

ESTTA Tracking number: **ESTTA272991**

Filing date: **03/18/2009**

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

Proceeding	91188736
Party	Defendant Anastasia Marie Laboratories, Inc.
Correspondence Address	Daphne Sheridan Bass Law Offices of Daphne Sheridan Bass 921 26th Street Santa Monica, CA 90403-2203 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Daphne Sheridan Bass
Filer's e-mail	daphneb@earthlink.net
Signature	/daphne sheridan bass/
Date	03/18/2009
Attachments	ANASTASIA.pdf (9 pages)(1398117 bytes)

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

ANASTASIA BEVERLY HILLS, INC.
ANASTASIA SOARE
ANASTASIA SKIN CARE, INC.

Opposers

v.

ANASTASIA MARIE LABORATORIES, INC.

Applicant

Opposition No. 91188736

MOTION TO DISMISS AND
DECLARE OPPOSITION
NO. 91188736 A NULLITY

AMENDMENT TO
DECLARATION

On March 16, 2009, Applicant, Anastasia Marie Laboratories, Inc., served opposers and filed with the Board the referenced Motion to Dismiss; a true copy of which is attached hereto. As the Declaration attached to the Motion filed on March 16, 2009 was missing intended language, Applicant hereby re-submits the identical Motion to which is attached the corrected Declaration and respectfully requests its substitution.

Dated:

March 18, 2009

Respectfully submitted,



Daphne Sheridan Bass
LAW OFFICES OF DAPHNE SHERIDAN BASS
921 26TH Street, Santa Monica, CA 90403
Telephone (310) 829-2805
Facsimile (310) 829-9018

Attorney for Applicant

Anastasia Marie Laboratories, Inc.

CERTIFICATE OF SERVICE BY EXPRESS MAIL

Mark : ANASTASIA
Serial No. : 76/372999
Opposition No.: 91188736

I hereby certify that copies of the attached MOTION TO DISMISS AND DECLARE OPPOSITION NO. 91188736 A NULLITY AND SUPPORTING MEMORANDUM OF LAW AND DECLARATION was addressed to the following parties and deposited with the United States Postal Service by Express Mail, postage prepaid, on March 16, 2009:

1. John M. May, Esq.
Anastasia Beverly Hills, Inc.
438 N. Bedford Dr.
Beverly Hills, CA 90210
2. Anastasia Beverly Hills, Inc.
438 N. Bedford Dr.
Beverly Hills, CA 90210

Dated: March 16, 2009


Daphne Sheridan Bass

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

ANASTASIA BEVERLY HILLS, INC.
ANASTASIA SOARE
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Applicant

Opposition No. 91188736

MOTION TO DISMISS AND DECLARE OPPOSITION NO. 91188736 A NULLITY

Applicant, Anastasia Marie Laboratories, Inc., by its attorney, hereby moves the Board for an Order dismissing the instant Opposition on the ground that it is a nullity. In support of its request, Applicant relies upon the Memorandum of Law and the supporting Declaration of Daphne Sheridan Bass attached hereto as Exhibit I.

Statement of Facts

1. Opposers, through their attorneys, filed the instant Opposition on January 24, 2009, the last day of the Opposition period; checking the box on the ESSTA form stating that they had served the Applicant.

2. In fact, opposers did not serve Applicant until *after* they filed the Opposition. In their letter serving applicant's attorney by U.S. mail, opposers' attorneys stated that the opposition ".....was filed earlier today....". *Bass Decl. attaching May Jan. 24, 2009 Letter – Exh. 1.*

Memorandum of Law

The Trademark Rules pertaining to service specifically require that:

...proof of such service must be made *before* the paper will be considered by the Office. A statement signed by the attorney or other authorized representative, attached to or appearing on the original paper when filed, clearly stating the date and manner in which service *was* made will be accepted as prima facie proof of service. *Trademark Rule § 2.119(a)* (Emphasis added).

The Board's Ruling in *Springfield Inc. vs. XD*, 86 USPQ2d 1063 (TTAB 2008) is precisely on point. In that case, as here, the opposer filed the Opposition on the last day; checking the box on the ESTTA form that it had served the applicant, when, in fact, it had not. Citing *Trademark Rules §§ 2.101(a) and 2.101(d)(4)*, which state that the Notice of Opposition must include a proof of service, and that the filing date of the Opposition is the date of receipt in the Office of the Notice of Opposition with the proof of service, the Board declared the Opposition a nullity; stating:

“Proof of service is meaningless in the absence of actual service in accordance with the statements contained in the proof of service. The requirement of the rules is for proof of service, not a promise to make service at some time in the future. In the instant case, as discussed above, the notice of opposition included proof of service, but there was no actual service upon applicant. Thus, opposer did not comply with the service requirement of the rules. Accordingly, opposer's notice of opposition should not have received a filing date, and this proceeding should not have been instituted.” *Springfield, Id.* (Emphasis added).

Here, as in *Springfield*, opposer's failure to effectuate service prior to filing the Opposition with the Board rendered service invalid.

While the opposer in *Springfield* attempted service after the last day, and opposer in this case attempted service later on the last day after filing the Opposition (which applicant received by U.S. mail 7 days later) — the timing of “when” opposer failed to comply with *Trademark Rules §§ 2.101(a) and 2.101(d)* --- is irrelevant. The fact remains that it did not comply with the rules pertaining to service.

Here, as in *Springfield*, opposers' notice of opposition should not have received a filing date, and the proceeding should not have been instituted. The invalid service should prevent this Opposition from proceeding.

Conclusion

For all of the foregoing reasons, applicant respectfully requests that the instant opposition proceeding be declared a nullity and that Application Serial No. 77150306 be forwarded for issuance of a notice of allowance.

Dated: March 14, 2009

Respectfully submitted,



Daphne Sheridan Bass
LAW OFFICES OF DAPHNE SHERIDAN BASS
921 26TH Street, Santa Monica, CA 90403
Telephone (310) 829-2805
Facsimile (310) 829-9018

Attorney for Applicant
Anastasia Marie Laboratories, Inc.

DECLARATION OF DAPHNE SHERIDAN BASS

I, Daphne Sheridan Bass, do declare that I have personal knowledge of all statements made herein; that all statements made herein are true, and that if called to do so, I would competently testify as to the truth of these statements.

1. I am the attorney representing the applicant herein. I have personal knowledge of the following facts and would competently testify as to their truth if called upon to do so.

2. On January 31, 2009, I received a letter by certified mail from Opposers' attorneys transmitting the subject Notice of Opposition; a true copy of which is attached hereto.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed this 18th day of March, 2009 in Santa Monica, CA 90403.

Date: March 18, 2009



Daphne Sheridan Bass

EXHIBIT A

24 January 2009

Daphne Sheridan Bass
Law Offices Of Daphne Sheridan Bass
921 26th St
Santa Monica, Ca 90403-2203

Re: Notice of Opposition re
Anastasia Marie Labs SN 77150306

John M May

Member of California Bar
Registered Patent Attorney

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Sierra Madre CA 91024
+1 (626) 355 4607
✉ LAW@MAY.US

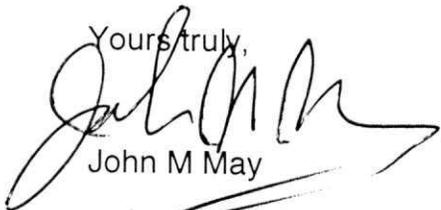
Dear Ms Bass

Enclosed is Anastasia Marie Labs' service copy of a Notice of Opposition and attached grounds.txt which was filed earlier today on behalf of Anastasia Beverly Hills, Inc. et al.

I believe you have already been in contact with the Opposers' general counsel, Mr Darin Chavez. Please feel free to direct any questions you may have concerning this matter directly to him, at the below address and telephone number.

I suggest that in the future we correspond and make any required service of pleadings etc in this matter by email. Please let us know if this is acceptable, also if you wish us to copy your client or any other person on such correspondence. In the meantime, all pleadings and other official correspondence should be directed to the address set forth in the Notice.

Yours truly,



John M May

cc: ~~John M May~~ Darin Chavez, esq.
Law Offices of Darin Chavez
1801 Century Park East, Suite 2300
Century City CA 90067
+1 (310) 470-8855

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Amended Declaration, Motion to Dismiss and Declare Opposition No. 91188736 a Nullity and Amended Declaration was forwarded to counsel for Opposer and to Opposer Anastasia Beverly Hills, Inc. at 438 North Bedford Drive, Beverly Hills, CA 90210 via first class mail, postage prepaid, this 18th day of March, 2009.

Date March 18, 2009


Daphne Sheridan Bass