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

In the matter of trademark application Serial Nos. 78/126,968 and 78/126,971
For the marks ACTIVESCOUT and FORESCOUT
Published in the Official Gazette on November 12, 2002

NETSCOUT SYSTEMS, INC.,

Opposer,

v. Opposition No. 91158578

FORESCOUT TECHNOLOGIES, INC.,

Applicant.

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

APPLICANT'S REPLY TO OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO SET ASIDE DEFAULT, OPPOSITION TO OPPOSER'S MOTION FOR A DEFAULT JUDGMENT, AND MOTION FOR LEAVE TO FILE A LATE ANSWER

Applicant, Forescout Technologies, Inc., hereby replies to the response filed by Opposer, NetScout Systems, Inc., to Applicant's Motion to Set Aside Default, Opposition to Opposer's Motion for a Default Judgment, and Motion for Leave to File a Late Answer.

I. Statement of Facts

Applicant stands behind the facts set forth in its original Motion to Set Aside Default, Opposition to Opposer's Motion for a Default Judgment, and Motion for Leave to File a Late Answer. Therefore, Applicant will not restate the facts set forth in Applicant's motion.

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II. Legal Argument

The law clearly favors the resolution of cases on their merits. CTRL Systems Inc. v. Ultraphonics of North America Inc., 52 USPQ2d 1300, 1301 (TTAB 1999). Default judgment is an extreme measure that should be used only as a last resort. Martin v. Coughlin, 895 F.Supp. 39 (N.D.N.Y. 1995). The TTAB has been "lenient in accepting late-filed answers" where, as in this case, the delay is not excessive. See, Mattel, Inc. v. Henson, 88 Fed. Appx. 401, n. 1 (Fed. Cir. 2004).

Applicant absolutely has shown the requisite "good cause" to cure its default, and, accordingly, a default judgment sanction is not warranted in this case. See, Fed. R. Civ. P. 55(c); Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc., 21 USPQ2d 1556 (TTAB 1991). As set forth in Applicant's Motion to Set Aside Default, etc., and accompanying Certification of T. Kent Elliott, the minimal delay involved herein was not attributable to willful conduct or gross neglect. The facts here clearly indicate that Applicant neither consciously nor deliberately chose to ignore the Consolidated Notice of Opposition. In fact, it is uncontrovertible that once Applicant did become aware of documents and deadlines, it moved swiftly, diligently, and decisively to defend the Opposition.

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This case is not DeLorme Publishing Co. v. Eartha's, Inc., 2000 WL 33321172 (TTAB 2000), where Applicant admittedly chose not to respond in any way to an Opposition for nearly six months because it believed the Notice to be incomplete. The DeLorme applicant, unlike the instant Applicant, did not even bother to file a motion to extend the response period. In this case, Applicant's Answer ultimately was due on April 30, 2004. Applicant filed its Motion on July 15, 2004 – a mere two-and-a-half-month delay. Such a negligible delay, coupled with Applicant's prior motion to extend the response period, does not rise to the level of willful conduct or gross neglect that calls for the extreme measure of judgment by default.

Opposer places much emphasis on the fact that Applicant has not filed its proposed Answer to the Opposition. In fact, only today has Applicant been able to find a copy of the Opposition. Indeed, Opposer's stress on this point comes with ill grace; in an effort to file its Answer as soon as possible, undersigned counsel requested from Opposer's counsel a copy of the Opposition, which was not among the documents transmitted to Applicant's management in June of this year (see, Kent Affidavit) but, to date, Opposer's counsel has not responded to the request.

Significantly, Opposer spends all of three sentences purporting to explain how the two-and-a-half-month delay at

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work herein will result in substantial prejudice to it. Opposer's Opposition at p. 5. Opposer, however, has not alleged that witnesses or evidence have become unavailable due to the passage of time or that it has suffered any other substantial prejudice. See, DeLorme, 2000 WL 33321172 at *2. While Opposer urges in a conclusory fashion that Applicant's minimal delay has been prejudicial, neither its Motion nor the accompanying Declaration establishes prejudice. Additionally, Opposer should not be heard to complain of prejudice when it took Opposer nearly four months to file its Opposition after Applicant's mark was published for opposition.

III. Conclusion

In light of the foregoing, the negligible two-and-a-half-month delay at issue herein was not the result of Applicant's willful conduct and gross neglect, and Opposer has failed utterly to establish that Applicant's delay in filing its Motion caused substantial prejudice to Opposer or that Applicant is without a meritorious defense to the Opposition. Applicant, therefore, respectfully requests that the default entered in this matter be set aside, that leave be granted to file a late Answer, and that Opposer's Motion for a Default Judgment be denied.

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COLEMAN & WEINSTEIN
A Professional Corporation

Ronald D. Coleman
David Stein

410 Park Avenue, 15th Floor
New York, NY 10022
(212) 752-9500

Dated: August 18, 2004

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CERTIFICATION OF SERVICE

I hereby certify that on August 18, 2004, a true and correct copy of the foregoing Applicant's Reply to Opposer's Response to Applicant's Motion to Set Aside Default, Opposition to Opposer's Motion for a Default Judgment, and Motion for Leave to File a Late Answer is being deposited with the U.S. Postal Service as first class mail, postage prepaid, to counsel for Opposer, and that courtesy service is being made by facsimile as well.

Ronald D. Coleman