

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

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LA SENZA CORP.,	:	
Opposer,	:	Opposition No. 91185325
v.	:	
OLYMPIC MOUNTAIN AND MARINE PRODUCTS, INC.,	:	
Applicant.	:	

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**APPLICANT'S MOTION FOR LEAVE TO AMEND  
ANSWER AND ASSERT COUNTERCLAIM FOR  
PARTIAL CANCELLATION**

Pursuant to Rule 2.107(a) of the Trademark Rules of Practice and Fed.R.Civ.P. 15(a)(2), Applicant Olympic Mountain and Marine Products, Inc. hereby moves for leave to amend its Answer in the above-referenced proceeding to assert a counterclaim for partial cancellation of Registration No. 1,800,379. A memorandum in support of this motion setting forth the grounds for relief is attached hereto.

Olympic Mountain and Marine Products, Inc.

By: 

Law Offices of Philip A. Kantor, P.C.  
Suite 202, 8440 W. Lake Mead Boulevard  
Las Vegas, NV 89128  
Tel.: (702) 255-1300  
Fax: (702) 256-6331  
prsak@aya.yale.edu

Attorneys for Applicant

Dated: November 20, 2009

**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of November, 2009, a true copy of Applicant's Motion for Leave to Amend Answer and Assert Counterclaim for Partial Cancellation, dated November 20, 2009, was served by first-class mail, postage prepaid, upon counsel for Opposer at the address shown below:

JACOBSON HOLMAN PLLC  
Attn.: Matthew J. Cuccias, Esq.  
400 Seventh Street, N.W.  
Washington, D.C. 20004

  
Rena Millet Kantor

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Opposer, :  
v. : Opposition No. 91185325  
OLYMPIC MOUNTAIN AND :  
MARINE PRODUCTS, INC., :  
Applicant. :

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**APPLICANT'S MEMORANDUM IN SUPPORT OF MOTION  
FOR LEAVE TO AMEND ANSWER AND ASSERT  
COUNTERCLAIM FOR PARTIAL CANCELLATION**

Law Offices of Philip A. Kantor, P.C.  
Suite 202, 8440 W. Lake Mead Boulevard  
Las Vegas, NV 89128  
Tel.: (702) 255-1300  
Fax: (702) 256-6331  
prsak@aya.yale.edu  
Attorneys for Applicant

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## Introduction and Background

Applicant Olympic Mountain and Marine Products, Inc. (“Olympic”) is a manufacturer and wholesaler of scented candles, diffusers, soaps and bath salts based in Kent, Washington. Supp. Interrog. Answer No. 2 (Exhibit A).<sup>1</sup> ESSENZA was first used in interstate commerce as a mark for scented candles. The first use was by Olympic’s predecessor-in-interest, Aroma Therapy of Rome, a Texas corporation, on March 1, 1997. Interrog. Answer No. 1 (Exhibit B). The mark has been used continuously since that time for scented candles,<sup>2</sup> and since February 6, 2007 for scent diffusers. Supp. Interrog. Answer No. 2 (Exhibit A).

This opposition proceeding concerns Olympic’s application Serial No. 77/071,961, ESSENZA for “scented oils used to produce aromas when heated, essential oils for household use” in Class 003; and “scent diffusers comprised of a container and wood rods used to diffuse oil scent poured in the container” in Class 021. This application was filed by Olympic on December 27, 2006 under Lanham Act Section 1(b) but, as noted above, Olympic began making extensive use of the ESSENZA

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<sup>1</sup> “Interrog. Answer” refers to Applicant’s Response to Opposer’s First Set of Interrogatories, dated June 16, 2009; “Supp. Interrog. Answer” refers to Applicant’s Supplemental Response to Opposer’s First Set of Interrogatories, dated September 30, 2009.

<sup>2</sup> Registration No. 2,184,021, ESSENZA for candles in Class 004, was cancelled on May 16, 2009, due to the inadvertent failure of former counsel to file a Section 8 declaration. Declaration of Philip A. Kantor, Esq., dated September 29, 2009 (“Kantor Dec.”) ¶ 2 and Ex. 1. (The Kantor Dec. was filed in support of Olympic’s Motion for Leave to Amend and for Summary Judgment, and may be found at Docket #20 dated October 14, 2009, starting at page 46.) A replacement application was filed by Olympic on June 17, 2009 seeking registration of ESSENZA for candles in Class 004 under Lanham Act Section 1(a) based on a date of first use in interstate commerce of March 1, 1997. Kantor Dec. ¶ 3 and Ex. 2.

mark for the sale of scent diffusers in interstate commerce starting on February 6, 2007.<sup>3</sup> Since first introducing its line of ESSENZA scent diffuser products, Olympic has sold [redacted] worth of them to the public (Supp. Interrog. Answer No. 2 (Exhibit A)) through large retailers such as Costco Warehouse Clubs (Interrog. Answer No. 6 (Exhibit D)).

According to the Notice of Opposition, dated July 21, 2008 (the “Opposition Complaint” or “Opp. Complaint”), ¶ 2, opposer La Senza Corporation (“La Senza”) is a retailer of “ladies wearing apparel, lingerie, loungewear, skin care products, and related goods and accessories, including, but not limited to, body oils, bath oils and massage oils” based in Mississauga, Ontario. A copy of La Senza’s U.S. home page as it appeared on the World Wide Web on September 27, 2009 is annexed as Ex. 3 to the Kantor Declaration. Kantor Dec. ¶ 4. For purposes of this opposition, La Senza relies on its Registration No. 1,800,379 (the “379 Registration”). Opp. Complaint, ¶ 3. According to the copy of the ‘379 Registration annexed as Exhibit 1 to the Opposition Complaint, as well as the allegations of paragraph 3 of the Opposition Complaint, the registration covers LA SENZA for “conditioners and skin moisturizing creams; toilet soaps; body, hand and face lotions [in Class 003], as well as make-up bags sold empty [in Class 018].”

Olympic’s Answer to the Notice of Opposition was filed by former counsel on August 28, 2008, denying the salient allegations of the complaint, but asserting no affirmative defenses or counterclaims. The parties waived initial disclosures, and neither

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<sup>3</sup> In case the Board is unfamiliar with scent diffusers, a picture of samples of Olympic’s scent diffuser products is annexed in Exhibit C (taken from Applicant’s Response to Opposer’s First Request for Production of Documents, Bates No. A352). The product consists of a bottle of scented oil into which the user places wood rods (packaged with the product). The rods wick up the scented oil and diffuse it into the surrounding air.

side served expert disclosures. The discovery period ended without Olympic's former counsel seeking any discovery on behalf of Olympic. On the last day of the discovery period, La Senza served extensive discovery requests, including requests for documents, interrogatories and requests to admit. Olympic responded to La Senza's discovery requests through current counsel. La Senza's trial period has not yet commenced.

In the motion docketed as #20 and dated October 14, 2009, Olympic moved for leave to amend and for summary judgment. The motion for leave to amend was to assert the affirmative defense of unclean hands, as well as to assert a counterclaim for fraud based upon the fact that La Senza knew or should have known the '379 Registration had been mostly abandoned in 2003. For reasons stated in Olympic's memorandum in support of the motion, pp. 7-8, it was unclear how Olympic's fraud counterclaim should best be brought to the Board's attention. In any event, the Board issued an order on November 5, 2009 (#21) directing Olympic to file a proposed amended pleading, accompanied by the required fee, for decision on the motion to amend prior to consideration of Olympic's summary judgment motion.

In the November 5 order, the Board provided an advisory opinion noting that the standard for assertion of a fraud counterclaim in proceedings before the United States Patent & Trademark Office was recently clarified in *In re Bose Corp.*, 580 F.3d 1240, 91 U.S.P.Q.2d 1938 (Fed. Cir. 2009). The November 5 order noted on page 2 that "[i]n the wake of the Bose decision, allegations that a trademark applicant 'knew or should have known' that it made material misrepresentations which were false or misleading do not constitute a proper pleading of the scienter element of fraud, because the 'should have known' alternative is no longer tenable." The Board further noted, on page 3, that any

pleading of a fraud counterclaim would have to conform with the requirements of Fed.R.Civ.P. 9(b) (pleading fraud with particularity).

In view of the clarified standard under *In re Bose*, Olympic recasts its motion for leave to amend to a motion for leave to amend to assert a counterclaim for partial cancellation of the '379 Registration. The new motion is based on the abandonment by La Senza of most of the '379 Registration as shown below. The proposed amended pleading is attached as Exhibit E to this motion, and the required fee is being remitted with the motion.

### **Argument**

#### **Standard of Review**

Leave to amend shall be freely given when justice so requires. Trademark Rule § 2.107(a) and Fed.R.Civ.P. 15(a)(2).

#### **La Senza's Partial Abandonment**

On October 20, 1999, La Senza's Chairman, Irving Teitelbaum, signed a declaration under Section 8 of the Lanham Act, stating that the LA SENZA mark was being used in interstate commerce for conditioners and skin moisturizing creams, toilet soaps, body, hand and face lotions as well as make-up bags sold empty. Kantor Dec. ¶ 6 and Ex. 5. On October 16, 2003, La Senza's president, Laurence Lewin, signed a combined Declaration of Use in Commerce/Application for Renewal under Sections 8 and 15 of the Lanham Act, stating that the LA SENZA mark was being used in interstate commerce for body lotions. Kantor Dec. ¶ 7 and Ex. 6. Despite the omission of all other goods from the combined declaration, the Trademark Office issued a Notice of

Acceptance and Notice of Renewal stating that “the registration will remain in force for classes 003 and 018.” Kantor Dec. ¶ 8 and Ex. 7. Olympic submits that this error was fostered, if not caused by La Senza’s failure to comply with Trademark Rule § 2.161(e)(2), which provides that “[i]f the affidavit or declaration covers less than all the goods or services, or less than all the classes in the registration, specify the goods or services being deleted from the registration ...” (see, also, § 2.161(f)(2), requiring the registrant to state when use of the mark stopped). Had La Senza complied with this provision, it would have been apparent that goods and classes were being dropped from the registration, resulting in proper Notices of Acceptance and Renewal.

Trademark Office records are now wrong. They show the ‘379 Registration as covering goods beyond just body lotions,<sup>4</sup> despite the fact that body lotions are the only goods the registration now covers. Kantor Dec. ¶ 9 and Ex. 8. Olympic notes that the Combined Declaration Under Sections 8 and 15 can no longer be changed. Trademark Rule § 2.164(b).

### **Unclean Hands**

Against this background, La Senza has commenced an opposition proceeding affirmatively claiming likelihood of confusion based on the ‘379 Registration. In support of the claim, La Senza affirmatively states that the ‘379 Registration is “valid and subsisting, and constitutes evidence of Opposer’s ownership of Opposer’s LA SENZA mark, and exclusive right to use same in commerce in connection with the goods set forth in said registration, namely, conditioners and skin moisturizing creams; toilet soaps; body, hand and face lotions, as well as make-up bags sold empty.” However, given that

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<sup>4</sup> Though Class 018 goods are now shown as cancelled.

the '379 Registration, based on the declaration of La Senza's president, now covers only body lotions, support for the likelihood of confusion claim is false and fraudulent, and calculated to have a material effect on the outcome of this proceeding. La Senza thus approaches the Board with unclean hands. Accordingly, Olympic seeks leave to amend the answer to assert the affirmative defense of unclean hands.

Unclean hands may be properly interposed in a Board proceeding as an affirmative defense. *Duffy-Mott Company, Inc. v. Cumberland Packing Company*, 424 F.2d 1095, 165 U.S.P.Q. 422 (CCPA 1970). In *Duffy-Mott Company*, the opposer relied on a trademark registration that had been improperly renewed under Sections 8 and 15. Renewal was improper, because the mark in question was not being used for all of the goods listed in the registration at the time of renewal. In these circumstances, the Court of Customs & Patent Appeals applied the doctrine of unclean hands to prevent the opposer from relying on the improperly renewed registration, writing at p. 1100 of 424 F.2d:

We deem such a sanction as we here apply necessary to deter the further development of such a cavalier attitude toward statements in affidavits under section 15 as appears in this case. Because opposer has attempted by false representations in the Patent Office to secure through this registration incontestable rights to use "Sweet 'N Low," it is precluded from relying on the registration in an attempt to defeat applicant's right to register.

Significantly, in *Duffy-Mott Company*, the court was not addressing conduct that could be characterized as purposely fraudulent or manipulative, but rather the opposer's carelessness in not making sure the registration it was renewing was still in force as to all of the goods listed in the registration. Here, too, steps were not taken to

make sure the registration La Senza relies upon was in force as to the goods listed in the registration before asserting the registration in an opposition proceeding. If such conduct can be characterized as no more than “cavalier,” it is nevertheless enough to trigger the doctrine of unclean hands, precluding La Senza from asserting the ‘379 Registration against Olympic in this proceeding — leading, in effect, to dismissal of the proceeding.

**Partial Cancellation**

Records kept in the ordinary course of business by the USPTO clearly establish that La Senza abandoned all goods under the ‘379 Registration save body lotions. The Combined Declaration Under Sections 8 and 15 — where the abandonment was made of record — can no longer be changed. Trademark Rule § 2.164(b). Accordingly, the ‘379 Registration should be partially cancelled to reflect the registration’s continuing validity only as to body lotions.

The Board’s authority to effect the partial cancellation of a registration in an opposition proceeding is clear. *Proctor & Gamble Co. v. Sentry Chemical Co.*, 22 U.S.P.Q.2d 1589 (TTAB 1992); *Aries Systems Corporation v. World Book, Inc.*, 26 U.S.P.Q.2d 1926 (TTAB 1993). In *Aries Systems*, the Board found (on a summary judgment motion) that the opposer’s identification of goods and services was broader than necessary. Consequently, the Board partially restricted the opposer’s identification of goods and services and, by doing so, eliminated the likelihood of confusion between the opposer’s and applicant’s marks. *Id.* at 1933.

Of course, a counterclaim for partial cancellation requires an allegation of standing. Here, Olympic denies there is any likelihood of confusion between its

ESSENZA mark and La Senza's LA SENZA mark in any goods sector, much less the scent diffuser sector. To fulfill applicable standing requirements in these circumstances, Olympic proposes to plead its counterclaim for partial cancellation of the '379 Registration in the alternative as follows:

22. Assuming for purposes of this counterclaim only that Opposer may be correct in asserting that Applicant's use of ESSENZA in connection with the goods set forth in application Serial No. 77/071,961 is likely to cause confusion with Opposer's use of LA SENZA as set forth in Registration No. 1,800,379, then the existence of Opposer's registration in its current form is a source of damage and injury to Applicant, because the existence of this overly broad registration may allow Opposer to prevent Applicant from using its mark and obtaining a federal registration thereof, despite the fact that Opposer abandoned Registration No. 1,800,379 for most of the goods listed in it, and which goods are claimed by Opposer to be similar to those sold by Applicant in connection with Applicant's ESSENZA mark.

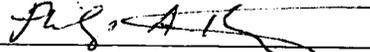
Exhibit E, pp. 5-6.

The foregoing tracks the equivalent language approved by the Board in *Aries Systems* verbatim, substituting only the particulars of this case for those of the *Aries Systems* case. *Aries Systems Corporation v. World Book, Inc.*, 23 U.S.P.Q.2d 1742 (TTAB 1992) at 1745.

### **Conclusion**

For all of the foregoing reasons, Olympic respectfully prays that it be granted leave to amend its Answer in the form attached as Exhibit E; and for such other and further relief as may be proper.

Respectfully submitted,



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Philip A. Kantor

Law Offices of Philip A. Kantor, P.C.  
Suite 202, 8440 W. Lake Mead Blvd.  
Las Vegas, NV 89128  
Tel.: (702) 255-1300  
Fax: (702) 256-6331  
prsak@aya.yale.edu

Attorneys for Applicant

Dated: November 20, 2009

EXHIBIT A

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
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LA SENZA CORP., :  
Opposer, :  
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APPLICANT'S SUPPLEMENTAL RESPONSE TO  
OPPOSER'S FIRST SET OF INTERROGATORIES

Interrogatory No. 2 of Opposer's First Set of Interrogatories sought information regarding Applicant's sale of products under the ESSENZA mark, including information on type of products, first and last dates of sale of each type of product, number of units of each type of product sold, aggregate dollar value of each type of product sold, sale price of each type of product sold, and geographic regions where each type of product was sold.

Since responding to Interrogatory No. 2, Applicant has identified some omissions and errors in the response. For example, after product was sold in the ordinary course, some residual inventory was broken up (such as from 3-packs) and sold in smaller lots under different item

numbers. These residual sales were inadvertently not all picked up in the first response. These errors and omissions are corrected here.

Additionally, Applicant updates its response to Interrogatory No. 2 to account for sales occurring since the time period covered by Applicant's first response.

This Supplemental Response is provided in the form of a cumulative response to Interrogatory No. 2, rather than a document intended to be used in conjunction with Applicant's first response. By contrast, the documents provided with this Supplemental Response are only the documents omitted at the time of the first response, or supplementing the first response, and are Bates-numbered continuing from where the previous series of Bates numbers stopped.

\* \* \*

2. Identify each product and/or service with which Applicant's mark has been (or is intended to be) used in the United States, and with respect to each such product and/or service identify:

(a) the period of time during which Applicant's mark has been used with said product and/or service (*i.e.*,

— REDACTED —

EXHIBIT B

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

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LA SENZA CORP., :  
Opposer, :  
v. : Opposition No. 91185325  
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MARINE PRODUCTS, INC., :  
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**APPLICANT'S RESPONSE TO OPPOSER'S  
FIRST SET OF INTERROGATORIES**

1. State the earliest date on which Applicant will rely in this proceeding to establish any rights in Applicant's mark vis-à-vis Opposer, and state in detail the basis for Applicant's claim of rights in Applicant's mark as of that date, including:

Response: March 1, 1997. This is the date on which Applicant's predecessor in interest, Aromatherapy of Rome ("AOR"), a Texas corporation, first used the mark ESSENZA in interstate commerce for candles in Class 4. The candles sold by AOR in interstate commerce continuously from that time have always consisted predominantly of scented candles. Applicant considers candles, especially scented candles, as closely related to the goods covered in

the trademark application at issue in this proceeding, namely, Serial No. 77/071,961 (the "Application"), which are scented oils used to produce aromas when heated and essential oils for household use in Class 3, and scent diffusers comprised of a container and wood rods used to diffuse oil scent poured in the container in Class 21. The goods covered in the Application are well within the zone of natural expansion of the ESSENZA mark for candles.

On September 9, 1998, AOR merged with Washington Aromatherapy of Rome, Inc., with the surviving company being the latter. On July 6, 1999, Washington Aroma Therapy of Rome, Inc. assigned a security interest in the trademark ESSENZA to Business Factors, Inc. On December 3, 1999, Washington Aromatherapy of Rome, Inc. changed its name to Big Wick Candle Company, Inc. and maintained the security interest to Business Factors, Inc. On November 20, 2000, Business Factors, Inc. foreclosed its security interest in the ESSENZA mark and assigned it to Aroma Candle and Scent Company. On December 30, 2005, Applicant acquired the ESSENZA mark from Aroma Candle & Scent Company. The documents showing each of these assignments and successions are submitted with these interrogatory responses.

AOR applied for trademark registration on the Principal Register of the ESSENZA word mark (in typed drawing form) for candles on July 31, 1997. The mark was duly registered on August 25, 1998, and has been continuously maintained by the various successor companies set forth above to the present day. As shown by the specimens filed in support of AOR's trademark application for ESSENZA under Lanham Act Section 1A, the mark has been used on candles in the same typeface and with the same graphical logo as Applicant uses the same mark on candles today, as well as on the goods covered in the Application.

(a) a description of the manner of use of Applicant's mark as of that date (*i.e.*, store signage, imprinted on the goods, on labels or tags for the goods, on packaging for the goods, in store displays, etc.);

Response: Mark has been continuously used on candles by Applicant and its predecessors on labels affixed to the goods and on packaging for the goods.

(b) the identity of each person involved in any way in such use, including, but not limited to the identity of each witness who can testify on personal knowledge as to such use;

Response: Jeff Stice - CEO, Olympic Mountain Products, Inc., 8655 S. 208<sup>th</sup> Street, Kent, WA 98031; Laurie Severe - Accounting, 32454 46<sup>th</sup> Place, South Auburn, WA 98001; Spencer Krenke, c/o True Labs, Seattle, WA; Robert Schwai, c/o True Labs, Seattle, WA.

(c) the identification of each product and/or service in connection with which the mark was used on that date; and

Response: Applicant does not have a list of each product and/or service sold under the ESSENZA mark on March 1, 1997. However, the specimens filed by AOR in support of the registration of the ESSENZA mark for candles under Lanham Act Sec. 1A on July 31, 1997 are submitted with these interrogatory responses, identifying three products sold by AOR in interstate commerce under the ESSENZA mark as of that date, namely, an ESSENZA unscented white candle, an ESSENZA "for fragrance" honeydew candle, and an ESSENZA "aromatherapy" "calm" lavender & vanilla scent candle.

Also submitted with these interrogatory responses and identifying ESSENZA products sold by AOR (and successors) through the time the ESSENZA mark and registration were acquired by Applicant are the following:

(i) Email from Laurie Severe to Jeff Stice dated July 12, 2006 enclosing a 2002 Aroma Candle and Scent Company price list for ESSENZA candles;

(ii) A March 14, 2006 candle inventory by Applicant of ESSENZA candles from Aroma Candle and Scent Company;

(iii) March 14 and 16, 2006 emails from Laurie Severe to Jeff Stice discussing the foregoing inventory as labeled for Aroma Candle and Scent Company customer, Fred Meyer;

(iv) A close-out offer from Applicant to Ross Stores dated September 8, 2006 for inventory from Aroma Candle and Scent Company;

(v) Email string between Laurie Severe and Jeff Stice of February 7 and 10, 2006 regarding the ESSENZA artwork transition from Aroma Candle and Scent to Applicant;

(vi) Aroma Candle and Scent Company Inventory Valuation Report - Finished Goods created on December 28, 2005;

(vii) Emails dated January 27, March 21 and 22, April 7, May 3 and June 8, 2006 between Jeff Stice and

Costco regarding the upcoming transition program by Applicant of ESSENZA candles; and

(viii) Applicant/Costco Item Agreement Quote Form for the ESSENZA Candle Four Pack Set dated March 28, 2006.

Also submitted with these interrogatory responses and identifying ESSENZA products sold by AOR is an AOR sales order catalogue revised in October 2005 including the "Color & Fragrance Collection," "Color Collection Unscented Tapers," "Fall Holiday '05," the "Botanical Collection," "Aromatherapy of Rome," the "Cucina Collection," the "Garden Collection," the "Soy Collection," "Essenza," the "Yoga Collection (Goddess; Rituals; Zodiac)," cast aluminum accessories and AOR solid perfumes. Some pages of the catalogue indicate that they are pages printed off the website at [www.aromacandleandscent.com](http://www.aromacandleandscent.com) on September 14, 2005, and some pages of which bear copyright notices of 2004 or 2002.

(d) the identification of each document which evidences or supports such claim of use as of that date.

Response: All documents referenced above, as well as a document entitled "Retail & Vendor Partnership Manual" dated September 1, 1997, a copy of which is being submitted with these interrogatory responses; a document entitled

"Memo to Accounts Receivable" dated May 26, 2000, a copy of which is being submitted with these interrogatory responses; a document entitled "Aromatherapy of Rome / Central Castings & Hilite Merger" dated November 4, 1999, a copy of which is being submitted with these interrogatory responses; a document entitled "Important Notice to Wicks N Sticks Franchisees" dated pre-June 30, 1998, a copy of which is being submitted with these interrogatory responses; and an undated document entitled "Our Sincerest Apologies," a copy of which is being submitted with these interrogatory responses.

All of the foregoing documents were identified and produced for these responses by Jeff Stice - CEO, Olympic Mountain Products, 8655 South 208<sup>th</sup> Street, Kent, WA 98031, except for the specimens of use under Lanham Act 1A filed with the USPTO by AOR, which were printed from the USPTO TDR service.

2. Identify each product and/or service with which Applicant's mark has been (or is intended to be) used in the United States, and with respect to each such product and/or service identify:

(a) the period of time during which Applicant's mark has been used with said product and/or service (i.e.,

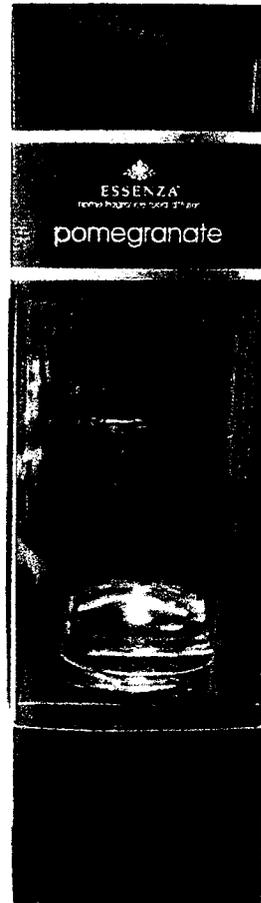
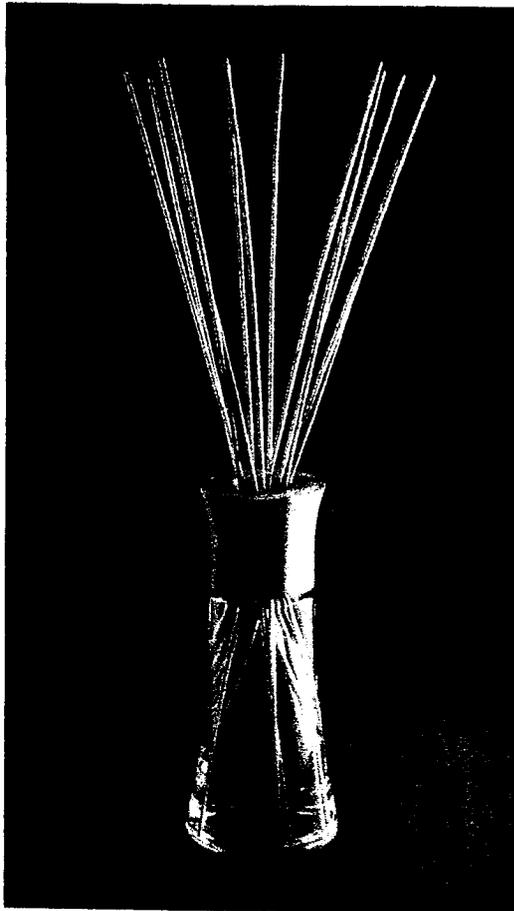
EXHIBIT C

# OLYMPIC MOUNTAIN PRODUCTS

Phone: 1-800-

South 208th Street, Kent, WA 98031

A 352



## Essenza 7.5oz Reed Diffusers with Wood Caps

Description	UPC # 034644-	Item #	Case Pack	Unit Cost	Case Cost
Firewood	323560	ES-323560	6	\$10.00	\$60.00
Vanilla Sunset	323577	ES-323577	6	\$10.00	\$60.00
Pomegranate	323584	ES-323584	6	\$10.00	\$60.00
Chai Spice	323591	ES-323591	6	\$10.00	\$60.00

Width=4.5" Depth=4.3125" Height=15" Cube=0.168 Weight=1.65 lbs

Phone: 253-850-2343 / Fax: 253-850-3545  
8655 So. 208<sup>th</sup> St. Kent, WA 98031

EXHIBIT D

which are outlets for Applicant's ESSENZA products. In addition to this, Applicant now sells its ESSENZA products at the trade shows listed above.

Applicant uses the services of the following individuals to sell its ESSENZA products: Jeff Stice - CEO, Ryan Porter - Sales, and Sharee Thompson - Sales, Olympic Mountain Products, 8655 South 208<sup>th</sup> Street, Kent, WA 98031.

All of the foregoing materials were identified and produced by Jeff Stice - CEO, Olympic Mountain Products, 8655 South 208<sup>th</sup> Street, Kent, WA 98031.

6. For each product and service in connection with which Applicant is using (or intends to use) Applicant's mark, identify, in detail, the channels of trade through which such products and/or services have been, are, or are intended to be sold and/or rendered, including but not limited to a general description of the type of customers to whom Applicant (intends to) advertises, promotes, and/or sells Applicant's products and/or services in connection with Applicant's mark. To the extent that your answer is different between the use of Applicant's Mark and the intended use of Applicant's Mark, your answer should so state, separately identifying the requested information.

Response: Department stores, wholesale clubs, gift stores, hardware stores, grocery stores and the World Wide Web. In addition to the documents already identified and produced above, a 2005 Report/Customer Analysis of Aroma Scent and Candle Company is being submitted with these interrogatory responses showing trade channels used at that time for ESSENZA products.

Though the foregoing trade channels are the types of customers to which Applicant markets its ESSENZA products, to the extent the interrogatory seeks identification of the type of *ultimate* customer of Applicant's ESSENZA products, such customers would tend to be primarily women 35 to 55 years old with mid- to high-income, and holiday shoppers looking for high-end home gift products.

7. Identify each agreement, assignment, license, contract, consent grant, or transfer of rights which concerns, refers or relates to Applicant's mark and/or any rights in connection with such mark.

Response: These documents were identified and produced in response to Interrogatory #1.

8. (a) Identify each person who participated in the selection, creation, and/or decision to adopt and/or to use Applicant's mark; and

EXHIBIT E

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

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LA SENZA CORP.,	:	
Opposer,	:	Opposition No. 91185325
		Re: Serial No. 77/071,961
v.	:	
OLYMPIC MOUNTAIN AND MARINE PRODUCTS, INC.,	:	Mark: ESSENZA
Applicant.	:	

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**APPLICANT'S AMENDED ANSWER TO  
NOTICE OF OPPOSITION AND  
COUNTERCLAIM FOR CANCELLATION**

Applicant, Olympic Mountain and Marine Products, Inc., by and through its attorneys, Law Offices of Philip A. Kantor, P.C., hereby answers the opposition of La Senza Corporation as follows:

1. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1, and therefore denies the same.
  
2. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2, and therefore denies the same.
  
3. Applicant admits that Opposer is the owner of U.S. Registration No. 1,800,379, issued on October 26, 1993, but denies that said registration is valid and subsisting as conclusive evidence of Opposer's ownership of Opposer's LA SENZA mark or of Opposer's exclusive right to use same in commerce in connection with most

of the goods set forth in said registration, namely, conditioners and skin moisturizing creams; toilet soaps; hand and face lotions; or bags sold empty.<sup>1</sup>

4. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4, and therefore denies the same.

5. Applicant admits the allegations of paragraph 5.

6. Applicant denies the allegations of paragraph 6.

7. Applicant denies the allegations of paragraph 7.

8. Applicant denies the allegations of paragraph 8.

9. Applicant denies the allegations of paragraph 9.

10. Applicant denies the allegations of paragraph 10.

#### First Affirmative Defense

11. Opposer approaches the Board with unclean hands.

#### Counterclaim for Cancellation

12. Applicant repeats and realleges the allegations of paragraphs 1 through 11 as though set forth in full hereat.

13. According to records of Registration No. 1,800,379 kept in the ordinary course of business by the United States Patent & Trademark Office, on October 20, 1999, Opposer's Chairman, Irving Teitelbaum, signed a declaration under Section 8 of the

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<sup>1</sup> "Bags sold empty" are stated in paragraph 3 of the Notice of Opposition as being included in Registration No. 1,800,379, however, USPTO records show these goods as cancelled.

Lanham Act, stating that the LA SENZA mark was being used in interstate commerce for conditioners and skin moisturizing creams, toilet soaps, body, hand and face lotions as well as make-up bags sold empty. These are the same goods that Opposer alleges in paragraph 3 of the Notice of Opposition are the goods for which Registration No. 1,800,379 is valid and subsisting as conclusive evidence of Opposer's ownership of the LA SENZA mark, and of Opposer's exclusive right to use same in commerce.

14. According to records of Registration No. 1,800,379 kept in the ordinary course of business by the United States Patent & Trademark Office, on October 16, 2003, Opposer's President, Laurence Lewin, signed a combined Declaration of Use in Commerce/Application for Renewal under Sections 8 and 15 of the Lanham Act, stating that the LA SENZA mark was being used in interstate commerce for body lotions, omitting mention of conditioners and skin moisturizing creams, toilet soaps, hand and face lotions or make-up bags sold empty. Consequently, Registration No. 1,800,379 was abandoned as to all goods except body lotions.

15. According to records of Registration No. 1,800,379 kept in the ordinary course of business by the United States Patent & Trademark Office, notwithstanding the abandonment by Opposer of all goods under Registration No. 1,800,379 except body lotions, the Trademark Office issued a Notice of Acceptance and Notice of Renewal to Opposer stating that "the registration will remain in force for classes 003 and 018." Upon information and belief, this error was fostered, if not caused by Opposer's failure to comply with Trademark Rule § 2.161(e)(2), which provides that "[i]f the affidavit or declaration covers less than all of the goods or services, or less than all of the classes in the registration, specify the goods or services being deleted from the registration ..." and

Trademark Rule § 2.161(f)(2) requiring the registrant to state when use of the mark stopped.

16. Trademark Office records are now wrong, in that they show Registration No. 1,800,379 as covering goods beyond just body lotions (though Class 018 goods are now shown as cancelled), despite the fact that body lotions are the only goods the registration now covers, and the Combined Declarations Under Sections 8 and 15 can no longer be changed as per Trademark Rule § 2.164(b).

17. Applicant filed application Serial No. 77/071,961, ESSENZA, for “scented oils used to produce aromas when heated, essential oils for household use” in Class 003; and “scent diffusers comprised of a container and wood rods used to diffuse oil scent poured in the container” in Class 021 on December 27, 2006 under Lanham Act Section 1(b). Applicant began selling these goods under the ESSENZA mark in interstate commerce on February 6, 2007, and has used the mark continuously to sell millions of dollars worth of these goods in interstate commerce.

18. According to paragraph 3 of the Notice of Opposition, Opposer relies on Registration No. 1,800,379 to support its claim in paragraph 7 that “the goods set forth in the application opposed herein are or may be found to be the same and/or similar and/or related to the goods in connection with which La Senza uses Opposer’s LA SENZA mark, and on information and belief, the goods set forth in the opposed application are and/or may be sold through the same and/or similar channels of trade, and/or to the same general class of purchasers, in and to which La Senza’s products are marketed and/or sold.”

19. According to paragraph 3 of the Notice of Opposition, Opposer relies on Registration No. 1,800,379 to support its claim in paragraph 9 that “the registration of the ESSENZA mark as set forth in the opposed application, may be likely to cause confusion, mistake, and/or to deceive as to origin, sponsorship, and/or association of Applicant’s goods as identified in the application sought to be registered by Applicant *vis a vis* Opposer’s LA SENZA mark, and/or may mislead purchasers of Applicant’s and/or Opposer’s goods, and/or the public in general, into believing that Applicant’s goods are sold by, emanate from, and/or in some way, directly or indirectly, as associated with La Senza, and/or Opposer’s LA SENZA mark, products, and/or business, or *vice versa*, to the damage and detriment of La Senza.”

20. According to paragraph 3 of the Notice of Opposition, Opposer relies on Registration No. 1,800,379 to support its claim in paragraph 10 that “[i]f Applicant is granted the registration opposed herein for the opposed goods, and Applicant obtains such rights as conferred under the Principal Register of the Trademark Act of 1946, Applicant will obtain unlawful gain and advantage to which it is not entitled under the Trademark Act of 1946, to the detriment and harm of Opposer.”

21. According to paragraph 3 of the Notice of Opposition, Opposer relies on Registration No. 1,800,379 to support its prayer for judgment in the present opposition to be entered in favor of Opposer; to sustain the present opposition; and for the registration of application Serial No. 77/071,961 to be rejected and refused.

22. Assuming for purposes of this counterclaim only that Opposer may be correct in asserting that Applicant’s use of ESSENZA in connection with the goods set forth in application Serial No. 77/071,961 is likely to cause confusion with Opposer’s use

of LA SENZA as set forth in Registration No. 1,800,379, then the existence of Opposer's registration in its current form is a source of damage and injury to Applicant, because the existence of this overly broad registration may allow Opposer to prevent Applicant from using its mark and obtaining a federal registration thereof, despite the fact that Opposer abandoned Registration No. 1,800,379 for most of the goods listed in it, and which goods are claimed by Opposer to be similar to those sold by Applicant in connection with Applicant's ESSENZA mark.

23. The maintenance of Opposer's Registration No. 1,800,379 for the abandoned goods may thus give Opposer a greater scope of protection to its LA SENZA mark than it should otherwise be entitled to claim, to the detriment of Applicant.

WHEREFORE, Applicant requests that:

A. The Commissioner partially cancel Registration No. 1,800,379, and modify that registration by limiting the goods specified therein, or otherwise restrict or rectify Registration No. 1,800,379 with respect to the Principal Register in accordance with 15 U.S.C. § 1068, so that the statement of goods contained therein more accurately reflects the goods in connection with which Registration No. 1,800,379 remains valid.

B. Opposition No. 91185325 be dismissed and the registration for which application has been made be issued in due course.

Law Offices of Philip A. Kantor, P.C.

By: \_\_\_\_\_  
Philip A. Kantor – Nevada Bar No. 6701

Suite 202  
8440 W. Lake Mead Boulevard

Las Vegas, NV 89128  
(702) 255-1300  
(702) 256-6331 (fax)  
prsak@aya.yale.edu

Attorneys for Applicant