

ESTTA Tracking number: **ESTTA251365**

Filing date: **11/25/2008**

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

Proceeding	91176744
Party	Defendant Michael Craig Silver
Correspondence Address	Michael Craig Silver 3229 Steiner Street San Francisco, CA 94123 UNITED STATES silver_michael@sbcglobal.net
Submission	Other Motions/Papers
Filer's Name	Michael Silver
Filer's e-mail	silver_michael@sbcglobal.net
Signature	/Michael Silver/
Date	11/25/2008
Attachments	Microsoft Word - USPTO.SH.1.pdf (2 pages)(50105 bytes) outbind2.pdf (2 pages)(87168 bytes) outbind.pdf (2 pages)(92803 bytes) MW-Base-Formulation1.pdf (2 pages)(74679 bytes) BriefResponseSuperH.pdf (8 pages)(69294 bytes)

Search:

Opposition

Number: 91176744

Filing Date: 04/09/2007

Status: Pending

Status Date: 04/13/2007

Interlocutory Attorney: [ANDREW P BAXLEY](#)

Defendant

Name: [Michael Craig Silver](#)

Correspondence: [Michael Craig Silver](#)

3229 Steiner Street
San Francisco, CA 94123
silver_michael@sbcglobal.net

Serial #: [78823155](#)

[Application File](#)

Application Status: Opposition Pending

Status:

Mark: SUPER HERO

Plaintiff

Name: [DC Comics and Marvel Characters, Inc.](#)

Correspondence: [Jonathan D. Reichman](#)

Kenyon & Kenyon, LLP
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Prosecution History

#	Date	History Text	Due Date
27	11/04/2008	SUSPENDED PENDING DISP OF OUTSTNDNG MOT	
26	10/31/2008	P'S MOTION TO AMEND PLEADING/AMENDED PLEADING	
25	10/22/2008	TRIAL DATES RESET	
24	10/22/2008	TRIAL DATES RESET	
23	10/10/2008	P'S COMMUNICATION	
22	10/10/2008	P'S MOTION FOR AN EXTENSION OF TIME	
21	10/10/2008	EXTENSION OF TIME GRANTED	
20	10/10/2008	STIPULATION FOR AN EXTENSION OF TIME	
19	09/04/2008	TRIAL DATES RESET	
18	08/29/2008	P'S MOTION FOR DEFAULT JUDGEMENT	
17	07/07/2008	SUSPENDED	
16	07/03/2008	P'S MOTION TO COMPEL DISCOVERY	
15	04/21/2008	PL'S MOT. FOR SUMM. JUDGMENT DENIED	
14	03/20/2008	CHANGE OF CORRESPONDENCE ADDRESS	
13	12/19/2007	REQUEST FOR AN ORAL ARGUMENT AND MOT TO SUSPEND IS DENIED	

Prosecution History

#	Date	History Text	Due Date
12	12/14/2007	P'S REPLY IN SUPPORT OF MOTION	
11	12/14/2007	P'S MOT TO SUSP PEND DISP OUTSTNDNG MOT	
10	11/29/2007	D'S OPPOSITION/RESPONSE TO MOTION	
9	11/02/2007	CHANGE OF CORRESPONDENCE ADDRESS	
8	10/30/2007	SUSPENDED	
7	10/25/2007	P'S MOTION FOR SUMMARY JUDGMENT	
6	10/25/2007	P'S MOTION FOR SUMMARY JUDGMENT	
5	10/25/2007	P'S MOTION FOR SUMMARY JUDGMENT	
4	05/18/2007	ANSWER	
3	04/13/2007	PENDING, INSTITUTED	
2	04/13/2007	NOTICE AND TRIAL DATES SENT; ANSWER DUE:	05/23/2007
1	04/09/2007	FILED AND FEE	

Search:

Michael Silver

From: teas@uspto.gov

Sent: Wednesday, October 22, 2008 12:27 PM

To: silver_michael@sbcglobal.net

Subject: Received Your Change of Correspondence Address for serial number 78823155

We have received your Change Of Correspondence Address form below.

Application serial number(s) 78823155 has/have been amended as follows:

Change Of Correspondence Address

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	78823155
LAW OFFICE ASSIGNED	LAW OFFICE 115
MARK SECTION	
MARK	SUPER HERO
CORRESPONDENCE SECTION (current)	
ORIGINAL ADDRESS	SILVER, MICHAEL, CRAIG 64 Lincoln Drive Sausalito California 94965 United States 530-581-3013 silver_michael@sbcglobal.net
NEW CORRESPONDENCE ADDRESS	
NEW ADDRESS	SILVER, MICHAEL, CRAIG 64 Lincoln Drive Sausalito California United States 94965 530-581-3013 silver_michael@sbcglobal.net
SIGNATURE SECTION	
SIGNATURE	/Michael Silver/
SIGNATORY NAME	Michael Silver
SIGNATORY DATE	10/22/2008
SIGNATORY POSITION	Owner
FILING INFORMATION SECTION	

11/25/2008

SUBMIT DATE	Wed Oct 22 15:26:40 EDT 2008
TEAS STAMP	USPTO/CCA-99.185.247.240- 20081022152640232138-7882 3155-4003b52be4121c3d8534 6b8923a22fe24-N/A-N/A-200 81022152143013914

Thank you,

The TEAS support team

Wed Oct 22 15:26:43 EDT 2008

STAMP: USPTO/CCA-99.185.247.240-20081022152640232138-78823155-
4003b52be4121c3d85346b8923a22fe24-N/A-N/A-20081022152143013914

Michael Silver

From: teas@uspto.gov
Sent: Friday, October 03, 2008 7:58 AM
To: silver_michael@sbcglobal.net
Subject: Received Your Change of Owner's Address for serial number 78823155

We have received your Change Of Owner's Address form below.
Application serial number(s) 78823155 has/have been amended as follows:

PTO Form 2197 (Rev 09/2005)
OMB No. 0651-0056 (Exp 10/31/2008)

Change Of Owner's Address

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	78823155
LAW OFFICE ASSIGNED	LAW OFFICE 115
MARK SECTION	
MARK	SUPER HERO
OWNER SECTION (current)	
NAME	Silver, Michael Craig
STREET	211 Woodhill Court
CITY	Tahoe City
STATE	California
ZIP/POSTAL CODE	96145
COUNTRY	United States
PHONE	530-320-6488
FAX	866-306-2405
CORRESPONDENCE SECTION (current)	
ORIGINAL ADDRESS	SILVER, MICHAEL, CRAIG 3229 STEINER STREET SAN FRANCISCO California 94123 United States 530-320-6488 silver_michael@sbcglobal.net
NEW OWNER ADDRESS	
STREET	64 Lincoln Drive

CITY	Sausalito
STATE	California
ZIP/POSTAL CODE	94965
COUNTRY	United States
PHONE	530-581-3013
CURRENT CORRESPONDENCE ADDRESS	
NAME	SILVER, MICHAEL, CRAIG
STREET	64 Lincoln Drive
CITY	Sausalito
STATE	California
COUNTRY	United States
POSTAL/ZIP CODE	94965
PHONE	530-581-3013
SIGNATURE SECTION	
SIGNATURE	/Michael Silver/
SIGNATORY NAME	Michael Silver
SIGNATORY DATE	10/03/2008
SIGNATORY POSITION	Owner
FILING INFORMATION SECTION	
SUBMIT DATE	Fri Oct 03 10:58:17 EDT 2008
TEAS STAMP	USPTO/COA-76.254.25.19-20 081003105817188165-788231 55-400957c4f52ddc22c3484b eab0bd2afc4-N/A-N/A-20081 003104627567234

Thank you,

The TEAS support team

Fri Oct 03 10:58:17 EDT 2008

STAMP: USPTO/COA-76.254.25.19-20081003105817188165-78823155-400957c4f52ddc22c3484beab0bd2afc4-N/A-N/A-20081003104627567234

Maiden Waves Sunscreen

“Engineered Nano-Suntection SPF 55”

Anti-Wrinkle, Very Water Resistant, High Sun Protection

FDA Approved Sunscreen Active Ingredients for everyday use.

UVA/UVB/UVC Protective Absorption Spectrums.

Slow Deep Tanning, Water Immersion Design, Water Stability Systems.

Intermittent Blockage of Ultraviolet Radiation -Range 200nm-700nm.

Non-comedogenic-won't clog pores.

Base Formulation Design:

1. Extracts-cucumber, sunflower
2. Elastin/Collagen
3. Vitamins –B, C, D, E
4. Antioxidants –Milk Thistle,
5. Oyster Shell Calcium with Vitamin D

Active Ingredient:

Up to %

1. Zinc Oxide	13.9%	25%
2. Octinoxate	7.5%	
3. Octocrylene	10%	10%
4. Oxybenzone	6%	6%
5. Octisalate	5%	?
6. Titanium dioxide (micronized)	?%	25%
7. Ethylhexyl p-methoxycinnamate	?%	?

Combined Ingredients:

8. Avobenzone (combo with micro-zinc oxide) legal? 3%
9. Avobenzone (combo with Cinoxate or oxybenzone) ?

Inert Ingredients:

Herbs, Medicinal Plants

Cosmetic Bases/Natural Oils/Aromatherapy/Homeopathy:

Herbs-

Aloe Vera-moistens and softens skin.

Balm- soothes skin. Lemon Balm- soothes sun burn

Calendula (marigold)- anti-septic and anti-inflammatory. Skin conditions and tone delicate skin.

Chamomile-anti-inflammatory for skin treatments. Useful against infections.

Cucumber- astringent, freshen and tone facial skin.

Devil's Claw-anti-inflammatory. Used in skin products.

Flax-anti-inflammatory, emollient and demulcent.

Ginseng-(panax ginseng) heals and softens skin.

Horsetail- skin conditions.

Lady's Mantle-skin care

Pansy-skin care

Sage-

Slippery Elm Bark-softens and lubricates the skin, non-greasy=emollient

Squirting Cucumber-treating baldness and cure against scalp diseases.

Walnut-(black walnut) sooth skin and reduce enlarged pores.

Medicinal Plants-Botanicals

Green Tea-anti-cancer, anti-viral, anti-oxidant

Seaweeds-Brown Algae-anti-cancer, anti-thrombotic effects

Aphrodisiacs-Kava Kava, Ginseng, Orchids

Cancer- Seaweeds, Rosemary, Periwinkle

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

In re Application of : Michael Craig Silver
Serial No. : 78/823,155
Filed : February 24, 2006
For : SUPER HERO

Published Official Gazette
Page TM 371
October 10, 2006

-----x
DC COMICS and :
MARVEL CHARACTERS, INC. :
 :
Opposers, :
 : Opposition # 91176744
vs. :
 :
MICHAEL CRAIG SILVER :
 :
Applicant, :
-----x

**BREIF AND RESPONSE TO OPPOSER'S MOTION FOR LEAVE TO AMEND
ITS NOTICE OF OPPOSITION**

The Applicant request the understanding of the Appeal Board to recognize the excusable neglect for the lack of a Brief and Response by the due date of November 20, 2008. The Applicant has acted in good faith with the TTAB and the Opposers on all proceedings and submits the following as justification for allowing the Applicant's Brief and Response to be considered against the Opposer's Motion For Leave to Amend Its Notice of Opposition.

As clarified by the Supreme Court in Pioneer Investment Services Company v. Brunswick Associates Limited

Partnership, 507 U.S. 380 (1993), and followed by the Board in Pumpkin, Ltd. v. The Seed Corps, 43 USPQ2d 1582 (TTAB 1997), a determination of whether a party's neglect is excusable involves consideration of (1) the prejudice to the non-moving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the moving party, and (4) whether the moving party had acted in good faith.

The Applicant has on more than one occasion acted to notify Opposers of a change in Applicant's correspondence address. The attached documents, dated 10/3/08 and 10/22/08 evidence Applicant good faith to advise the Opposers of the updated Correspondence address. As either a result of either the TTAB computer database or the Opposer's neglect the correspondence address for documents filed in regards to this opposition have been on more than one occasion sent to an old correspondence address of the Applicant.

The USPTO email confirmation that is attached, dated 10/3/08, details that the "new address" is 64 Lincoln Drive, Sausalito, CA 94965. This initial confirmation served to give the Applicant notice that the new address of

64 Lincoln Dr. had been successfully updated with the TTAB and the Opposers.

After discussion with more than one representative of the USPTO to confirm the status of the Applicant's correspondence address a subsequent good faith effort was made by filing a second update of the Applicant's new address to ensure that the Opposers and the TTAB were correctly informed of the Applicant's new correspondence address, see document dated 10/22/08.

The applicant on more than one occasion after updating the USPTO correspondence address of the Applicant continued to receive filings from either the Opposers or the USPTO / TTAB to the old address. The impact of this incorrect addressing served to delay the information being received. The inaccurate correspondence address continues to appear as detailed in the attached USPTO document dated 11/4/08.

Although the applicant does receive email notices from the USPTO in regards to this opposition, this method of correspondence is not relied upon or checked. In effect, the Applicant had detrimentally relied on the expected notices from the TTAB and Opposers by regular US Mail Delivery. These instances of inconsistent mail delivery and

the Applicant's efforts to correct them serve to prove the good faith of the Applicant to ensure that the proceedings of the TTAB are as efficient and accurate as possible. The Applicant was also placed at a disadvantage to act timely as a reliance upon the US postal delivery served to frustrate the Applicant's efforts with late notices.

Applicant has acted as immediately as possible to respond to motions by the TTAB and Opposers. The submission of the attached documents at this time do not prejudice the non-moving party. The submission of an additional document evidencing a bona fide intent of the applicant do not frustrate the non-moving party's case since the document references a different trademark owned by the Applicant that is not in contest with the Opposers and therefore not relevant to the instant opposition. The document submitted is offered to verify the bona fide intent of the Applicant to use the Super Hero name for a sunscreen product.

The trademark name of Maiden Waves is owned by the Applicant and was Registered with the USPTO as a trademark on January 18, 2005 and has the USPTO registration number of 2920196. Applicant has not submitted this documentation in the past based on the fact that this document was created for use with a different trademark name than the

one referenced in the present Opposition proceedings.

However, this Maiden Waves Sunscreen document, having been created by the Applicant serves to evidence the mental direction and intent that the Applicant had understood when he submitted the Super Hero trademark application.

The purpose for the submission of the Maiden Waves Sunscreen document at this time is to evidence the bona fide intent to use the Super Hero name within it's designated trademark class. It was the Applicant's good faith intent to supply the Opposers and the TTAB a complete production of document as was requested. Based on the understanding that the Maiden Waves mark has been registered, is not the mark in question and serves to evidence the Applicant mental direction and intent at the time of application, such documentation was not submitted based on the good faith belief that such document was not relevant. Because this Maiden Waves Sunscreen document, which was created December 20, 2005, serves to reference the bona fide intent of the Applicant at the time the application was submitted the non-moving party has not been prejudiced by its submission at this time.

The length of the delay of the submission of this Brief and

Response and its potential impact on judicial proceedings is not substantial enough to prejudice the Opposers. The deadline for submission for a Brief and Response to the Opposer's Motion For Leave To Amend It's Notice Of Opposition was on 11/20/08. Considering the good faith of the Applicant which has granted an extension time for the Opposition in the past, a finding of excusable neglect for the Applicant is appropriate. A delay of five days in filing this Brief and Response does not prejudice the Opposers nor the judicial proceedings.

The Applicant's reasons for the delay, being both the lack of accurate and timely mail delivery and the Applicant's inability to conduct day to day personal and business obligations for the first three weeks of November, (because of the flu), serve to provide a justifiable and excusable neglect argument for the Applicant. The Applicant has suffered health issues that starting before 11/4/08 and which did not allow the Applicant to have any reasonable control or capacity to prevent or limit the delay. In addition, as the Applicant acts as an individual and does not have any counsel to act on his behalf, no third party could respond on behalf of Applicant in a timely fashion.

The moving party has consistently acted in good faith, evidenced by accommodating the Opposer's past request for time extension, updating USPTO correspondence information and responding to interrogatories as best as possible; as evidenced by the Applicant disclosing business strategy of the universally acknowledged marketing tactic of performing a grass roots marketing campaign, as detailed in Applicant's Amended / Supplemental Responses to Interrogatory No. 11. This disclosed business strategy of grass roots marketing, as detailed in the aforementioned document, also evidences the Applicants bona fide intent to use the trademark name in question. The Applicant prays that on balance, the TTAB will find that the moving party's delay in submitting this Brief and Response was the result of excusable neglect.

By: /Michael Silver/

Dated: 11/25/08

Michael Craig Silver
64 Lincoln Drive
Sausalito, CA 94965
(530) 320-6488
Applicant

PROOF OF SERVICE

I hereby certify that a true and complete copy of the
BREIF AND RESPONSE TO OPPOSER'S MOTION FOR LEAVE TO AMEND
ITS NOTICE OF OPPOSITION has been served by mailing said
copy on November 25, 2008 via first class mail, to:

Kenyon & Kenyon LLP
Jonathan D. Reichman
One Broadway
New York, New York 10004

/Michael Silver/

Michael C. Silver