

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

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|-------------------|---|--------------------------|
| VERILUX, INC. |) | Serial No. 76/396,211 |
| |) | |
| Opposer, |) | Opposition No. 91156531 |
| |) | |
| v. |) | Mark: INDOOR SUNSHINE |
| |) | |
| LINAYA GAIL HAHN, |) | Published in Official |
| |) | Gazette January 14, 2003 |
| Applicant. |) | |

**APPLICANT’S RESPONSE TO OPPOSER’S
MOTION FOR RELIEF FROM FINAL JUDGMENT**

Linaya Gail Hahn (“Applicant”), by her attorney, respectfully requests that Opposer’s Motion for Relief from Final Judgment be denied.

Verilux, Inc. (“Opposer”) moved pursuant to the Trademark Trial and Appeal Board Manual of Procedure § 544 and Rule 60(b)(1) of the Federal Rules of Civil Procedure for relief from the Board’s default judgment against Opposer and dismissal of the Opposition of Opposer with prejudice, entered December 21, 2004. Opposer made the request based upon relief, inadvertence, and excusable neglect. However, Opposer’s Motion for Relief fails to set forth legitimate reasons for relief under § 544 and Rule 60(b)(1), and the Motion should be denied by the Board.

Rule 60(b), which governs motions to set aside or vacate a final judgment rendered by the Board, states that: “On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;” Relief from a final judgment is an extraordinary remedy to be granted only in exceptional circumstances, and the determination of whether such a motion should be

granted is matter that lies within the sound discretion of the Board. TTAB Manual of Proc. § 544 (*citing Djeredjian v. Kashi Co.*, 21 USPD2d 1613, 1615 (TTAB 1991)).

Applicant's Answer to Opposer's Notice of Opposition was filed on August 26, 2003. No response was filed by Opposer, and on October 6, 2004, more than one year later, the TTAB informed Opposer that time to file had expired. The letter stated that Opposer would be given 30 days to show cause why the Board should not treat its failure to file a brief as a concession of the case, failing which a judgment dismissing the notice of opposition with prejudice would be entered against Opposer. Opposer did not respond, and on December 21, 2004, the Board informed the parties that judgment had been entered against Opposer and the opposition dismissed with prejudice.

Opposer's motion states that its inaction was due to a shift in workload following the loss of three attorneys and a paralegal at the firm, which resulted in confusion as to who was responsible for what specific work. In interpreting Board decisions denying motions under § 544 and Rule 60(b)(1), appellate courts have affirmed in instances where "mere inattention on the part of counsel or the press of counsel's other business" were the only reasons proffered for excusable neglect. *See, e.g., Williams v. The Five Platters, Inc.*, 510 F.2d 963, 964 (C.C.P.A. 1975). In *Williams*, the appellate court affirmed the decision of the Board, which characterized reasons such as absence from office and pressure of other work as "carelessness and inattention on the part of counsel," and did not consider the reasons as constituting the excusable neglect referred to in Rule 60(b)(1). *Id.*

Similarly, other courts interpreting Rule 60(b)(1) motions have found that "Routine carelessness by counsel leading to a late filing is not enough to constitute

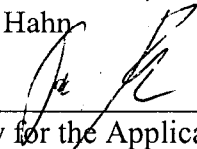
excusable neglect for purposes of motion for relief from judgment.” *Negron v. Celebrity Cruises*, 316 F.3d 60, 62 (1st Cir. 2003). In *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 177 (2nd Cir. 2004), the court found that when a party demonstrates a lack of diligence in defending a lawsuit, a court need not set aside a default judgment. Here, Opposer’s failure to file a reply brief due to “confusion” from a “shift in workload” is merely an example of disorganization, carelessness, and lack of diligence in prosecuting the filed Opposition, and fails to meet the excusable neglect standard set forth in 60(b)(1). Opposer’s requested relief from judgment should be denied for failure to demonstrate that such extraordinary relief is warranted.

Opposer also states as a reason for its failure to prosecute its opposition that Applicant did not respond promptly to its first set of interrogatories. However, no follow-up contact was made by Opposer following the service of the interrogatories, and Applicant believed that Opposer was not interested in assuring the completion of the interrogatories or in pursuing the opposition.

In addition, the support for this motion was a declaration by Opposer’s attorney Kathryn Grant Belleau. Although § 544 of the TTAB Manual of Proc. States that relief requires for a reason specified in Rule 60(b) must be “persuasively shown (preferably by affidavits, declarations, documentary evidence, etc.)”, Opposer’s attorney chose not to file a sworn affidavit. The declaration was instead chosen, and provides only that the shift in workload and subsequent confusion as reasons for its failure to prosecute the opposition.

For the above reasons, Applicant respectfully requests that the Board deny Opposer’s Motion for Relief From Final Judgment.

Respectfully Submitted,
Linaya Gail Hahn

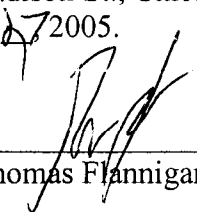
By: 

Attorney for the Applicant

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that *Applicant's Response to Opposer's Motion for Relief from Final Judgment* was served on Opposer, by placing a copy of the same in the U.S. Mail at Three First National Plaza, 70 W. Madison St., Chicago, Illinois, with postage prepaid, before the hour of 5:00 p.m. on January 27, 2005.



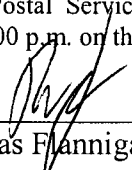
Thomas Flannigan

TTAB

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CERTIFICATE OF MAILING
 37 C.F.R. § 1.10
 I hereby certify that this correspondence is being deposited with the United States Postal Service as Express Mail to the addressee named below before 5:00 p.m. on the date of January 27, 2005.

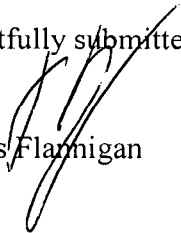
By: 
 Thomas Flannigan

Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513
Box TTAB Fee

By USPS Express Mail

Dear Sir or Madam:

Enclosed please find *Applicant's Response To Opposer's Motion For Relief From Final Judgment.*

Respectfully submitted,

Thomas Flannigan

Encl.

