

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CANFIELD SCIENTIFIC, INC.,  
Petitioner,

v.

MELANOSCAN, LLC,  
Patent Owner.

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Case IPR2017-02125  
Patent 7,359,748

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Before JOHN C. KERINS, MICHAEL W. KIM, and SCOTT C. MOORE,  
*Administrative Patent Judges.*

KERINS, *Administrative Patent Judge.*

ORDER  
Granting Petitioner's Motion to Deem Reply and  
Supporting Exhibits Timely Filed  
37 C.F.R. § 42.5(c)(3)

On October 12, 2018, Petitioner filed a Motion to Deem Reply and Supporting Exhibits Timely Filed (“Motion”), together with a Declaration of lead counsel, Julianne M. Hartzell (“Hartzell Decl.”). Paper 39, Ex. 1048. Patent Owner filed an Opposition to this Motion (“Opposition”) on October 17, 2018. Paper 40.

In its Motion, Petitioner chronicles a series of events leading up to the filing of the Reply and supporting exhibits, which were due to be filed by October 1, 2018. Motion 1–2, Hartzell Decl. ¶¶ 2–8. Ultimately, Petitioner acknowledges that, although the process of filing of these papers commenced before midnight on the due date, filing receipts evidence receipt in the Patent and Trademark Office between 12:04 and 12:13 a.m. on October 2, 2018. Hartzell Decl. ¶ 7. Petitioner represents that service on Patent Owner was completed by 12:29 a.m. on October 2. *Id.* at ¶ 8.

Under 37 C.F.R. § 42.5(c)(3), we may excuse a party’s late action upon “a showing of good cause or upon a Board decision that the consideration on the merits would be in the interests of justice.” 37 C.F.R. § 42.5(c)(3). Petitioner does not seek relief on the basis that good cause exists to excuse the late filing, but rather that the late action be excused in the interests of justice. Motion, *passim*.

The provisions of 37 C.F.R. § 42.5(c) are to be construed to secure the just, speedy, and inexpensive resolution of proceedings such as the present one. 37 C.F.R. § 42.1(b). In determining whether the interests of justice are served by excusing a late action, we look to, for example, whether the non-moving party has suffered any prejudice as a result of the late filing in this case, whether a statutory bar applies, and the possible prejudice to the

moving party were the late action not excused. *See, e.g., Pacific Market International, LLC v. Ignite USA, LLC*, IPR2014-00561, Paper 40 (PTAB May 12, 2015).

Petitioner asserts that Patent Owner has not likely been prejudiced by the late filing. Motion 3. Patent Owner responds with allegations that Petitioner has not been diligent in this and other matters, which have prejudiced Patent Owner, but has identified no prejudice arising specifically from the late filing of the Reply and supporting exhibits. Opposition 1–3.

Petitioner avers that there is no statutory bar involved with the filing at issue, Patent Owner has pointed to none, and we are unaware of any such bar that might affect the filing of these papers.

Petitioner maintains that denial of its Motion would deprive Petitioner its ability to respond to Patent Owner’s arguments presented in the Patent Owner Response, which would result in prejudice outweighing any harm to Patent Owner from the delay in filing. Motion 4.

Under the circumstances present here, we find that Petitioner’s minutes-long delay in filing its Reply and supporting exhibits has not caused any significant prejudice to Patent Owner. Contrarily, a denial of the Motion and relief sought would potentially result in considerable prejudice to Petitioner. Accordingly, in the circumstances before us, we conclude that the interests of justice justify granting the Motion, because doing so enables

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both parties to present the most complete set of arguments and evidence for the record, while avoiding undue prejudice to either party.

ORDER

For the reasons given above, it is:

ORDERED that Petitioner's Motion to Deem Reply and Supporting Exhibits Timely Filed, IPR2017-02125, Paper 39, is *granted*.

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PETITIONER:

Julianne M. Hartzell  
Sandip H. Patel  
MARSHALL, GERSTEIN & BORUN LLP  
[jhartzell@marshallip.com](mailto:jhartzell@marshallip.com)  
[spatel@marshallip.com](mailto:spatel@marshallip.com)

PATENT OWNER:

Mark D. Giarratana  
Kevin L. Reiner  
McCARTER & ENGLISH LLP  
[mgiarratana@mccarter.com](mailto:mgiarratana@mccarter.com)  
[kreiner@mccarter.com](mailto:kreiner@mccarter.com)