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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	Motion to Amend Pleading/Amended Pleading
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Date	01/23/2008
Attachments	First-Amended-Petition_012308.pdf (4 pages)(120588 bytes)

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

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

FIRST AMENDED PETITION FOR CANCELLATION

There having been no responsive pleading to the Petition for Cancellation in this matter, Petitioner, pursuant to Fed. R. Civ. P. 15(a), files as of right this first amended petition for cancellation. ¹

Pursuant to 37 C.F.R. § 2.111, MIOX Corporation (“Petitioner”) (1700 Paseo de Peralta, Ste. A, Santa Fe, NM 87501), by and through its attorneys, Peacock Myers P.C., petitions for cancellation of Trademark Reg. No. 2,598,272.

1. Petitioner owns the mark MIOX, Reg. No. 1,805,225 for “water purification units for domestic, commercial and industrial use, and replacement

¹ Zaidi v. Ehrlich, 732 F.2d 1218, 1219-20 (5th Cir. 1984) (right to amend a complaint is not terminated by motion to dismiss given that the latter is not a responsive pleading); Rogers v. Girard Trust Co., 159 F.2d 239, 241 (6th Cir. 1947) (even if plaintiff files motion for leave to amend where right to amend exists, it is error to deny motion); an acceptable amended complaint therefore renders moot any pending motions relevant to the motion to dismiss.

parts therefore”, registered November 16, 1993. The first use date in commerce for that mark is February 15, 1993.

2. Orica Australia Pty. Ltd. (“Respondent”) (Orica Australia Pty. Ltd., 1 Nicholson Street, Melbourne, Victoria 3000 Australia) owns the mark MIEX, Reg. No. 2,598,272 for “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”, registered July 23, 2002.” The first use date for Respondent’s mark is 1994, and the first use date in commerce is August 2001.

3. Petitioner is and/or will be damaged by the continued registration of Respondent’s mark MIEX in that there is a likelihood of confusion between Petitioner’s mark MIOX and Respondent’s mark MIEX. Respondent’s mark so resembles Petitioner’s mark as to be likely, when used on or in connection with the goods or services of Respondent, to cause confusion, to cause mistake, or to deceive.

4. The grounds for cancellation are as provided in 15 U.S.C. § 1052(d) in that Respondent’s so resembles a mark registered in the Office, or a mark or trade mane previously used in the United States by another and not abandoned,

as to be likely, when used on or in connection with the goods or services of the Respondent, to cause confusion, or to cause mistake, or to deceive.

5. Respondent's mark, MIEX, should be cancelled because there is at least a likelihood of confusion between the two marks.

WHEREFORE, Petitioner prays that Trademark Registration No. 2,598,272 be cancelled.

Dated this 23rd day of January 2008

Respectfully submitted,



Vidal A. Oaxaca

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Attorneys for Petitioner
MIOX Corporation

CERTIFICATE OF TRANSMISSION

I hereby certify that this First Amended Petition for Cancellation 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 23, 2008.



Vidal A. Oaxaca,

January 23, 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 First Amended Petition for Cancellation 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 January 23, 2008, via First Class Mail, postage prepaid, to said Attorneys at said address.



Vidal A. Oaxaca,

January 23, 2008
(Date Signed)

Peacock Myers, P.C.
Attorneys for Petitioner