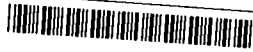


TTAB

Attorney Docket No. 14594-002710



04-08-2002

U.S. Patent & TMO/c/TM Mail Rcpt Dt. #70

CERTIFICATE OF MAILING

Date of Deposit: April 3, 2002

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, Box TTAB NO FEE, 2900 Crystal Drive, Arlington, VA 22202-3513.

TOWNSEND AND TOWNSEND AND CREW LLP

By: Elizabeth R. Gosse
Elizabeth R. Gosse

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

In re Application Serial No. 75/828,810

Mark: **NCR**
Filed: October 30, 1999
Published: October 13, 2000
Applicant: **GAM Products, Inc.**

NCR CORPORATION,

Opposer,

v.

GAM PRODUCTS, INC.,

Applicant.

Opposition No. 121,438

**CONSENTED MOTION TO SET
ASIDE DEFAULT AND
STIPULATED REQUEST FOR
SUSPENSION OF OPPOSITION**

TRADEMARK TRIAL AND
APPEAL BOARD
APR 15 AM 5:15

Commissioner for Trademarks
BOX TTAB NO FEE
2900 Crystal Drive
Arlington, VA 22202-3513

Madam:

MOTION TO SET ASIDE DEFAULT

Pursuant to Federal Rule of Civil Procedure 55(c), Applicant GAM Products, Inc.

("Applicant") hereby moves the Trademark Trial and Appeal Board to set aside the notice of

default entered against Applicant in this opposition proceeding. Opposer's attorney, Paul Martin, consented to the granting of this Motion by telephone on April 2, 2002.

On March 1, 2001, Applicant filed a consented motion for extension of time to answer or otherwise plead to allow time for settlement discussions between the parties. In response, on March 28, 2001, the Board suspended proceedings in this opposition pending the parties' negotiations. The opposition was resumed November 30, 2001 by an order of the Board, giving Applicant thirty days, or until December 29, 2001, to file its answer. However, Applicant did not receive notice that the opposition had been resumed or a copy of the Board's order. Therefore, no answer was filed.

Applicant's counsel had left several phone messages for Opposer's counsel over the past year in an effort to resolve this dispute, but replies were sparse. Only after Applicant's counsel wrote a letter to Opposer's counsel regarding his lack of response did Applicant learn by a telephone message from Opposer's counsel on March 13, 2002 that the opposition proceeding had resumed. On March 18, 2002, Applicant's counsel contacted Ms. Shirley Hassan, a legal assistant at the TTAB assigned to this opposition, requesting the status of the opposition and inquiring into the availability of further suspension. On March 19, 2002, Ms. Hassan left a message for Applicant's counsel stating that requests for suspension are always granted when the parties are negotiating settlement. On March 19 and 20, 2002, Applicant's counsel left phone messages with Opposer's counsel requesting a stipulation to further suspend the proceedings. On March 21, 2002, the Board issued a notice of default. On March 22, Applicant's counsel received a message from Opposer's counsel stating that he would be out of the office until April 1, 2002. On April 2, 2002, Opposer's counsel phoned Applicant's counsel and consented to the

granting of this motion to set aside the notice of default pending the parties' further settlement negotiations.

Under Fed. R. Civ. Proc. 55(c), a notice of default may be set aside upon showing of good cause. "[G]ood cause is usually found to have been established if the delay in filing is not the result of willful conduct or gross neglect on the part of the defendant, if the delay will not result in substantial prejudice to the plaintiff, and if the defendant has a meritorious defense." *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 U.S.P.Q.2d 1556 (T.T.A.B. 1991). The determination of whether to set aside a notice of default lies within the sound discretion of the Board. T.B.M.P. § 317.02. "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." *Id.*

There has been no willful conduct or gross neglect on the part of Applicant regarding its delay in filing an answer. As described above, these proceedings were suspended by the Board in March of 2001. Applicant and its counsel never received an order from the Board resuming and resetting the dates for this opposition proceeding. Applicant was not aware that the Board had resumed the opposition proceedings until well after the due date of its answer. Until March 13, 2002, Applicant believed that the opposition was still suspended pending settlement negotiations with counsel.

The parties are still negotiating a settlement of this opposition and wish to keep the opposition proceeding suspended pending these settlement negotiations. Opposer's counsel has consented to the granting of this Motion to set aside the notice of default in order to continue with these negotiations. Therefore, there is no prejudice to Opposer in any delay in the filing of

the answer because an amicable settlement should be reached by the continued suspension of this proceeding. Because settlement negotiations are still in progress, Applicant does not wish to state the grounds upon which a meritorious defense exists. However, Applicant does believe a meritorious defense exists. Any doubt on the matter should be resolved in favor of the Applicant. T.B.M.P. § 317.02

Because Applicant has shown good cause why an answer has not been filed in this opposition, Applicant requests the Board grant this consented motion to set aside the notice of default pursuant to Fed. R. Civ. Proc. 55(c).

REQUEST FOR SUSPENSION

If the Board grants the above motion to set aside the notice of default and reinstates the opposition, then in accordance with 37 C.F.R. § 2.117(c), Applicant hereby requests the Board to suspend the above proceedings for six months. Opposer's attorney, Paul Martin, consented to the granting of the requested suspension by telephone on April 2, 2002. Applicant believes there is good cause for the granting of this request, as it is made to enable the parties to discuss settlement of this opposition and is not interposed for the purpose of delay.

Respectfully submitted,

TOWNSEND and TOWNSEND and CREW LLP

Dated: April 3, 2002

By 

Paul W. Vapnek
Elizabeth R. Gosse
Attorneys for Applicant

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CERTIFICATE OF SERVICE

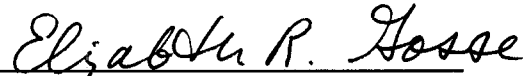
I hereby certify that on April 3, 2002, I caused the foregoing:

**CONSENTED MOTION TO SET ASIDE DEFAULT AND
STIPULATED REQUEST FOR SUSPENSION OF OPPOSITION**

to be served by United States mail, postage prepaid, in an envelope addressed to:

Mr. Paul W. Martin
Law Department
NCR Corporation
1700 S. Patterson Boulevard
Dayton, OH 45479

Counsel for Opposer



Elizabeth R. Gosse