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Filing date: **01/12/2009**

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

Proceeding	91185479
Party	Defendant Welter, Nathan
Correspondence Address	Pollie Gautsch G&A Legal a professional corporation 2033 San Elijo Avenue #201 Cardiff, CA 92007 UNITED STATES pollie@gandalegal.com
Submission	Response to Board Order/Inquiry
Filer's Name	Stephen Z. Vegh
Filer's e-mail	opposition@stetinalaw.com
Signature	/Stephen Z. Vegh/
Date	01/12/2009
Attachments	Response.OSC.Vegh.Decl.Exhibits.pdf (35 pages)(729505 bytes)

Case: TRINI-022M

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
IN THE MATTER OF SERIAL NOS. 77/284,828 and 77/284,816**

Dwindle, Inc.,)	Opposition No.: 91185479
<i>and</i>)	
)	
Chomp, Inc.)	
)	
Opposers)	
)	
v.)	
)	
Welter, Nathan.)	
Applicant.		

**APPLICANT’S RESPONSE TO BOARD’S ORDER TO SHOW CAUSE RE: NOTICE
OF ENTRY OF DEFAULT, MOTION TO SET ASIDE DECEMBER 13, 2008 ENTRY OF
DEFAULT AND LEAVE TO FILE ANSWER TO NOTICE OF OPPOSITION**

BOX TTAB – No Fee
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Dear Sir/Madam:

Applicant Nathan Welter (“Applicant”) hereby responds to the Board’s Order to Show Cause Re: Notice of Entry of Default and moves to set aside the Entry of Default on December 13, 2008 pursuant to Federal Rule of Civil Procedure 55(c). Applicant further moves for leave to file an Answer to Opposer’s Notice of Opposition attached as Exhibit “H” to the Declaration of Stephen Z. Vegh. Applicant has established “good cause” why the Board’s Entry of Default should be set aside pursuant to Federal Rule of Civil Procedure 55(c) and TBMP Rule 312.02.

I. AUTHORITIES SUPPORTING APPLICANT'S MOTION TO SET ASIDE

DEFAULT

Federal Rule of Civil Procedure 55 (c) states as follows:

The court may set aside an Entry of Default for good cause...

TBMP Rule 312.02 (Setting Aside Notice of Default) states in pertinent part as follows:

If a defendant who has failed to answer a timely answer to the complaint responds to a notice of default by filing a satisfactory showing of good cause why default judgment should not be entered against it, the Board will set aside the notice of default. ...

...

Good cause why default judgment should not be entered against a defendant, for failure to file a timely answer to the complaint, is usually found when the defendant shows that (1) the delay in filing an answer was not the result of willful conduct or gross neglect on the part of the defendant, (2) the plaintiff will not be substantially prejudiced by the delay, and (3) the defendant has a meritorious defense to the action. (citation to *Paulo's Association Limited Partnership v. Paolo Bodo*, 21 USPQ2d 1899, 1903-04; see also, *Fred Hayman Beverly Hills, Inc. v. Jacques Bernier, Inc.*, 21 USPQ2d 1556, 1557 (TTAB 1991).)...

...

The determination whether default judgment should be entered against a party lies within the sound discretion of the Board. (citation omitted.) In exercising that discretion, the Board must be mindful of the fact that it is the policy of the law to decide cases on their merits. Accordingly, the Board is very reluctant to enter a default judgment for failure to file a timely answer, and tends to resolve any doubt on the matter in favor of the defendant.

The standard for setting aside default judgment is far stricter than for setting aside a notice of entry of default. (TBMP Rule 312.03). Under Fed. R. Civ. P. 55(c), the three factors described above are balanced determining whether "good cause" has been shown to set aside entry of default, with the first factor of culpability evaluated in the general context of whether the movant is entitled to equitable relief. Under Fed. R. Civ. P. 60 (b), once a default judgment has been entered, there are no balancing of these factors, and movant must show that default had been entered due to mistake, inadvertence, surprise, or excusable neglect. *Waifersong, Ltd. Inc. Classical Music Vending*, 976 F.2d 290, 292, 24 USPQ2d 1632, 1634 (6th Cir. 1992) and *Jack Lenore Larsen, Inc. v. Chas. O. Larson Co.*, 44 USPQ2d 1950, 1952 (TTAB 1997). For this reason, the showing submitted by a defendant seeking to show cause why default should not be

entered against it is viewed with greater leniency than when a defendant seeks relief from an actual default judgment. TBMP Rule 312.03; *Waifersong, Ltd. Inc., supra*.

Default is a harsh sanction and a drastic step that should only be resorted to in the most extreme cases. *United Coin Meter v. Sea Board Coastline R.R.*, 705 F.2nd 839, 843 (6th Cir. 1983). A trial on the merits is greatly favored in the federal courts. *United Coin*, 705 F.2nd at 846. It is an abuse of discretion to enter a default judgment for a marginal failure to comply with time requirements that resulted from an honest mistake rather than willful misconduct, even under the more stringent standard of “excusable neglect” applied following the entry of a default judgment. *Time Equip. Rental and Sales, Inc. v. Harre*, 983 F.2nd 128, 130 (8th Cir. 1993); *United Coin*, 705 F.2nd at 845.

A. Applicant’s Delay in Responding to the Notice of Opposition was Reasonable and not Willful

To the extent possible, courts always encourage the settlement and resolution of disputes short of further court proceedings. *Ford Motor Credit Company, LLC v. Lewis Family Enterprises, Inc.* 2007 U.S. Dist. LEXIS 83133, 9 (N.D. Cal 2007).

A party who intentionally fails to Answer a Complaint that cannot otherwise set forth a credible good faith explanation that negates an intention to take advantage of the opposing party, interfere with judicial authority, or manipulate the legal process, will be found to have engaged in “culpable conduct” with respect to the delay in filing an Answer. *TCI Group Life Ins. Plan v. Konebber*, 244 F.3rd 691, 697-98 (9th Cir. 2001). A reasonable belief that a matter can be resolved through continued settlement discussions is not considered “culpable conduct” in evaluating the reason for a delay in the answering of a complaint. *Ford Motor Credit Company*, 2007 U.S. Dist. LEXIS at 8.; see also *Jones Truck Lines, Inc. v. Foster’s Truck and Equipment Sales, Inc.*, 63 F.3rd 685, 687-88 (8th Cir. 1995) (no willful conduct shown where delay in answering due to defendant wanting to save additional expenses for both sides by pursuing settlement discussions, with both sides interested in pursuing further settlement negotiations prior to the time a responsive pleading was due); *Barber v. Turberville*, 218 F.2nd 34, 35 (D.C. Cir. 1954) (ongoing settlement discussions in instant case and companion case contributed to finding that default should be set aside).

In this case, on or about July 29, 2008, Applicant’s then attorney of record, Pollie Gautsch, received notice that Opposer had filed a Notice of Opposition with respect to

Application Nos. 77/284,828 and 77/284,819. Vegh Decl., ¶ 2. On or about August 1, 2008, attorney Gautsch notified attorney Kit M Stetina of the Stetina Brunda Garred and Brucker law firm of Opposer's Notice of Opposition. Ms. Gautsch requested Mr. Stetina to evaluate Opposer's Notice of Opposition and if appropriate, engage in settlement discussions with Opposer's counsel. Vegh Decl., ¶ 3.

On or about August 15, 2008, Mr. Stetina on behalf of the Applicant and attorney Paul F. Rafferty on behalf of the Opposer conducted settlement discussions in this matter. Specifically, Applicant's counsel advised that Applicant marketed its products primarily to mixed martial arts enthusiasts and that it did not market and would not market any products in the skateboarding trade. Opposer's counsel agreed to prepare and forward a draft settlement agreement in an attempt to resolve this matter. On or about September 4, 2008, Opposer's counsel agreed to a 60-day extension of the pre-trial periods in this matter, including the deadline for Applicant to file an answer through November 8, 2008. That same day, Applicant filed a consented motion for an extension of the time to answer and pre-trial periods, which the TTAB granted. Opposer's counsel subsequently forwarded a draft settlement agreement to Applicant's counsel. Vegh Declaration, ¶¶ 4-6.

On or about November 4, 2008, attorney Stephen Z. Vegh of the Stetina Brunda law firm sent to Opposer's counsel Rafferty (who as understood at the time continued to represent Opposer) proposed revisions to the draft settlement agreement. The revisions were sent via e-mail. Vegh Decl., ¶ 7, Ex. A. That same day, in response to this e-mail, Mr. Vegh received an out-of-office reply that Mr. Rafferty was no longer with the Sheppard Mullin Richter & Hampton law firm and that inquiries should be sent to attorney Finley Taylor at the Sheppard Mullin firm. Vegh Decl., ¶ 7, Ex. B. Accordingly, that same day, Mr. Vegh left a voicemail for Mr. Taylor and requested a response regarding the proposed revisions to the settlement agreement, or alternatively to forward the revisions to the settlement agreement to attorney Rafferty at his new firm, if he was still representing the Opposer. Mr. Vegh did not receive a response from Mr. Taylor to this inquiry. Vegh Decl., ¶¶ 8-9. A representative of the Stetina Brunda firm also spoke with the Sheppard Mullin firm that day who was advised that Mr. Taylor would be handling Mr. Rafferty's previous matters including the subject Opposition. Mr. Taylor was also requested to contact Mr. Vegh at the Stetina Brunda firm once again, which he never did. Vegh Decl., ¶ 10. Throughout this period, Applicant was under the good faith belief that in

light of the prior settlement discussions between counsel for Opposer and Applicant, the parties would be able to reach agreement on the terms of a settlement agreement. Applicant's co-counsel at the Stetina Brunda firm also had a good faith belief that either Mr. Taylor from the Sheppard Mullin firm or Mr. Rafferty from his new firm would expeditiously contact Applicant's counsel to finalize the terms of the settlement agreement. Vegh Decl., ¶ 11.

On or about November 18, 2008, after not having heard from either attorney Taylor or Rafferty, a representative of the Stetina Brunda firm forwarded another e-mail to Mr. Rafferty at his Sheppard Mullin e-mail address, to which she received the same out-of-office reply indicating that Mr. Rafferty was no longer with the firm. Vegh Decl., ¶ 12, Ex. C. However, that same day, after apparently being contacted by his former firm, attorney Rafferty responded to this e-mail, indicating he had moved to a different firm and would look over the changes made by Applicant to the settlement agreement, and also requested a redlined version of these changes. Vegh Decl., ¶ 13, Ex. D.

On or about December 4, 2008, after not having received any further word from either attorney Rafferty or the Sheppard Mullin firm, a representative of the Stetina Brunda firm again contacted attorney Rafferty by e-mail and requested him to clarify who was handling the representation of the Opposer in this matter as well as whether counsel would be agreeable to a 60-day suspension of the case while Opposer reviewed the revisions to the settlement agreement made by the Applicant. Vegh Decl., ¶ 14, Ex. E. That same day, attorney Rafferty responded that the Opposer had previously assumed that the matter was concluded. Accordingly, Opposer also assumed that only signatures were needed to finalize the agreement and no further legal representation was necessary. As a result, the original draft settlement agreement prepared by Mr. Rafferty remained at the Sheppard Mullin firm after his departure, while the revisions to the draft settlement agreement sent by Applicant's co-counsel were now in the possession of the Opposer, who had not as of yet determined how it wanted to proceed given the changes to the draft settlement agreement. Mr. Rafferty further advised that his former Sheppard Mullin firm had inquired of him on December 3, 2008 as to the status of the case which prompted him to enter into a new engagement agreement with Opposer that same day. Mr. Rafferty agreed to review the proposed revisions made by Applicant's co-counsel to the settlement agreement with the anticipation of being able to conclude the matter by the end of the following week (around December 12, 2008). Mr. Rafferty added that he wanted to attempt to conclude the agreement

without requesting further extensions of the trial periods in this matter. Vegh Decl., ¶ 15, Ex. F. Based on the foregoing, Applicant's counsel believed in good faith that the parties could finalize their settlement agreement prior to any further action being taken by the TTAB in this matter.

On or about December 9, 2008, Applicant's co-counsel received Mr. Rafferty's further proposed revisions to the settlement agreement. Vegh Decl., ¶ 16, Ex. G. On or about December 11, 2008, Mr. Vegh left a voicemail with Mr. Rafferty to discuss his proposed revisions. On or about December 12, 2008, Mr. Vegh was able to speak with Mr. Rafferty regarding Opposer's proposed changes to the agreement, including the basis for Opposer's changes. Mr. Vegh indicated that he would forward Opposer's proposed revisions to the Applicant for review. Vegh Decl., ¶¶ 17-18. On or about December 13, 2008 (a Saturday), the TTAB issued its Notice of Entry of Default and advised that Applicant had 30 days to respond to the order to show cause pursuant to Fed. R. Civ. P. 55. Vegh Decl., ¶ 19. The parties have since continued their settlement negotiations regarding the draft settlement agreement. However, the parties have yet to finalize and execute a settlement agreement. Therefore, in light of the January 12, 2009 deadline for Applicant to respond to the TTAB's Order to Show Cause re: Entry of Default, Applicant has filed its papers. Vegh Decl., ¶ 21.

As the foregoing chronology reveals, from November 4, 2008 through December 4, 2008, there was significant confusion as to what law firm represented Opposer in this matter. However, throughout this entire period, Applicant's co-counsel had a good faith belief in light of the prior and ongoing settlement discussions with Opposer's counsel that both sides were interested in resolving this matter short of further litigation and that given the parties' positions, the matter would be resolved before any further action would be taken by the TTAB. As a result of the delay in Mr. Rafferty's receipt from Opposer of the revisions made by the Stetina Brunda firm to the draft settlement agreement, the delay in Opposer's engagement of Mr. Rafferty's new law firm as its counsel of record, the diligence by co-counsel for Applicant to contact both Opposer's former law firm as well as Mr. Rafferty's new law firm, and based on the prior and ongoing discussions between Applicant's co-counsel and Mr. Rafferty, Applicant and its counsel had a good faith belief that this matter was very close to resolution prior to and at the time of the TTAB issued its entry of default. Opposer's counsel was apparently under the same impression, which is presumably why they felt there was no need to suspend or otherwise extend the pre-trial deadlines in this matter. Accordingly, Applicant's counsel honestly albeit incorrectly believed

that the matter could be resolved before the TTAB took any further action with respect to this Opposition proceeding.

Given the foregoing chronology, Applicant submits that neither Applicant nor its counsel willfully delayed the filing of an Answer in this matter. Rather, in the interests of judicial economy and to focus the parties' resources in an effort to resolve this matter short of further litigation, Applicant and its counsel had a good faith belief that this matter would be resolved before any further action need be taken by Applicant or before the Board took any further action in this proceeding. As in *Ford Motor Company* and *Jones Truck Line, Inc.*, and pursuant to TBMP Rule 312.02 and Fed. R. Civ. P. 55(c), the delay in filing an Answer by Applicant was based on a good faith belief that the parties had reached or would very shortly reach a final resolution of this matter. Accordingly, Applicant has shown "good cause" why the entry of default should be set aside and a default judgment should not be entered against it.

B. Opposer is not Prejudiced by Applicant's delay in Filing an Answer.

Significantly, Opposer's counsel confirmed on January 5, 2009 that Opposer would not oppose Applicant's motion to set aside the TTAB's entry of default in this matter. Vegh Decl., ¶ 20. Therefore, Opposer's non-opposition weighs heavily in favor of a finding that Opposer will not be substantially or unduly prejudiced by the setting aside of the TTAB's entry of default. *Operating Engineers Local #49, et. al. v. TMS Construction, Inc.*, 2006 U.S. Dist. LEXIS 71459, 5 (D.C. Minn. 2006). Furthermore, mere delay in the resolution of this proceeding is not in and of itself sufficient to constitute substantial prejudice to the Opposer. *United Coin*, 705 F.2nd at 845. Accordingly, this factor further supports a finding of good cause as to why the default entered against Applicant should be set aside and default judgment should not be entered.

C. Applicant has a Meritorious Defense to the Opposition.

The showing of a meritorious defense by Applicant does not require an evaluation of the merits of the case. TBMP Rule 312.02. All that is required is a plausible response to the allegations in the complaint. *Id.*; *DeLourme Publishing Co. v. Eartha's Inc.*, 60 USPQ2d 1222, 1224 (TTAB 2000). That is, the merit of a proposed defense is not appraised with respect to the likelihood of its success. Instead a court must determine whether the proposed defense "contains 'even a hint of a suggestion' which, proven at trial would constitute a complete defense." *INVST Financial Group v. Chem-Nuclear Systems*, 815 F.2nd 391, 399 (6th Cir. 1987). In this case, as

eluded to above, Applicant believes it has a meritorious defense under the “likelihood of confusion” factors set forth *In The Matter of the Application of E.I. DuPont DeNemours and Co.*, 476 F.2nd 1357, 1361 (CCPA 1973). Specifically, Applicant contends as follows: (1) the marks in their entirety as to appearance, sound, connotation and commercial impression are dissimilar in that the helmet/skull designs are sufficiently distinct from the helmet from Opposer’s registered helmet designs; (2) the nature of the goods or services described in Applicant’s applications are dissimilar to the goods or services described in Opposer’s registrations in that Applicant markets its products primarily to mixed martial arts enthusiasts, and Applicant does not and will not use its marks on or in connection with skateboarding, snowboarding, skate or snow-related activities; (3) Applicant does not and will not sell, advertise, market or promote any use of its marks through specialty stores, publications, advertising media, sponsorships, sporting events, and other trade channels specifically directed to skateboarding, snowboarding, skate or snow-related activities.

For these and other reasons to be established following further discovery in this matter (should it become necessary), there is no likelihood of confusion between Applicant’s marks and Opposer’s registered marks under the standard set forth in *DuPont*. Accordingly, Applicant submits that it has set forth a satisfactory showing of good cause in that it has a meritorious defense to the Opposition proceeding. Therefore, the TTAB’s entry of default should be set aside and default judgment should not be entered in this matter.

II. CONCLUSION

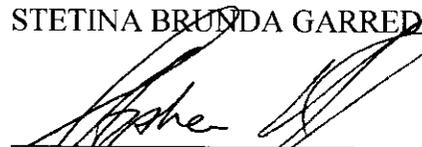
Based on all of the foregoing, the balancing of the factors set forth in TBMP Rule 312.02 and Fed. R. Civ. P. 55 (c) clearly show that the equities weigh strongly in favor of finding that Applicant has made a satisfactory showing of good cause as to why the TTAB’s entry of default

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should be set aside, why default judgment should not be entered against Applicant, and that Applicant should be granted leave to file its proposed Answer to Opposer's Notice of Opposition, which is attached to the Declaration of Stephen Z. Vegh, ¶ 22, as Exhibit "H".¹

STETINA BRUNDA GARRED & BRUCKER

Dated: January 9, 2009

By: 

Kit M. Stetina, Reg. No. 29,445
Stephen Z. Vegh, Reg. No. 48,550
Stetina Brunda Garred & Brucker
75 Enterprise, Suite 250
Aliso Viejo, California 92656
Tel: (949)855-1246
Fax: (949)855-6371
Attorney for Applicant

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¹ It is noteworthy that on or about September 4, 2008, a Motion for an Extension of Answer of Discovery or Trial Periods with Consent was filed on behalf of Applicant, which the TTAB granted. Given this request of extension along with the prior settlement discussions between counsel for Applicant and Opposer, Applicant clearly had every intention to defend this Opposition proceeding. Arguably, by such conduct, Applicant may be said to have "appeared" in this proceeding before the TTAB entered default. *H.F. Livermore Corp. v. Aktiengesellschaft Gebrüder Loepfe*, 432 F.2nd 689, 692 (DC Cir. 1970). This evidence at minimum establishes that Applicant was not an "essentially non-responsive party" for whom the default provisions of Fed. R. Civ. P. 55 and 60 were meant to deter.

PROOF OF SERVICE

State of California)
) ss.
County of Orange)

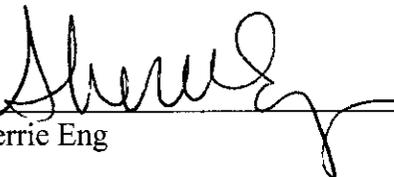
I am over the age of 18 and not a party to the within action; my business address is 75 Enterprise, Suite 250, Aliso Viejo, California 92656. On **January 12, 2009**, the attached **APPLICANT’S RESPONSE TO BOARD’S MOTION TO SET ASIDE DECEMBER 13, 2008 ENTRY OF DEFAULT AND LEAVE TO FILE ANSWER TO NOTICE OF OPPOSITION** was served on all interested parties in this action by U.S. Mail, postage prepaid, at the addresses as follows:

Paul F. Rafferty
Sheppard Mullin Richter & Hampton LLP
650 Town Center Drive, Fourth Floor
Costa Mesa, CA 92626

and

Paul F. Rafferty
JONES DAY
3 Park Plaza, Suite 1100
Irvine, CA 92614

Executed on **January 12, 2009** at Aliso Viejo, California. I declare under penalty of perjury that the above is true and correct. I declare that I am employed in the office of STETINA BRUNDA GARRED & BRUCKER at whose direction service was made.



Sherrie Eng

Case: TRINI-022M

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
IN THE MATTER OF SERIAL NOS. 77/284,828 and 77/284,816

Dwindle, Inc.,)	Opposition No.: 91185479
<i>and</i>)	
Chomp, Inc.)	
)	
Opposers)	
)	
v.)	
)	
Welter, Nathan.)	
)	
Applicant.)	

DECLARATION OF STEPHEN Z. VEGH IN SUPPORT OF APPLICANT'S
RESPONSE TO BOARD'S ORDER TO SHOW CAUSE RE: NOTICE OF ENTRY
OF DEFAULT, MOTION TO SET ASIDE DECEMBER 13, 2008 ENTRY OF
DEFAULT AND LEAVE TO FILE ANSWER TO NOTICE OF OPPOSITION

I, Stephen Z. Vegh, declare as follows:

1. I am an associate in the law firm of Stetina Brunda Garred and Brucker ("Stetina Brunda"), who along with the firm's managing partner Kit M. Stetina, has represented Applicant Nathan Welter in settlement discussions with counsel for Opposers Dwindle, Inc. and Chomp, Inc. in the above-referenced matter. Stetina Brunda has filed a power of attorney with the TTAB to serve as Mr. Welter's attorney of record in this action. I have personal knowledge of the facts stated herein.

2. I am informed and believe that on or about July 29, 2008, Mr. Welter's former attorney of record, attorney Pollie Gautsch, received notice of Opposers' Notice of Opposition.

3. I am informed and believe that on or about August 1, 2008, Ms. Gautsch notified Mr. Stetina of the Stetina Brunda firm of Opposer's Notice of Opposition. I am further informed and believe that Ms. Gautsch requested Mr. Stetina to evaluate Opposer's Notice of Opposition and if appropriate, engage in settlement discussions with Opposer's counsel Paul F. Rafferty.

4. I am informed and believe that on or about August 15, 2008, attorney Stetina spoke on behalf of Applicant Nathan Welter with Opposer's counsel Paul F. Rafferty regarding the possible settlement of the above-referenced action. In that discussion, I am further informed and believe that Mr. Stetina advised Mr. Rafferty that Applicant marketed its products primarily to mixed martial arts enthusiasts and that Applicant did not market and would not market any products in the skateboarding trade. I am further informed and believe that at the conclusion of their discussion, Mr. Rafferty agreed to prepare and forward a draft settlement agreement in an attempt to resolve the above-referenced action.

5. I am further informed and believe that on or about September 4, 2008, Opposer's counsel agreed to a 60-day extension of the pre-trial periods in this matter, including the deadline for Applicant to file an Answer through November 8, 2008. I am further informed and believe that on that same day, a consented motion for an extension of the time to answer and pre-trial periods was filed with the TTAB, which was subsequently granted.

6. Attorney Rafferty subsequently forwarded a draft settlement agreement to the offices of Stetina Brunda Garred & Brucker.

7. On or about November 4, 2008, I sent via e-mail to attorney Rafferty and behalf of the Applicant proposed revisions to his draft settlement agreement. Attached hereto as Exhibit "A" is a true and correct copy of my correspondence to Mr. Rafferty enclosing my proposed revisions to the settlement agreement. That same day, in response to my e-mail, I received an out-of-office autoreply that Mr. Rafferty was no longer with the Sheppard Mullin Richter & Mullin law firm and that inquiries should be sent to attorney Finley Taylor. Attached hereto as Exhibit "B" is a true and correct copy of this out-of-office autoreply.

8. Still on or about November 4, 2008, I left a voicemail for Mr. Taylor requesting a response regarding the proposed revisions to the settlement agreement, or alternatively that he forward Applicant's proposed revisions to the settlement agreement to attorney Rafferty at his new law firm, if he was still representing the Opposer.

9. I never received a response to this inquiry from Mr. Taylor.

10. I am further informed and believe that also on November 4, 2008, a paralegal at our firm spoke with the Sheppard Mullin firm who was advised that Mr. Taylor would be handling all of Mr. Rafferty's previous matters, including the subject opposition proceeding. Mr. Taylor was again requested to contact me or the Stetina Brunda law firm regarding this matter. No response was forthcoming to this inquiry either.

11. Based on the foregoing, both Kit Stetina and myself were under the good faith belief at this time that in light of the prior settlement discussions with Opposer's counsel, the parties would be able to expeditiously reach an agreement on the terms of a settlement agreement. We also believed that either Mr. Taylor from the Sheppard Mullin firm or Mr. Rafferty from his new firm would expeditiously contact our office to further discuss and finalize the terms of such settlement agreement.

12. On or about November 18, 2008, after not having heard from attorney Taylor or Rafferty, paralegal Tara Hamilton of the Stetina Brunda firm sent another e-mail to Mr. Rafferty at his Sheppard Mullin e-mail address, to which she received the same out-of-office reply indicating that Mr. Rafferty was no longer with the firm. Attached hereto is Exhibit "C" is a true and correct copy of an e-mail from Ms. Hamilton to Mr. Rafferty on which I was copied.

13. That same day however, after apparently being contacted by his former Sheppard Mullin firm, attorney Rafferty responded to Ms. Hamilton's e-mail, indicating that he had moved to a different law firm and would look over the changes made on behalf of Applicant to the settlement agreement. Apparently Mr. Rafferty also requested a redlined version of the changes. Attached hereto as Exhibit "D" is a true and correct copy of Mr. Rafferty's correspondence which had been forwarded to me by Ms. Hamilton.

14. On or about December 4, 2008, after not having received any further word from either attorney Rafferty or the Sheppard Mullin firm, Ms. Hamilton again contacted attorney Rafferty by e-mail and requested him to clarify who was handling the representation of the Opposer in this action as well as whether counsel would be agreeable to a 60-day suspension of the case while Opposer reviewed the proposed revisions to the settlement agreement made by the Applicant. Attached hereto as Exhibit "E" is a true and correct copy of Ms. Hamilton's e-mail to attorney Rafferty on which I was copied.

15. That same day, attorney Rafferty responded to Ms. Hamilton's e-mail, when he stated that the Opposer hadn't assumed that the matter needed to be transferred to Mr. Rafferty's new firm, viewing the matter as concluded subject to the signature of Applicant on the original draft agreement. However, shortly after receiving the revised agreement, Opposer realized that the draft settlement agreement had been modified. The original settlement agreement had remained at Mr. Rafferty's prior firm Sheppard Mullin, while Opposer was in possession of the revised agreement. The Opposer had not as of yet determined how it wanted to proceed given these changes. Mr. Rafferty further advised that his former Sheppard Mullin firm had inquired of him of December 3, 2008 as to the status of this matter which prompted him to enter into a new engagement agreement with the Opposer that same day. Mr. Rafferty agreed to review the proposed revisions made by the Stetina Brunda law firm to the draft settlement agreement with the anticipation being that the matter could be concluded by the end of the following week. (around December 12, 2008). As such, Mr. Rafferty wanted to attempt to finalize the settlement agreement without any further extensions of the pre-trial deadlines, including the date for Applicant to Answer the Notice of Opposition. Attached hereto as Exhibit "F" is a true and correct copy of Mr. Rafferty's e-mail to Ms. Hamilton on which I was copied.

16. On or about December 9, 2008, I received Mr. Rafferty's further proposed revisions to the settlement agreement. Attached hereto as Exhibit "G" is a true and correct copy of Mr. Rafferty's e-mail enclosing his proposed revisions to the parties' draft settlement agreement.

17. On or about December 11, 2008, I left a voicemail message with Mr. Rafferty to discuss these proposed revisions to the settlement agreement.

18. On or about December 12, 2008, I spoke with Mr. Rafferty regarding Opposer's proposed changes to the agreement, including the basis for Opposer's changes. I indicated to Mr. Rafferty that I would forward Opposer's proposed revisions to the Applicant for their review.

19. The next day (a Saturday), the TTAB issued its Notice of Entry of Default and notified Applicant's then attorney of record, Pollie Gautsch, that Applicant had 30 days to respond to the Order to Show Cause pursuant to Federal Rule of Civil Procedure 55.

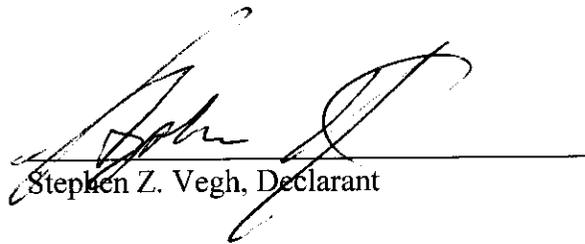
20. On or about January 5, 2009, attorney Rafferty confirmed to me that Opposer would not oppose Applicant's motion to set aside the TTAB's entry of default.

21. The parties have since continued their settlement negotiations regarding the draft settlement agreement. However, the parties have yet to finalize and execute a settlement agreement. Therefore, in light of the January 12, 2009 deadline for Applicant to respond to the TTAB's Order to Show Cause re: Entry of Default, Applicant has filed its papers.

22. Attached hereto as Exhibit "H" is a true and correct copy of Applicant's proposed Answer to Opposer's Notice of Opposition, which Applicant seeks leave to file in this action.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 9th day of January, 2009, at Aliso Viejo, California.


Stephen Z. Vegh, Declarant

PROOF OF SERVICE

State of California)
) ss.
County of Orange)

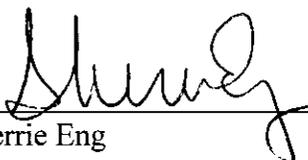
I am over the age of 18 and not a party to the within action; my business address is 75 Enterprise, Suite 250, Aliso Viejo, California 92656. On **January 12, 2009**, the attached **DECLARATION OF STEPHEN Z. ZEGH IN SUPPORT OF APPLICANT’S RESPONSE TO BOARD’S MOTION TO SET ASIDE DECEMBER 13, 2008 ENTRY OF DEFAULT AND LEAVE TO FILE ANSWER TO NOTICE OF OPPOSITION** was served on all interested parties in this action by U.S. Mail, postage prepaid, at the addresses as follows:

Paul F. Rafferty
Sheppard Mullin Richter & Hampton LLP
650 Town Center Drive, Fourth Floor
Costa Mesa, CA 92626

and

Paul F. Rafferty
JONES DAY
3 Park Plaza, Suite 1100
Irvine, CA 92614

Executed on **January 12, 2009** at Aliso Viejo, California. I declare under penalty of perjury that the above is true and correct. I declare that I am employed in the office of STETINA BRUNDA GARRED & BRUCKER at whose direction service was made.



Sherrie Eng

EXHIBIT A

Stephen Z. Vegh

From: Stephen Z. Vegh
Sent: Tuesday, November 04, 2008 1:04 PM
To: 'prafferty@sheppardmullin.com'
Subject: Dwindle v. Welter

FOR SETTLEMENT PURPOSES ONLY, FRE 408

Dear Mr. Rafferty,

Please find attached our proposed draft settlement agreement. Should you wish to discuss, please feel free to contact me.

Regards,

Stephen Vegh

STETINA BRUNDA GARRED & BRUCKER
75 Enterprise, Suite 250
Aliso Viejo, CA 92656
Ph: 949-855-1246
Fx: 949-855-6371
Web: www.stetinalaw.com
Email: svegh@stetinalaw.com

EXHIBIT B

Stephen Z. Vegh

From: Paul Rafferty [PRafferty@sheppardmullin.com]
Sent: Tuesday, November 04, 2008 1:04 PM
To: Stephen Z. Vegh
Subject: Out of Office AutoReply: Dwindle v. Welter

Paul Rafferty is no longer with Sheppard Mullin.

If you have any questions or need assistance, please contact Finley Taylor at FTaylor@sheppardmullin.com or by calling 714-424-8210.

**Please note that you will only receive this message once.

Circular 230 Notice: In accordance with Treasury Regulations we notify you that any tax advice given herein (or in any attachments) is not intended or written to be used, and cannot be used by any taxpayer, for the purpose of (i) avoiding tax penalties or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein (or in any attachments).

Attention: This message is sent by a law firm and may contain information that is privileged or confidential. If you received this transmission in error, please notify the sender by reply e-mail and delete the message and any attachments.

EXHIBIT C

Stephen Z. Vegh

From: Tara L. Hamilton
Sent: Tuesday, November 18, 2008 12:21 PM
To: 'prafferty@sheppardmullin.com'
Cc: Stephen Z. Vegh
Subject: Chomp, Inc. v. Nathan Welter//Our Ref.: TRINI-022M
Importance: High

Mr. Rafferty:

I am just following up to see if you had a chance to review the proposed Settlement Agreement sent to you on November 4th. Please let us know your comments/changes at your earliest convenience. Thank you.

Tara Hamilton
Litigation Paralegal
Stetina Brunda Garred & Brucker
75 Enterprise, Suite 250
Aliso Viejo, CA 92656
Tel: (949) 855-1246
Fax: (949) 855-6371
www.stetinalaw.com

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EXHIBIT D

Stephen Z. Vegh

From: Tara L. Hamilton
Sent: Tuesday, November 18, 2008 1:19 PM
To: Stephen Z. Vegh
Subject: FW: Chomp, Inc. v. Nathan Welter//Our Ref.: TRINI-022M

??

Tara Hamilton
Litigation Paralegal
Stetina Brunda Garred & Brucker
75 Enterprise, Suite 250
Aliso Viejo, CA 92656
Tel: (949) 855-1246
Fax: (949) 855-6371
www.stetinalaw.com

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From: Paul F Rafferty [mailto:pfrafferty@jonesday.com]
Sent: Tuesday, November 18, 2008 12:55 PM
To: Tara L. Hamilton
Subject: Fw: Chomp, Inc. v. Nathan Welter//Our Ref.: TRINI-022M

Tara;

As you may now know, I have moved. I have your email below and will look your changes over. I assume the below is a version with changes from the original version I sent to you? If so, if there a redline version below as well?

Paul Rafferty
JONES DAY
3 Park Plaza, Suite 1100
Irvine Ca. 92614-8505
Direct (949) 553-7588
Main (949) 851-3939
Cell (714) 305-9359
Fax (949) 553-7539
email: pfrafferty@jonesday.com

EXHIBIT E

Stephen Z. Vegh

From: Tara L. Hamilton
Sent: Thursday, December 04, 2008 1:34 PM
To: Paul F Rafferty
Cc: Stephen Z. Vegh
Subject: RE: Chomp, Inc. v. Nathan Welter//Our Ref.: TRINI-022M

Paul:

As a follow up to me email below, would you be agreeable to suspend this case for 60 days pending review of the settlement agreement in this matter? We also need clarification as to who is handling this matter, your firm or Sheppard Mullin? If you can please confirm. Thank you.

Tara Hamilton

Litigation Paralegal
Stetina Brunda Garred & Brucker
75 Enterprise, Suite 250
Aliso Viejo, CA 92656
Tel: (949) 855-1246
Fax: (949) 855-6371
www.stetinalaw.com

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From: Paul F Rafferty [<mailto:pfrafferty@jonesday.com>]
Sent: Tuesday, November 18, 2008 12:55 PM
To: Tara L. Hamilton
Subject: Fw: Chomp, Inc. v. Nathan Welter//Our Ref.: TRINI-022M

Tara,

As you may now know, I have moved. I have your email below and will look your changes over. I assume the below is a version with changes from the original version I sent to you? If so, if there a redline version below as well?

Paul Rafferty
JONES DAY
3 Park Plaza, Suite 1100
Irvine Ca. 92614-8505
Direct (949) 553-7588
Main (949) 851-3939
Cell (714) 305-9359
Fax (949) 553-7539
email: prafferty@jonesday.com

EXHIBIT F

Stephen Z. Vegh

From: Paul F Rafferty [pfrafferty@jonesday.com]
Sent: Thursday, December 04, 2008 3:13 PM
To: Tara L. Hamilton
Cc: Stephen Z. Vegh
Subject: RE: Chomp, Inc. v. Nathan Welter//Our Ref.: TRINI-022M

Tara;

Let's get the document done without further extension.

To avoid any misunderstandings, here is an honest reply to the status of things:

Months ago I sent you an agreement. At least a month ago you sent something back. Then, I moved to JD. The client hadn't assumed that the matter needed to be transferred to JD viewing it as concluded subject to the signature of your client to the original agreement. However, shortly after it was sent to the client, it noticed that the agreement had been materially changed. And so, the original agreement remained at SMRH, I am at JD, your later document is with the client, there was no decision from the client as to how this would be handled, and until earlier this week when Stephen emailed SMRH, nothing changed.

SMRH inquired yesterday of me. I spoke to the client last night. Today, we are formalizing an engagement letter with JD. Then, I need to see the changes made to your original version. They may be fine, or they may not. I will look them over, and if we both pledge a prompt return of thoughts, we should get this put to bed by the end of next week.

Paul Rafferty
JONES DAY
3 Park Plaza, Suite 1100
Irvine Ca. 92614-8505
Direct (949) 553-7588
Main (949) 851-3939
Cell (714) 305-9359
Fax (949) 553-7539
email: prafferty@jonesday.com

"Tara L. Hamilton" <thamilton@stetinalaw.com>

To "Paul F Rafferty" <pfrafferty@jonesday.com>

CC "Stephen Z. Vegh" <svegh@stetinalaw.com>

12/04/2008 01:34 PM

Subject RE: Chomp, Inc. v. Nathan Welter//Our Ref.: TRINI-022M

Paul:

As a follow up to me email below, would you be agreeable to suspend this case for 60 days pending review of the settlement agreement in this matter? We also need clarification as to who is handling this matter, your firm or Sheppard Mullin? If you can please confirm. Thank you.

1/8/2009

Exhibit F Page 1 of 1

EXHIBIT G

Stephen Z. Vegh

From: Paul F Rafferty [pfrafferty@jonesday.com]
Sent: Tuesday, December 09, 2008 1:39 PM
To: Stephen Z. Vegh
Subject: Warrior: Settlement and Co-Existence Agreement

Stephen;

Please pass this along to Tara as well if appropriate. Here is the latest version of the Agreement acceptable to Dwindle. It elected not to make material changes to the document, but you will note changes to 2.2, 2.3, and removal of Warrior's 3.5, and 3.6 as unnecessary. Dwindle will execute this document.

Paul Rafferty
JONES DAY
3 Park Plaza, Suite 1100
Irvine Ca. 92614-8505
Direct (949) 553-7588
Main (949) 851-3939
Cell (714) 305-9359
Fax (949) 553-7539
email: prafferty@jonesday.com

=====
This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege. If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.
=====

EXHIBIT H

Case: TRINI-022M

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
IN THE MATTER OF SERIAL NOS. 77/284,828 and 77/284,816**

Dwindle, Inc.,)	Opposition No.: 91185479
<i>and</i>)	
Chomp, Inc.)	
)	
Opposers)	
)	
v.)	
Welter, Nathan.)	
<u>Applicant.</u>		

ANSWER TO NOTICE OF OPPOSITION

Box TTAB – No Fee
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Dear Sir/Madam:

Applicant, Nathan Welter (hereinafter “Applicant”) hereby responds to the Notice of Opposition as follows:

1. Applicant is without sufficient information to form a belief as to matters set forth in this paragraph and, on that basis, denies those allegations.

2. Applicant is without sufficient information to form a belief as to matters set forth in this paragraph and, on that basis, denies those allegations.

3. Applicant is without sufficient information to form a belief as to matters set forth in this paragraph and, on that basis, denies those allegations.

4. Applicant is without sufficient information to form a belief as to matters set forth in this paragraph and, on that basis, denies those allegations.

5. Applicant is without sufficient information to form a belief as to matters set forth in this paragraph and, on that basis, denies those allegations.

6. Applicant admits its application for the subject mark was for the category of goods listed and alleges a first used date of at least as early as May 11, 2005. Applicant is without sufficient information to form a belief as to whether such goods constitute "similar products" with goods in which Opposer has used its mark, and on that basis denies this allegation.

7. Applicant admits its intent to use application for the subject mark was for the category of goods listed and that no amendment to allege use has been filed. Applicant is without sufficient information to form a belief as to whether such goods constitute "similar products" with goods in which Opposer has used its mark, and on that basis denies this allegation.

8. Applicant is without sufficient information to form a belief as to matters set forth in this paragraph and, on that basis, denies those allegations.

9. Applicant is without sufficient information to form a belief as to matters set forth in this paragraph and, on that basis, denies those allegations.

10. Applicant denies the allegations of this paragraph.

11. Applicant is without sufficient information to form a belief as to how Opposer defines the term “Action Sports Market”, and on that basis denies the allegations in this paragraph.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Opposer has failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Opposer has no standing to assert the claims set forth in the Notice of Opposition.

THIRD AFFIRMATIVE DEFENSE

Opposer’s claims are precluded by the Doctrine of Estoppel.

FOURTH AFFIRMATIVE DEFENSE

Opposer’s claims are precluded by the Doctrine of Acquiescence.

FIFTH AFFIRMATIVE DEFENSE

Opposer will not be damaged by registration of Applicant’s Mark.

SIXTH AFFIRMATIVE DEFENSE

Opposer is barred, in whole or in part, from relief by the Doctrine of Waiver.

SEVENTH AFFIRMATIVE DEFENSE

Opposer is barred, in whole or in part, from relief by the Doctrine of Laches.

EIGHTH AFFIRMATIVE DEFENSE

Opposer is barred, in whole or in part, from relief by the Doctrine of Unclean

Hands.

///

///

NINTH AFFIRMATIVE DEFENSE

Applicant alleges that its conduct was at all times lawful, privileged, justified, reasonable, and in good faith, based upon the relevant facts known at the time it acted.

TENTH AFFIRMATIVE DEFENSE

Opposer's claims are barred insofar as Opposer has abandoned its trademark(s).

ELEVENTH AFFIRMATIVE DEFENSE

Opposer has failed to adequately maintain, police or enforce any trademark or proprietary rights it may once have had in its alleged pleaded mark(s).

TWELFTH AFFIRMATIVE DEFENSE

Applicant hereby gives notice that it may rely on any other defenses that may become available or appear proper during discovery, and hereby reserves its right to amend this Answer to assert any such defenses.

WHEREFORE, Applicant prays that this opposition be dismissed, and that the subject application proceed to registration and for such other and further relief as may be appropriate.

Respectfully submitted,

Dated: January 9, 2009

By:



Kit M. Stetina, Reg. No. 29,445
Stephen Z. Vegh, Reg. No. 48,550
Stetina Brunda Garred & Brucker
75 Enterprise, Suite 250
Aliso Viejo, California 92656
Tel: (949)855-1246
Fax: (949)855-6371
Counsel for Applicant,
Nathan Welter