

TTAB

03031-N0055A

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

-----X	:	
VERILUX, INC.,	:	
	:	
Opposer	:	
	:	
v.	:	Opposition No. 91156531
	:	
LINAYA GAIL HAHN,	:	
	:	
Applicant	:	
-----X	:	

OPPOSER'S MOTION FOR RELIEF FROM FINAL JUDGMENT

Opposer, Verilux, Inc. (hereinafter "Verilux"), by its attorneys, respectfully moves, pursuant to the Trademark Trial and Appeal Board Manual of Procedure §544 and Rule 60(b)(1) of the Fed. R. Civ. P., for relief from the Final Judgment of the Board, mailed December 21, 2004, entering a default judgment against Verilux and dismissing the Opposition of Opposer with prejudice.

Verilux is making the request for relief based upon mistake, inadvertence, and excusable neglect and to ensure that the determination in the Opposition proceeding be based upon the merits as opposed to default. A trademark registration on the federal Principal Register is at least prima facie evidence of the ownership and exclusive right to use of the mark (Lanham Act §7(b), 15 USCS §1057(b); Lanham Act §33(a), 15 USC §1115(a); *Trademark and Unfair Competition*, §16:6, J. Thomas McCarthy), and to permit the Applicant's



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registration to issue based on the default would be granting rights without a review of the merits of the Opposition.

Opposer has every intention to enforce its senior rights in and to its SUNSHINE Family of Marks, and its various registrations and applications therefor, over Applicant's INDOOR SUNSHINE mark for identical goods.

A Declaration of Kathryn Grant Belleau, Esq., the attorney representing Opposer (hereinafter "Belleau Declaration"), is attached in support of this Motion.

From the beginning of the opposition proceeding, responsive communications from Applicant were delayed, as explained by her counsel, because he is a sole practitioner and various situations arose which affected his ability to file timely documents and responses. This occurred initially when the Answer to the Notice of Opposition was due and the Trademark Trial and Appeal Board accepted the late filing of the Answer and Opposer did not object thereto.

Opposer then served Applicant with a set of interrogatories to which nothing responsive was ever filed or received by Opposer. Opposer believed that Applicant was not interested in defending the opposition and thought to rely then on its Brief in support of its position in the Opposition.

Around the time Opposer's Brief was due, there was a shift in the workload at the undersigned attorneys' firm. Three attorneys left the firm and, simultaneously, the Trademark Paralegal left on maternity leave. These departures resulted in an increased workload for those attorneys remaining at the firm and the resultant need for them to pick up the slack. The files were distributed to the Trademark attorneys within the firm resulting in an increased

workload for each, including supervising staff normally reporting to the Trademark Paralegal. This additional workload resulted in confusion as to who was responsible for what specific work, as a result of the shuffling of matters resulted in the inadvertence and mistake which led to the failure to prosecute the Opposition. This resulted in the entry of the default with prejudice.

By issuing the Default, Opposer is being denied due process in this opposition.

As Opposer is filing the Motion in a timely manner, and the resultant action was due to mistake, inadvertence and excusable neglect, it is respectfully requested that Opposition No. 91156531 be reinstated, that a new scheduling order be issued, and that Opposer be permitted to file its Brief and enforce its rights.

Respectfully submitted,



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Kathryn Grant Belleau  
Attorney for Opposer, Verilux, Inc.  
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203 324-6155  
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Dated: January 20, 2005

CERTIFICATE OF SERVICE

This is to certify that the foregoing document is being served on Applicant's counsel of record, this 20<sup>th</sup> day of January, 2005 by depositing the same as first class prepaid mail to the following:

Thomas Flannigan  
LAW OFFICES OF THOMAS FLANNIGAN  
70 West Madison, Suite 5330  
Chicago, IL 60602  
ATTORNEY FOR APPLICANT

  
Aaliyah S. Thornton

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	-----X	

DECLARATION OF KATHRYN GRANT BELLEAU

I, Kathryn Grant Belleau, affirm and state the following:

I am a Trademark Attorney at the firm St. Onge Steward Johnston & Reens LLC responsible for trademark prosecution, oppositions, cancellations, and litigation;

I was handling, *inter alia*, Opposition No. 91156531 on behalf of Opposer, Verilux, Inc., and prepared and filed the Notice of Opposition therein as well as Discovery documents;

During the pendency of the Opposition, there was a shift in responsibility of trademark matters at the firm due to the departure of three attorneys and the maternity leave of the Trademark Paralegal, resulting in an increase in the workload assigned to the remaining attorneys;

As a result of this additional workload for the remaining attorneys as well as a shift in responsibility for some matters to either consolidate or simplify work, the filing of the Brief in the present opposition was inadvertently overlooked resulting in the Default Judgment;

No instructions were received by Opposer to permit this Opposition to lapse and the oversight was due to inadvertence and excusable neglect.

I hereby declare, under penalty of perjury under the laws of the United States of America that the foregoing statements are true and correct.

January 20, 2005  
Date

  
Kathryn Grant Belleau