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

Proceeding	91169571
Party	Plaintiff G&W Laboratories, Inc.
Correspondence Address	Gregg A. Paradise Lerner, David, Littenberg, Krumholz & Mentlik, LLP 600 South Avenue West Westfield, NJ 07090 UNITED STATES gparadise@ldlkm.com, litigation@ldlkm.com
Submission	Opposition/Response to Motion
Filer's Name	Gregg A. Paradise
Filer's e-mail	gparadise@ldlkm.com, litigation@ldlkm.com
Signature	/s/ Gregg A. Paradise
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

G&W LABORATORIES, INC.,

Opposer,

v.

GW PHARMA LTD.,

Applicant.

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: Opposition No. 91169571  
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: For: GW PHARMACEUTICALS  
:  
: Published: February 7, 2006  
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: Serial No. 78/354,188  
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**OPPOSER'S BRIEF IN SUPPORT OF IT'S OPPOSITION TO APPLICANT'S MOTION  
TO STRIKE OPPOSER'S REPLY BRIEF PURSUANT TO TBMP §§ 539 AND 801.05**

**TABLE OF CONTENTS**

	Page
I. INTRODUCTION .....	1
II. ARGUMENT .....	1
A. Under The Trademark Rules, Opposer Timely Filed Its Reply To Applicant's Trial Brief .....	2
B. Applicant Did Not Show Any Prejudice.....	4
III. CONCLUSION.....	5



**A. Under The Trademark Rules, Opposer  
Timely Filed Its Reply To Applicant's Trial Brief**

Rule 37 C.F.R. § 2.128(a)(1) addresses the briefing schedule in a Trademark Opposition proceeding. That rule provides the following:

The brief of the party in the position of plaintiff shall be due not later than sixty days after the date set for the close of rebuttal testimony. The brief of the party in the position of defendant, if filed, shall be due not later than thirty days after the due date of the first brief. A reply brief by the party in the position of plaintiff, if filed, shall be due not later than fifteen days after the due date of the defendant's brief.

The close of rebuttal testimony as set by the Board was May 3, 2009. Based on Rule 2.128(a)(1) alone, Opposer's trial brief was due "not later than sixty days after the date set for close of rebuttal testimony" (May 3, 2009) or July 2, 2009. Opposer timely submitted its brief on that day. According to the rule, Applicant's trial brief was due "not later than thirty days after the due date of the first brief," July 2, 2009, which was Saturday, August 1, 2009. As such, Applicants' trial brief became due on Monday, August 3, 2009. *See* 37 C.F.R. § 2.196. Opposer's reply brief was due 15 days after the due date of the Defendant's brief, August 3, 2009, or Tuesday, August 18, 2009.

However, Rule 37 C.F.R. § 2.119(c) must also be considered when calculating the correct due date. This rule provides for an extra five days in certain situations:

Whenever a party is required to take some action within a prescribed period after the service of a paper upon the party by another party and the paper is served by first-class mail, "Express Mail," or overnight courier, 5 days shall be added to the prescribed period.

Opposer was required to file its reply trial brief within a prescribed period (15 days) after service of a paper on it (Applicant's trial brief), and the paper was served by overnight courier. As such, Opposer was entitled to five additional days, bringing the due date for Opposer's reply trial brief to Sunday, August 23, 2009. Since this date was a weekend, under 37 C.F.R. § 2.196,

Opposer's reply brief became due on the following Monday, which was Monday, August 24, 2009. Opposer timely filed its reply brief on Monday, August 24, 2009.

Applicant's motion to strike Opposer's reply trial brief appears to be incorrectly premised on the ground that TBMP § 113.05 applies to this situation, and therefore Opposer is not afforded the five extra days provided in Rule 2.119(c). TBMP § 113.05, provides that Rule 2.229(c) allowing five extra days "does not apply to an action that must be taken by a party within a time set in a communication from the Board." (Emphasis added.) Applicant's argument fails to consider, however, that the Board did not set the briefing schedule; rather the briefing schedule was set by statute. *See* 37 C.F.R. § 2.182(a)(1). Even the example in TBMP § 113.05 makes a distinction between a date set by the Board versus a date set by statute. That example is as follows:

[F]or example, when a Board action notifying a defendant of the filing of an opposition or petition to cancel allows the defendant 40 days from the date of the notification in which to file an answer to the complaint, the answer is due on or before the 40<sup>th</sup> day, not on the 45<sup>th</sup> day.

In the present situation, the Board's scheduling order of January 29, 2009, only addressed the remaining opposition period and did not notify the parties of any dates for trial briefing. It certainly did not state or notify the parties when Opposer's trial brief was due. Instead, Opposer was left to rely on the statute, 37 C.F.R. § 2.182(a)(1), to determine when its trial brief was due. While the due date of Opposer's trial brief was triggered from the date set by the Board for the close of rebuttal testimony (60 days after the date set for the close of rebuttal testimony), the exchange of briefs and the entire briefing schedule between the parties was set by statute. *See* 37 C.F.R. § 2.182(a)(1). The briefing schedule as stated in Rule 2.182(a)(1) was not altered by the Board in any way through a scheduling order. Accordingly, because the briefing schedule was not set by the Board, TBMP § 113.05 does not apply, and Opposer is afforded the five extra days

for its reply as stated in Rule 2.119(c). Thus, Opposer timely filed its brief when it was submitted on August 24, 2009.

**B. Applicant Did Not Show Any Prejudice**

While Opposer is of the belief that its brief was timely filed, if its brief is found by the Board to have been filed late, Opposer's reply trial brief should still be considered by the Board for two reasons. First, Applicant did not and cannot demonstrate that consideration of Opposer's brief will prejudice it in any way. Second, Opposer submits that if its brief is deemed untimely, such action constitutes excusable neglect.

In its motion to strike Opposer's reply brief as untimely, Applicant did not even attempt to identify any prejudice it suffered based on the date of filing of Opposer's reply trial brief. This is likely because none exists. Applicant would not suffer prejudice because there is no further briefing left in this Opposition proceeding. In fact, there are no other scheduled events remaining in this opposition proceeding. At this point in time, all briefing has been completed, and the only action left is for the Board to render its decision on the merits with regard to this opposition.

Opposer further contends that to the extent the Board finds Opposer's analysis of the relevant statutes to be incorrect, such action constitutes excusable neglect. Thus, if the Board disagrees with Opposer and considers Opposer's reply brief untimely, Opposer respectfully requests leave for consideration of its reply brief since Applicant did not, and would not, suffer any prejudice.

**III. CONCLUSION**

For the foregoing reasons, Opposer submits that its reply brief was timely filed on August 24, 2009. However, in the event that the Board disagrees, Opposer respectfully requests leave for this Board to consider its reply brief.

Respectfully submitted,

LERNER, DAVID, LITTENBERG,  
KRUMHOLZ & MENTLIK, LLP  
600 South Avenue West  
Westfield, NJ 07090-1497  
Tel: 908.654.5000  
Fax: 908.654.7866  
*Attorneys for G&W Laboratories, Inc.*

Dated: September 25, 2009

By: /Gregg A. Paradise/  
Gregg A. Paradise  
Tel: 908.654.5000  
Fax: 908.654.7866  
E-mail: gparadise@ldlkm.com  
litigation@ldlkm.com



**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the within OPPOSER'S REPLY BRIEF was served upon the following counsel of record this 25th day of September, 2009, as follows:

**VIA FIRST-CLASS MAIL**

Michelle L. Visser, Esq.  
Rader, Fishman & Grauer, PLLC  
39533 Woodward Avenue  
Suite 140  
Bloomfield Hills, MI 48304  
Fax: 248-594-0610

*Attorneys for Applicant GW Pharma Ltd.*

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/Gregg A. Paradise/

Gregg A. Paradise

G&W 10.20-027  
Opposition No. 91169571