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

Proceeding	91168324
Party	Plaintiff Z-TECH INC.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Z-TECH, INC.,	)	
	)	
Opposer,	)	
	)	
vs.	)	Opposition No. 91168324
	)	
ACI INTERNATIONAL,	)	
	)	
Applicant	)	
	)	
_____	)	

Serial No. 78/529,121
Mark: SPRING Z

MOTION AND BRIEF OF OPPOSER
FOR DEFAULT JUDGMENT AND OTHER RELIEF

Z-Tech, Inc. ("Plaintiff" or "Opposer") moves the Trademark Trial and Appeal Board ("Board") for a Default Judgment in favor of Opposer, and for other relief as requested in this motion,

AND AS GROUNDS THEREFORE states that:

1. On March 22, 2006 Opposer mailed to counsel for Applicant discovery requests included respectively as Exhibits A-C that accompanied the MOTION OF OPPOSER TO COMPEL DISCOVERY AND FOR OTHER RELIEF, AND BRIEF OF OPPOSER ("Motion to Compel") received by the Board on 24 May 2006.

2. The Motion to Compel was mailed to counsel for Applicant on 22 May 2006.

3. Counsel for Applicant received the Motion to Compel on 25 May 2006.

4. Applicant had 20 days from the date of service to respond to the Motion to Compel, a period of time that ended on 12 June 2006.

5. Applicant has responded neither to any discovery requests of Opposer nor to the Motion to Compel.

6. Opposer, however, timely responded to discovery requests received from Applicant.

7. The Trial Order of the Board provides that the discovery period ends on 17 July 2006, but Opposer has received no discovery responses.

WHEREFORE OPPOSER PRAYS FOR AN ORDER from the Board:

A. Granting a default judgment in favor of Opposer determining that Opposer would be damaged by registration of the trademark SPRING Z as shown in Serial No. 78/529,121.

B. Finding and concluding that Applicant's mark SPRING Z so nearly resembles Opposer's marks identified in the Notice of Opposition, paragraphs 4-12 ("Opposer's Marks"), as to likely be confused with Opposer's marks and lead to mistake and/or deception when used on or in connection with Applicant's goods.

C. Finding and concluding that Applicant's mark SPRING Z would cause confusion, mistake, and lead to deception as to the origin of Opposer's footwear goods that bear Opposer's marks.

D. Finding and concluding that Applicant's mark SPRING Z so resembles Opposer's Marks as to be likely, when applied to the goods set forth in Applicant's application (which are the same International Classification and type of goods sold by Opposer), to cause confusion, mistake, or deception within the meaning of 15 U.S.C. §1052(d), Lanham Act §2(d).

E. Finding and concluding that registration of Application No. 78/529,121 in connection with the mark SPRING Z sought for the goods identified in the Application should be denied and refused.

F. Forfeiting Applicant's right to object to the Discovery Request on their merits as provided in TBMP §403.03.

G. Granting such other and further relief as to the Board seems just and appropriate in the circumstances.

OPPOSER'S BRIEF IN SUPPORT OF MOTION

Opposer submits the following in compliance with 37 CFR §2.127(a) and TBMP §502.02(b):

(1) Applicant has failed to answer and respond to the Opposer's discovery requests and has filed no response to the Motion to Compel.

(2) Opposer's counsel made a good faith effort by correspondence to resolve the refusal of Applicant to provide discovery by sending a letter to counsel for Applicant via both facsimile transmission and mail requesting responses to the Discovery Requests. See Exhibit D attached to the Motion to Compel. Opposer has received no communication from Applicant's counsel.

(3) All conditions precedent for the Board to enter a default and Default Judgment requested in this Motion have been met.

(4) The Board has power and authority to enter judgment against a party that does not respond to discovery requests. See TBMP §411.04.

(5) A motion for a default judgment is a motion contemplated by the Federal Rules of Civil Procedure ("FRCP"), specifically FRCP 54 and 55. Accordingly, this motion is included among the wide range of motions that may be filed in *inter partes* proceedings before the Board. See Trademark Rule 2.116(a), 37 CFR §2.116(a), and TBMP §502.01.

(6) FRCP provides that when a party "against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend...and that fact is made to appear by affidavit or otherwise," a default and a judgment of default may be entered against that party.

(7) If a party fails to file a brief in opposition to a motion, the Board may treat the motion as conceded. See 502.03 and 37 CFR §2.127(a). In the Motion to Compel, Opposer requested not only an order compelling responses to Opposer's discovery requests and forfeiture of Applicant's right to object to Opposer's discovery requests on their merits as provided in TBMP §403.03, but also for a judgment on the merits in favor of Opposer and against Applicant. Applicant failed to file a brief in opposition to the Motion to Compel. The Motion to Compel, therefore, is conceded. Opposer, therefore, is entitled to an order for a judgment on the merits in favor of Opposer and against Applicant.

(8) As the Court of Appeals, Federal Circuit noted in the case of *Minnesota Mining & Manufacturing Company v. Eco Chem, Inc.*, 757 F.2d 1256, 225 USPQ 350 (CAFC, 1985), FRCP 37(d) authorizes courts (and in this case, the Board) to "make such orders in regard to the failure [to respond to discovery requests] as are just." *Minnesota Mining & Manufacturing Company*, at page 1261. The Federal Circuit held that a "total failure to respond" to discovery

requests warranted entry of a default judgment against the party who had not responded to discovery. *Id.*, at 1261.

In the case of *Adriana International Corporation v. Lewis & Company, et al.*, 913 F.2d 1406, 17 Fed. R. Serv. 3d 1006 (1990) the Ninth Circuit confirmed a default judgment as an appropriate sanction for failure to respond to discovery requests. The court cited a number of reasons why a default judgment is appropriate: "(1) the public's interest in expeditious resolution of litigation; (2) the court's [in this case, Board's] need to manage its docket; (3) the risk of prejudice to the other party [which in this case is the inability of the Opposer to prepare for trial in the absence of discovery]; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." See *Adriana International Corporation*, at 1411. The court held that the third factor, the risk of prejudice in this instance to the Opposer, occurs when actions of the other party "impair the [party's] ability to go to trial or threaten to interfere with the rightful decision of the case." *Id.*, at 1411. Because the Board, unlike district courts, does not directly intervene in the discovery process of an opposition proceeding, and does not award costs and attorney fees in connection with the Board's decisions, the absence of any response by Applicant either to Opposer's discovery requests or to the Motion to Compel is sufficient basis for the Board to impose a default judgment in favor of Opposer.

WHEREFORE, Opposer requests an Order from the Board granting the relief prayed for in paragraphs A. through G. above.

Respectfully submitted by:

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By: _____
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CERTIFICATE OF MAILING AND SERVICE

I HEREBY CERTIFY that the originals of this paper is being filed via electronic transmission with the Trademark Trial and Appeal Board, P.O. Box 1451, Alexandria, Virginia 22313-1451; and that a copy of this paper is being mailed via first class mail (Priority Mail, Delivery Confirmation Receipt) in an envelope addressed to Louis J. Bovasso, Esq. at Greenberg Traurig, LLP, 2450 Colorado Avenue, Suite 400 E, Santa Monica, California 90404, on the 20° day of June, 2006.

Ray R. Regan