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

Proceeding	92047833
Party	Defendant Orica Australia Pty. Ltd.
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Submission	Motion to Dismiss - Rule 12(b)
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

_____	)	
MIOX Corporation,	)	
	)	
Petitioner,	)	Cancellation Action No. 92047833
	)	Registration No. 2598272
v.	)	Mark: MIEX
	)	
Orica Australia Pty. Ltd.,	)	
	)	
Respondent.	)	
_____	)	

RESPONDENT’S MOTION TO DISMISS FOR LACK OF STANDING, OR IN THE  
ALTERNATIVE, TO DISMISS FOR FAILURE TO STATE A CLAIM

Respondent, Orica Australia Pty. Ltd., through the undersigned counsel, respectfully moves to dismiss the Petition for Cancellation for lack of standing pursuant to 15 U.S.C. § 1064 and 37 C.F.R. § 2.112(a). In the alternative, Respondent moves to dismiss the Petition for Cancellation for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(6) and 37 C.F.R. § 2.112(a).

BACKGROUND

Respondent owns Registration No. 2,598,272 for the mark MIEX covering “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.”

On July 29, 2007, Petitioner filed a Petition to Cancel against Registrant’s mark. The Petition in its entirety, states as follows:

That Defendant's mark so resembles a mark registered in the Office, or a mark or trade name 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 Defendant, to cause confusion, or to cause mistake, or to deceive, per 15 U.S.C. § 1052(d).

This statement fails to establish Petitioner's standing to seek cancellation of Respondent's registration as it does not allege that Petitioner has been or will be harmed or damaged by the continued registration of Respondent's mark. 37 C.F.R. §2.111(b). This statement also fails to state a claim upon which relief can be granted because it does not allege that Petitioner owns prior rights in a mark, or that Respondent's mark is likely to cause confusion with such a mark owned by Petitioner. Fed. R. Civ. P. 12(b)(6); 37 C.F.R. § 2.112(a).

## LEGAL ANALYSIS

### A. Petitioner Has No Standing.

To have standing to bring a cancellation action, a petitioner must allege that he or she will be damaged by the continued registration of the mark at issue. 15 U.S.C. § 1064; 37 C.F.R. § 2.111(d); T.B.M.P. § 309.03(b); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 1027 (C.C.P.A. 1982). "To establish a reasonable basis for a belief that one is damaged by the registration sought to be cancelled, a petition may assert a likelihood of confusion." *Lipton Indus.*, 670 F.2d at 1029. Standing is determined "upon the well-pleaded allegations of the complaint, made in good faith . . ." *Id.*

The Petition to Cancel fails to allege that Petitioner will be damaged by the continued existence of Respondent's registration and it fails to allege facts from which a conclusion of harm or damage could be drawn. Specifically, the Petition fails to

allege that Petitioner owns a prior mark or registration with which confusion is likely. Therefore, the Petition fails to meet the statutory standing requirement, and the Board should dismiss it.

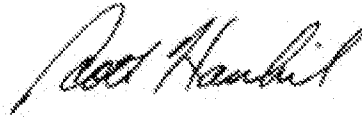
**B. The Petition Fails to State a Claim for Which Relief Can Be Granted.**

The Petition should also be dismissed because it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12 (b)(6). On the most basic level, the Petitioner has not alleged that Petitioner owns rights in any mark, or that Respondent's use of its mark is likely to cause confusion with a prior mark owned by Petitioner. Therefore, even if all facts alleged in the Petition are true, namely that Respondent's mark is likely to cause confusion with an unidentified mark owned by an unidentified party, Petitioner has failed to state a claim upon which relief can be granted by this Board. Fed. R. Civ. P. 12(b)(6); 37 C.F.R. § 2.112(a). Moreover, Petitioner's failure to allege facts sufficient to confer standing precludes relief.

THEREFORE, Respondent respectfully requests that the Board dismiss the Petition for Cancellation for lack of standing, or in the alternative, for failure to state a claim. Should the Board deny this motion, Respondent respectfully requests that the Board reset the trial calendar with discovery closing no earlier than three months after the date of the Board's order, and that testimony and briefing deadlines be reset accordingly. T.B.M.P. § 503.02.

Dated: Wednesday, December 5, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott S. Havlick". The signature is written in a cursive style with some loops and flourishes.

Scott S. Havlick  
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ATTORNEYS FOR RESPONDENT  
ORICA AUSTRALIA PTY. LTD.

CERTIFICATE OF SERVICE

I certify that on December 5, 2007, I served a copy of the above Motion for  
Extension of Time to Answer to the following by:

- |                                     |                            |
|-------------------------------------|----------------------------|
| <input checked="" type="checkbox"/> | U.S. Mail, postage prepaid |
| <input type="checkbox"/>            | Hand Delivery              |
| <input type="checkbox"/>            | Fax                        |

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