

ESTTA Tracking number: **ESTTA182372**

Filing date: **12/20/2007**

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

| | |
|------------------------|---|
| Proceeding | 92047833 |
| Party | Plaintiff MIOX Corporation |
| Correspondence Address | Deborah A. Peacock Peacock Myers, P.C. P.O. Box 26927 Albuquerque, NM 87125-6927 UNITED STATES achaselfeld@hollandhart.com |
| Submission | Other Motions/Papers |
| Filer's Name | Vidal A. Oaxaca |
| Filer's e-mail | jmyers@peacocklaw.com |
| Signature | /Vidal A. Oaxaca/ |
| Date | 12/20/2007 |
| Attachments | Response Brief Opposing Dismissal_122007.pdf (7 pages)(231717 bytes) |

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

| | | |
|----------------------------|---|----------------------------------|
| MIOX CORPORATION |) | |
| |) | Cancellation No. 92047833 |
| Petitioner, |) | |
| |) | Trademark Reg. No. 2,598,272 |
| v. |) | |
| |) | |
| ORICA AUSTRALIA PTY. LTD., |) | Mark: MIEX |
| |) | International Class: 36 |
| Respondent |) | |

**RESPONSE BRIEF IN OPPOSITION TO
RESPONDENT’S MOTION TO DISMISS**

MIOX Corporation (“Petitioner”), by and through its attorneys, Peacock Myers, P.C. files this brief in opposition to Respondent’s motion to dismiss and requests that Respondent’s motion be denied.

A. BRIEF

1. On July 20, 2007, Petitioner filed its Petition for Cancellation of the mark MIEX, belonging to Orica Australia Pty. LTD. (“Respondent”) using the ESTTA online filing system of United States Patent and Trademark Office. In the field wherein an attachment providing a statement of the grounds is required, Petitioner made a statement pursuant to, and in reliance on, 15 U.S.C. § 1052(d), likelihood of confusion. In the Petition, Petitioner referenced its mark, MIOX, Reg. No. 1,805,225, as the basis for the cancellation, and the Petition, apart from the attached statement, further alleged priority of use and likelihood of confusion.

2. On December 7, 2007, Petitioner received service of Respondent's motion, filed December 5, 2007, to dismiss for lack of standing or for failure to state a claim. Respondent alleges that Petitioner failed to allege that it would be damaged and that Petitioner failed to allege any rights in any mark. As noted above, Petitioner did cite, and relied upon, its mark MIOX and did allege a likelihood of confusion. Petitioner notes that the copy of the Petition for Cancellation appearing in the Trademark Trial and Appeal Board Inquiry System does not reference Petitioner's mark; however, the Receipt of the filing of the Petition (copy attached as Exhibit A) shows the grounds and the reference to Petitioner's mark. As such, Petitioner has alleged a likelihood of confusion and has relied upon its mark MIOX as the basis for the filing of the Petition. The standing obviously derives from the reliance on Petitioner's mark MIOX as the basis for filing the Petition.

3. Petitioner submits that the Petition adequately provides the required standing and grounds. Notwithstanding the facts set out in the Petition for Cancellation giving Respondent the notice required, Petitioner filed on December 10, 2007 a motion for leave to amend the Petition in the event the Board determines that an amended Petition serves the interest of justice.

B. PRAYER FOR RELIEF

Wherefore, Petitioner requests that Respondent's motion be denied or, in the alternative, that Petitioner's motion for leave to amend the pleading, filed December 10, 2007, be granted.

Dated this 20th day of December, 2007

Respectfully submitted,



Vidal A. Oaxaca

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P.O. Box 26927
Albuquerque, NM 87125-6927
(505) 998-1505

Attorneys for Petitioner
MIOX Corporation

CERTIFICATE OF TRANSMISSION

I hereby certify that this Brief in Opposition to Respondent's Motion to Dismiss is being deposited under 37 CFR 1.8 as an electronic filing via Electronic System for Trademark Trials and Appeals (ESTTA) addressed to: Commissioner for Trademarks, Trademark Trial and Appeal Board, USPTO, on December 20, 2007.



Vidal A. Oaxaca,

December 20, 2007
(Date Signed)

Peacock Myers, P.C.
Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing Brief in Opposition to Respondent's Motion to Dismiss has been served on Attorneys for Registrant, Scott S. Havlick, Holland & Hart, LLP, One Boulder Plaza, 1800 Broadway, Ste. 300, Boulder, Colorado 80302 mailing said copy on December 20, 2007, via First Class Mail, postage prepaid, to said Attorneys at said address.



Vidal A. Oaxaca,

December 20, 2007
(Date Signed)

Peacock Myers, P.C.
Attorneys for Petitioner



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Receipt

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ESTTA Tracking number: **ESTTA152288**

Filing date: **07/20/2007**

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

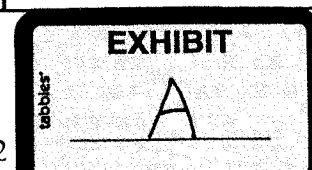
Petitioner Information

| | | | |
|----------------|--|--------------------|------------|
| Name | MIOX Corporation | | |
| Entity | Corporation | Citizenship | New Mexico |
| Address | 5601 Balloon Fiesta Parkway NE Albuquerque, NM 87113 UNITED STATES | | |

| | | | |
|-----------------------------|--|--|--|
| Attorney information | Deborah A. Peacock Peacock Myers, P.C. P.O. Box 26927 Albuquerque, NM 87125-6927 UNITED STATES jmyers@peacocklaw.com Phone:505-998-1500 | | |
|-----------------------------|--|--|--|

Registration Subject to Cancellation

| | | | |
|---------------------------------------|---------------------------|--|------------|
| Registration No | 2598272 | Registration date | 07/23/2002 |
| International Registration No. | NONE | International Registration Date | NONE |
| | Orica Australia Pty. Ltd. | | |



| | |
|---|---|
| Registrant | 1 Nicholson Street Melbourne, Victoria, 3000 AUSTRALIA |
| Goods/Services Subject to Cancellation | Class 001. First Use: 1994/00/00 , First Use In Commerce: 2001/08/00 Goods/Services: ARTIFICIAL RESINS, INCLUDING ION EXCHANGE RESINS HAVING MAGNETIC PROPERTIES, FOR USE IN THE REMOVAL OF CONTAMINANTS IN INDUSTRIAL PROCESSES, WASTE WATER FLOWS AND POTABLE WATER SOURCES, THE EXTRACTION OF MATERIALS FROM INDUSTRIAL AND ORE PROCESSING APPLICATIONS, AND FOR USE IN ION EXCHANGE APPLICATIONS |

Grounds for Cancellation

| | |
|--------------------------------------|----------------------------|
| Priority and likelihood of confusion | Trademark Act section 2(d) |
|--------------------------------------|----------------------------|

Mark Cited by Petitioner as Basis for Cancellation

| | | | |
|------------------------------|---|------------------------------|------------|
| U.S. Registration No. | 1805225 | Application Date | 02/27/1992 |
| Registration Date | 11/16/1993 | Foreign Priority Date | NONE |
| Word Mark | MIOX | | |
| Design Mark | | | |
| Description of Mark | NONE | | |
| Goods/Services | Class 011. First use: First Use: 1992/05/15 First Use In Commerce: 1993/02/15 water purification units for domestic, commercial and industrial use, and replacement parts therefor | | |

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|--------------------|--|
| Attachments | Statement.pdf (1 page)(27500 bytes) |
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| | |
|------------------|----------------------|
| Signature | /Deborah A. Peacock/ |
| Name | Deborah A. Peacock |
| Date | 07/20/2007 |

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