Commissioner of Patents and Trademarks
Patent and Trademark Office (P.T.O.)

RE: TRADEMARK APPLICATION OF SU WUNG CHONG DBA MIDO TRADING CO.
Serial No. 73-807,244
May 31, 1991
***1** Petition Filed: September 12, 1990

For: MIDO PRODUCTS and design
Filing Date: June 19, 1989

Attorney for Petitioner

Jess M. Collen

McGlew and Tuttle, P.C.

Su Wung Chong

Applicant

Jeffrey M. Samuels

Assistant Commissioner for Trademarks

On Petition

Mido G. Schaeren & Co. S.A. has petitioned the Commissioner to accept the request for extension of time to oppose registration of the above-captioned application which was filed on August 29, 1990, and to enter the notice of opposition which accompanies this petition.

The subject application was published for opposition on May 1, 1990. Petitioner filed three requests for extensions to file a notice of opposition which were granted through August 29, 1990. On August 29, 1990, petitioner filed a fourth request for a thirty day extension of time. On September 12, 1990, the Applications Examiner at the Trademark Trial and Appeal Board (TTAB) informed petitioner that the additional extension of time requested on behalf of potential opposer, if granted, would result in total extensions of time aggregating 150 days from the date of publication of the mark and, therefore, could not be granted because petitioner did not recite extraordinary circumstances in the request, or did not indicate that applicant had consented to the extension.

Counsel for petitioner has executed a declaration pursuant to 37 C.F.R. § 2.20 in which he declares that the opposer contacted the applicant by mail on June 28, 1990 and July 30, 1990, as evidenced by copies included with the petition, but did not receive any response. Counsel further declares that the potential opposer tried on numerous occasions to reach the applicant by telephone and was told that the applicant was out of the country and also that he was being represented

by a law firm. However, petitioner was subsequently advised that applicant was not represented by counsel. Petitioner maintains that "the consent of applicant or its attorney (required under Trademark Rule 2.102(c)(2)), had been given by virtue of the implications and false representations which were made by those entities. In the alternative, the applicant respectfully submits that this situation, namely the fraud perpetrated on the Opposer, clearly qualifies under Section 2.102(c)(3) as extraordinary circumstances to grant the extension and enter the Notice of Opposition which accompanies this Petition."

The Commissioner will exercise supervisory authority under Trademark Rule 2.146(a)(3) to vacate an action of the TTAB only where the TTAB has committed a clear error or abuse of discretion. Riko Enterprises, Inc. v. Lindley, 198 USPQ 480 (Comm'r Pats.1977).

Trademark Rule 2.102(c) provides, in part:

[E]xtensions of time to file an opposition aggregating more than 120 days from the date of publication of the application will not be granted except upon, (1) a written consent or stipulation signed by the applicant or its authorized representative, or (2) a written request by the potential opposer or its authorized representative stating that the applicant or its authorized representative has consented to the request, and including proof of service on the applicant or its authorized representative, or (3) a showing of extraordinary circumstances, it being considered that a potential opposer has an adequate alternative remedy by a petition for cancellation.

***2** Inasmuch as there were no extraordinary circumstances recited in the extension request, nor did petitioner provide any indication that applicant had consented to the extension, including proof of service on the applicant, the Applications Examiner acted properly by denying the request.

Trademark Rules 2.146(a)(5) and 2.148 provide that the Commissioner may suspend a rule that is not a requirement of the statute in an extraordinary situation, when justice requires and no other party is injured thereby. In this case, petitioner is attempting to show that applicant did, in effect, consent to the extension or, in the alternative, that an extraordinary circumstance required the further extension to be requested. However, the extension request does not contain either a statement indicating consent, with proof of serviceon applicant, or a statement of extraordinary circumstance. Whether petitioner has now shown that an extraordinary circumstance existed which prevented him from obtaining consent of the applicant when the request was filed is not the question on petition. The question is whether petitioner has provided an explanation showing that an extraordinary circumstance existed to prevent compliance with Rule 2.102(c)(3) which, absent consent of the applicant, requires a showing of extraordinary circumstances for the additional extension. Petitioner has provided no explanation in the petition as to why it omitted a showing of extraordinary circumstance at the time its extension request was filed. It appears, therefore, that the omission was inadvertent. Inadvertent omissions on the part of attorneys do not constitute extraordinary situations within the purview of these rules. In re Bird & Son, Inc., 195 USPQ 586, 588 (Comm'r Pats.1977).

The petition is denied. The application file will be returned to the TTAB to process the refund of the opposition fee, after which it will be forwarded to the Trademark Services Division for issuance of the registration.

Petitioner is not without remedy in this case. Once the mark in question registers, petitioner may file a petition to cancel the registration under 15 U.S.C. § 1064.

20 U.S.P.Q.2d 1399

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