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

Proceeding no.	91291126
Party	Plaintiff Cedar Garden Food Import and Export, Inc.
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Attachments	Reply in Support of MSJ Opposition No 91291126.pdf(356201 bytes)

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

In the Matter of Application Serial No. 98099258
Published on April 23, 2024

CEDAR GARDEN FOOD IMPORT & EXPORT, INC.)	Opposition No.: 91291126
)	
Opposer)	Mark: 
)	
v.)	
)	
SAAD TRADING INC.)	
)	
Applicant.)	

Reply of Opposer in Support of Motion for Summary Judgment

Nothing in Applicant’s response (TTABVUE 7)(the “**Response**”) refuted any argument levied by Opposer in the motion summary judgment. TTABVUE 5 (the “**Motion**”). Applicant does not dispute that: (i) it and Opposer were party to the Prior Opposition; (ii) the Prior Application sought registration for the same mark at issue in this proceeding; and (iii) the Prior Opposition resulted in a final decision on the merits. Instead, the Response focused entirely on one argument; that Applicant’s counsel in the Prior Opposition failed to communicate with Applicant concerning unanswered discovery resulting in the judgment and, consequently, Applicant did not have a full and fair opportunity to defend. But, not only does Applicant’s argument any lack merit, it is incorrect as a matter of law.

The Response invites the Board to excuse Applicant's admitted failure to comply with its own duty to communicate with counsel during the Prior Opposition. Specifically, in the declaration of Khalil Saad on behalf of Applicant that was included with the Response (the "**Saad Decl.**"), Applicant admits that: (i) it knew about the Prior Opposition (Saad Decl. at ¶ 6); and (ii) Applicant had no communication with prior counsel after the Answer was filed (Saad Decl. at ¶ 7). Missing, however, from the Saad Decl. was any suggestion that Applicant even tried to communicate with prior counsel. Zero. Not even one mention of an unreturned call or email.

The law is crystal clear that communication is a duty shared by client and counsel, and a party/client cannot fail of its own accord to communicate and thereafter ask to retry a case because of the failures of counsel, to wit:

"[I]t is well settled that the client and the attorney share a duty to remain diligent in prosecuting or defending the client's case; that communication between the client and attorney is a two-way affair; and that **action, inaction or even neglect by the client's chosen attorney will not excuse the inattention of the client so as to yield the client another day in court."**

CTRL Sys., Inc. v. Ultraphonics of North America, Inc., 52 USPQ2d 1300, 1302 (TTAB 1999) (collecting cases) (*emphasis added*); See also *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993); *Link v. Wabash R. Co.*, 370 U.S. 626 (1962).

Therefore, contrary to the arguments in the Response, Applicant absolutely did have a full and fair opportunity to defend, and its own failure to communicate with its counsel does not in any way create a genuine issue

of fact in this proceeding.

Further, even if Applicant's own failure to communicate with counsel could somehow be excused, that excuse should be irrelevant to claim preclusion for at least the reason that Applicant has done nothing to remove the prior judgment; something it can no longer do.

No matter its merits, a prior judgment "can be corrected only by a direct review and not by bringing another action upon the same cause of action." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981)(internal quotation omitted). If Applicant wished to persist in seeking registration for the CEDARLAND Mark, then as an initial matter it should have sought relief from judgment in the Prior Opposition by filing a motion in that proceeding under Fed. R. Civ. P. 60. *See also, Maloul v. New Colom. Res., Inc.*, 2018 U.S. Dist. LEXIS 133371, at *13-17 (S.D.N.Y. Aug. 7, 2018) (granting summary judgment for claim preclusion regardless of merits of plaintiff's motion for relief from judgment in the first action). But, not only has Applicant never, to date, filed a motion for relief, the time to do so has passed.

Applicant had one (1) year to seek relief from judgement in the Prior Opposition. As a reminder, final judgement issued on May 27, 2022, giving Applicant until May 27, 2023 to file. However, Applicant admits that it had from until at least October 2022 to the end of May 2023 to act; and didn't. More specifically, and referring again to the Saad Decl.: (i) Applicant knew about the judgment by the end of August 2022 (Saad Decl. at ¶ 8), and;

Applicant's new counsel, Mr. Raykinsteen, was retained in October 2022. Consequently, any effort to request relief from the judgment in the Prior Opposition has long since passed.

To conclude, Applicant does not refute Opposer's grounds for summary judgment and nothing in the Response created a genuine issue of material fact, or any other grounds, relevant to summary judgment in this action. The Board should, therefore, grant summary judgment in favor of Opposer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. 2.119(b)(6), I hereby certify that a true and complete copy of the foregoing **Reply of Opposer in Support of Motion for Summary Judgment** has been served on the Applicant's attorney of record on July 23, 2024, via electronic mail to the email addresses listed below:

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