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

In the matter of Application Serial No. 78/357,903
Filed on January 27, 2004
For the Mark **VIVACE**
Published in the *Official Gazette (Trademarks)* on April 19, 2005

FLORAGEM LLC, Opposer,	)	
v.	)	Opposition No. 91166345
VIVACE, INC., Applicant.	)	78/357-903

BOX TTAB NO FEE
Assistant Commissioner for Trademarks
2900 Crystal Drive
Arlington, VA 22202-3513

ANSWER

Applicant Vivace Inc., having a principal place of business at 2709 E Coddington Circle, Urbana IL 61802, responds to the Notice of Opposition as follows:

1. Applicant Next Marketing admits the allegations of Paragraphs 1-9.

2. Applicant has no knowledge of the usage of the trademark VIVA, or any common law rights that may be owned by Opposer and therefore must deny the allegations of Paragraphs 10-13.

3. Applicant denies the allegations of Paragraphs 14-15.

4. Applicant has no knowledge of the usage of the trademark VIVA by Opposer and therefore must deny the allegations of Paragraphs 16-19.

5. Applicant denies the allegations of Paragraphs 20-24.

6. Applicant has no knowledge on the belief of Opposer and therefore denies the allegation of Paragraph 25.

10-03-2005
U.S. Patent & TMOfc/TM Mail Rcpt Dt. #57

Affirmative Defenses

The applicant asserts the following affirmative defenses:

7. Opposer is estopped from enforcing the trademark against Applicant because of other uses and registrations using the trademark term VIVA, including Registration 07/74524 for VIVA!, now expired, Registration 07/89389 for VIVA!, now expired, Registration 09/46404 for CANADA DRY VIVA!, now expired, Registration 13/88590 for VIVA! DISCOVERY, now expired, Registration 14/43519 for VIVA!MAIL, now expired, Registration 16/35064 for MUSICA VIVA!, now expired, Registration 24/47508 for VIVA!FIESTA, Registration 25/86523 for VIVA!, pending application 76/514017 for VIVA!, pending application 78/258205 for VIVA! PANINI PANINI, pending application 78/258219 for VIVA! CORNETTI CORNETTI, pending registration 78/592215 for VIVA!, pending registration 78/440474 for VIVA in International Class 031, pending registration 78/354369 for VIVAGUARD in International Class 031, pending registration 78/386025 for VIVAFRESH in International Class 031, pending registration 78/513275 for VIVA TIERRA ORGANIC in International Class 031, and pending registration 78/503416 for VIVAFLOWER in International Class 031, among other trademark registrations, former registrations, along with other uses of VIVA and VIVA!.

8. Applicant believes that the marks VIVA! and VIVACE are inherently different and distinguishable.

9. Opposer's registrations are not standard character marks and usage of the exclamation point is not found in the pending application.

10. Applicant believes there has never been any actual confusion, and would not be any likelihood of confusion between the goods of Applicant and Opposer.

11. Applicant has no predatory intent in the use and registration of the mark, as it was not aware of Opposer's usage and VIVACE is not in any way evocative of VIVA! or Opposer's goods.

12. Applicant believes the Opposer's trademarks are not strong enough to eliminate usage of the subject trademark, because of the differences in the marks, and the wide range of uses of forms of the mark in various fields.

13. Applicant's goods and services are for "fresh herbs", not "live plants...", as in the '435 registration or "live potted herbs" as in the '305 registration. Opposer is estopped from using the '435 registration to cover fresh herbs as correspondence from applicant for registration of VIVA!, dated May 6, 2002 to the Examining Trademark Attorney specifically discussed exclusion of herbs in the identification of goods and services in the application which was filed

as "Live plants" and amended to obtain the registration.

Respectfully Submitted,

Attorney for Applicant Vivace, Inc.
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Dated: September 28, 2005

Certificate of Mailing by First Class Mail

I hereby certify that this correspondence is being deposited with the United States Postal Service by First Class Mail in an envelope addressed to the Commissioner for Trademarks, BOX TTAB NO FEE, P.O. Box 1451, Alexandria, Virginia 22313-1451, on September 28, 2005.

Michael Berns

CERTIFICATE OF SERVICE

I, the undersigned, declare that I am over the age of 18 and am not a party to this action. My business address is 135 West Main Street, Urbana, IL 61801. On September 28, 2005, I caused a copy of the foregoing ANSWER upon the attorney for Opposer, by depositing same in the United States Mail, first class postage prepaid, in an envelope addressed as follows:

Colleen F. Goss
FAY, SHARPE, FAGAN, MINNICH & McKEE, LLP
1100 Superior Ave, 7th Floor
Cleveland OH 44114

Attorney for Opposer

EXECUTED this 28th day of September, 2005 at Urbana, Illinois.

Michael Berns