery) to: (set out name, address, and email address of opposing counsel or party).

Signature_____

Date_____

Submissions in Board proceedings must be made via ESTTA, the Electronic System for Trademark Trials and Appeals, and must be in compliance with Trademark Rules 2.126(a) and (b). *See* TBMP § 110.01. The ESTTA user manual, ESTTA forms, and instructions for their use are at <http://estta.uspto.gov/>.

It is recommended that any pro se party be familiar with the latest edition of Chapter 37 of the Code of Federal Regulations, which includes the Trademark Rules of Practice. Parties should also be familiar with the Trademark Trial and Appeal Board Manual of Procedure (TBMP), available at <http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>, the TTABVUE system for viewing the record for all Board proceedings, available at <http://ttabvue.uspto.gov/ttabvue/>, and the Standard Protective Order, available at <https://www.uspto.gov/trademarks-application-process/appealing-trademark-decisions/standard-documents-and-guidelines-0>.

Strict compliance with the Trademark Rules of Practice, and where applicable the Federal Rules of Civil Procedure, is required of all parties, whether or not they are represented by counsel. *McDermott v. San Francisco Women's Motorcycle Contingent*, 81 USPQ2d 1212, n.2 (TTAB 2006), *aff'd unpub'd*, 240 Fed. Appx.865 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 1109 (2008).

Proceedings Resumed/Dates Reset

Proceedings are resumed. The Board's order of September 15, 2016 is vacated in part as it set disclosure, discovery and trial dates that are inappropriate as such time has passed in this proceeding. Mr. Ryan has until **TWENTY (20) DAYS** from the mailing date of this order to submit amended answers to the amended notice of opposition and amended petition to cancel as construed herein.

Dates are reset as set out below.

Expert Disclosures Due	5/19/2017
Discovery Closes	6/18/2017
Plaintiff's Pretrial Disclosures Due	8/2/2017
Plaintiff's 30-day Trial Period Ends	9/16/2017
Defendant's Pretrial Disclosures Due	10/1/2017
Defendant's 30-day Trial Period Ends	11/15/2017
Plaintiff's Rebuttal Disclosures Due	11/30/2017
Plaintiff's 15-day Rebuttal Period Ends	12/30/2017

Generally, the Federal Rules of Evidence apply to Board trials. Trial testimony is taken and introduced out of the presence of the Board during the assigned testimony periods. The parties may stipulate to a wide variety of matters, and many requirements relevant to the trial phase of Board proceedings are set forth in Trademark Rules 2.121 through 2.125. These include pretrial disclosures, the manner and timing of taking testimony, matters in evidence, and the procedures for submitting and serving testimony and other evidence, including affidavits,

declarations, deposition transcripts and stipulated evidence. Trial briefs shall be submitted in accordance with Trademark Rules 2.128(a) and (b). Oral argument at final hearing will be scheduled only upon the timely submission of a separate notice as allowed by Trademark Rule 2.129(a).

NOTICE: CHANGES TO THE TRADEMARK TRIAL AND APPEAL BOARD (“BOARD”) RULES OF PRACTICE EFFECTIVE JANUARY 14, 2017

The USPTO published a Notice of Final Rulemaking in the Federal Register on October 7 2016, at 81 Fed. Reg. 69950. It sets forth **several** amendments to the rules that govern *inter partes* (oppositions, cancellations, concurrent use) and ex parte appeal proceedings. A correction to the final rule was published on December 12, 2016, at 81 Fed. Reg. 89382.

For complete information, the parties are referred to:

- The Board’s home page on the uspto.gov website:
<http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>
- The final rule: <http://www.uspto.gov/sites/default/files/documents/81%20FR%2069950.pdf>
- The correction to the final rule:
<http://www.uspto.gov/sites/default/files/documents/81%20FR%2089382.pdf>
- A chart summarizing the affected rules and changes:
http://www.uspto.gov/sites/default/files/documents/RulesChart_12_9_16.pdf

For **all** proceedings, including those **already in progress on January 14, 2017**, some of the changes are:

- All pleadings and submissions must be filed through ESTTA. Trademark Rules 2.101, 2.102, 2.106, 2.111, 2.114, 2.121, 2.123, 2.126, 2.190 and 2.191.
- Service of all papers must be made by email, unless otherwise stipulated. Trademark Rule 2.119.
- Response periods are no longer extended by five days for service by first-class mail, Priority Mail Express®, or overnight courier. Trademark Rule 2.119.
- Deadlines for submissions to the Board that are initiated by a date of service are 20 days. Trademark Rule 2.119. Responses to motions for summary judgment remain 30 days. Similarly, deadlines for responses to discovery requests remain 30 days.
- All discovery requests must be served early enough to allow for responses prior to the close of discovery. Trademark Rule 2.120. Duty to supplement discovery responses will continue after the close of discovery.
- Motions to compel initial disclosures must be filed within 30 days after the deadline for serving initial disclosures. Trademark Rule 2.120.

- Motions to compel discovery, motions to test the sufficiency of responses or objections, and motions for summary judgment must be filed prior to the first pretrial disclosure deadline. Trademark Rules 2.120 and 2.127.
- Requests for production and requests for admission, as well as interrogatories, are each limited to 75. Trademark Rule 2.120.
- Testimony may be submitted in the form of an affidavit or declaration. Trademark Rules 2.121, 2.123 and 2.125
- New requirements for the submission of trial evidence and deposition transcripts. Trademark Rules 2.122, 2.123, and 2.125.
- For proceedings **filed on or after January 14, 2017**, in addition to the changes set forth above, the Board's notice of institution constitutes service of complaints. Trademark Rules 2.105(a) and 2.113(a).

This is only a summary of the significant content of the Final Rule. All parties involved in or contemplating filing a Board proceeding, regardless of the date of commencement of the proceeding, should read the entire Final Rule.
