

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

LEO Pharma A/S,	:	Opposition No. 91171694
	:	
Opposer,	:	Appl. No. 76/636,322
	:	
v.	:	
	:	
Lev Pharmaceuticals, Inc.,	:	
	:	
Applicant.	:	
	:	

**Opposer's Reply to Applicant's Response to
Motion for Leave to Amend Notice of Opposition**

During discovery, Applicant has not produced any materials showing use, and in fact, Applicant produced documents showing that Applicant has never used the mark "LEV PHARMA" for services for others. Therefore, Opposer seeks leave to amend the pleadings to add allegations based on the lack of use. Applicant responds to Opposer's Motion to Amend with complaints about irrelevant discovery issues and meritless allegations that Applicant will be prejudiced if it has to show use of its mark. Such allegations are a smoke screen calculated to divert the Board from the apparent fraud committed by Applicant in filing its service mark application. Accordingly, Opposer requests that the Board grant Opposer's Motion to Amend the Notice of Opposition.



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Opposer's Motion was Timely

When Opposer originally filed the Notice of Opposition, Opposer was unaware that Applicant had not actually used the service mark LEV PHARMA in commerce for the recited services. During discovery Opposer learned that Applicant could not substantiate legitimate use of the service mark in commerce for the recited services. Within weeks of learning that Applicant had not been using the mark LEV PHARMA in commerce, the parties began settlement discussions, and the Board suspended the proceedings for nearly 9 months while it ruled on a Motion for Protective Order.

Applicant's protestation of an inexcusable 14-month delay ignores the fact that the Opposition was suspended for 9 of those 14 months, and the parties were actively engaged in settlement discussions for 11 of those 14 months. In other words, far from being unexplained, Applicant knew exactly why Opposer did not seek to amend the pleadings. Opposer believing or hoping that the opposition could be settled, acted reasonable and did not spend the time, effort and expense to amend the pleadings while the Opposition was suspended and also while the parties were in settlement discussions. There would be no point in amending the pleadings, if the parties could reach a settlement.

Specifically, Applicant correctly points out that Applicant's discovery responses in late January 2007, implied that it had not used the mark in commerce for the recited services. Weeks later, the parties began settlement discussions and on March 6, 2007, Opposer sent a formal settlement offer along with supplemental

discovery responses. Shortly thereafter, on March 16, 2007, the Board suspended the proceedings while it ruled on a Motion for Protective Order that Opposer requested.

During the pendency of the Motion for Protective Order, the parties continued to make several offers and counter-offers in the hope of resolving the dispute. The last offer made by Opposer was on October 8, 2007. On December 4, 2007, the Board granted Opposer's Motion for Protective Order, re-started discovery and re-set the trial schedule. However, the parties appeared to agree on several terms of settlement and continued to attempt to reach agreement on the remaining issues. On January 4, 2008, Applicant made another counter-offer which included several substantive terms that Opposer had stated were not acceptable. After deliberation and discussions regarding options, in February 2008, Opposer concluded that continued settlement discussions were not warranted because Applicant continued to insist on demands, such as, a worldwide settlement and other unacceptable terms. Shortly thereafter, Opposer filed a Motion for Summary Judgment based on Applicant's non-use of the mark. In response, Applicant contended that Opposer had not sufficiently pled non-use and fraud. Opposer then promptly filed the Motion to Amend the Notice of Opposition.

As can be seen from the foregoing, Opposer did not delay. Opposer pursued settlement with Applicant during the suspension of the proceedings, and has sought to amend the pleadings after it became apparent that settlement could not be reached and discovery has not closed.

After making unfounded claims of delay in its Response, Applicant rambles on about prejudice and insidious delays because Opposer did not further

supplement its discovery responses to Applicant's liking. However, the issue here is not whether Opposer produced sufficient documents to satisfy Applicant. If Applicant did not like Opposer's document production, Applicant should have filed a motion to compel. In fact, this is not the first time Applicant has tried to cloud up matters with discovery complaints. Applicant tried the same strategy when it opposed Applicant's Request for a Protective Order. The Board saw through Applicant's attempts to cloud the issues, and in the Board's Order of December 4, 2007, granting Opposer's Motion, the Board specifically reminded Applicant that the proper way to deal with a perceived lack of sufficient document production is to seek a motion to compel. Rather than heeding the Board's direction, Applicant continues to complain about discovery responses in every paper as a smoke screen to mask Applicant's own shortcomings and fraud on the Patent and Trademark Office.

Opposer also notes that it was Applicant that forced Opposer to seek to amend the pleadings. In response to Opposer's Motion for Summary Judgment, Applicant chose not to address the issues substantively, but instead claimed that the issues were not sufficiently plead in the Notice of Opposition. Opposer promptly sought to amend the pleadings to eliminate Applicant's objections and unveil Applicant's fraud in filing its service mark application.

Applicant's attempts to cloud the issues are also reflected in the authority it cites to support its arguments. For example, in arguing that Opposer unduly delayed, Applicant frequently cites *Lockheed Martin Corp. v. Network Solutions Inc.*, 44 U.S.P.Q. 2d 1521 (C.D. Cal. 1997). However, Applicant fails to note that *Lockheed* filed its motion to amend after an agreed upon cut-off date, despite the fact that before the cut-

off date, Lockheed was aware of the information that led to the motion to amend the pleadings. Further still, Lockheed's amendments to the pleadings would have added tenuous claims that would have required significant discovery of third parties. In other words, the facts in *Lockheed* are nothing like the facts in the present case. Further, the other cases cited by Applicant are also factually different from the facts presented here and are clearly not relevant to the current circumstances.

It is clear that Applicant Would Not be Unduly Prejudiced by Having to Show Legitimate Use of its Service Mark as Sworn in its Application.

As previously noted, the Board will liberally grant leave to amend the pleadings unless the amendment would cause undue prejudice to the non-moving party. See T.B.M.P. §507.02 (2nd ed. Rev. 2004). Clearly, Applicant would not be unduly prejudiced by having to show its service mark use from its own records. Applicant does not need any discovery, because the issues are based on information that is in Applicant's custody and/or control. In fact, it should be easy for Applicant to show that it had been using the mark, as it stated in sworn declarations to the Patent and Trademark Office. Applicant is merely trying to avoid facing its apparent fraud in filing its application.

Interestingly, Applicant does not state how it would be prejudiced by the addition of the allegations of non-use. Instead, Applicant makes the conclusory statement that it will be unfairly prejudiced, and then goes on a tirade about discovery complaints. Such a diversion is simply a smoke screen in an attempt to hide the fact that there is no rational basis for finding that Applicant would be unduly prejudiced by having to establish that it used the mark in commerce as it has sworn.

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