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

Proceeding	92056052
Party	Defendant Extremity Medical, LLC
Correspondence Address	EXTREMITY MEDICAL LLC 300 INTERPACE PARKWAY SUITE 410 PARSIPPANY, NJ 07054 UNITED STATES
Submission	Answer
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Date	09/24/2012
Attachments	IO FIX Design Answer to Notice of Opposition.pdf (7 pages)(476830 bytes)

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

<p>BAXANO, INC.,</p> <p style="text-align:center">Petitioner,</p> <p style="text-align:center">v.</p> <p>EXTREMITY MEDICAL, LLC</p> <p style="text-align:center">Respondent.</p>	<p>Trademark Registration</p> <p>Mark: </p> <p>Reg. No.: 4,057,095</p> <p>Issued: 11/15/2011</p> <p>Cancellation No.: 92056052</p>
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**ANSWER AND AFFIRMATIVE DEFENSES TO THE PETITION FOR
CANCELLATION**

Extremity Medical, LLC (hereinafter “Respondent”) hereby answers the Petition for Cancellation of Baxano, Inc. (hereinafter collectively “Petitioner”). Paragraph numbers 1 – 20 correspond to the numbered paragraphs in the Petition for Cancellation. Respondent reserves the right to amend or supplement this Answer as appropriate.

1. Denied.
2. Respondent lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in this paragraph, and therefore denies same.
3. Respondent admits that what purports to be copies of Petitioner’s registration certificates and corresponding TARR status reports of the IOFLEX Marks is attached as Exhibit A to the Petition for Cancellation. Respondent lacks knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in this paragraph, and therefore denies same.
4. Respondent lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that Petitioner’s IOFLEX Marks have been used in connection with its goods and services since October 7, 2009 and are currently being used in commerce in association with such goods and services, and therefore denies same. Respondent denies the remaining allegations contained in this paragraph.
5. Denied.
6. Admitted.

7. Admitted.
8. Admitted.
9. Denied.
10. Admitted that the side-by-side comparison of Petitioner's Mark and Respondent's Mark contains an accurate depiction of both marks. Admitted that Respondent's Mark contains a stylized "X," which is in the form of an "X-Man" represented by the abstract design of a person with a solid circle for a head and two curved lines of increasing thickness running from left hand to right foot and right hand to left foot as well as an arc over the man's head. Respondent denies the remaining allegations of this paragraph.¹
11. Denied.
12. Denied.
13. Denied.
14. Denied.
15. Respondent admits that its Trademark Registration was filed on an intent-to-use basis on April 13, 2010. Respondent denies the remaining allegations contained in this paragraph. In particular, Respondent denies that any of Petitioner's IOFLEX Marks give Petitioner priority of use over Respondent because, inter alia, Respondent's registration for its X-Man, a predominant feature of Respondent's Mark, was already a federally-registered trademark and in use before Petitioner's earliest alleged date of first use of the IOFLEX Marks.
16. Denied.
17. Denied.
18. Denied.
19. Denied.
20. Denied.

¹ Respondent owns U.S. Trademark Reg. No. 3,684,368 for its "X-Man" (attached as Ex. A) registered on September 15, 2009, more than one year prior to any federal registration of Petitioner's IOFLEX Marks, and prior to Petitioner's earliest alleged first use of the IOFLEX Marks.

AFFIRMATIVE DEFENSES

Respondent sets forth below its affirmative defenses. By setting forth these affirmative defenses, Respondent does not assume the burden of proving any fact, issues, or element of a cause of action where such burden properly belongs to Petitioner. Moreover, nothing stated herein is intended or shall be construed as an acknowledgement that any particular issue or subject matter is relevant to Petitioner's allegations.

1. Petitioner's action is barred because Petitioner fails to state a claim upon which relief may be granted.
2. Petitioner's action is barred by the doctrine of laches.
3. Respondent asserts that there is no likelihood of confusion because Petitioner's Marks are dissimilar in their overall appearance, meaning and commercial impression.
4. Respondent asserts that there is no likelihood of confusion because there is no evidence of any actual confusion by consumers between the goods offered by the Respondent and the goods and/or services offered by the Petitioner.
5. Respondent asserts that there is no likelihood of confusion because the consumers of Respondent's goods are sufficiently sophisticated to know that Petitioner's goods and/or services are unrelated to those of Respondent.
6. Respondent asserts that there is no likelihood of dilution, either by blurring or tarnishment, between Petitioner's Marks and Respondent's Marks.
7. Respondent asserts that there is no likelihood of dilution because Petitioner's Marks are not recognized by the general public, and indeed, Petition does not even allege that the Marks are recognized by the general public.
8. Respondent hereby gives notice that it intends to rely on any additional affirmative defenses that become available or apparent during discovery and thus reserves the right to amend its answer to assert such additional affirmative defenses.

Wherefore, Respondent respectfully requests that the Board dismiss the above-captioned Petition for Cancellation for lack of merit and grant any other relief the Board deems appropriate.

Dated: September 24, 2012

Respectfully submitted,

/s/ Michael J. Zinna
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via email on the 24th of September 2012 to the following:

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By: /s/ Michael J. Zinna
Michael J. Zinna
Attorney of Record

EXHIBIT A

United States of America

United States Patent and Trademark Office



Reg. No. 3,684,368 EXTREMITY MEDICAL LLC (NEW JERSEY LIMITED LIABILITY COMPANY)
Registered Sep. 15, 2009 SUITE 410

300 INTERPACE PARKWAY
PARSIPPANY, NJ 07054

Int. Cl.: 10

FOR: MEDICAL DEVICES, NAMELY, ORTHOPEDIC IMPLANTS AND ORTHOPEDIC
SURGICAL INSTRUMENTS, IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

TRADEMARK

PRINCIPAL REGISTER FIRST USE 1-15-2009; IN COMMERCE 1-15-2009.

THE MARK CONSISTS OF THE LETTER "X" WHERE THE "X" IS REPRESENTED AS A
STYLIZED PERSON WITH A SEMI-CIRCLE ABOVE THE STYLIZED PERSON.

SN 77-611,737, FILED 11-11-2008.

PAUL MORENO, EXAMINING ATTORNEY



David J. Kyfos

Director of the United States Patent and Trademark Office