

2. In response to the allegations of paragraph 2, Applicant admits an application to register the trademark EX-SCENT Serial No. 78-110,238, for “thermal underwear, tops and bottoms, shirts, T-shirts, pants, turtlenecks, mock turtlenecks, underwear” has been allowed by the USPTO. Applicant is without knowledge or information sufficient to form a belief as to the truth of the averments that Opposer filed this application on February 21, 2002, and based thereon denies each and every such averment. Applicant denies all other averments of paragraph 2.

3. In response to the allegations of paragraph 3, Applicant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 3, and based thereon denies each and every such averment.

4. In response to the allegations of paragraph 4, Applicant is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 4, and based thereon denies each and every such averment.

5. In response to the allegations of paragraph 5, Applicant admits the averment that Applicant seeks to register X SCENT for “clothing, namely, gloves, mittens, footwear, socks, neckwear, muffs, bib overalls, jackets and coveralls” and denies all other averments of paragraph 5.

6. The averments of paragraph 6 are denied.

7. The averments of paragraph 7 are denied.

8. The averments of paragraph 8 are denied.

AFFIRMATIVE DEFENSES

In further answer to the Notice of Opposition, Applicant asserts the following:

Abandonment of Opposer's Application for Registration

9. The allegations of paragraphs 1-8 are incorporated herein by reference.
10. Opposer's intent-to-use application 78-110,238 for the mark "EX-SCENT" was allowed on June 17, 2003.
11. Opposer's cut-off date for filing a Statement of Use or Request for Extension of Time was December 17, 2003.
12. Opposer's application was abandoned on December 18, 2003 for failure to timely file a Statement of use or Request for Extension of Time.
13. Opposer's first use of the mark "EX-SCENT" is alleged to have occurred on December 31, 2003, after the date of abandonment of Opposer's application.
14. Applicant's intent-to-use application for the mark "X SCENT" was filed on April 25, 2003, before the dates of abandonment of Opposer's application and before the first use by Opposer of the mark EX-SCENT.
15. Applicant's first use of the mark "X SCENT" occurred in August, 2003 and, therefore, Applicant is the senior user in this opposition.
16. Applicant has continuously used the mark "X SCENT" since the date of first use.
17. Applicant's intent-to-use application filing date precedes the date of abandonment of Opposer's application and, therefore, Applicant is the senior applicant in this opposition.
18. Opposer's abandoned application cannot be revived to priority over the right of a senior user and senior applicant for registration.

Acquiescence, Laches and/or Estoppel

19. The allegations of paragraphs 1-18 are incorporated herein by reference.

20. Opposer's failure to timely file a request for extension of time resulted, by statute, in abandonment of Opposer's application 78-110,238 on December 18, 2003.

21. The USPTO entered its notice of abandonment of Opposer's application 78-110,238 on April 6, 2004.

22. On April 12, 2004, the USPTO advised Applicant that Opposer's application was abandoned and that consideration of Opposer's application 78-110,238 as a potential bar to registration of Applicant's mark was withdrawn.

23. Opposer did not file a petition to revive its abandoned application until May 26, 2004, more than five months after Opposer allowed its application 78-110,238 to become abandoned and almost two months after the Notice of Abandonment was entered.

24. Applicant relied on Opposer's abandonment and Applicant's resulting superior rights.

25. Applicant's reliance has been to its great detriment and material prejudice in that Applicant has expended large sums of money in furtherance of its mark and has created considerable, valuable goodwill related thereto.

26. Opposer is estopped by acquiescence, laches and/or estoppel from asserting its trademark application No. 78-110,238 that it permitted to become abandoned.

Prior Innocent Adoption

27. The allegations of paragraphs 1-26 are incorporated herein by reference.

28. Applicant adopted, applied for registration of and used its mark without knowledge of Opposer's then pending application 78-110,238.

29. Applicant's use of its mark X SCENT was initiated prior to Opposer's use of the mark EX-SCENT.

30. Applicant has established an association of its mark with Applicant and Applicant's goods and has created in the mind of the relevant purchasing public an association of its mark with a single source for the goods.

No Likelihood of Confusion

31. The allegations of paragraphs 1-30 are incorporated herein by reference.

32. There is no likelihood of confusion of the marks of Applicant and Opposer by members of the relevant purchasing public.

Failure to State a Claim

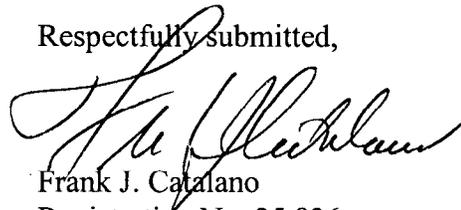
33. The allegations of paragraphs 31-32 are incorporated herein by reference.

34. Opposer's Notice of Opposition fails to state a claim upon which relief can be granted.

RELIEF REQUESTED

Applicant asks that this opposition proceeding be dismissed and that Applicant's registration be issued forthwith.

Respectfully submitted,



Frank J. Catalano
Registration No. 25,836
GABLE & GOTWALS
100 West 5th St., 10th Floor
Tulsa, OK 74103
Tel: (918) 595-4963
Fax: (918) 595-4990
E-mail: jplaw@gablelaw.com
Attorney for Applicant

1/18/05
Date

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing "Applicant's Answer to the Notice of Opposition" was served via first class mail, postage prepaid, upon the following by depositing a copy thereof in the U.S. Mail on 1/18/05.

Nicholas J. Valenziano, Jr.
1000 East Hanes Mill Road
Winston-Salem, NC 27105


FRANK J. CATALANO