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

Proceeding	92073449
Party	Defendant Nature's Specialties, LLC
Correspondence Address	NATURE'S SPECIALTIES LLC 168 EAST FREEDOM AVENUE ANAHEIM, DE 92801 UNITED STATES efiling@knobbe.com no phone number provided
Submission	Motion for Relief from entry of Default Judgment
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Signature	/Marc E. Hankin/
Date	06/18/2020
Attachments	Natures Specialties - 92073449 - Motion to Vacate Notice of Default.pdf(46064 bytes) Natures Specialties - 92073449 - Declaration of Marc E Hankin.pdf(26319 bytes) Answer to Petition for Cancellation - ConSeal v Nature.pdf(35858 bytes)

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

ConSeal International Incorporated,)
)
)
Petitioner,) Cancellation No. 92073449
)
v.)
)
Nature’s Specialties, LLC,)
)
Registrant.)
_____)

**MOTION TO VACATE NOTICE OF DEFAULT AND MOTION FOR LEAVE
TO FILE ANSWER**

United States Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

TO THE TRADEMARK TRIAL AND APPEAL BOARD:

Pursuant to Fed. R. Civ. P. 55(c), TBMP 312.01, and TBMP 508, Registrant, Nature’s Specialties, LLC (“Registrant”), hereby moves the Trademark Trial and Appeal Board to Vacate the Notice of Default issued on June 4, 2020 and for an extension of time to file its Answer. A copy of the Registrant’s Answer is attached as Exhibit A. Petitioner ConSeal International Incorporated does not Oppose this Motion to Vacate Notice of Default. *See* the concurrently filed Declaration of Counsel Marc E. Hankin (“Decl. M. Hankin”) at ¶ 5.

The standard for determining whether default judgment should be entered against the defendant for its failure to file a timely answer to the complaint is the Fed. R. Civ. P. 55(c) standard, which requires that the defendant show good cause why default judgment should not be entered against it. TBMP 508.

I. Default Judgment Is Disfavored And Should Be Set Aside For Good Cause

Registrant submits that the circumstances surrounding Registrant's failure to file the Answer to the Cancellation demonstrates that there is good cause for, and the Board should grant, this Motion and permit the late filing of Registrant's Answer. Default judgments are strongly disfavored and, as such, courts should readily grant relief from default judgment by resolving doubts in favor of the defaulting party. *Community Dental Servs. v. Tani*, 282 F.3d 1164, 1170 (9th Cir. 2002) (default judgment is extreme and, whenever possible, cases should be decided on the merits); *United States ex rel. Time Equip. Rental & Sales, Inc. v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993) (the law disfavors judgment by default). The Board has the discretion to "vacate a judgment by default in accordance with Rule 60(b)" upon a showing of good cause, such as "mistake, inadvertence, surprise, or excusable neglect," or "any other reason that justifies relief." Fed. R. Civ. P. 55(c), 60(b)(1), 60(b)(6).

The Board has determined that good cause can be established if (1) the delayed filing was not a product of "willful conduct or gross neglect on the part of the defendant," (2) the delayed filing does not substantially prejudice the Petitioner, and (3) the Registrant has a meritorious defense. *Fred Haymen Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 U.S.P.Q.2d 1556, 1557 (T.T.A.B. 1991).

Determination as to whether default shall be set aside rests in the sound discretion of the Board; factors for consideration are: first, fact that governing Rule 60(b) is remedial in nature and must be liberally applied, second, default judgments are generally disfavored, third, doubt should be resolved in favor of motion to set aside default so that cases may be decided on their merits when relief sought is timely and movant has meritorious defense. *In re Ireco Industries, Inc.*, 2 BR 76, 22 Collier Bankr Cas (MB) 659 (Bankr. D. Or. Dec. 17, 1979).

A. The Delayed Filing Of The Answer Is Not A Product Of Willful Conduct Or Gross Neglect On The Part Of Registrant

Registrant's failure to timely file the Answer to the Petition for Cancellation was a result of an inadvertent mistake and was not a product of willful conduct or gross neglect.

Here, two specific issues caused Registrant to fail to timely file the Answer to the Petition for Cancellation. First, Registrant was in the process of changing counsel for all of its Trademark Matters when the Answer to Petition for Cancellation was due. While this first issue on its own would likely have not caused Petitioner to timely file its Answer, this issue was complicated by the COVID-19 pandemic because the prior law firm could not easily transfer to the new law firm the documents, including those related to this Petition for Cancellation. They did not advise me that an Answer was coming due, or even that this Cancellation had been filed, presumably because their office was not operating as usual due to the COVID-19 Quarantine and Shelter in Place. *See* Decl. M. Hankin ¶ 4. The combination of changing counsel for all of its Trademark Matters and dealing with the COVID-19 pandemic's effect on Registrant's old and new Counsel's business operations inadvertently caused Registrant to fail to timely file its Answer when the first Extension of Time expired.

Registrant switched to current counsel Hankin Patent Law, APC recently and current counsel obtained Power of Attorney over U.S. Trademark Registration No. 2,956,207 on May 2, 2020, and current counsel was not made aware of the pending Cancellation or the deadline to file the Answer by predecessor Counsel until the day that the Notice of Default was actually entered. *See* Decl. M. Hankin ¶ 2, 3

Accordingly, the inadvertent delay in filing the Answer to Opposition is not a result of willful conduct or gross negligence, and there are other good reasons to justify relief.

B. Registrant's Delay Will Not Prejudice Opposer

Further, Registrant submits that the delay in filing the Answer to the Cancellation will not prejudice the Petitioner. Indeed, Petitioner has agreed that it will not Oppose this

Motion to Vacate Notice of Default. *See* Decl. M. Hankin at ¶ 5. Thus, by Vacating the Notice of Default, Registrant submits that Petitioner would not be prejudiced.

C. Registrant Has A Meritorious Defense

Finally, the attached Answer demonstrates that Registrant has a meritorious defense to the claims in the instant Cancellation and in favor of continued registration, in that Registrant never intended to abandon its KENNEL KLEAN Mark and, in fact, Registrant is making current use of the KENNEL KLEAN Mark in commerce in the United States. Accordingly, the Cancellation Petition will fail.

II. Conclusion

As established in the Declaration of Registrant’s Counsel Marc Hankin, and the attached Answer, the failure to timely Answer and respond to the Notice of Default was not the result of willful conduct or gross neglect, the Petitioner would not be prejudiced by the grant of the instant motion, and the Registrant has a meritorious defense. Accordingly, the circumstances merit the grant of the instant Motion and Registrant respectfully requests that this Motion be granted and that its Answer be accepted and made of record.

Respectfully Submitted,

DATED: June 18, 2020

HANKIN PATENT LAW, APC

By: *Marc E. Hankin*
Marc E. Hankin
Attorneys for Registrant Nature’s
Specialties, LLC

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 12400 Wilshire Blvd., Suite 1265, Los Angeles, CA 90025.

I certify that on July 18, 2018, I caused to be served a copy of the foregoing **MOTION TO VACATE NOTICE OF DEFAULT AND MOTION FOR LEAVE TO FILE ANSWER** on Counsel for Petitioner by e-mail, addressed as follows:

Joshua D. Martin
Johnson & Martin, P.A.
500 West Cypress Creek Road
Suite 430
Fort Lauderdale, FL 33309
JOSH.MARTIN@JOHNSONMARTINLAW.COM,
litigation@johnsonmartinlaw.com
(954) 790-6699

- ___ (BY MAIL) The envelope was mailed with postage thereon fully prepaid U.S. Mail. I am “readily” familiar with the firm’s practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business.
- ___ (BY PERSONAL SERVICE) I delivered such envelope by hand to the office of the addressee listed above.
- XX Via E-Mail to the e-mail address of the addressee listed above.
- ___ Via Facsimile to the fax number of the addressee listed above.

Date: July 18, 2018

/Anooj Patel/

Anooj Patel

Answer by predecessor Counsel until the day that the Notice of Default was actually Entered.

4. Due to the COVID-19 pandemic, Registrant's prior law firm could not easily transfer to me and Hankin Patent Law, APC Registrant's documents, including those related to Petition for Cancellation No. 92073449. They did not advise me that an Answer was coming due, or even that this Cancellation had been filed, presumably because their office was not operating as usual due to the COVID-19 Quarantine and Shelter in Place.

5. Very graciously, Counsel for Petitioner ConSeal International Incorporated has informed the undersigned that Petitioner does not Oppose this Motion to Vacate Notice of Default.

I declare under penalty of perjury under the laws of the United States and the State of California, that the foregoing is true and correct and was executed this 18th day of June, 2020, at Los Angeles, California.

Respectfully Submitted,

Marc E. Hankin

Marc E. Hankin, Esq.

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 12400 Wilshire Blvd., Suite 1265, Los Angeles, CA 90025.

I certify that on June 18, 2020, I caused to be served a copy of the foregoing **DECLARATION OF MARC E. HANKIN IN SUPPORT OF MOTION TO VACATE NOTICE OF DEFAULT AND MOTION FOR LEAVE TO FILE ANSWER** on Applicant and Counsel for Petitioner by e-mail, addressed as follows:

Joshua D. Martin
Johnson & Martin, P.A.
500 West Cypress Creek Road
Suite 430
Fort Lauderdale, FL 33309
JOSH.MARTIN@JOHNSONMARTINLAW.COM,
litigation@johnsonmartinlaw.com
(954) 790-6699

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- Via Facsimile to the fax number of the addressee listed above.

Date: June 18, 2020

/Anooj Patel/

Anooj Patel

Exhibit A

results for “Kennel Klean”. Registrant denies that it has ceased selling products under, never sold products under, has ceased using and abandoned, or never used. the KENNEL KLEAN Mark. Exhibits A and B speak for themselves, and accordingly, Registrant declines to admit or deny allegations related thereto.

4. Registrant admits that Exhibit C appears to be a printout from the Waybackmachine reflecting a webpage on Registrant’s website as it appeared in 2015 that lists products sold by Registrant at that time. Exhibit C speaks for itself, and accordingly, Registrant declines to admit or deny allegations related thereto. Registrant denies that it has had no bona fide use of the KENNEL KLEAN Mark cited in the ‘207 Registration in the ordinary course of trade in the United States within the last three years.

5. Registrant denies the allegations of ¶5, page 2, of the Petition for Cancellation.

6. Registrant denies the allegations of ¶6, page 3, of the Petition for Cancellation.

7. Registrant admits that Exhibit D appears to be a filing receipt for US Trademark Application No. 88/207,594. Registrant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in ¶ 7 and therefore denies the remaining allegations of ¶ 7, page 3, of the Petition for Cancellation.

8. Registrant is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶ 8 and therefore denies the allegations of ¶ 8, page 3, of the Petition for Cancellation.

9. Registrant is without knowledge or information sufficient to form a belief as to the truth of the allegations in ¶ 9 and therefore denies the allegations of ¶ 9, page 3, of the Petition for Cancellation.

10. Registrant denies the allegations of ¶10, page 4, of the Petition for Cancellation. While there might be a rebuttable presumption of abandonment if there can be proved to be no use for more than three years, Registrant is currently using the KENNEL KLEAN Mark and there has been no intention to abandon use of the mark whatsoever. Quite to the contrary, Registrant is absolutely continuing to use the KENNEL KLEAN Mark and absolutely intends to continue doing so in the future.

WHEREFORE, Registrant respectfully requests: (1) dismissal of the Petition for Cancellation with prejudice in its entirety, (2) a finding that U.S. Trademark Registration No. 2,956,207 be maintained, and (3) that the Petition for Cancellation be

determined in favor of Registrant.

Applicant appoints Marc E. Hankin, Esq. and Hankin Patent Law, APC, 12400 Wilshire Blvd., Suite 1265, Los Angeles, California 90025, to transact all business on its behalf in connection with this Opposition.

Dated: June 18, 2020

Respectfully submitted,

Marc E. Hankin

Marc E. Hankin
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Attorneys for Registrant

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 12400 Wilshire Blvd., Suite 1265, Los Angeles, CA 90025.

I certify that on June 18, 2020, I caused to be served a copy of the foregoing **REGISTRANT'S ANSWER TO PETITIONER'S PETITION FOR CANCELLATION OF REGISTRATION NO. 2,956,207** on Counsel for Petitioner by e-mail, addressed as follows:

Joshua D. Martin
Johnson & Martin, P.A.
500 West Cypress Creek Road
Suite 430
Fort Lauderdale, FL 33309
JOSH.MARTIN@JOHNSONMARTINLAW.COM,
litigation@johnsonmartinlaw.com
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Date: June 18, 2020

/Anooj Patel/

Anooj Patel