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Filing date: **06/17/2019**

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

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|------------------------|--|
| Proceeding | 91247838 |
| Party | Plaintiff FZIOMED, INC. |
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| Submission | Motion for Default Judgment |
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| Signature | /Steven E Lauridsen/ |
| Date | 06/17/2019 |
| Attachments | 2019-06-17 - FINAL - OPTIPLEX - Motion for Default Judgment.pdf(211142 bytes) |

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

FZIOMED, INC,

Opposer,

v.

MEDLINE INDUSTRIES, INC.,

Applicant.

Opposition No. 91247838

Serial No. 88/144,784

Mark: OPTIPLEX

MOTION FOR DEFAULT JUDGMENT

Pursuant to 37 C.F.R. § 2.106(a) and Rule 55 of the Federal Rules of Civil Procedure, Opposer hereby moves for default judgment against Applicant.

I. INTRODUCTION

Default judgment is warranted because Applicant failed to file an answer or an appropriate motion in response to Opposer's notice of opposition by the Board-ordered deadline to do so. Applicant is therefore in default. Applicant has not sought relief from default, nor has it attempted to show good cause as to why default judgment should not be entered. Opposer therefore requests that this motion be granted, that default judgment be entered against Applicant, and that this opposition be sustained.

II. DEFAULT JUDGMENT IS APPROPRIATE DUE TO A FAILURE TO ANSWER.

A. Legal Standard

If an applicant fails to file an answer within the time prescribed, default may be entered and the opposition decided against the Applicant. 37 C.F.R. § 2.106(a). An opposer need not

wait until the Board issues a notice of default; the issue may be raised and decided upon a motion for default judgment once the time to answer has expired. TBMP §§ 312.01 & 508.

The standard for default judgment in Board proceedings is governed by Rule 55 of the Federal Rules of Civil Procedure. *DeLorme Publishing Co. v. Eartha's Inc.*, 60 U.S.P.Q.2d 1222, 1224 (TTAB 2000). Thus, absent good cause shown by the applicant, default judgment should be entered when the applicant fails to respond timely to a notice of opposition either by filing an answer or an appropriate motion. Fed. R. Civ. P. 55(b)-(c); *see also, e.g., Paolo's Assocs. L.P. v. Bodo*, 21 U.S.P.Q.2d 1899, 1902 (Comm'r 1990). A showing of good cause to discharge a default generally requires that “(1) the delay in filing is not the result of willful conduct or gross neglect, (2) the delay will not result in substantial prejudice to the opposing party, and (3) the defendant has a meritorious defense.” *DeLorme*, 60 U.S.P.Q.2d at 1224 (citing *Fred Hayman Beverly Hills Inc. v. Jacques Bernier Inc.*, 21 U.S.P.Q.2d 1556 (TTAB 1991)).

B. Default judgment should be entered.

Applicant's deadline to answer in this proceeding was June 8, 2019, as set forth in the Board's Notice of Institution. Dkt. 2. As of the date of this motion, Applicant has neither filed nor served any response—either by motion or by way of answer—to the notice of opposition in this proceeding. Similarly, Applicant has not filed a motion seeking relief from default and thus has not demonstrated good cause as to why default judgment should not be entered. Default judgment is therefore appropriate and this opposition should be sustained.

III. CONCLUSION

Due to Applicant's failure to file a timely answer or an appropriate motion in response to the notice of opposition in this proceeding, default judgment is warranted, and this opposition should be sustained.

Respectfully submitted,

TUCKER ELLIS LLP

Date: June 17, 2019

By: /s/Steven E. Lauridsen

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Attorneys for Opposer

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **MOTION FOR DEFAULT JUDGMENT** has been served on Applicant by email on this 17th day of June, 2019

to:

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