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

<b>Proceeding</b>	91157867
<b>Party</b>	Defendant Frosty Treats, Inc. Frosty Treats, Inc. 620 East Linwood Boulevard Kansas City, MO 641091718
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<b>Submission</b>	Reply in Support of Motion
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<b>Date</b>	12/20/2004
<b>Attachments</b>	2004-12-20 FTreats Reply in Supp of M_for Relief.pdf ( 5 pages )

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

In re: Application Serial No. 78/168,231  
for: FROSTY TREATS  
Filed: September 26, 2002  
Published in the Official Gazette on May 13, 2003

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SONY COMPUTER ENTERTAINMENT	)	
AMERICA INC.,	)	
	)	
Opposer,	)	
	)	
v.	)	Opposition No. 91-157,867
	)	
FROSTY TREATS, INC.,	)	
	)	
Applicant.	)	

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Alexandria, VA 22313-1451

**APPLICANT'S REPLY IN SUPPORT OF MOTION FOR RELIEF  
FROM SUMMARY JUDGMENT**

Applicant Frosty Treats, Inc. ("Frosty Treats") respectfully submits this Reply in support of its Motion for Relief from Summary Judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure and Chapter 544 of the Trademark Trial and Appeal Board Manual of Procedure. In support of its motion, Frosty Treats states as follows:

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**CERTIFICATE OF TRANSMISSION**

I hereby certify that, on the date shown below, this correspondence is being deposited with the United States Patent and Trademark Office, Trademark Trial and Appeal Board via electronic filing through their website located at <http://estta.uspto.gov/>.

/david r. barnard/  
David R. Barnard

December 20, 2004  
Date

**I. Sony has Acknowledged that the Eighth Circuit Should be Allowed to Rule on this Issue Prior to the Board Taking Any Determinative Action.**

Opposer Sony Computer Entertainment America, Inc. ("Sony") has effectively demonstrated the most fundamental tenet behind Frosty Treats' current motion – that this Board should and must allow the Eighth Circuit to rule on this matter before the Board issues any dispositive ruling. As Sony has shown, "[t]o the extent that the civil action is dispositive of the issues before the Board, the decision of the federal court is binding upon the Board." Sony's Response in Opposition to Applicant's Motion for Relief, p.7, citing *Goya Foods Inc. v. Tropicana Products, Inc.* 846 F.2d 848, 853-54 (2nd Cir. 1988); *Kearns-Tribune, L.L.C. v. Salt Lake Tribune Publishing Co. L.L.C.*, 2003 WL 22134916 at \*3 (T.T.A.B. 2003). Accordingly, proceedings before this board should be stayed, pending outcome of the civil litigation. *Whopper-Burger, Inc. v. Burger King Corp.*, 171 U.S.P.Q. 805, 807 (T.T.A.B. 1971). However, in order to effectuate this well-settled policy, Frosty Treats' Motion for Relief must be granted, so that the parties can be returned to a neutral position before the Eighth Circuit. Sony is actively relying upon the Board's default judgment as evidence against Frosty Treats in support of its brief to the Eighth Circuit. *See* Appellee's Opening Brief, p. 2, attached as Exhibit A to Sony's Response in Opposition to Applicant's Motion for Relief. If Frosty Treat's Motion for Relief is not granted, and the default summary judgment remains in place, then the actions of this Board risk skewing the Eighth Circuit's decision on this matter.

Setting aside the default summary judgment is the only way to ensure that neither party is prejudiced before the Eighth Circuit. Incredibly, Sony has argued that staying the proceedings before the Board without setting aside the default judgment "would not prejudice Frosty Treats," while setting aside the default judgment and allowing the Eighth

Circuit to rule solely on the merits would "substantially prejudice" Sony. Sony's position is entirely inconsistent with its admission that the outcome of Federal civil litigation should guide the actions of the Board.

As both parties agree, case law requires that the Board stay proceedings on this matter pending the resolution of the Eighth Circuit appeal. The only way to accomplish this goal, while not prejudicing the appeal, is for the Board to simply set aside its default summary judgment without prejudice, and then stay further proceedings in this matter until the Eighth Circuit has ruled. Such action would avoid prejudicing either party, would adhere to the well established case law, and would require minimal action from the Board.

## **II. Issues in Sony's Response Meriting Reply**

### **A. Good Faith**

The simple operative fact that created this situation is that Sony's Motion for Summary Judgment never made it into the hands of Frosty Treat's attorneys. Sony has no more or less evidence that Frosty Treats was negligent than Frosty Treats has that Sony failed to send its summary judgment motion to Frosty Treats. The record indicates simply that something, somewhere obviously went wrong with the delivery of Sony's motion. There is no evidence that this was Frosty Treat's fault. Instead, this is a textbook case of unavoidable mistake, for which neither party can be blamed and as a result of which neither party should be prejudiced. By granting Frosty Treat's motion for relief, the parties will be returned to the position they held prior to this unavoidable error, and this matter can be resolved on its merits.

**B. Sony Offers No Authority to Support its Contention that Frosty Treats is Obligated to Regularly Check the U.S.P.T.O.'s Website for Sony's Filings or that Frosty Treats Showed a "Complete Lack of Diligence" in Prosecuting its Application.**

Sony offers no authority to support its bald assertion that Frosty Treat had an obligation to discover Sony's motion through the U.S.P.T.O.'s web page. Sony also has provided no authority for its position that the Board's stay order provided actual notice to Frosty Treats sufficient to justify the extremely prejudicial default ruling Sony urges here. It is unclear how Sony has reached these conclusions, as it has provided no case law to support these claims.

**III. Sony's Response Ignores Frosty Treat's Substantive Arguments.**

Sony's failure to respond to any of the substantive arguments put forth by Frosty Treats demonstrates Sony's original motion for summary judgment to this Board lacks merit. This fact would make not setting aside the default particularly egregious.

**IV. Conclusion.**

This Board should set aside its default judgment against Frosty Treats and stay further proceedings until the Eighth Circuit rules on the merits of this case.

Dated: December 20, 2004

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served on counsel for Opposer by U.S. First-Class mail, postage prepaid, this 20th day of December, 2004 addressed to:

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