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

Proceeding	92052027
Party	Defendant Eustaquio, Yolanda
Correspondence Address	Eustaquio, Yolanda 13912 SW 139 Ct Miami, FL 33186 UNITED STATES promex@cfl.rr.com
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Henry Rodriguez, Esq.
Filer's e-mail	henry@lexarian.com
Signature	/henry rodriguez/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In Re: Application Serial No. 77/411,075
Trademark: CICATRICURA
International Class: 10
Registration Date: October 31, 2006

-----)	
Genomma Lab International, S.A.B. de C.V.,)	
Petitioner,)	
)	
v.)	Cancellation No. 92052027
)	
Yolanda Eustaquio,)	
Registrant.)	
-----)	

**REGISTRANT’S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, TO STRIKE**

Registrant Yolanda Eustaquio (“Registrant”), pursuant to Federal Rule of Civil Procedure 12(b)(6) and Trademark Rule 2.116(a), hereby moves to dismiss the Petition to Cancel (“Petition”) served by Petitioner Genomma Lab International, S.A.B. de C.V. (“Petitioner”) for failure to state a claim upon which relief may be granted, or, in the alternative, to strike portions thereof, and avers as follows:

Petitioner fails to sufficiently plead facts to establish a cause of action for fraud under Federal Rule of Civil Procedure 9(b). Lack of specific facts showing fraud on the Patent and Trademark Office (“PTO”) result in the failure to state a cause of action in the Petition.

In the alternative, Registrant, pursuant to Federal Rule 12(f), hereby moves to strike certain impertinent, scandalous, immaterial or irrelevant paragraphs in the Petition, as follows:

1. To strike paragraphs 8 - 9 of the Petition in their entirety because:
 - a. They are immaterial and impertinent.

- b. They unduly prejudice Registrant by confusing the issues and unfairly burdening Registrant.
- 2. To strike paragraph 50 of the Petition in its entirety because:
 - a. It is immaterial, impertinent and scandalous.
 - b. It unduly prejudices Registrant by confusing the issues and unfairly burdening Registrant.
- 3. To strike paragraphs 51 - 56 of the Petition, as well as the referenced Exhibits C and D, in their entireties because:
 - a. They are immaterial, impertinent and scandalous.
 - b. They unduly prejudice Registrant by confusing the issues and unfairly burdening Registrant.
- 4. To strike paragraphs 57 - 60 of the Petition, as well as the referenced Exhibit E, in their entireties because:
 - a. They are immaterial, impertinent and scandalous.
 - b. They unduly prejudice Registrant by confusing the issues and unfairly burdening Registrant.
- 5. To strike paragraphs 61 - 64 of the Petition, as well as the referenced Exhibit F, in their entireties because:
 - a. They are immaterial, impertinent and scandalous.
 - b. They unduly prejudice Registrant by confusing the issues and unfairly burdening Registrant.
- 6. To strike paragraphs 65 - 68 of the Petition, as well as the referenced Exhibits G and H, in their entireties because:

a. They are immaterial, impertinent and scandalous.

b. They unduly prejudice Registrant by confusing the issues and unfairly burdening Registrant.

7. To strike paragraphs 69 - 70 of the Petition, as well as the referenced Exhibit I, in their entireties because:

a. They are immaterial, impertinent and scandalous.

b. They unduly prejudice Registrant by confusing the issues and unfairly burdening Registrant.

8. To strike paragraph 72 of the Petition in its entirety because:

a. It is immaterial, impertinent and scandalous.

b. It unduly prejudices Registrant by confusing the issues and unfairly burdening Registrant.

MEMORANDUM OF LAW IN SUPPORT OF REGISTRANT'S MOTION TO DISMISS

Registrant hereby files its memorandum of law in support of its motion to dismiss, in accordance with Trademark Rule 2.127(a). Petitioner alleges Registrant committed fraud on the PTO upon information and belief. Petition, ¶¶ 27, 34, 49, 71. Charges of fraud on the PTO are serious and should not be made capriciously. The Board does not take charges of fraud lightly and has often made statements to the following effect with respect to *inter partes* proceedings:

Fraud in a trademark cancellation is something that must be “proved to the hilt” with little or no room for speculation or surmise; considerable room for honest mistake, inadvertence, erroneous conception of rights, and negligent omission; and any doubts resolved against the charging party.

3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 31:68 at 31-149 (4th ed. 2002) (citing *Yocum v. Covington*, 216 U.S.P.Q. 210 (TTAB 1982))

Petitioner’s allegations fail to state with particularity the information and beliefs it possesses that warrants a claim of fraud.

I. Legal Standards

Generally, cancellations on the ground of fraud must be based on particular allegations of the elements of fraud. Fed. R. Civ. P. 9(b). “[T]he pleadings [must] contain explicit rather than implied expression of the circumstances constituting fraud.” *King Automotive, Inc. v. Speedy Muffler King, Inc.*, 212 U.S.P.Q. 801, 803 (C.C.P.A. 1981). Further, pleading fraud “on information and belief” where there is no allegation of “specific facts upon which the belief is reasonably based” is insufficient. *Asian and Western Classics B.V. v. Lynne Selkow*, 2009 WL 4081699 (T.T.A.B. 2009) (quoting *Exergen Corp. v. Wal-Mart Stores Inc.*, 91 U.S.P.Q.2d 1656, 1670 (Fed. Cir. 2009)). These types of allegations solely create the possibility that the pleader may uncover such evidence. *Id.* (noting that USPTO Rule 11.18 requires that “the pleader know of facts that support the pleading or that evidence showing the factual basis is likely to be

obtained after reasonable opportunity for discovery.”) They do not constitute pleading fraud with particularity. *Id.*

Though courts have permitted allegations of fraud to be made upon information and belief where the facts constituting the fraud are peculiarly within the other party’s knowledge, such allegations must be supplemented with specific facts. *Drobnak v. Andersen Corporation*, 561 F.3d 778, 783 (8th Cir. 2009). Allegations of fraud should “set forth the source of the information,” and “be accompanied by a statement of facts on which the belief was founded.” *Florida State Board of Administration v. Green Tree Financial Corporation*, 270 F.3d 645, 668 (8th Cir. 2001). There is a further requirement that the pleader state its “efforts made to obtain additional information,” to support its allegations made upon information and belief, as well as that the pleader specifically allege that the necessary facts are within defendant’s control. *Drobnak*, 561 F.3d at 784 (citing *Moore’s Federal Practice* § 9.03[1][g]); *Exergen Corp.*, 91 U.S.P.Q.2d at 1670, n.7 (citing *Kowal v. MCI Commc’n Corp.*, 16 F.3d 1271, 1279, n.3 (D.C. Cir. 1994).

II. Grounds for Dismissing Petition

In this case, nearly two-thirds of Petitioner’s Petition is comprised of allegations made “on information and belief.” None of these allegations state that information necessary to Petitioner’s claims are in Registrant’s control. None of these allegations indicate the efforts made by Petitioner to obtain information supportive of its numerous allegations made “on information and belief.”

Registrant shall now address Petitioner’s specific allegations of fraud.

a. *Wrong Date of First Use*

Petitioner may be alleging that Registrant committed fraud in obtaining its Registration because “Registrant made no bona fide use ... of Registrant’s Mark in commerce on or prior to Registrant’s claimed date of first use in commerce or filing the use-based application.” Petition, ¶¶ 27, 71. The only statements Petitioner makes in support of this allegation are further baseless allegations made on information and belief that reiterate that Registrant did not sell or did not use the mark at issue on Registrant’s goods by the claimed date of first use in commerce or the filing of the use-based application, and that Registrant possesses no documents that support Registrant’s claimed date of first use. Petition, ¶¶ 23-26. These allegations fail to set forth the source of the information basing those claims. Furthermore, these allegations are not accompanied by a statement of facts on which Petitioner’s beliefs are founded.

b. *Submission of False Documents*

Petitioner may be alleging that Registrant committed fraud in obtaining its Registration because “Registrant knew Registrant’s specimen was fraudulent.” Petition, ¶¶ 49, 71. Petitioner raises certain particular allegations relating to Registrant’s submission of Registrant’s specimen and the similarity between part of Registrant’s specimen and Petitioner’s product packaging. Petition, ¶¶ 28, 35-43. The remaining statements Petitioner makes in support of this allegation are further baseless allegations made on information and belief that Registrant deceived the PTO, that Registrant did not sell or use Registrant’s specimen by the claimed date of first use in commerce or the filing of the use-based application, and that Petitioner manufactured goods contained by the specimen. Petition, ¶¶ 29-34, 44-48. These allegations fail to set forth the source of the information basing those claims. Furthermore, these allegations are not accompanied by a statement of facts on which Petitioner’s beliefs are founded.

Additionally, Registrant's submission of an allegedly fraudulent specimen was accepted by the assigned Trademark Examining Attorney. Any question whether the specimen showed use of the applied-for mark for the goods listed in Registrant's application was a matter for the Examining Attorney to determine. It would have been plainly evident whether the specimen supported an application to register the mark for the listed goods. Petitioner does not allege with the requisite particularity that Registrant fabricated a specimen to outfox the Examining Attorney by withholding information or materials needed by the Examiner to determine sufficiency of said specimen. Any deficiency in the specimen would have been readily apparent to the Examiner and could not have led to the unwarranted approval of the mark for publication. *Torres v. Cantine Torresella S.r.l.*, 1 U.S.P.Q.2d 1483 (Fed. Cir. 1986).

c. Insufficient Allegations of Intent

Moreover, Petitioner's Petition fails to include proper allegations of intent in pleading fraud. *In re Bose Corp.*, 91 U.S.P.Q. 2d 1938, 1939-1940 (Fed. Cir. 2009). Though Federal Rule of Civil Procedure 9(b) permits general allegations of intent, the pleader must still "allege sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind." *Asian and Western Classics B.V.*, 2009 WL 4081699. Allegations that merely state that the trademark applicant knowingly made, or "should have known" that it made, false or misleading material representations of fact in connection with the application do no more than imply negligence. *In re Bose Corp.*, 91 U.S.P.Q.2d at 1940. "Negligence is not sufficient to infer fraud or dishonesty." *Asian and Western Classics B.V.*, 2009 WL 4081699.

Petitioner's allegation that "Registrant made no bona fide use ... of Registrant's Mark in commerce on or prior to Registrant's claimed date of first use in commerce or filing the use-based application," provides no allegation of *scienter*. Petition, ¶ 27. Petitioner's conclusory

allegation that Registrant committed fraud in obtaining the registration at issue fails to address Registrant's *mens rea* at all. Petition, ¶ 71.

Petitioner's allegations regarding Registrant's specimen of use also fail, for they do not correlate the alleged intentional deception by Registrant with Registrant's intent to obtain the registration through that deception. Petition, ¶¶ 34, 47-49; *Crown Wallcovering Corp. v. The Wall Paper Mfrs. Ltd.*, 188 U.S.P.Q. 141, 144 (T.T.A.B. 1975) ("in order to state a claim upon which relief can be granted on the ground of fraud, it must be asserted that the false statements complained of were made willfully in bad faith with the intent to obtain that to which the party making the statements would not otherwise have been entitled").

III. Conclusion

Petitioner's Petition to Cancel is based on nebulous allegations of fraud that fail to satisfy the requirements of alleging the elements of fraud with particularity and with the proper allegation of intent. Such particularity is necessary to provide adequate notice, to weed out baseless claims, and to prevent fishing expeditions and fraud actions where all necessary facts are learned after discovery. The Petition is insufficient, for it provides no specific facts upon which the allegations on information and belief can be reasonably based, nor does it adequately allege Registrant's *scienter*. For all these reasons, Registrant is entitled, as a matter of law, to the dismissal of Petitioner's Petition and prays that the Board grant this motion and dismiss this case.

**MEMORANDUM OF LAW IN SUPPORT OF
REGISTRANT'S ALTERNATIVE MOTION TO STRIKE**

Registrant hereby files its memorandum of law in support of its alternative motion to strike in accordance with Trademark Rule 2.127(a).

I. Legal Standards

Generally, motions to strike matters raised in the pleadings are appropriate in cases where such matters are redundant, immaterial, impertinent or scandalous. Fed. R. Civ. P. §12(f); *Harsco Corp. v. Electrical Science, Inc.*, 9 U.S.P.Q. 2d. 1570 (T.T.A.B. 1988) (Holding that allegation of lack of distinctiveness at the time of the filing of the application was immaterial, for even if proven true, the allegation would have no effect on the outcome of the proceeding); *Global View Ltd. Venture Capital v. Great Central Basin Exploration*, 288 F. Supp. 2d 473, 481 (S.D. N.Y. 2003) (striking reference to defendants as “unscrupulous, unprincipled con artists” since it is nothing more than name calling and does not contribute to substantive claims).

Though the Board does not favor such motions, matters will be stricken if they have no bearing to the issues in the case. *Harsco Corp.*, 9 U.S.P.Q. 2d. at 1572; T.B.M.P § 506.01. The Board, in determining the merits of a motions to strike, must deem as admitted all of the non-moving party’s well-pleaded acts, draw all reasonable inferences in the pleader’s favor, and resolve all doubts in favor of denying the motion to strike. *Robinson v. Managed Accounts Receivables Corp.*, 654 F.Supp.2d 1051, 1064-65 (C.D. Cal. 2009). Superfluous historical allegations are a proper subject of a motion to strike. *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527-28 (9th Cir. 1993) (Finding that activity of predecessor-in-interest was not relevant to materiality of issue before the court), *rev’d on other grounds*, 510 U.S. 517 (U.S. Cal. 1994).

To succeed in its motion to strike, Registrant must show: (a) that no evidence in support of the challenged allegations would be admissible at trial, (b) that the challenged allegations have

no bearing to the pleader's claims, and, (c) that Registrant will be prejudiced by the Board permitting those allegations to remain in the pleading. *Lundy v. Town of Brighton*, 521 F. Supp. 2d 259, 265 (W.D. N.Y. 2007); *McDowell v. Morgan Stanley & Co.*, 645 F. Supp. 2d 690, 693 (N.D. Ill. 2009). Prejudice is found when the challenged allegations would confuse the issues, or by their length or complexity, would place an undue burden on Registrant, open the possibility of unnecessarily extensive and burdensome discovery, improperly increase the time, expense and complexity of the case, or otherwise unduly burden Registrant. *Canadian St. Regis Band of Mohawk Indians ex rel. Francis v. New York*, 278 F. Supp. 2d 313, 325 (N.D. N.Y. 2003); *Fantasy*, 984 F.2d at 1528 (Holding that allegations not involving the parties to the action would have been burdensome for the moving party to answer, created serious risks of prejudice to said party, delay, and confusion of the issues and that the evidence of those allegations would lead to unwarranted and prejudicial inferences against moving party).

II. Grounds for Striking Allegations

Petitioner's cancellation of Registrant's federal trademark registration is based on a claim of alleged fraud committed by Registrant against the PTO in obtaining its registration of CICATRICURA. Petition ¶¶ 47 - 49, 71. Numerous averments raised by Petitioner in its Petition are immaterial and impertinent to its claim of fraud, as well as being derogatory of Registrant.

a. Paragraphs 8 through 9

Petitioner's allegations in paragraphs 8 and 9 of the Petition are wholly immaterial to the basis of Petitioner's cancellation, i.e. the claim of fraud. These allegations have no bearing on the instant claim of fraud in obtaining the federal registration for CICATRICURA because they present no facts relating to the alleged fraud. Petitioner alleges facts that relate to a claim of

likelihood of confusion. However, no claim of likelihood of confusion is presented by Petitioner in its Petition. Petitioner makes no allegation of superior rights through priority of use in commerce of its alleged trademark. Petitioner's statements are not facts that will help the Parties or the Board resolve Petitioner's claim of fraud in the issuance of Registration No. 3165259. Petitioner's allegations are impertinent.

b. Paragraph 50

Petitioner's allegation in paragraph 50 of the Petition is a bald-faced, libelous mischaracterization of Registrant's business practices and impugns the character of Registrant. This allegation bears no essential or important relationship to Petitioner's claim for relief. The allegation has no bearing on the instant claim of fraud in obtaining the federal registration for CICATRICURA because it presents no facts relating to that registration. Petitioner's allegations are immaterial. Further, this paragraph is unnecessary to resolve the issue in the present dispute. Petitioner's statement is not a fact that will help the Parties or the Board resolve Petitioner's claim of fraud in the issuance of Registration No. 3165259. Petitioner's allegations are impertinent.

Furthermore, these paragraphs are scandalous for they improperly cast Registrant in a derogatory light. Petitioner's purpose in these allegations can only be to improperly taint the Board's view of Registrant without the benefit of due process. This proceeding was only brought forth to litigate Registrant's right to own the CICATRICURA registration. The Board will have no opportunity to adjudicate the merits of Petitioner's allegation. Registrant's prior business activities unrelated to CICATRICURA are not within the purview of this proceeding. This paragraph does nothing but confuse the issue and unduly burden Registrant and the Board by improperly increasing the time, expense and complexity of this proceeding.

c. Paragraphs 51 through 56

Petitioner's allegations and referenced exhibits in paragraphs 51 through 56 of the Petition refer to the unrelated trademark BEDOYECTA. These allegations bear no essential or important relationship to Petitioner's claim for relief. The allegations have no bearing on the instant claim of fraud in obtaining the federal registration for CICATRICURA because they speak only to alleged facts vis-à-vis BEDOYECTA, not the registration at issue. Petitioner's allegations are immaterial. Further, these paragraphs are unnecessary to resolve the issue in present dispute. The disposition of the BEDOYECTA mark or Registrant's relationship to Valeant Pharmaceuticals International are facts that will not help the Parties or the Board resolve Petitioner's claim of fraud in the issuance of Registration No. 3165259. Petitioner's allegations are impertinent. Under no legal theory can Registrant's alleged ownership or abandonment of BEDOYECTA, BEDOYECTA's registration or use in Mexico by a Mexican company, or Registrant's relationship to said Mexican company bear any relation to Petitioner's claim of fraud.

Additionally, these paragraphs are scandalous for they improperly cast Registrant in a derogatory light. Petitioner's purpose in these allegations can only be to improperly taint the Board's view of Registrant without the benefit of due process. This proceeding was not brought forth to litigate Registrant's prior ownership or use of BEDOYECTA, but rather to address Registrant's right to own the CICATRICURA registration. The Board will have no opportunity to adjudicate the merits of Registrant's prior ownership or use of BEDOYECTA. Valeant Pharmaceuticals International is not a party to this proceeding. These paragraphs do nothing but confuse the issues and unduly burden Registrant and the Board by improperly increasing the time, expense and complexity of this proceeding.

d. Paragraphs 57 through 60

Petitioner's allegations and referenced exhibit in paragraphs 57 through 60 of the Petition refer to the unrelated trademark CREMA CUADRIDERMA. These allegations bear no essential or important relationship to Petitioner's claim for relief. The allegations have no bearing on the instant claim of fraud in obtaining the federal registration for CICATRICURA because they speak only to alleged facts vis-à-vis CREMA CUADRIDERMA, not the registration at issue. Petitioner's allegations are immaterial. Further, these paragraphs are unnecessary to resolve the issue in present dispute. Registrant's ownership of the CREMA CUADRIDERMA mark or Schering Corporation's Mexican registration for QUADRIDERM are alleged facts that will not help the Parties or the Board resolve Petitioner's claim of fraud in the issuance of Registration No. 3165259. Petitioner's allegations are impertinent. Under no legal theory can Registrant's alleged ownership of CREMA CUADRIDERMA or CREMA CUADRIDERMA's registration or use in Mexico by a Mexican company bear any relation to Petitioner's claim of fraud.

Additionally, these paragraphs are scandalous for they improperly cast Registrant in a derogatory light. Petitioner's purpose in these allegations can only be to improperly taint the Board's view of Registrant without the benefit of due process. This proceeding was not brought forth to litigate Registrant's ownership or use of CREMA CUADRIDERMA, but rather to address Registrant's right to own the CICATRICURA registration. The Board will have no opportunity to adjudicate the merits of Registrant's ownership or use of CREMA CUADRIDERMA. Schering Corporation is not a party to this proceeding. These paragraphs do nothing but confuse the issues and unduly burden Registrant and the Board by improperly increasing the time, expense and complexity of this proceeding.

e. Paragraphs 61 through 64

Petitioner's allegations and referenced exhibit in paragraphs 61 through 64 of the Petition refer to the unrelated trademark CALCIGENOL. These allegations bear no essential or important relationship to Petitioner's claim for relief. The allegations have no bearing on the instant claim of fraud in obtaining the federal registration for CICATRICURA because they speak only to alleged facts vis-à-vis CALCIGENOL, not the registration at issue. Petitioner's allegations are immaterial. Further, these paragraphs are unnecessary to resolve the issue in present dispute. Registrant's ownership of the CALCIGENOL mark or Aventis Pharma, S.A.'s Mexican registration for CALCIGENOL are alleged facts that will not help the Parties or the Board resolve Petitioner's claim of fraud in the issuance of Registration No. 3165259. Petitioner's allegations are impertinent. Under no legal theory can Registrant's alleged ownership or use of CALCIGENOL or CALCIGENOL's registration or use in Mexico by a Mexican company bear any relation to Petitioner's claim of fraud.

Additionally, these paragraphs are scandalous for they improperly cast Registrant in a derogatory light. Petitioner's purpose in these allegations can only be to improperly taint the Board's view of Registrant without the benefit of due process. This proceeding was not brought forth to litigate Registrant's ownership or use of CALCIGENOL, but rather to address Registrant's right to own the CICATRICURA registration. The Board will have no opportunity to adjudicate the merits of Registrant's ownership or use of CALCIGENOL. Aventis Pharma, S.A. is not a party to this proceeding. These paragraphs do nothing but confuse the issues and unduly burden Registrant and the Board by improperly increasing the time, expense and complexity of this proceeding.

f. Paragraphs 65 through 68

Petitioner's allegations and referenced exhibits in paragraphs 65 through 68 of the Petition refer to the unrelated trademark ESTOMAQUIL. These allegations bear no essential or important relationship to Petitioner's claim for relief. The allegations have no bearing on the instant claim of fraud in obtaining the federal registration for CICATRICURA because they speak only to alleged facts vis-à-vis ESTOMAQUIL, not the registration at issue. Petitioner's allegations are immaterial. Further, these paragraphs are unnecessary to resolve the issue in present dispute. Registrant's ownership of the ESTOMAQUIL mark or Laboratorios Higia, S.A.'s Mexican registration for ESTOMAQUIL are alleged facts that will not help the Parties or the Board resolve Petitioner's claim of fraud in the issuance of Registration No. 3165259. Petitioner's allegations are impertinent. Under no legal theory can Registrant's alleged ownership of ESTOMAQUIL or ESTOMAQUIL's registration or use in Mexico by a Mexican company bear any relation to Petitioner's claim of fraud.

Additionally, these paragraphs are scandalous for they improperly cast Registrant in a derogatory light. Petitioner's purpose in these allegations can only be to improperly taint the Board's view of Registrant without the benefit of due process. This proceeding was not brought forth to litigate Registrant's ownership or use of ESTOMAQUIL, but rather to address Registrant's right to own the CICATRICURA registration. The Board will have no opportunity to adjudicate the merits of Registrant's ownership or use of ESTOMAQUIL. Laboratorios Higia, S.A. is not a party to this proceeding. These paragraphs do nothing but confuse the issues and unduly burden Registrant and the Board by improperly increasing the time, expense and complexity of this proceeding.

g. Paragraphs 69 through 70

Petitioner's allegations and referenced exhibit in paragraphs 69 through 70 of the Petition refer to Registrant's alleged claim of ownership to numerous trademarks and federal applications that are allegedly identical or similar to marks owned by unnamed Mexican companies. These allegations bear no essential or important relationship to Petitioner's claim for relief. The allegations have no bearing on the instant claim of fraud in obtaining the federal registration for CICATRICURA because they speak only to alleged facts vis-à-vis marks other than CICATRICURA. Petitioner's allegations are immaterial. Further, these paragraphs are unnecessary to resolve the issue in present dispute. The ownership of marks other than CICATRICURA or the similarity of these other marks to Mexican marks are alleged facts that will not help the Parties or the Board resolve Petitioner's claim of fraud in the issuance of Registration No. 3165259. Petitioner's allegations are impertinent. Under no legal theory can Registrant's alleged ownership of non-CICATRICURA marks or the use of these marks in Mexico bear any relation to Petitioner's claim of fraud.

Additionally, these paragraphs are scandalous for they improperly cast Registrant in a derogatory light. Petitioner's purpose in these allegations can only be to improperly taint the Board's view of Registrant without the benefit of due process. This proceeding was not brought forth to litigate Registrant's ownership or use of marks other than CICATRICURA, but rather to address Registrant's right to own the registration for said mark. The Board will have no opportunity to adjudicate issues surrounding Registrant's ownership or use of non-CICATRICURA marks. No other Mexican manufacturer is a party to this proceeding. These paragraphs do nothing but confuse the issues and unduly burden Registrant and the Board by improperly increasing the time, expense and complexity of this proceeding.

h. Paragraph 72

Petitioner's allegation in paragraph 72 of the Petition is a bald-faced, libelous mischaracterization of Registrant's business practices and impugns the character of Registrant. This allegation bears no essential or important relationship to Petitioner's claim for relief. The allegation has no bearing on the instant claim of fraud in obtaining the federal registration for CICATRICURA because it presents no facts relating to that registration. Petitioner's allegations are immaterial. Further, this paragraph is unnecessary to resolve the issue in present dispute. Petitioner's statement is not a fact that will help the Parties or the Board resolve Petitioner's claim of fraud in the issuance of Registration No. 3165259. Petitioner's allegations are impertinent.

Additionally, these paragraphs are scandalous for they improperly cast Registrant in a derogatory light. Petitioner's purpose in these allegations can only be to improperly taint the Board's view of Registrant without the benefit of due process. This proceeding was only brought forth to litigate Registrant's right to own the CICATRICURA registration, nothing more. The Board will have no opportunity to adjudicate the merits of Petitioner's allegation. Registrant's prior business activities unrelated to CICATRICURA are not within the purview of this proceeding. This paragraph does nothing but confuses the issue and unduly burdens Registrant and the Board by improperly increasing the time, expense and complexity of this proceeding.

III. Conclusion

Petitioner's Petition to Cancel include numerous allegations that are immaterial, impertinent and scandalous. These allegations provide no insight to Petitioner's claim that Registrant fraudulently obtained the Registration No. 3165259. Any evidence in support of

those averments would be inadmissible at trial on the basis of irrelevancy or immateriality or both. The presence of these allegations has a strong likelihood of creating prejudicial inferences against Registrant. For all these reasons, Registrant is entitled, as a matter of law, to the striking of paragraphs Nos. 8 through 9, 50 through 70 and paragraph No. 72 of Petitioner's Petition and prays that the Board grant this motion and strike these paragraphs from Petitioner's pleading.

Respectfully submitted,

Henry Rodriguez, Esq.
Amaury Cruz & Associates
Attorneys for Plaintiff
1560 Lenox Avenue, Suite 207
Miami Beach, FL 33139
Tel: 305-604-2051
Fax: 305-604-2011
Email: henry@lexarian.com

By: s/ Henry Rodriguez
Henry Rodriguez, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Dismiss or, in the alternative, to Strike is being deposited with the United States Postal Service and sent via First Class Mail in an envelope addressed to Petitioner's counsel Mark H. Miller, 112 East Pecan Street, Suite 2400, San Antonio, TX, 78205, on this 15th day of March, 2010.

s/ Henry Rodriguez
Henry Rodriguez, Esq.