

ESTTA Tracking number: **ESTTA229574**

Filing date: **08/11/2008**

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

Proceeding	91184985
Party	Defendant Wildfire Ultimate Pty Ltd
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Date	08/11/2008
Attachments	0002Answer.pdf (10 pages)(137358 bytes)

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

3 In the Trademark Opposition of:

4 Mark: WILDFUSION
5 Serial No. 77/191,750
6 Filed: May 29, 2007
7 Published: March 4, 2008

Attorney Docket No. WILD0002

Opposition Proceeding No: 91184985

8 Fusion Brands International
9 Opposer/Plaintiff

v.

10 Wildfire Ultimate Pty Ltd.
11 Applicant/Defendant

12 ANSWER TO NOTICE OF OPPOSITION

13 TO THE TRADEMARK TRIAL AND APPEAL BOARD:

14 Applicant, Wildfire Ultimate Pty Ltd., hereby answers the allegations of the Notice of
15 Opposition in the above-identified matter as follows:

16 1. Applicant, Wildfire Ultimate Pty Ltd., (hereafter “Applicant”) has filed Application
17 Serial No. 77/191,750 for the mark WILDFUSION, covering “cosmetics, namely, non-medicated
18 massage oils, non-medicated body oils, non-medicated lotions, blended essential oils, cosmetic body
19 creams, cosmetic moisturizing skin creams, aromatherapy oils, and aromatherapy preparations in the
20 nature of aromatherapy creams and lotions” in Class 3, and “Pharmaceutical products, namely,
21 medicated massage oils, herbal beverages for medicinal use, herbal dietary supplements, herbal
22 extracts for medicinal purposes, herbal infusions for medicinal use, dietary nutritional supplements
23 for medicinal use, health food supplements made principally of vitamins and minerals, medicinal
24 food supplements for nutritional purposes, nutritional supplements, vitamin preparations in the nature
25 of food supplements, vitamin supplements, medicated body creams, medicated pharmaceutical grade
26 moisturizing skin creams, herbal supplements for natural male and female enhancement, water-based
personal lubricants, silicone oil-based personal lubricants, vegetable oil-based personal lubricants,

1 herbal medicines for the treatment of sexual dysfunction, herbal medicines for the treatment of
2 decreased libido, herbal medicines for the treatment of infertility, herbal medicines for the treatment
3 of stress, herbal medicines for the treatment of lethargy, herbal preparations for medicinal purposes in
4 the nature of oral supplements used for relief from at least one of the following: sexual dysfunction,
5 loss of libido, infertility, stress and lethargy, herbal preparations for medicinal purposes in the nature
6 of personal lubricants used for relief from at least one of the following: sexual dysfunction, loss of
7 libido, infertility, stress and lethargy, herbal preparations for medicinal purposes in the nature of oils,
8 lotions and creams used for relief from at least one of the following: sexual dysfunction, loss of
9 libido, infertility, stress and lethargy, herbal remedies in the nature of tonics used for relief from at
10 least one of the following: sexual dysfunction, loss of libido, infertility, stress and lethargy, herbal
11 remedies in the nature of oral supplements used for relief from at least one of the following: sexual
12 dysfunction, loss of libido, infertility, stress and lethargy, herbal remedies in the nature of personal
13 lubricants used for relief from at least one of the following: sexual dysfunction, loss of libido,
14 infertility, stress and lethargy, and herbal remedies in the nature of oils, lotions and creams used for
15 relief from at least one of the following: sexual dysfunction, loss of libido, infertility, stress and
16 lethargy” in Class 5 (“Applicant’s Mark”).

17 ANSWER: Applicant admits to seeking to register WILDFUSION in International Class 3
18 and Class 5, for use with the above-identified products.

19 2. Opposer is, and has for many years been, engaged in the business of developing and
20 marketing its highly successful skincare products, lip products and cosmetic products, all sold
21 under its trade name and trademark FUSION BEAUTY.

22 ANSWER: Applicant is without knowledge or information sufficient to form a belief as to
23 the allegations of paragraph 2 of the Notice of Opposition.

24 3. Among such successful products to by Opposer under its FUSION BEAUTY trade
25 name and trademark are its highly successful LIPFUSION, LASHFUSION, LIFTFUSION,
26 GLOWFUSION and SKINFUSION branded products. Opposer’s FUSION BEAUTY,

1 LIPFUSION, LASHFUSION, LIFTFUSION, GLOWFUSION and SKINFUSION marks are here
2 after referred to as Opposer's Common Law Trademarks.

3 ANSWER: Applicant is without knowledge or information sufficient to form a belief as to
4 the allegations of paragraph 3 of the Notice of Opposition.

5 4. Opposer owns, among others, registrations and/or allowed applications for the
6 following trademarks ("Opposer's Trademarks Registrations and Applications").

<u>#</u>	<u>Mark</u>	<u>Reg./App. No.</u>	<u>Goods/Service</u>
7			
8	1. FUSION BEAUTY	3,229,984	skin care/lip gloss
9	2. FUSION BEAUTY	78/848174	medicated skin care
10	3. FUSION BEAUTY	3,365,476	online store
11	4. FUSION RX	78/619162	cosmetics
12	5. LIFTFUSION	3,162,790	cosmetic creams
13	6. LIFTFUSION	78/654001	skin care/lotions
14	7. LIGHTFUSION	78/688918	creams & cosmetics
15	8. CLEARFUSION	78/790630	skin care preparations
16	9. FUSIONPHARMA	78/917156	skin care preparations
17	10. PUREFUSION	78/669703	skin care products
18	11. LIPFUSION	78/599462	lip products/lip gloss
19	12. LIPFUSION	77/187693	online store
20	13. GLOWFUSION	3,288,759	cosmetics & lotions
21	14. LASHFUSION	3,358,421	mascara
22	15. SKINFUSION	77/005335	cosmetics
	16. GIFTFUSION	77/092573	lip products/lip gloss
	17. HAIRFUSION	78/734625	shampoo

23 Opposer's Common Law Trademarks and Opposer's Trademarks Registrations and
24 Applications are collectively referred to as Opposer's Trademarks.

25 ANSWER: Applicant is without knowledge or information sufficient to form a belief as to
26 the allegations of paragraph 4 of the Notice of Opposition.

1 5. Thus, Opposer's Trademarks form a family of marks.

2 ANSWER: Applicant denies the allegations of paragraph 5 of the Notice of Opposition.

3 Applicant notes that the issue of whether or not Opposer's Trademarks form a family of
4 marks is a matter to be decided by a Court or the Trademark Trial and Appeal Board, and not by
5 the Opposer.

6 Many factors must be present to support a finding that a family of marks is sufficient to
7 prevent registration of a mark including a term employed by the family.

8 It must be emphasized that an overzealous application of the family of marks doctrine
9 would enable the owner of the family to entirely preclude the use of a particular term when applied
10 to a particular class of goods. Opposer asserts that they, and they alone, have the right to use the
11 term FUSION when applied to any good or service related to the beauty industry.

12 Significantly, the TESS database indicates that there are 138 trademarks on file with the
13 U.S. Patent and Trademark Office that include the term FUSION for International Class 3. Of
14 those 138 trademarks, 41 are actually registered to parties *other than* the Opposer, and are for
15 products very closely related to the beauty products industry. An additional seven trademarks that
16 include the term FUSION are registered in International Class 3, for products including dish wash
17 soaps and rinses.

18 Opposer asserts that it is the only party to have the right to use the term FUSION in a
19 trademark employed with goods in the beauty industry, yet Opposer does not have any right to use
20 41 trademarks that are registered by other in International Class 3 and which include the term
21 FUSION, in connection with products for the beauty industry (i.e., cosmetics, lipsticks, skincare
22 products, lotions, etc.).

23 These marks that include the term FUSION and which are already registered by others in
24 International Class 3 include the following:
25
26

CURRENTLY REGISTERED TO PARTIES OTHER THAN OPPOSER

#	<u>IC CLASS 003 MARK</u>	<u>GOODS</u>	<u>Registration #</u>	<u>OWNER</u>
1.	SILK FUSION	HAIR CARE	3160291	HENKEL AG & CO.
2.	SILK FUSION TREATMENT	HAIR CARE	3151961	HENKEL AG & CO.
3.	GILLETTE FUSION	HAIR/BODY CARE	ALLOWED	GILLETTE CO
4.	FUSION	SHAVING GEL	3353328	GILLETTE CO
5.	AWAKE HERBAL FUSION	COSMETICS	3428669	KOSE CORP.
6.	FUSION ORGANICS	COSMETICS	3392858	WESTPORT LABS
7.	FLOWER FUSION	COSMETICS	3231179	ORIGINS NATURAL
8.	MODERN FUSION	COSMETICS	3327871	ORIGINS NATURAL
9.	B-FUSION	SHAMPOO	3209109	KEY BRANDS INTL
10.	B-FUSION	HAIR CONDITIONER	1391292	KEY BRANDS INTL
11.	TEINT FUSION	COSMETICS	3285978	HELENA RUBENSTEIN
12.	AQUA FUSION	COSMETICS	3364051	HELENA RUBENSTEIN
13.	ROUGE FUSION	LIPSTICK	2930324	HELENA RUBENSTEIN
14.	IDEAL FUSION	COSMETICS	2888564	HELENA RUBENSTEIN
15.	OLEO-FUSION	BEAUTY PRODUCTS	3224648	L'OREAL
16.	DOUBLE FUSION	HAIR CARE	3218940	L'OREAL
17.	COLOR FUSION	HAIR COLOR	2254107	LOREAL
18.	WEST SHINE FUSION	LIPSTICK	2997820	L'OREAL
19.	HI-FUSION	HAIR COLOR	3037898	L'OREAL
20.	WORLD FUSION	AROMATHERAPY	3295218	LANCASTER
21.	FLORAL FUSION	DEODORANT	3175016	KAO KABUSHIKI
22.	BREATH FUSION	DENTIFRICES	3143088	DE SALTILLO
23.	FRESH FUSION	PERSONAL CARE	3006450	COLGATE
24.	COOL FUSION	PERSONAL CARE	2952971	COLGATE
25.	ULTIMATE FUSION COMPLEX	SKIN CARE	2805746	AVON
26.	FUSION BIOTECHNICAL HAIR SYSTEMS	SHAMPOO	3044222	BBL CORP
27.	THE FUSION OF ART AND HAIR	HAIR CARE	2647327	ALBERTO CULVER
28.	SUPER-FUSION C	SKIN CARE	2510544	JON MORGAN, MD
29.	BOTANICAL FUSION	BODY WASH	3463433	PROCTOR & GAMBLE
30.	DERMA 'ET FUSION	ASTRINGENTS	3340710	KIMBALL SILVERTON
31.	CRYSTAL FUSION	MAKEUP	3349095	MG MAKEUP
32.	BERRY FUSION	BAR SOAP	2792192	LEVER BROTHERS
33.	BERRY FUSION	BODY WASH/LOTION	2735300	LEVER BROTHERS
34.	CITRUS FUSION	LAUNDRY BLEACH	3206531	KIK HOLDCO
35.	FF FUSION FACTORY	PERSONAL CARE	3022526	FUSION FACTORY INC
36.	RAGE & REACT BY FUSION KOLLECTION	HAIR COLOR	3115603	MYKON INTNTNL
37.	FUSION KOLLECTION	HAIR COLOR	2557925	MYKON INTNTNL
38.	LIQUID-FUSIONS	CLEANING PREPARATIONS	2681809	KHANTZIS, CARLOS A
39.	EYE FUSION	MAKEUP	2685543	BONNIE BELL
40.	TEXTURE FUSION	HAIR PREPARATIONS	2336595	SCRUPLES SALON
41.	VITA-FUSION	HAIR CARE	1676489	HII, LLC
42.	DUO FUSION	DISH WASH RINSE	2364499	ECOLAB
43.	BALANCED FUSION	DISH SOAP	2420085	ECOLAB
44.	METAL FUSION	DISH SOAP	2285473	ECOLAB
45.	CRYSTAL FUSION	DISH WASH RINSE	2192297	ECOLAB
46.	SILVER FUSION	DISH PRESOAK	2193756	ECOLAB
47.	POWER FUSION	DISH SOAP	2215494	ECOLAB
48.	SOLID FUSION	DISH SOAP	2192294	ECOLAB

1 An analysis as to whether a party is entitled to expanded trademark protection under the
2 family of marks doctrine generally looks to the following factors: (1) whether the surname for the
3 family (i.e., the term common to the asserted family of marks) is strong or distinctive; (2) whether
4 the members of the family have been promoted together to create an association with each other;
5 (3) registration of multiple members in the asserted family; and, (4) whether the family owner has
6 acted to prevent registration of other marks using the surname by other parties.

7 In the context of Opposer's Trademarks, the family surname **is not strong**. The fact that
8 there already exist 41 registrations for marks owned by other parties that are used for products
9 related to the beauty industry (some of which appear to be identical products to those marketed by
10 Opposer) which employ the presumed surname strongly suggests that the Opposer selected a weak
11 surname.

12 At present, there is no evidence showing that the members of the family have been
13 promoted together so as to create an association with each other; however, even if such evidence
14 can be provided by the Opposer, the fact that there already exists registrations for almost three
15 times as many trademarks owned by other parties that are for beauty products and include the
16 surname FUSION, very strongly indicates that Opposer is not entitled to expanded trademark
17 protection under the family of marks doctrine.

18 Although Opposer has registrations and pending applications for 17 trademarks utilizing the
19 term FUSION as applied to beauty products, that fact is NOT persuasive in finding that Opposer is
20 entitled to expanded trademark protection under the family of marks doctrine, because 41 other
21 trademarks are registered to different parties that also employ the term FUSION as applied to
22 beauty products. If Opposer were the only party that currently owned registered trademarks
23 including the term FUSION for beauty products, it might be reasonable to apply the family of
24 marks doctrine to enable Opposer to prevent other parties from using the FUSION surname as
25 applied to beauty products. However, where there are already 41 registered trademarks that use the
26 term FUSION for beauty products, and which are owned by other parties, there appears to be no

1 reasonable basis for concluding that Opposer is entitled to prevent Applicant from registering a
2 mark that includes an already very commonly used term.

3 Finally, while it appears that Opposer is attempting to prevent additional registrations for
4 trademarks that include the term FUSION as applied to beauty products, as noted above, it appears
5 too late for Opposer to now assert that it and it alone has the right to use the term FUSION in
6 trademarks for beauty products. The term FUSION is simply too widely used in the beauty
7 products industry in this country for any party to assert that it and it alone has the right to use the
8 term FUSION in trademarks for beauty products.

9 6. Opposer has spent millions of dollars advertising Opposer's Trademarks and the
10 goods sold there under.

11 ANSWER: Applicant is without knowledge or information sufficient to form a belief as to
12 the allegations of paragraph 6 of the Notice of Opposition.

13 7. By virtue of extensive use in advertising and commerce, Opposer has built up highly
14 valuable goodwill in Opposer's Trademarks, and said goodwill has become closely and uniquely
15 associated with Opposer.

16 ANSWER: Applicant is without knowledge or information sufficient to form a belief as to
17 the allegations of paragraph 7 of the Notice of Opposition.

18 8. Opposer's first use and/or priority dates for Opposer's Trademarks predate
19 Applicant's alleged priority date of May 29, 2007 for Applicant's Mark.

20 ANSWER: Applicant is without knowledge or information sufficient to form a belief as to
21 the allegations of paragraph 8 of the Notice of Opposition.

22 9. The goods of Applicant are identical and/or related to the goods covered by and
23 offered in connection with Opposer's Trademarks so that there would be a likelihood of confusion.

24 ANSWER: Applicant denies the allegations of paragraph 9 of the Notice of Opposition. As
25 discussed in detail above with respect to Applicant's answer to the allegations of paragraph 5 of the
26 Notice of Opposition, because there are so many different parties employing the term FUSION in

1 trademarks applied to beauty products, it is illogical to conclude that the public uniquely associates
2 the term FUSION used in trademarks applied to beauty products, with Opposer. Thus, there is no
3 reasonable likelihood of the public associating Applicant's WILDFUSION mark with Opposer.

4 10. Applicant's WILDFUSION mark so resembles Opposer's Trademarks as to be
5 likely, when applied to Applicant's goods, to cause the confusion, to cause mistake, and to deceive
6 the trade and public, who are likely to believe that these goods have their origin with Opposer
7 and/or that such goods are associated in some way with Opposer. Opposer would thereby be
8 injured by the grant to Applicant of registration for Applicant's WILDFUSION mark.

9 ANSWER: Applicant denies the allegations of paragraph 10 of the Notice of Opposition. As
10 discussed in detail above with respect to Applicant's answer to the allegations of paragraph 5 of the
11 Notice of Opposition, because there are so many different parties employing the term FUSION in
12 trademarks applied to beauty products, Opposer cannot reasonably assert that it and it alone is
13 uniquely associated with the term FUSION as used in trademarks applied to beauty products.
14 Other parties have registered 41 marks that include the term FUSION for beauty products, and
15 there appears to be no reasonable basis for concluding that the public associates the term FUSION
16 in marks used for beauty products only with Opposer. Indeed, it appears that some of the other
17 parties using the term FUSION in their trademarks for beauty products are much better known than
18 Opposer (e.g., L'Oreal, Helena Rubenstein, Gillette, Colgate, Procter & Gamble, and Lever
19 Brothers).

20 11. Opposer would further be injured by the grant of a registration to Applicant for
21 Applicant's WILDFUSION mark because such mark would falsely suggest a connection between
22 Applicant and Opposer.

23 ANSWER: Applicant denies the allegations of paragraph 11 of the Notice of Opposition.
24 Significantly, aside from Opposer's Trademarks, there are 41 registered marks that include the term
25 FUSION, for beauty products, and which are owned by companies such as well-known companies,
26 such as L'Oreal, Helena Rubenstein, Gillette, Colgate, Procter & Gamble, and Lever Brothers, as

1 well as other lesser-known companies. Given that the term FUSION is widely used in trademarks
2 within the beauty products industry by many different well-known companies, there simply is no
3 reasonable basis for concluding that there is any connection between Applicant and Opposer
4 because Applicant's WILDFUSION mark includes the term FUSION. While it might be
5 reasonable to conclude that such a connection exists if Opposer were the *only* other party
6 employing the term FUSION in trademarks applied to beauty products, it is clear that Opposer is
7 NOT in that position.

8 WHEREFORE, having made full answer to the Notice of Opposition, Applicant requests that
9 the Opposition be dismissed, and Applicant's mark WILDFUSION be granted registration without
10 further delay.

11 Respectfully submitted,

12
13 /Michael C. King/
14 Michael C. King
15 Registration No. 44,832
16 Attorney for Applicant/Defendant
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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Answer to Notice of Opposition to be sent via First Class Mail, postage paid to Opposer's attorneys, Arlana S. Cohen, Esquire, Sujata Chaudhri, Esquire, and Elise Wolinsky, Esquire, Cowan, Leibowitz & Latman, P.C., 1133 Avenue of the Americas, New York, NY 10036 on August 11, 2008

Date: August 11, 2008

/Michael C. King/
Michael C. King

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