ESTTA Tracking number: **ESTTA208762**
Filing date: **05/02/2008**

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

Proceeding	91178943
Party	Plaintiff Corporacion Cimex S.A.
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Date	05/02/2008
Attachments	Opp Motion Reopen.91178943.pdf (4 pages)(146078 bytes)

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

CORPORACION CIMEX, S.A.,	)	
Opposer,	)	
v.	)	Opposition No. 91178943
DM ENTERPRISES & DISTRIBUTORS, INC.,	)	
Applicant.	)	

OPPOSER'S OPPOSITION TO APPLICANT'S MOTION FOR ENLARGEMENT OF THE DISCOVERY, TESTIMONY AND BRIEF PERIOD

Pursuant to Fed. R. Civ. P. 6(b); 37 C.F.R. § 2.120(a); TBMP § 509.01, Opposer Corporation CIMEX, S.A. ("Opposer"), by and through undersigned counsel, hereby opposes the motion to reopen discovery, filed after the close of discovery, of Applicant DM Enterprises & Distributors, Inc. ("Applicant"), misleadingly captioned as a "motion for enlargement of the discovery, testimony and brief period," and in support thereof, avers as follows:

1. Pursuant to the Stipulation of the parties, filed November 19, 2007, to reset discovery and testimony periods, and the Board's Scheduling Order dated December 7, 2007, adopting the stipulated dates, discovery in this matter closed on Saturday, April 12, 2008, and thus no later than Monday April 14, 2008.

2. Applicant did not file its motion to reopen until April 22, 2008, after the close of discovery, and requested "an enlargement" of the discovery period from April 12, 2008 until June 22, 2008 (although Applicant claims the discovery "enlargement" is for "sixty (60) days," the request is in fact for an additional 71 days).

3. Because Applicant's motion was not filed until after the discovery period closed, it is a "motion to reopen," however Applicant chooses to mischaracterize it. *See* TBMP § 509.01. In order to prevail on its motion to reopen, Applicant "must show that its failure to act during the time allowed therefor was the result of excusable neglect." *Id.* (citing Fed. R. Civ P. 6(b), requiring a showing of "excusable neglect"). By contrast, when the motion is made prior to the expiration of the period, the movant "need only show" the less demanding "good cause for the requested extension." TBMP § 509.01; *see also id.* § 509.01(b)(1) (elaborating excusable neglect standard and citing cases).

4. As explained in TBMP § 509.01(b)(1), "A party moving to reopen its time to take required action *must* set forth *with particularity the detailed facts* upon which its excusable neglect is based; *mere conclusory statements are insufficient.*" (Emphasis added). Further, "it is irrelevant that the failure to timely take the required action was the result of the party's counsel's neglect and not the neglect of the party itself." *Id.* Generally, the most important factor is "the reason for the delay, including whether it was within the reasonable control of the movant." *Id.* (internal quotation omitted).

5. The sole "excuse" and entire explanation provided by Applicant, is "Applicant recently received discovery requests from Opposer, which alleges new information, not known to the Applicant and further discovery is needed." Whatever Applicant means by this statement, it clearly does not "set forth with particularity the detailed facts upon which its excusable neglect is based"; and is nothing more than "mere conclusory statements." Applicant does not identify any "new information," why it was not known to Applicant, or why or what further discovery is needed. Moreover, Applicant was served by email with the "discovery requests from Opposer" on March 26, 2008, four weeks prior to making the motion.

6. Even if one were to speculate that Applicant mistakenly referred to Opposer's "discovery requests" and meant to refer to Opposer's discovery responses (and the Board is additionally prepared to indulge this speculation), Applicant has likewise failed to make the mandatory showing of particular detailed facts explaining its failure to act timely. Applicant provides no explanation, and none could possibly exist, as to why it did not serve its discovery requests until almost six (6) months after the discovery period originally opened, or why it failed to request additional time from Opposer or the Board prior to the close of discovery. Further, Opposer's responses overwhelmingly consisted of publicly available documents, including proceedings in the USPTO, of which counsel was doubtless aware, and records of Opposer's continuous use of the mark for many years prior to Applicant's use or application and continuing to the present (as pled in the Notice of Opposition, and as indisputably well known to Applicant, and which could not possibly have come as a surprise); and a few pieces of correspondence between Opposer and Applicant's own counsel and its claimed assignor.

7. Bluntly put, other than the documentary details of Opposer's years of use, there is nothing in the responses that could not have been learned by Applicant's counsel in a couple of hours of internet research, a review of the USPTO's website, and conversations with the Applicant, its prior counsel, or Applicant's claimed assignor. Applicant, of course, does not, and cannot, claim otherwise.

WHEREFORE, for the reasons stated herein, and in the absence of any showing of "excusable neglect," Applicant's motion to reopen the discovery period, miscaptioned by Applicant as a "Motion For Enlargement Of The Discovery, Testimony And Brief Period," should be denied.

Dated: New York, New York
May 2, 2008

RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.

By: _____

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of **OPPOSER'S OPPOSITION TO APPLICANT'S MOTION FOR ENLARGEMENT OF THE DISCOVERY, TESTIMONY AND BRIEF PERIOD** was served by email and by U.S. first class mail, postage prepaid, on May 2, 2008 upon:

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