

TTAB



09-22-2003

U.S. Patent &amp; TMO/TM Mail Rpt Dt. #79

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

**Sterling Software, Inc.**

Opposer

VS.

**Atwood Daniel Cool**

Applicant

CERTIFICATION UNDER 37 CFR § 1.8

I hereby certify that the documents referred to as enclosed herein are being deposited with the United States Postal Service as first class mail on this date September 19, 2003, as in an envelope addressed to "BOX TTAB,, Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513

Laura Lee Samayoa

(Name of person mailing paper)

Signature

Opposition No. 118,919

Box TTAB

NO FEE

Assistant Commissioner for Trademarks

2900 Crystal Drive

Arlington, VA 22202-3513

APPLICANT'S MOTION TO SET ASIDE DEFAULT

Applicant respectfully requests that the Board disregard Applicant's previously filed Motion to Suspend Proceedings and submits this Motion to Set Aside Default in lieu thereof.

Fed. R. Civ. P. 55(c) provides that "[f]or good cause shown, the court may set aside an entry of default."

"Good cause for discharging a 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." *Delorme Publishing.*, 2000 WL 3332122, at \*1 (TTAB Nov. 2, 2000). In analyzing the above factors, the Board is mindful that the law strongly favors determination of cases on their merits. *Id.* (citing

*CTRL Systems Inc. v. Ultraphonics of North America Inc.*, 52 USPQ 2d 1300, 1301 (TTAB 1999)).

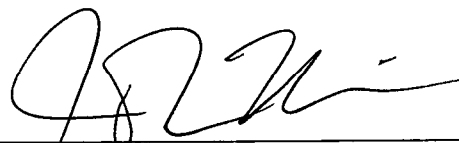
Generally, this motion should be granted because the parties have been engaged in settlement discussions that, if successful, will result in the termination of this proceeding.

Further, this short delay will not result in any prejudice to the opposing party. Opposer did not file a motion for default judgment on July 12, 2003 the date Applicant's answer was due. Further, there is no evidence that witnesses or evidence have become unavailable due to the passage of time. *Delorme Publishing.*, 2000 WL 3332122, at \*1 (finding lack of undue prejudice where Applicant failed to file answer for six months). Moreover, the delay in filing the answer was not due to willful misconduct or gross neglect. Applicant filed its answer shortly after the due date, and the late filing was due to an inadvertent mistake. *Fred Hayman Beverly Hills, Inc. V. Jacques Bernier, Inc., D.B.A. Parfums Gianelli*, 21 USPQ 2d 1556 (TTAB 1991) (finding good cause where late answer filed due to inadvertence). Upon realizing its error, Applicant quickly filed its answer and cured the oversight. Finally, Applicant must merely show that "a plausible response to the allegations contained in the notice of opposition has been made." *Delorme Publishing.*, 2000 WL 3332122, at \*1. Applicant's answer, filed on August 15, 2003, is a plausible response and is not frivolous. Thus, Applicant has a meritorious defense.

For the foregoing reasons, Applicant's Motion To Set Aside Default should be GRANTED.

Applicant is not aware of any filing fees, but if there are any, the Commissioner is hereby authorized to charge any additional fees which may be required, to Deposit Account No. 07-1895.

Respectfully submitted,



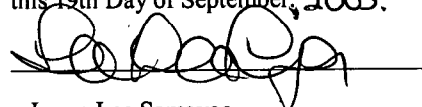
Dated: September 19, 2003

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Applicant's Motion to Set Aside Default was mailed by first-class mail, postage prepaid, to Anita Nesser, Baker Botts, L.L.P., 2001 Ross Avenue, Suite 600, Dallas, TX 75201-2980 this 19th Day of September, 2003.



Laura Lee Samayoa  
(type name of person mailing)