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February 5, 2024

Cancellation No. 92082984

Chromadex, Inc.

v.

Avior Nutritionals L.L.C.

Before Adlin, English, and Casagrande,
Administrative Trademark Judges.

By the Board:

This proceeding now comes up for consideration of Respondent's motion (filed November 29, 2023) to set aside default judgment pursuant to Fed. R. Civ. P. 60(b). 9 TTABVUE.[1] The motion is fully briefed.

I. Background

Respondent owns U.S. Registration No. 5747483 for the standard-character mark TRU NAD+ (with a disclaimer of NAD+) for "[n]utritional supplements containing nicotinamide adenine dinucleotide co-enzymes" in International Class 5. Petitioner

[1] Citations to the record refer to TTABVUE, the Board's online docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding "TTABVUE" corresponds to the docket entry number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry, if applicable.

Citations to the examination record refer to the United States Patent and Trademark Office's (USPTO) Trademark Status & Document Retrieval (TSDR) system.

filed a petition to cancel the registration on August 9, 2023, asserting the sole claim of abandonment. 1 TTABVUE.

Pursuant to the Board's August 10, 2023 institution order, Respondent's answer to the petition to cancel was due September 19, 2023. 2 TTABVUE 3. When Respondent failed to file a timely Answer, we issued a notice of default pursuant to Fed. R. Civ. P. 55(a). The notice allowed Respondent thirty days to show cause why default judgment should not be entered. 4 TTABVUE. Respondent failed to file a timely response and, as a consequence, we entered a default judgment on November 20, 2023. 5 TTABVUE. That same day, the Commissioner cancelled Respondent's registration. 6 TTABVUE. Respondent filed a proposed answer with its motion.[2] 9 TTABVUE.

In support of its motion, Respondent contends that its failure to respond was not the result of willful conduct, but rather because it did not receive notice of the institution of the instant proceeding or any of the Board's orders issued before default judgment was entered. *Id.* at 3, ¶¶ 4, 8. Specifically, Respondent contends that it relocated its offices "[m]ore than two years ago" (*id.*, ¶ 5); that Respondent's attorney submitted a Change Address or Representation Form in January 2022 but never received any of the orders in this proceeding (*id.*, ¶¶ 6-7); that Respondent first learned of the instant proceeding in November of 2023 (*see id.*, ¶ 9); and that, upon

[2] Respondent has also filed two changes of correspondence address, both of which have been noted and made of record. 8, 11 TTABVUE. The address in the most recent of the two filings, dated January 8, 2024, will be retained as Respondent's correspondence address of record. 11 TTABVUE.

learning of the default judgment, Respondent "immediately engaged counsel" to respond on its behalf (*id.*, ¶ 10).[3] Respondent further asserts that it has set forth a meritorious defense through its proposed answer (*id.*, ¶¶ 15, 19, 21), and that Petitioner will not be prejudiced by the Board setting aside the judgment because Respondent filed its motion fewer than ten days after default judgment was entered (*id.*, ¶¶ 15, 20-21).

In response, Petitioner argues, inter alia, that the change of address form to which Respondent refers requested only that the address of Respondent's former counsel be changed, which would not have affected service of the Board's institution order because, under Trademark Rule 2.113(c), 37 C.F.R. § 2.113(c), the Board serves a petition for cancellation on the respondent, not the attorney who represented the respondent during prosecution of the underlying application. *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 310.01 (2023). 10 TTABVUE 2, 4, 12-15. Petitioner further argues that any failure by Respondent to maintain current correspondence information with the USPTO cannot excuse Respondent's failure to file a timely answer. *See id.* at 5.

II. Decision

Fed. R. Civ. P. 55(c) and Fed. R. Civ. P. 60(b)(1), made applicable to Board proceedings by Trademark Rule 2.116(a), 37 C.F.R. § 2.116(a), provide relief from default judgment in instances of mistake, inadvertence, surprise, or excusable

[3] In support of these assertions, Respondent attached to its reply brief the declaration of its Manager, Stephen M. Camp. 12 TTABVUE 9-11.

neglect. They require that a motion for relief from judgment be made within a "reasonable time," or no more than one year after entry of judgment. Inasmuch as Respondent's motion was filed nine days after entry of default judgment, it is timely. *See* 5, 9 TTABVUE.

Factors to be considered in determining a Rule 60(b)(1) motion for relief from default judgment include: (1) whether the default was willful; (2) whether the non-defaulting party will be prejudiced; and (3) whether the defendant has a meritorious defense. *See Info. Sys. & Networks Corp. v. United States*, 994 F.2d 792, 795 (Fed. Cir. 1993); *Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991). Because default judgments for failure to timely answer the complaint are not favored by the law, a Rule 60(b) motion for relief from default judgment is generally treated with more liberality than other types of Rule 60(b) motions. *Info. Sys. & Networks Corp.*, 994 F.2d at 795; *see also* TBMP § 544.

Respondent's failure to act was not willful. We acknowledge that pursuant to Trademark Rule 2.18(c), 37 C.F.R. § 2.18(c), it is the responsibility of the owner of a registration to maintain a current and correct mailing address and email address with the USPTO. Respondent's former counsel updated the correspondence address (i.e. the attorney's address) for Respondent's registration on January 6, 2022, but failed to update Respondent's address of record or provide an email address for Respondent. *See* Registration No. 5747483, January 6, 2022, Change Address or Representation Form at TSDR. Because the Board effects service of the petition to cancel on the **address of record** for the current owner of the registration under

Trademark Rules 2.113(c) and 2.119(a), 37 C.F.R. §§ 2.113(c) and 2.119(a), Respondent's assertion that it did not receive the service documents because it had changed its physical address is plausible. Although Respondent should have updated its address of record as soon as its business moved, Respondent's failure to do so does not constitute willful conduct, let alone bad faith. Respondent submitted a Change Address or Representation Form with its current address on January 8, 2024, the same day it filed its reply brief in support of its Rule 60(b) motion. *See* Registration No. 5747483, January 8, 2024, Change Address or Representation Form at TSDR. We note, however, that Respondent must take greater care to comply with all Trademark Rules going forward.

As to the question of prejudice, Petitioner has not pointed to loss of witnesses or evidence, or other circumstances constituting prejudice sufficient to defeat a Rule 60(b) motion. *See S. Indus. Inc. v. Lamb-Weston Inc.*, 45 USPQ2d 1293, 1296 (TTAB 1997). Although Petitioner argues that it has expended resources in developing its business since the entry of default judgment (10 TTABVUE 8), Petitioner has put forth no evidence to demonstrate that it made any significant investment in the nine days between the entry of default judgment and Respondent's Rule 60(b) motion, much less that any witnesses or evidence disappeared during that short period of time.

Petitioner also points to a November 8, 2023 Office action that issued in connection with its pleaded application for the mark TRU NAD+ showing that the USPTO has refused registration of its mark based on a likelihood of confusion with

Respondent's registered TRU NAD+ mark. 10 TTABVUE 8, 40-47. Petitioner argues that "[r]einstatement of Respondent's registration will thus prejudice Petitioner in preventing Petitioner's application from proceeding to registration." *Id.* at 8. That Petitioner would have to litigate the merits of the petition for cancellation is not a reason to deny relief to Respondent under Fed. R. Civ. P. 60(b). *See S. Indus. Inc. v. Lamb-Weston*, 45 USPQ2d at 1296 (no prejudice shown where "the only prejudice to petitioner … is that its motion for summary judgment would face testing on the merits").

The delay in this proceeding was quite short by any measure. *See* 5, 9 TTABVUE. In any event, mere delay does not constitute prejudice. *Regatta Sport Ltd. v. Telux-Pioneer Inc.*, 20 USPQ2d 1154, 1156 (TTAB 1991); *see also Pratt v. Philbrook*, 109 F.3d 18, 22 (1st Cir. 1997) (mere fact that proceedings are reopened after default does not constitute prejudice).

Further, as aforementioned, Respondent filed a proposed answer concurrently with its motion to set aside default judgment, setting forth its meritorious defense. *See* 9 TTABVUE 7-9. Contrary to Petitioner's argument, a finding that Respondent has a meritorious defense does not require an evaluation of the merits of the case. All that is required is a plausible response to the allegations in the complaint. *See DeLorme Publ'g Co.*, 60 USPQ2d at 1224; *see also Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991) ("[B]y the submission of an answer which is not frivolous, applicant has adequately shown that it has a meritorious defense.").

Finally, it is well-established that the Board favors a trial on the merits. *See, e.g.*, *Info. Sys. & Networks Corp.*, 994 F.2d at 795.

For the foregoing reasons, Respondent's motion to set aside default judgment is **granted**. Respondent's registration will be reinstated, and Respondent's proposed answer is accepted as its operative pleading in this proceeding.

III. Proceeding Schedule

Proceedings are **resumed** and remaining dates are reset as set forth below:

Deadline for Discovery Conference	**3/3/2024**
Discovery Opens	**3/3/2024**
Initial Disclosures Due	**4/2/2024**
Expert Disclosures Due	**7/31/2024**
Discovery Closes	**8/30/2024**
Plaintiff's Pretrial Disclosures Due	**10/14/2024**
Plaintiff's 30-day Trial Period Ends	**11/28/2024**
Defendant's Pretrial Disclosures Due	**12/13/2024**
Defendant's 30-day Trial Period Ends	**1/27/2025**
Plaintiff's Rebuttal Disclosures Due	**2/11/2025**
Plaintiff's 15-day Rebuttal Period Ends	**3/13/2025**
Plaintiff's Opening Brief Due	**5/12/2025**
Defendant's Brief Due	**6/11/2025**
Plaintiff's Reply Brief Due	**6/26/2025**
Request for Oral Hearing (optional) Due	**7/6/2025**

IMPORTANT TRIAL AND BRIEFING INSTRUCTIONS

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, 37 C.F.R. §§ 2.121-2.125. 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), 37 C.F.R. §§ 2.128(a) and (b). Such briefs should utilize citations to the TTABVUE record created during trial, to facilitate the Board's review of the evidence at final hearing. *See* TBMP § 801.03. 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), 37 C.F.R. § 2.129(a).