

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

In the matter of Applications:
Serial Nos.: 78/126,968 and 78/126,971
Filed: May 7, 2002
Applicant: ForeScout Technologies, Inc.
Marks: ACTIVESCOUT and FORESCOUT
Published in the Official Gazette of November 12, 2002


06-21-2004
U.S. Patent & TMO/c/TM Mail Rcpt Dt. #78

NetScout Systems, Inc.,)
)
Opposer,)
)
v.) Opposition No. 91158578
)
ForeScout Technologies, Inc.,)
)
Applicant.)

MOTION FOR DEFAULT JUDGMENT

COMES NOW the Opposer, NetScout Systems, Inc., pursuant to 37 C.F.R. § 2.106(a) and Fed. R. Civ. P. 55, and moves for a default judgment against the Applicant, ForeScout Technologies, Inc. Applicant has failed to file an Answer to the Consolidated Notice of Opposition during the time allowed therefor.

MEMORANDUM OF LAW

I. BACKGROUND.

Opposer is the owner of the inherently distinctive trademark NETSCOUT for and in connection with computer software and programs for monitoring and managing computer network traffic and computer network diagnostic software, and related goods and services. Opposer has registered its NETSCOUT trademark with the United States Patent and Trademark Office (PTO) and is the owner of Registration No. 1,764,154 for NETSCOUT and Registration

No. 2,287,610 for NETSCOUT and Design, both for computer software in International Class 9. Registration No. 1,764,154 has been made incontestible, in accordance with 15 U.S.C. § 1065.

On May 7, 2002, Applicant filed applications with the PTO for registration of the trademarks ACTIVESCOUT and FORESCOUT for and in connection with “computer software designed to provide computer network perimeter security; computer hardware” in International Class 9. On March 14, 2003, Opposer timely filed its Consolidated Notice of Opposition, No. 91158578. On November 25, 2003, the Board mailed a copy of the Consolidated Notice of Opposition to Applicant, along with an Order stating that an Answer thereto was due forty (40) days after the mailing date of such Order. As forty days from the Board’s Order fell on Sunday, January 4, 2004, the due date for Applicant’s filing of an Answer, therefore, was January 5, 2004. On February 3, 2004, Applicant filed a Consented-to Motion to Extend the Time to File an Answer. The Board granted this Motion and, in an Order dated April 10, 2004, set a new deadline of twenty (20) days from that Order for Applicant to file its Answer. Applicant’s Answer was due on or before April 30, 2004. To date, no Answer has been filed by Applicant, nor has Applicant sought any additional extensions of time.

The undersigned counsel for Opposer called Applicant’s counsel of record to learn of Applicant’s position in this case. Julia Gard, Esq. of Barnes & Thornburg stated that her firm no longer represented Applicant in this matter and relevant files had been returned to Applicant; Ms. Gard provided the name of a contact person at Applicant. Undersigned counsel spoke with this individual in an effort to learn Applicant’s position on its default and the opposition, but did not receive a definitive answer.

II. DEFAULT JUDGMENT SHOULD BE ENTERED.

Trademark Rule 2.106(a) provides that "If no answer is filed within the time set, the opposition may be decided as in case of default." 37 C.F.R. § 2.106(a). See also Fed. R. Civ. P. 55. Under these rules, "the failure to answer is all that is necessary to support [default] judgment." Old Grantian Co. v. William Grant & Sons Ltd., 150 USPQ 58, 60 (CCPA 1966).

The opposition defendant that "fails to file a timely answer is in 'default' once the due date for the answer has passed." Paolo's Assocs. Ltd. v. Bodo, 21 USPQ2d 1899, 1901 (Comm'r Pat. 1990). In such a case, the Board may issue a Notice of Default, or alternatively, the party in the position of "plaintiff" may move for entry of a default judgment. Old Grantian, 150 USPQ at 60.

Applicant has wholly failed to answer, thereby failing to answer within the time set by the Board. Accordingly, a judgment of default should be entered against Applicant.

III. CONCLUSION.

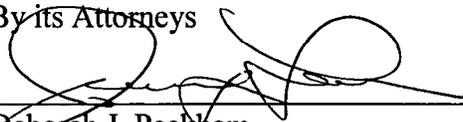
In light of the foregoing, Opposer respectfully requests that default judgment be entered against Applicant, in accordance with § 2.106(a) of the Trademark Rules.

Date: June 14, 2004

Respectfully submitted,

NETSCOUT SYSTEMS, INC.

By its Attorneys



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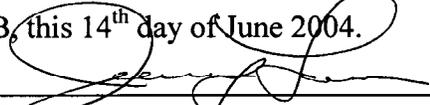
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CERTIFICATE OF MAILING

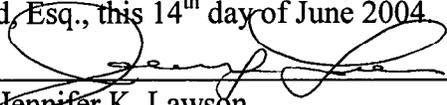
I hereby certify that a true and correct copy of the foregoing Motion for Default Judgment is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to: Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia, 22202-3514, Attn: TTAB, this 14th day of June 2004.



Jennifer K. Lawson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Default Judgment is being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to the Applicant at: Ayelet Steinitz, ForeScout Technologies, Inc., c/o Accel Partners, 2755 Campus Drive, Suite 115, San Mateo, California, 94403, with a copy to counsel of record for Applicant, Barnes & Thornburg LLP, 11 South Meridian Street, Indianapolis, Indiana, 46204, Attn: Julia Gard, Esq., this 14th day of June 2004.



Jennifer K. Lawson