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

Proceeding	92047833
Party	Plaintiff MIOX Corporation
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Submission	Opposition/Response to Motion
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Date	01/11/2008
Attachments	Response-Brief-Opposing-Motion-Strike_011108.pdf (4 pages)(126879 bytes)

On December 12, 2007, The Board issued its notice suspending the case pursuant to 37 C.F. R. 2.127(d) wherein the Board stated that it would not consider any matters that are not germane to the motion to dismiss.

In addition to its December 10, 2007 motion for leave to amend the petition for cancellation, Petitioner filed on December 20, 2007 a brief in opposition to Respondent's motion to dismiss.

On December 28, 2007, Respondent filed a Motion to Strike Petitioner's Motion for Leave to Amend Petition for Cancellation. Respondent also seeks, in the event the Board denies Respondent's motion, additional time to respond to Petitioner's motion for leave to amend the petition for cancellation.

B. Argument

In response to Respondent's motion to dismiss, there are two responsive, pending pleadings: (1) Petitioner's motion for leave to amend its petition for cancellation; and (2) Petitioner's brief in opposition to Respondent's motion to dismiss. The pleadings seek alternative relief – a denial of Respondent's motion to dismiss or leave to amend the petition for cancellation. Both pleadings are germane to Respondent's pending motion to dismiss.

The basis for Respondent's motion to strike Petitioner's motion for leave to amend the petition is that the latter is not germane. However, Petitioner's motion for leave to amend the petition directly addresses Respondent's bases for the motion to dismiss. As such, Petitioner correctly filed its motion for leave to amend the petition as is often done in such matters and as noted in TBMP § 503.3, "Leave to Amend Defective Pleading".

Further, the Board has already stated that it will not consider any document that is not germane. Respondent's motion to strike is therefore superfluous.

Therefore, Petitioner requests that both Petitioner's opposition to Respondent's motion to dismiss and Petitioner's motion for leave to amend the petition be considered by the Board given that they are both germane, alternative requests for relief regarding the issues raised in Respondent's motion to dismiss. Further Petitioner opposes Respondent's request for additional time to respond to Petitioner's motion for leave to amend the petition, there being no reason given for Respondent's failure to file a timely response.

II. PRAYER FOR RELIEF

Wherefore, Petitioner requests that Respondent's motion to strike be denied and that Respondent's request for additional time to respond to Petitioner's motion for leave to amend the petition be denied.

Dated this 11th day of January 2008

Respectfully submitted,



Vidal A. Oaxaca

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CERTIFICATE OF TRANSMISSION

I hereby certify that this Response Brief in Opposition to Respondent's Motion to Strike 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 January 11, 2008.



Vidal A. Oaxaca,

January 11, 2008

(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 Response Brief in Opposition to Respondent's Motion to Strike has been served on Attorneys for Registrant, Scott S. Havlick, Holland & Hart, LLP, One Boulder Plaza, 1800 Broadway, Ste. 300, Boulder, Colorado 80302 by mailing said copy on January 11, 2008, via First Class Mail, postage prepaid, to said Attorneys at said address.



Vidal A. Oaxaca,

January 11, 2008

(Date Signed)

Peacock Myers, P.C.
Attorneys for Petitioner