UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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December 4, 2024

Cancellation No. 92086350

Advanced Bionutritionals, L.L.C.

v.

Advanced, LLC[1]

Charles H. Hiser IV, Interlocutory Attorney:

On November 20, 2024, the Board issued notice of default against Respondent for failure to file an answer to the petition to cancel, or in the alternative, to file a motion to extend time to file an answer.[2] On November 21, 2024, Respondent filed its response to the notice of default.

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[1] Respondent's change of correspondence address is noted and made of record.

[2] Respondent's motion is single-spaced. Trademark Rule 2.126(a)(1), 37 C.F.R. 2.126(a)(1), requires that all electronic submissions made to the Trademark Trial and Appeal Board be double-spaced. The Board, in exercising it discretion, accepts the motion. However, all future motions filed with the Board must comply with Trademark Rule 2.126.

When a party to an inter partes proceeding before the Board files a submission required by 37 C.F.R.§ 2.119(a) to be served upon every other party to the proceeding, the party filing the submission must include proof that the required service has been made before the filing will be considered by the Board. Occasionally, in order to expedite matters, the Board will provide a link to the database where a copy of the filing can be viewed. In this instance, the Board exercises its discretion and will consider the filing, however, strict compliance is required in all future submission filed with the Board. A copy of the filing can be viewed using TTABVUE at http://ttabvue.uspto.gov.

The decision whether to enter default judgment is within the Board's discretion. *See Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991). 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 Paolo's Assoc. Ltd. P'ship v. Bodo*, 21 USPQ2d 1899, 1902 (Comm'r 1990); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 312.02 (2024).

The Board will set aside entry of default if a defendant who has failed to file a timely answer to the complaint files a satisfactory showing of good cause why default judgment should not be entered against it. *See* Fed. R. Civ. P. 55(c); TBMP § 312.02. Good cause for discharging default is generally found if (1) the delay in filing is not the result of willful conduct or gross neglect, (2) the delay will not result in substantial prejudice to the opposing party, and (3) the defendant has a meritorious defense. *Fred Hayman*, 21 USPQ2d at 1557.

In this case, Respondent asserts that the institution order was sent to an old address which delayed Respondent learning about the proceeding and that after the parties were attempting to engage in settlement. There is nothing in the record to suggest that Respondent's inaction was in bad faith or in willful disregard for the Board's rules and deadlines. In addition, the Board does not find any prejudice to Petitioner's ability to prosecute its case. *See, e.g.*, *Pumpkin Ltd. v. Seed Corps*, 43 USPQ2d 1582, 1587 (TTAB 1997); *Paolo's Assoc. Ltd. P'ship*, 21 USPQ2d at 1904.

The Board notes, however, that in seeking relief from entry of default, it is customary for the moving party to include a copy of a proposed answer to establish that it has a meritorious defense in this action. *See, e.g., See Djeredjian v. Kashi Co.*, 21 USPQ2d 1613, 1615 (TTAB 1991) (the two other factors being shown, applicant was allowed time to show meritorious defense by submission of answer). Accordingly, Respondent is allowed **20 DAYS** from the date of this order to file an answer or otherwise respond to the petition to cancel, failing which the Board may enter default judgment against Respondent. If Respondent files an answer, Trademark Rule 2.106(b)(2) and Fed. R. Civ. P. 8(b) require that Respondent, in short and plain terms, either admit, deny, or acknowledge that Respondent is without sufficient information or knowledge to admit or deny each averment to which Petitioner relies. *See Turner Entertainment Co. v. Ken Nelson*, 38 USPQ2d 1942, 1943 (TTAB 1996). In the event default is ultimately set aside, dates will be reset by the Board.

Proceedings are suspended pending Respondent's response to this order. Moreover, Respondent is warned that all Board rules must be followed in its future filings or said filings might not be considered. Please consult the Board's institution order as well as the information below with regards to some of the more common rules Respondent needs to follow.

❖ **Information Regarding Legal Representation**

It is noted that Respondent intends to represent itself in this proceeding. While Patent and Trademark Rule 11.14 permits a party domiciled in the United States to represent itself, it is strongly advisable for a party 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* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 114.02 (2024).

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, 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 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 mailing), 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/sites/default/files/documents/Standard%20Protective%20Order_02052020.pdf.

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); *see also Hole In 1 Drinks, Inc. v. Lajtay*, 2020 USPQ2d 10020, at *1 (TTAB 2020) (noting that compliance with the Trademark Rules of Practice, and where applicable, the Federal Rules of Civil Procedure and the Federal Rules of Evidence, is required of all parties even those who assume the responsibility and risk of representing themselves).