

ESTTA Tracking number: **ESTTA364607**

Filing date: **08/23/2010**

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

Proceeding	92051832
Party	Defendant Montani Cosmetics Inc.
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Date	08/23/2010
Attachments	11C53.pdf (6 pages)(278814 bytes)

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

Merz Pharmaceuticals, LLC and)	
Merz, Incorporated)	
)	
Petitioners,)	
v.)	Cancellation No. 92051832
)	
Montani Cosmetics Inc.,)	Reg. No. 3,608,042
)	
Registrant.)	
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UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
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**REGISTRANT’S REPLY TO PETITIONERS’ RESPONSE TO
REGISTRANT’S MOTION TO STRIKE PETITIONERS’ SECOND AMENDED PETITION
FOR CANCELLATION AND TO PETITIONERS’ CROSS-MOTION TO REOPEN THE
DEADLINE TO FILE SUCH SECOND AMENDED PETITION FOR CANCELLATION**

In reply to Petitioners’ Opposition to Registrant’s Motion to Strike Petitioners’ Second Amended Petition for Cancellation, and Cross-Motion to Reopen the Deadline to File Such Second Amended Petition for Cancellation, Registrant, Montani Cosmetics Inc., states the following:

Petitioners were allowed until TWENTY DAYS from the June 25, 2010 mailing date of the Board’s Order to amend the allegations in paragraph 9 of the amended petition to cancel to clarify their claims as set forth in its response to the previous motion to strike, but failed to do so by the July 15, 2010 deadline. In Petitioner’s Cross-Motion to Reopen this deadline, Petitioners make a conclusory assertion of excusable neglect. However, Petitioners have failed to set forth with particularity the detailed facts upon which its excusable neglect claim is based. Since Petitioners have failed to set forth a sufficient showing of excusable neglect, Petitioners’ Cross-Motion to

reopen the deadline to file its Second Amended Petition for Cancellation should be denied, and Registrant's pending Motion to Strike the late filed Second Amended Petition for Cancellation should be granted.

“A party moving to reopen its time to take required action must set forth with particularity the detailed facts upon which its excusable neglect claim is based; mere conclusory statements are insufficient.” (footnote omitted) TBMP 509.01(b)(1). The only facts Petitioners set forth to establish excusable neglect in their Cross-Motion to Reopen the missed deadline are as follows:

Petitioner made its filing on July 19th because the 20 day deadline set by the Order to make such filing was erroneously docketed by Petitioner's counsel as 20 days following the mailing date of the Order plus an enlargement of such 20 day period by 5 days pursuant to 37 C.F.R. § 2.119(c). The entering of this “20 plus 5” docketing deadline followed the correct entering of multiple docketing deadlines for Petitioner to respond to Registrant's myriad of other motions filed within a short time frame in this cancellation action and served by mail, taking into account this same 5-day enlargement period. Based on this docketing error, Petitioner's counsel was under the mistaken belief that Petitioner was in fact filing its Second Amended Petition for Cancellation ahead of the applicable deadline as docketed, i.e., July 20th.

(Cross-Motion, p. 2)

Petitioners' brief, conclusory explanation of its docketing error wholly fails to set forth with particularity the detailed facts upon which excusable neglect is based. Petitioners set forth no affidavits or attachments in support of its simple, conclusory allegation of excusable neglect. Further, Petitioners wholly fail to set forth any facts to support its allegations that the docketing error followed the correct entering of “multiple docketing deadlines” for Petitioner to respond to Registrant's “myriad of other motions filed within a short time frame” in this cancellation action and served by mail.

A review of the TTAB record in this matter clearly indicates that these allegations set forth by Petitioners are untrue and misleading. The Board issued its Order with the 20 day deadline on

June 25, 2010. At that time, no other Motions were pending. All prior motions were filed over a month before the June 25, 2010 date and were ruled upon in the Board's Order. Thereafter, Registrant filed its Motion for Summary Judgment on July 2, 2010. No other motions were pending or filed between the Board's June 25, 2010 Order and Petitioner's late filing of its Second Amended Petition on July 19, 2010. Petitioners' untrue, misleading and conclusory allegation that the docketing error "*followed the correct entering of multiple docketing deadlines for Petitioner to respond to Registrant's myriad of other motions filed within a short time frame in this cancellation action*" fails to set forth with particularity the detailed facts upon which its excusable neglect claim is based.

While TTAB decisions prior to the TTAB decision in *Pumpkin Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997) held that a failure to act due to counsel's docketing errors is, per se, not the result of excusable neglect (*see* TBMP 509.01(b)(1)), the TTAB in *Pumpkin* held "*that the excusable neglect determination must take into account all relevant circumstances surrounding the party's omission or delay, including (1) the danger of prejudice to the nonmovant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.*" (footnote omitted) TMBP 509.01(b)(1).

After considering all four of these factors, the TTAB in *Pumpkin, supra*, held that opposer had not demonstrated excusable neglect resulting from the failure of opposer's counsel's docketing system. With respect to the 3rd factor, the TTAB stated that the delay was caused by circumstances wholly within opposer's reasonable control, i.e., the failure of opposer's counsel's docketing system, and that this factor weights heavily against a finding of excusable neglect. *Id.* at 1586-1587. With

respect to the 1st factor, the TTAB stated that it did not appear that applicant's ability to defend against opposer's claims had been prejudiced by the delay, and that this factor weighed in favor of finding of excusable neglect. *Id.* at 1587. With respect to the 2nd factor, the TTAB stated the Board's interest in deterring such sloppy practice weighs heavily against a finding of excusable neglect. *Id.* at 1588. With respect to the 4th factor, the TTAB found no basis that opposer acted in bad faith, and that this factor weighed in favor of finding of excusable neglect. *Id.*

The analysis in this case is the essentially the same as in *Pumpkin, supra*. In holding that opposer had not demonstrated excusable neglect, the TTAB in *Pumpkin* concluded that the absence of prejudice and bad faith, under the 1st and 4th factors, is outweighed by the combination of circumstances under the 2nd and 3rd factors, i.e., opposer's delay caused solely by its negligence and inattention, the unnecessary and otherwise avoidable delay of the proceeding and expenditure of the Board's resources which are a direct result of opposer's negligence, and the Board's clear interest in deterring such negligence in proceeding before it. *Id.*

For these same reasons, Petitioners in this case have not demonstrated excusable neglect. Petitioners' sole excuse for its negligence is that the docketing error "*followed the correct entering of multiple docketing deadlines for Petitioner to respond to Registrant's myriad of other motions filed within a short time frame in this cancellation action.*" This statement is false, misleading and does not establish excusable neglect.

Petitioners have now had three (3) opportunities¹ to clearly set forth its fraud/bad faith allegations made in paragraph 9 of its Petition for Cancellation, and have failed all three times to clearly do so. By way of their Cross-Motion to Reopen, Petitioners are now seeking a fourth

¹ First in its initial Petition, second in its First Amended Petition, and third during the TWENTY DAYS time period set in the Board's June 25, 2010 Order.

opportunity to do so, despite their clear negligence and inattention, and their unsupported, misleading and conclusory assertion of excusable neglect.

Even if given a fourth opportunity, Registrant believes Petitioner's late filed Second Amended Petition still makes naked allegations of bad faith, unrelated to the sole issue of likelihood of confusion, and it appears a further motion to strike or for a more definite statement regarding paragraph 9 would still be necessary, resulting in further delay and expenditure of the Board's resources in this matter. Petitioners' actions have caused, and if their Cross-Motion is granted, will continue to cause delay and great expense in fees, costs and resources. Although this means nothing to an approximately billion dollar pharmaceutical group, Petitioners' actions are having a significant and negative affect on Registrant's small business.

Accordingly, for the reasons discussed above, Petitioners have failed to establish excusable neglect. As such, Petitioners' Cross-Motion to Reopen should be denied, and the Board should strike Petitioners' late filed Second Amended Petition for Cancellation.

Respectfully submitted,
PATULA & ASSOCIATES, P.C.

Dated: August 23, 2010

By: /Charles T. Riggs Jr./
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CERTIFICATE OF SERVICE

I hereby certify that a copy of REGISTRANT'S REPLY TO PETITIONERS' RESPONSE TO REGISTRANT'S MOTION TO STRIKE PETITIONERS' SECOND AMENDED PETITION FOR CANCELLATION AND TO PETITIONERS' CROSS-MOTION TO REOPEN THE DEADLINE TO FILE SUCH SECOND AMENDED PETITION FOR CANCELLATION was served upon Petitioners by depositing a copy with the United States Postal Service as first class mail, postage paid, in an envelope addressed to Lile H. Deinard, Esq., DORSEY & WHITNEY LLP, 250 Park Avenue, New York, New York 10177, this 23rd day of August, 2010.

/Charles T. Riggs Jr./

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