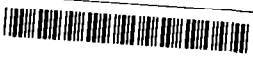


**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**Exhibits**

INVACARE CORPORATION )  
 )  
 Opposer, )  
 v. )  
 )  
 BANYAN LICENSING, L.L.C., )  
 )  
 Applicant. )

  
08-01-2002  
U.S. Patent & TMO/TM Mail Rcpt Dt. #79

Opposition No. 91150883

In the Matter of Trademark Application Serial No. 76001555  
for the mark CONTOUR SEAT CUSHION

**OPPOSER'S MOTION TO COMPEL DISCOVERY ANSWERS**

NOW COMES Opposer Invacare Corporation, by and through counsel, and pursuant to T.B.M.P. 523 moves this Board for an Order compelling Applicant Banyan Licensing LLC to answer discovery requests propounded upon Applicant on April 29, 2002. Pursuant to T.B.M.P. 407.01 and 409.01, answers were due on or before June 3, 2002 (including the five (5) extra days allowed for responding to requests sent by first-class mail). Despite good faith efforts by Opposer's counsel, Applicant and/or Applicant's counsel willfully refuses to answer interrogatories and requests for production of documents lawfully propounded upon Applicant by Opposer. An affidavit of Opposer's attorney, a short Memorandum of Law in support, and

true and accurate copies of the original discovery requests are attached hereto and incorporated herein.

Respectfully submitted,

By: 

Bradford J. Patrick, Esq.  
Mansour Gavin Gerlack & Manos Co. LPA  
55 Public Square, Suite 2150  
Cleveland, OH 44113  
Phone: 216-523-1500  
Fax: 216-523-1705  
Email: [bpatrick@mggmlpa.com](mailto:bpatrick@mggmlpa.com)

Date: July 30, 2002

Attorney for Opposer Invacare Corporation

## MEMORANDUM OF LAW

### **I. Statement of Facts**

Unfortunately, Opposer Invacare Corporation (“Opposer”) has been forced to resort to filing this Motion to Compel Discovery Answers due to the willful conduct of Applicant Banyan Licensing LLC (“Applicant”) and/or Applicant’s attorney, Mr. Larry C. Jones in refusing to answer discovery in this opposition proceeding. On April 29, 2002, Opposer’s attorney of record Bradford J. Patrick deposited in the United States Postal Service Ordinary Mail, the original First Set of Interrogatories To Applicant Banyan Licensing LLC and the original First Set of Requests For Production of Documents And Things to Applicant Banyan Licensing LLC (collectively, the “Discovery Requests”), and addressed to attorney of record for Applicant, Mr. Larry C. Jones, Esq., Alston & Bird, Bank of America Plaza, 101 S. Tryon Street, Suite 4000, Charlotte, NC 28280-4000. See, original Affidavit of Bradford J. Patrick, attached hereto and incorporated herein as **Exhibit 1**, at ¶ 4 (hereinafter, “Affidavit at ¶ \_\_\_\_”). True and accurate copies of the Discovery Requests are attached hereto and incorporated herein as **Exhibits 2 & 3**.

Pursuant to T.B.M.P. 407.01 and 409.01, answers were due on or before June 3, 2002 (including the five (5) extra days allowed for responding to requests sent by first-class mail). Affidavit at ¶ 5. Mr. Jones responded on May 16, 2002 via electronic mail and informed Opposer’s counsel that “Our client has decided not to incur any additional expenses at this time in its effort to register CONTOUR SEAT CUSHION on the Principal Register. To minimize expenses, we will be closing our file without participating further in the opposition proceeding.” Affidavit at ¶ 6. A true and accurate copy of said e-mail is attached hereto and incorporated herein as **Exhibit 4**.

On June 11, 2002, via electronic mail, Opposer's counsel contacted Mr. Jones to clarify what he meant by his May 16, 2002 e-mail. Affidavit at ¶ 7. A true and accurate copy of said e-mail is attached hereto and incorporated herein as **Exhibit 5**. Mr. Jones responded on June 12, 2002 via electronic mail and informed Opposer's counsel as follows: "I repeat (from my email of May 16): 'To minimize expenses, we will be closing our file without participating further in the opposition proceeding.'" Affidavit at ¶ 8. A true and accurate copy of said e-mail is attached hereto and incorporated herein as **Exhibit 6**.

On or about June 14, 2002, in a final good faith effort to resolve the unwillingness of Applicant to answer the Discovery Requests, Opposer's attorney sent a letter via facsimile and ordinary mail to Mr. Jones dated June 14, 2002, and asked him whether he intended to answer the requests before Opposer had to resort to filing a motion with this Board. Affidavit at ¶ 9. A true and accurate copy of said letter is attached hereto and incorporated herein as **Exhibit 7**. As of the date of this Affidavit, Opposer's counsel has not received a response of any kind from Mr. Jones to the letter of June 14, 2002. Affidavit at ¶ 9.

**II. Legal Argument: Applicant Has Failed To Answer Discovery Requests Lawfully Propounded Upon It; Therefore, This Court Should Compel Discovery.**

Pursuant to T.M.R.P. 2.120(e), "if a party...fails to answer...any interrogatory, or fails to produce and permit the inspection and copying of any document or thing, the party seeking discovery may file a motion before the Trademark Trial and Appeal Board for an order to compel...an answer, or production and an opportunity to inspect and copy..." Opposer has unfortunately had to resort to this rule, due to the unwillingness of Applicant and/or Applicant's attorney to provide answers to discovery lawfully propounded upon Applicant. As set forth above, pursuant to T.B.M.P. 407.01 and 409.01, answers were due on or before June 3, 2002. Despite the good faith efforts of Opposer's counsel, Applicant and/or Applicant's counsel

willfully refuses to provide answers to the Discovery Requests. Therefore, Opposer moves this Board for an order compelling Applicant to provide answers to the Discovery Requests without further delay. As this Board so states in its rules, “[t]he Board expects parties (and their attorneys or other authorized representatives) to cooperate with one another in the discovery process, and looks with extreme disfavor upon those who do not....” T.B.M.P. 412.01.

Opposer reminds Applicant of the potential harsh result if it continues to refuse to provide answers to discovery:

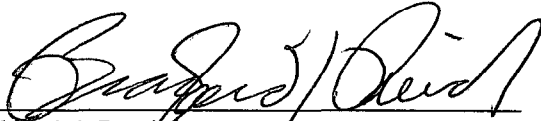
If a party fails to comply with an order of the Board relating to discovery, including an order compelling discovery, the Board may order appropriate sanctions as defined in Trademark Rule 2.120(g)(1) and Fed. R. Civ. P. 37(b)(2), including entry of default judgment. Default judgment is a harsh remedy, but it is justified where no less drastic remedy would be effective, and there is a strong showing of willful evasion.

*Baron Philippe de Rothschild, S.A. et al. v. Styl-Rite Optical Mfg. Co.*, Opposition No. 95,170, 2000 WL 1300412 (Trademark Tr. & App. Bd.), June 23, 2000, at \*7 (copy attached) (internal citations omitted).

### **III. Conclusion.**

For the foregoing reasons, Opposer Invacare Corporation, by and through counsel, and moves this Board for an Order compelling Applicant Banyan Licensing LLC to answer discovery requests propounded upon Applicant, and further, that the Board in its Order issue a date by which discovery answers must be provided to Opposer under threat of sanctions for any noncompliance, no matter its degree, with such date certain.

Respectfully submitted,

By: 

Date: July 30, 2002

Bradford J. Patrick, Esq.  
Mansour Gavin Gerlack & Manos Co. LPA  
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Cleveland, OH 44113  
Phone: 216-523-1500  
Fax: 216-523-1705  
Email: [bpatrick@mggmlpa.com](mailto:bpatrick@mggmlpa.com)

Attorney for Opposer Invacare Corporation

**CERTIFICATE OF SERVICE**

I hereby certify that the a copy of the foregoing Opposer's Motion To Compel Discovery Answers was deposited with the United States Postal Service as first class mail with proper postage affixed, this 30<sup>th</sup> day of July, 2002 in an envelope addressed to:

Larry C. Jones, Esq.  
Jason M. Sneed, Esq.  
ALSTON & BIRD LLP  
Bank of America Plaza  
101 S. Tryon Street  
Suite 4000  
Charlotte, NC 28280-4000

*COUNSEL FOR APPLICANT  
BANYAN LICENSING, L.L.C.*



Bradford J. Patrick

Date of Signature: July 30, 2002

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

INVACARE CORPORATION )  
 )  
 Opposer, )  
 v. ) Opposition No. 91150883  
 )  
 BANYAN LICENSING, L.L.C., )  
 )  
 Applicant. )


In the Matter of Trademark Application Serial No. 76001555  
for the mark CONTOUR SEAT CUSHION

**CERTIFICATE OF MAILING**

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first-class mail in an envelope addressed to:

Box TTAB  
NO FEE  
Assistant Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3513

on Tuesday, July 30, 2002.

  
Bradford J. Patrick, Esq.





MANSOUR, GAVIN, GERLACK & MANOS CO., L.P.A.

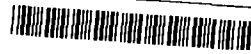
55 PUBLIC SQUARE  
SUITE 2150  
CLEVELAND, OHIO 44113-1994

Phone 216/523-1500

Writer's E-mail  
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Fax 216/523-1705

July 30, 2002



08-01-2002

U.S. Patent & TMO/TM Mail Rpt Dt. #79

TTAB  
TRADEMARK TRIAL AND  
APPEAL BOARD  
02 AUG -5 AM 12:39

**Via Priority Mail**

Box TTAB

NO FEE

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

**Re: Enclosed Motion to Compel Discovery Answers & Supporting Affidavit  
Opposition No. 91150883  
In the matter of Trademark Application Serial No. 76-001,555  
For the mark "CONTOUR SEAT CUSHION" in International Class 10**

Dear Assistant Commissioner for Trademarks:

Enclosed is the original and one (1) copy of Opposer's Motion to Compel Discovery Answers (with Affidavit) against Applicant Banyan Licensing, L.L.C. in the matter of Opposition No. 91150883. Also attached to said Motion is the original and one (1) copy of the Certificate of Mailing for this correspondence.

If you have any questions regarding this filing, please contact the undersigned, attorney for the Opposer in this proceeding.

Very truly yours,

Bradford J. Patrick

BJP:td

Enclosures

cc: Larry C. Jones, Esq. (w/encl)  
Bridget Miller, Esq., Invacare Corporation (w/encl.)

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

INVACARE CORPORATION	)	
	)	
Opposer,	)	
v.	)	Opposition No. 91150883
	)	
BANYAN LICENSING, L.L.C.,	)	
	)	
Applicant.	)	


In the Matter of Trademark Application Serial No. 76001555  
for the mark CONTOUR SEAT CUSHION

**CERTIFICATE OF MAILING**

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on Tuesday, July 30, 2002.

  
Bradford J. Patrick, Esq.

  
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