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

Proceeding	92059314
Party	Defendant Merit Medical Systems, Inc.
Correspondence Address	MERIT MEDICAL SYSTEMS LEGAL DEPARTMENT, 1600 WEST MERIT PARKWAY SALT LAKE CITY, UT 84095 UNITED STATES blorimer@wnlaw.com
Submission	Motion to Suspend for Civil Action
Filer's Name	Brent P. Lorimer
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Signature	/Brent P. Lorimer/
Date	08/14/2014
Attachments	Motion to suspend TTAB proceedings in view of pending litigation.pdf(536049 bytes)

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

In the matter of: Trademark Registrations Nos. 1526710, 4413590
Marks: MERIT and MERIT MEDICAL
Dates Registered: February 28, 1989 and October 8, 2013

<p>MERIT HEALTHCARE INTERNATIONAL, INC., dba MERIT PHARMACEUTICAL,</p> <p>Petitioner,</p> <p>v.</p> <p>MERIT MEDICAL SYSTEMS, INC.,</p> <p>Respondent.</p>	<p>Cancellation No. 92059314</p> <p>STIPULATED MOTION TO SUSPEND PENDING A CIVIL PROCEEDING UNDER 37 C.F.R. § 2.117(a)</p>
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Pursuant to 37 C.F.R. § 2.117(a) and T.B.M.P. § 510.02(a), Respondent Merit Medical Systems, Inc. and Petitioner Merit Healthcare International, Inc., dba Merit Pharmaceutical hereby inform the Board that they are parties to a civil action which will have a bearing on the outcome of this cancellation proceeding. That civil action is captioned *Merit Healthcare International, Inc. dba Merit Pharmaceutical vs. Merit Medical Systems, Inc.*, Case No. 2:14-cv-04280, pending in the U.S. District Court for the Central District of California. A copy of the complaint in that action is attached hereto as Exhibit A. Based on the pendency of the aforementioned civil action, the parties jointly request suspension of the captioned Cancellation proceeding until such time as the pending civil litigation is resolved.

DATED this 13th day of August, 2014.

By: /Brent P. Lorimer/
Brent P. Lorimer

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Attorneys for Respondent
MERIT MEDICAL SYSTEMS, INC.

DATED this 13th day of August, 2014.

By: /Thomas J. Daly/
Thomas J. Daly

CHRISTIE, PARKER & HALE, LLP
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Glendale, CA 91209-9001
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Attorneys for Applicant
MERIT HEALTHCARE
INTERNATIONAL, INC., DBA MERIT
PHARMACEUTICAL

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **STIPULATED MOTION TO SUSPEND PENDING A CIVIL PROCEEDING UNDER 37 C.F.R. § 2.117(a)** was served on Petitioner by emailing true copies thereof to its attorney of record at the address below, with confirmation copies via First Class Mail, postage prepaid this 14th day of August, 2014, in an envelope addressed as follows:

CHRISTIE, PARKER & HALE, LLP
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/Brent P. Lorimer/

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Exhibit A

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7 Attorneys for Plaintiff,
 Merit Healthcare International, Inc., dba Merit Pharmaceutical

9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA

12 MERIT HEALTHCARE
 INTERNATIONAL, INC., DBA
 13 MERIT PHARMACEUTICAL, a
 California corporation,

14 Plaintiff,

15 vs.

16 MERIT MEDICAL SYSTEMS, INC.,
 17 a Utah corporation,

18 Defendant.

Case No. 2:14-cv-04280

**COMPLAINT FOR
 TRADEMARK CANCELLATION
 AND DECLARATORY
 JUDGMENT**

DEMAND FOR JURY TRIAL

19
 20 Plaintiff, Merit Healthcare International, Inc., dba Merit Pharmaceutical
 21 (“Plaintiff”) or (“Merit Pharmaceutical”) files its complaint against Merit Medical
 22 Systems, Inc. (“Merit Medical”) or (“Defendant”), and alleges as follows:

23 **JURISDICTION AND VENUE**

24 1. This is an action for trademark cancellation under the Trademark
 25 Act, Title 15 U.S.C. §§ 1052(a), 1052(d), and 1064(3), and for declaratory relief
 26 under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

27 2. This Court has subject matter jurisdiction over Plaintiff’s federal
 28 claims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338 in that this

1 Complaint raises federal questions arising under the Lanham Act, 15 U.S.C. §
2 1051 et seq.

3 3. This Court has personal jurisdiction over the Defendant at least for
4 the reason that Defendant has, upon information and belief, sold products that are
5 the subject of this action in this District.

6 4. Venue in this District is proper pursuant to 28 U.S.C. §§ 1391(b) and
7 (c) because a substantial part of the events giving rise to Plaintiff's claims
8 occurred in this District and Defendant is subject to personal jurisdiction in this
9 District.

10 **PARTIES**

11 5. Plaintiff Merit Healthcare International, Inc., dba Merit
12 Pharmaceutical is a California corporation having a principal place of business at
13 2611 San Fernando Road, Los Angeles, California 90065.

14 6. Plaintiff alleges, on information and belief, that Defendant Merit
15 Medical is a Utah corporation with a principal place of business at 1600 West
16 Merit Parkway, South Jordan, Utah 84095. Plaintiff further alleges on
17 information and belief that Defendant conducts business in this District and
18 within the State of California, including at least via its interactive website,
19 www.merit.com.

20 **FACTUAL BACKGROUND**

21 7. Merit Pharmaceutical has been continuously engaged in the
22 distribution and sale of a variety of professional healthcare products, including
23 pharmaceutical and related medical devices and products, such as syringes,
24 intravenous administration devices, and various intravenous therapy items, since
25 1977.

26 8. Merit Pharmaceutical has continuously and extensively used in
27 commerce the mark MERIT in connection with its professional healthcare
28 products since 1977. Accordingly, Merit Pharmaceutical has obtained common

1 law rights in the MERIT mark for use in connection with professional healthcare
2 products, including syringes, intravenous administration devices, and various
3 intravenous therapy items.

4 9. Merit Pharmaceutical, through the continuous use and promotion of
5 its MERIT mark over a long period of time and by virtue of the quality of goods
6 sold under this mark, has established valuable goodwill and reputation in
7 connection with the MERIT mark.

8 10. On April 22, 2013, Plaintiff filed U.S. Trademark Application No.
9 85/910,467 (“the ‘467 Application’”) for MERITPHLO. A true and correct copy
10 of the ‘467 Application is attached herein as Exhibit 1.

11 11. On January 21, 2014, Plaintiff filed U.S. Trademark Application No.
12 86/170,810 (“the ‘810 Application’”) for MERITAPE. A true and correct copy of
13 the ‘810 Application is attached herein as Exhibit 2.

14 12. On January 21, 2014, Plaintiff filed U.S. Trademark Application No.
15 86/170,803 (“the ‘803 Application’”) for MERITDERM. A true and correct copy
16 of the ‘803 Application is attached herein as Exhibit 3.

17 13. On October 4, 2013, Plaintiff filed U.S. Trademark Application No.
18 86/083,470 (“the ‘470 Application’”) for MERITCATH. A true and correct copy
19 of the ‘470 Application is attached herein as Exhibit 4.

20 14. On November 4, 2013, Plaintiff filed U.S. Trademark Application
21 No. 86/109,483 (“the ‘483 Application’”) for MERITSET. A true and correct
22 copy of the ‘483 Application is attached herein as Exhibit 5.

23 15. Upon information and belief, Defendant is the owner of United
24 States Trademark Registration No. 1,526,710 for MERIT for “medical devices,
25 namely, coronary control syringes and intravenous fluid delivery components” in
26 International Class 010, with a filing date of July 11, 1988, a registration date of
27 February 28, 1989, and an alleged date of first use in commerce of March 28,
28 1988 (“the ‘710 Registration’”). A copy of the ‘710 Registration is attached

1 herein as Exhibit 6.

2 16. Upon information and belief, Defendant is the owner of United
3 States Trademark Registration No. 4,413,590 for MERIT MEDICAL for “House
4 mark for catheters, guidewires, syringes and medical accessories used therewith
5 in the fields of cardiology, radiology, surgery, oncology and endoscopy” in
6 International Class 10, with a filing date December 12, 2012, a registration date
7 of October 8, 2013, and an alleged date of first use in commerce of March 28,
8 1988 (“the ‘590 registration”). A copy of the ‘590 Registration is attached herein
9 as Exhibit 7.

10 17. Upon information and belief, Defendant is the owner of United
11 States Trademark Registration No. 3,314,740 for MERIT ADVANCE for
12 “Medical devices, namely, angiographic needles” in International Class 10, with a
13 filing date July 7, 2006, a registration date of October 16, 2007, and an alleged
14 date of first use in commerce of November 1, 2006 (“the ‘740 registration”). A
15 copy of the ‘740 Registration is attached herein as Exhibit 8.

16 18. Upon information and belief, Defendant is the owner of United
17 States Trademark Registration No. 3,203,573 for MERIT H2O for "Medical
18 products, namely, guide wires" in International Class 10, with a filing date
19 August 5, 2005, a registration date of January 30, 2007, and an alleged date of
20 first use in commerce of November 30, 2003 (“the ‘573 registration”). A copy of
21 the ‘573 Registration is attached herein as Exhibit 9.

22 19. Upon information and belief, Defendant is the owner of United
23 States Trademark Registration No. 3,933,405 for MERIT MEDICAL ENDOTEK
24 for “Medical devices and accessories used in interventional procedures, namely,
25 stents, stent delivery devices, catheters, balloon inflation devices used in medical
26 procedures, hydrophilic and non-hydrophilic guide wires to track catheters, and
27 devices for sizing stents in the airway” in International Class 10, with a filing date
28 October 30, 2009, a registration date of March 22, 2011, and an alleged date of

1 first use in commerce of July 3, 2009 (“the ‘405 registration”). A copy of the
2 ‘405 Registration is attached herein as Exhibit 10.

3 20. Upon information and belief, Defendant is the owner of United
4 States Trademark Registration No. 3,846,054 for MERIT LAUREATE for
5 “Medical devices, namely, hydrophilic guide wires for use in radiology,
6 cardiology, and endovascular surgical procedures” in International Class 10, with
7 a filing date April 6, 2009, a registration date of September 7, 2010, and an
8 alleged date of first use in commerce of May 11, 2010 (“the ‘054 registration”).
9 A copy of the ‘054 Registration is attached herein as Exhibit 11.

10 21. Upon information and belief, Defendant is the owner of United
11 States Trademark Registration No. 3,709,826 for MERIT MAESTRO for
12 “Medical devices, namely, micro catheters” in International Class 10, with a
13 filing date July 7, 2008, a registration date of November 10, 2009, and an alleged
14 date of first use in commerce of September 1, 2009 (“the ‘826 registration”). A
15 copy of the ‘826 Registration is attached herein as Exhibit 12.

16 22. Upon information and belief, Defendant is the owner of United
17 States Trademark Registration No. 1,808,408 for MERITRANS for “Medical
18 devices; namely, blood-pressure transducers” in International Class 10, with a
19 filing date July 31, 1991, a registration date of November 30, 1993, and an
20 alleged date of first use in commerce of March 8, 1993 (“the ‘408 registration”).
21 A copy of the ‘408 Registration is attached herein as Exhibit 13.

22 23. Defendant’s ‘710 and ‘590 registrations were cited by the United
23 States Patent and Trademark Office (“USPTO”) as reasons to deny approval of
24 Plaintiff’s ‘467 Application for MERITPHLO under Lanham Act § 2(d) (15
25 U.S.C. § 1052(d)).

26 24. Defendant’s ‘590 registration was cited by the United States Patent
27 and Trademark Office (“USPTO”) as reasons to deny approval of Plaintiff’s ‘810
28 Application for MERITAPE under Lanham Act § 2(d) (15 U.S.C. § 1052(d)).

1 25. Defendant’s ‘590 registration was cited by the United States Patent
2 and Trademark Office (“USPTO”) as reasons to deny approval of Plaintiff’s ‘803
3 Application for MERITDERM under Lanham Act § 2(d) (15 U.S.C. § 1052(d)).

4 26. Defendant’s ‘710, ‘590, ‘740, ‘573, ‘405, ‘054, ‘826, and ‘408
5 registrations were cited by the United States Patent and Trademark Office
6 (“USPTO”) as reasons to deny approval of Plaintiff’s ‘470 Application for
7 MERITCATH under Lanham Act § 2(d) (15 U.S.C. § 1052(d)).

8 27. Defendant’s ‘710, ‘590, ‘740, ‘573, ‘405, ‘054, ‘826, and ‘408
9 registrations were cited by the United States Patent and Trademark Office
10 (“USPTO”) as reasons to deny approval of Plaintiff’s ‘483 Application for
11 MERITSET under Lanham Act § 2(d) (15 U.S.C. § 1052(d)).

12 28. On May 7, 2014, counsel for Plaintiff Merit Pharmaceutical sent
13 Defendant a letter describing Plaintiff’s continuous and extensive use of the
14 MERIT mark in connection with the distribution and sale of pharmaceuticals,
15 including pharmaceuticals for intravenous delivery, since at least November
16 1977. In the letter, counsel for Plaintiff also requested that Defendant enter into a
17 coexistence agreement with Plaintiff. A true and correct copy of the letter is
18 attached herein as Exhibit 14.

19 29. On May 12, 2014, counsel for Plaintiff spoke via telephone with a
20 representative of Defendant, Delos Larson, regarding the possibility of entering
21 into a coexistence agreement. During the telephone call, Mr. Larson would not
22 agree, and expressed doubt that Defendant would consent to Plaintiff’s continued
23 use of the MERIT mark in connection with professional healthcare products.

24 30. On May 14, 2014, Mr. Larson sent counsel for Plaintiff an email
25 questioning the accuracy of Plaintiff’s date of first use of the MERIT mark in
26 connection with intravenous devices.

27 31. Thus, despite Plaintiff’s attempts to resolve these trademark priority
28 issues and consequently potential infringement issues, Defendant has not agreed,

1 and based on their recent actions, appear unwilling to consent to Plaintiff's
2 continued use of MERIT in connection with professional healthcare products.
3 Defendant's refusal to consent to Plaintiff's use of MERIT creates a justiciable
4 case and controversy. A cloud has now been placed over Plaintiff's continued
5 use of its MERIT mark. Plaintiff has a reasonable apprehension that Defendant
6 will assert that Plaintiff's use of its MERIT mark infringes one or more of
7 Defendant's claimed trademark rights. The fact that Defendant has not consented
8 to Plaintiff's continued use and the fact that Defendant has now questioned
9 Plaintiff's evidence of prior use, creates a cloud of controversy regarding this
10 trademark infringement issue. Without relief from the Court, Plaintiff would risk
11 being sued for trademark infringement by Defendant or would be forced to stop
12 using its MERIT mark and thus lose the substantial goodwill developed over the
13 many years of use. It is therefore appropriate for the Court to exercise its
14 discretion under the Declaratory Judgment Act and declare that Plaintiff's use of
15 its MERIT mark does not infringe any of Defendant's Registrations or other
16 asserted rights.

17 32. On June 2, 2014, Plaintiff filed Combined Petitions for Cancellation
18 with the USPTO seeking cancellation of Defendant's '710 and '590 registrations.

19 **COUNT 1**

20 **(DECLARATORY JUDGMENT OF NON-INFRINGEMENT)**

21 33. Plaintiff repeats, realleges, and incorporates by reference the
22 allegations of Paragraphs 1-32 of this Complaint as though set forth here.

23 34. Since long before Defendant's asserted dates of first use of
24 Defendant's Registrations, Plaintiff has continuously and extensively used in
25 interstate commerce the mark MERIT in connection with its professional
26 healthcare products, including pharmaceutical and related medical devices and
27 products.

28 35. Accordingly, because Plaintiff is the senior user of the MERIT mark,

1 Plaintiff is entitled to a declaratory judgment that its use of the MERIT mark does
2 not violate Section 32 or Section 43(a) of the Lanham Act, nor does it constitute
3 unfair competition or trademark infringement under the common law of any state
4 in the United States.

5 36. Upon information and belief, a justiciable case and controversy
6 exists. A cloud has now been placed over Plaintiff's continued use of its MERIT
7 mark. Plaintiff has a reasonable apprehension that Defendant will assert that
8 Plaintiff's use of its MERIT mark infringes one or more of Defendant's claimed
9 trademark rights. The fact that Defendant has not consented to Plaintiff's
10 continued use and the fact that Defendant has now questioned Plaintiff's evidence
11 of prior use, creates a cloud of controversy regarding this trademark infringement
12 issue. Without relief from the Court, Plaintiff would risk being sued for
13 trademark infringement by Defendant or would be forced to stop using its MERIT
14 mark and thus lose the substantial goodwill developed over the many years of
15 use. It is therefore appropriate for the Court to exercise its discretion under the
16 Declaratory Judgment Act and declare that Plaintiff's use of its MERIT mark
17 does not infringe any of Defendant's Registrations or other asserted rights.

18 **COUNT 2**

19 **(CANCELLATION FOR FRAUD)**

20 37. Plaintiff repeats, realleges, and incorporates by reference the
21 allegations of Paragraphs 1-32 of this Complaint as though set forth here.

22 38. On information and belief, Defendant or its agent made false
23 representations of material facts to the United States Patent and Trademark Office
24 ("USPTO") during the prosecution of the applications that resulted in the '710,
25 '590, '740, '573, '405, '054, '826, and '408 Registrations (collectively,
26 "Defendant's Registrations") that Defendant knew or should have known were
27 false.

28 39. On information and belief, the fraud was committed when the

1 Defendant filed the required Statement of Use for Defendant's Registrations
2 alleging that it was using the subject mark of Defendant's Registrations on all of
3 the goods identified in each of the corresponding applications when Defendant
4 knew or should have known it was not using the mark in association with all of
5 the goods.

6 40. On information and belief, Defendant or its agent made the above-
7 identified false statements with the intent to induce the USPTO to grant
8 Defendant's Registrations, and that the USPTO, incorrectly relying upon the
9 assumed truth of these false material statements, did in fact grant Defendant's
10 Registrations.

11 41. The above-described acts of Defendant or its agent constitute
12 fraudulent procurement of Defendant's Registrations under Lanham Act § 14 (3)
13 (15 U.S.C. § 1064(3)) and/or Lanham Act § 33 (b)(1) (15 U.S.C. § 1115(b)(1)).

14 42. Plaintiff has been and will continue to be damaged by the continued
15 registration of Defendant's Registrations, which have barred Plaintiff from
16 registering its MERITPHLO, MERITAPE, MERITDERM, MERITCATH, and
17 MERITSET marks.

18 **COUNT 3**

19 **(CANCELLATION FOR FALSELY SUGGESTING**
20 **A CONNECTION WITH PLAINTIFF)**

21 43. Plaintiff repeats, realleges, and incorporates by reference the
22 allegations of Paragraphs 1-32 of this Complaint as though set forth here.

23 44. The goods covered by Defendant's Registrations, including
24 intravenous fluid delivery components and catheters, are identical or closely
25 related to the goods Plaintiff has continuously sold and distributed under its
26 MERIT mark.

27 45. Defendant's MERIT mark is identical to Plaintiff's MERIT mark
28 previously used in commerce by Plaintiff and not abandoned as to be highly

1 likely, when applied to the goods of Defendant, to falsely suggest a connection
2 with Plaintiff.

3 46. The remainder of Defendant's Registrations each incorporates the
4 word MERIT. Accordingly, each of these registrations so resembles Plaintiff's
5 MERIT mark, previously used in commerce by Plaintiff and not abandoned, as to
6 be likely, when applied to the goods of Defendant, to falsely suggest a connection
7 with Plaintiff.

8 47. The use of the word MERIT in each of Defendant's Registrations
9 points uniquely and unmistakably to Plaintiff Merit Pharmaceutical because the
10 word MERIT is a significant element of Plaintiff's name.

11 48. Plaintiff Merit Pharmaceutical is not affiliated or otherwise
12 connected with the activities performed by Defendant under the marks in
13 Defendant's Registrations.

14 49. The fame and reputation of Plaintiff is such that when Defendant
15 uses Defendant's Registrations on the goods recited in Defendant's Registrations,
16 a connection with Plaintiff Merit Pharmaceutical is presumed.

17 50. The above-described acts of Defendant falsely suggest a connection
18 with Plaintiff under Lanham Act § 2(a) (15 U.S.C. § 1052(a)).

19 51. Plaintiff has been and will continue to be damaged by the continued
20 registration of Defendant's Registrations and Defendant's use of these
21 registrations in a manner falsely suggesting a connection with Plaintiff.

22 **COUNT 4**

23 **(CANCELLATION FOR LIKELIHOOD OF CONFUSION)**

24 52. Plaintiff repeats, realleges, and incorporates by reference the
25 allegations of Paragraphs 1-32 of this Complaint as though set forth here.

26 53. The goods covered by Defendant's Registrations, including
27 intravenous fluid delivery components and catheters, are identical or closely
28 related to the goods Plaintiff has continuously sold and distributed under its

1 MERIT mark since 1977.

2 54. Defendant's MERIT mark is identical to Plaintiff's MERIT mark
3 previously used in commerce by Plaintiff and not abandoned as to be highly
4 likely, when applied to the goods recited in Defendant's Registrations, to cause
5 confusion or to cause mistake or to deceive.

6 55. The remainder of Defendant's Registrations each incorporates the
7 word MERIT. Accordingly, each of these registrations so resembles Plaintiff's
8 MERIT mark, previously used in commerce by Plaintiff and not abandoned, as to
9 be likely, when applied to the goods recited in Defendant's Registrations, to cause
10 confusion or to cause mistake or to deceive.

11 56. Accordingly, Defendant's use of Defendant's Registrations on the
12 goods recited in Defendant's Registrations is likely to cause confusion, or to
13 cause mistake, or to deceive as to the affiliation, connection, or association of
14 Defendant with Plaintiff, or as to the origin, sponsorship, or approval of
15 Defendant's goods by Plaintiff under Lanham Act § 2(d) (15 U.S.C. § 1052(d)).

16 57. Plaintiff has been and will continue to be damaged by the continued
17 registration of Defendant's Registrations and Defendant's use of these
18 registrations in a manner likely to cause confusion, or to cause mistake, or to
19 deceive.

20
21

PRAYER

22 **WHEREFORE**, Plaintiff demands judgment against Defendant as follows:

23 1. That the Court enter judgment declaring that Plaintiff's use of its
24 MERIT mark does not violate § 32 or § 43(a) of the Lanham Act, 15 U.S.C. §
25 1114 or 1125(a), or constitute unfair competition with, or trademark infringement
26 under the Lanham Act or the common law of Defendant's Registrations;

27 2. For cancellation of Defendant's Registrations pursuant to Lanham
28 Act § 37 (15 U.S.C. § 1119);

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DEMAND FOR JURY TRIAL

Merit Healthcare International, Inc., dba Merit Pharmaceutical demands a trial by jury on all issues so triable.

DATED: June 3, 2014

Respectfully submitted,
CHRISTIE, PARKER & HALE, LLP

By /s/G. Warren Bleeker
G. Warren Bleeker

Attorneys for Plaintiff,
Merit Healthcare International, Inc.,
dba Merit Pharmaceutical

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